Vol. 14 / 2023 No. 2

Journal on European History of Law

9 772042 640001 07

STS Science Centre

The European Society for History of Law

Journal on European History of Law

Vol. 14 / 2023 No. 2

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JOURNAL ON EUROPEAN HISTORY OF LAW

www.sts-books.co.uk / www.historyoflaw.eu

ISSN 2042-6402

Women as Judges and Public Prosecutors in Austria: A Historical Overview

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Abstract

In 1919, the studies of law opened for women in Austria. Nevertheless, women remained excluded from legal professions in the judiciary. It was a long and hard road until the first female judges were appointed in 1947 and the first female prosecutor in 1959. The article examines the legal framework and the factual conditions for women who aspired to professions in the judiciary. Furthermore, it provides short biographies of the pioneering women in these professions based on archival sources. Finally, the study outlines the development of female judges and public prosecutors in Austria until today.

Keywords: *Austria; women in legal professions; study of law; judges; public prosecutors; 20th century; female pioneers; Johanna Kundmann; Gertrud Jaklin; Erika Meissl; Margareta Haimberger.*

1. Introduction

'And so we must admit right away that […] certain branches of the legal professions will remain closed to the female sex. Namely, the most important ones […]. Specifically, those offices that deal directly with the public and which, moreover, involve the enforcement of state authority […]. This means the judiciary, as well as political service in the usual sense of the term.'[1] So said Dr Edmund Bernatzik, professor of constitutional and administrative law at the University of Vienna, in 1900. These words are taken from Bernatzik's expert opinion on the question of admitting women to study law. He spoke out strongly in favour of their admission but, at the same time, he saw the career opportunities of any future female law graduates as strictly limited.[2]

Women were admitted to the law faculty as full students in 1919. When the first new female law graduates began their careers in the early 1920s, Bernatzik's assessment of their professional opportunities – which was now over two decades old – was still valid. Women were still prohibited from becoming (professional) judges; the public prosecutor's office was also closed to them, since passing the judge's examination was a prerequisite for entry.[3] This was the case not only for the first generation of female law graduates, but for the second and third generations, too. Two female lawyers were appointed as judges in Austria for the first time in 1947, almost thirty years after the law faculties opened to women. Yet more years would pass before a woman would be appointed public prosecutor. The former appointment came in 1959, the latter in 1964. At first, only a few women followed in the footsteps of these early pioneers in the Austrian judiciary. Female judges and public prosecutors remained the exception until the late 1970s. From then onwards, we can see a rise in the proportion of women in these two professions: a slight one at first, but from 1990 onwards the increase is significant. In the Austrian ordinary court system today, on average, just over 58% of judges are women. The proportion of women among public prosecutors is only a little lower, at around 54%.

Between Bernatzik's evaluation of female lawyers' career opportunities in 1900 and the situation as it now stands lies a long, stony path forged by women who set out to become judges and public prosecutors. In the following, the article will sketch out their progress in overview. It illustrates the legal framework, examines the conditions in which the women who first entered these fields worked and furnishes insights into their professional experiences. Then the study illustrates the road women took in the judiciary until now. Finally, short biographies of the first

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1 BERNATZIK, E., *Die Zulassung der Frauen zu den juristischen Studien. Ein Gutachten*. Wien, 1900, p. 8.

2 On the admission of women to the law degree, see a.o. STAUDIGL-CZIECHOWICZ, K., The Long Struggle to Open Austrias'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, Nr. 2, 2022, p. 12-23; EHS, T., (Studium der) Rechte für Frauen? Eine Frage der Kultur! In: *Beiträge zur Rechtsgeschichte Österreichs (BRGÖ)*, vol. 2, Nr. 2, 2012, p. 250-262.

3 In this paper, the term 'judiciary' is used to refer to the professional judiciary. Women had been admitted as lay judges in the criminal courts since 1919. On this, see SCHNEIDER, G., Die Zulassung von Frauen als Laienrichterinnen in der österreichischen Strafrechtspflege. In: KOHL, G., REITER-ZATLOUKAL, I. (Ed.), *Laien in der Gerichtsbarkeit. Geschichte und aktuelle Perspektiven*. Wien, 2019, p. 143-160.

female judges and public prosecutors based on archival sources in the appendix of the article show professional career paths of the pioneers and provide insights into their private lives.

2. Women on the way to becoming judges and public prosecutors

2.1 Access to judicial training in the First Republic

When the first women completed their law degrees in the early 1920s, passing the judge's examination was – as it still is – a prerequisite for being appointed either judge or public prosecutor. Both the judiciary and the public prosecutor's office were characterised by the mutual permeability of their career paths. The following norms, which dated back to the monarchy and were adopted into the body of law of the First Republic, formed the legal basis of the judicial training programme: the 1896 Court Organisation Act (*Gerichtsorganisationsgesetz*: *GOG*); the 1897 decree on the judicial preparatory service; and the 1900 decree on the judge's examination.[4] In accordance with these legal norms, completion of the law degree was a condition of admission to judicial training. This was followed by a three-year long professional training course (the judicial preparatory service) with the judge's examination at the end. Law graduates were admitted to the judicial preparatory service at the discretion of the judicial administration.

None of these norms contained a provision stating that the profession of judge was exclusively open to men. Of course, they originated in a time when access to the judiciary was denied to women simply because they were not admitted to study the law, even though the free choice of profession had been established as a fundamental right since 1867, with Article 18 of the Basic Law on the General Rights of Citizens (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger: StGG-ArStB*): 'Everyone is free to choose his own profession, and to train for said profession however and wherever he wishes.'. But this basic right, as well as the right of free access to all public positions standardised in Article 3 of the same law, was not accorded to women until sometime into the twentieth century; this in spite of the clause that all citizens are equal before the law (Article 2, leg. cit.).[5] Even after the principle of equality was anchored in Article 7 of Federal Constitution Law 1920 (*Bundes-Verfassungsgesetz: B-VG*) 'All federal citizens are equal before the law. Privileges of birth, sex, status class, and creed are excluded.'),[6] and with it the exclusion of all unequal treatment on the basis of gender, there were varying legal opinions about whether this in itself immediately opened the judiciary to women, or whether a special law needed to be issued.[7]

Other than this controversial point, no legal barriers could be identified that blocked women from entering the judiciary. In reality, the barriers were not so much legal as practical: above all, the issues lay in the socio-political and economic conditions in the First Republic. One factor was the view, which persisted stubbornly despite the generally progressive democratisation process, that women were incapable of assuming the authority of the state and acting as its representatives; the 'masculinity' of the state meant that this field of action was supposed to be reserved exclusively to men.[8] Another was that the disastrous economic situation of the time was causing drastic cuts, along with an associated temporary civil service hiring block. The judiciary, which had to face considerable problems and challenges after the collapse of the monarchy, was hit particularly hard by this state of affairs. The situation there was catastrophic. There were endless complaints about poor pay and excessive workload and, above all, the Association of Judges repeatedly claimed that there were far too few judicial posts, and that even those remaining were being dismantled.[9] Places on the judicial training course also fell victim to the economy measures. Between 1927 and 1929, not a single candidate was admitted.[10]

The first women to graduate with the law degree seem to have accepted implicitly that the professions of judge, public prosecutor and notary were beyond their reach. In any case, they did not make any applications to the judicial training course. Instead, after graduation, they contented themselves with completing the 'court practice' (*Gerichtsjahr/Gerichtspraxis*): a court traineeship lasting several months, which was also open to women.[11] Furthermore, the number of female law graduates in the 1920s was very low. For example, at the University of Vienna – which had the highest percentage of female law graduates in the whole of Austria, at approximately 5% – only 76 women graduated in the years up to and including the summer semester of 1929.[12]

Concrete demands for the admission of women to the judiciary were raised for the first time in 1927, at the jubilee celebration 'Thirty Years of Women's Higher Education in Austria'.

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[4] GOG: Reichsgesetzblatt für die im Reichsrathe vertretenen Königreiche und Länder (RGBl) 1896/217; decree 1897, RGBl 1897/192; decree 1900, RGBl 1900/182. On judicial training, see KOHL, G., Richter in der Habsburgermonarchie. In: KOHL, G., REITER-ZATLOUKAL, I. (Ed.), *RichterInnen in Geschichte, Gegenwart und Zukunft*. Wien, 2014, p. 63-82, p. 70; and also GRÜNSTÄUDL, G., *Richterauswahl und Richterausbildung im Systemvergleich. Österreich, Deutschland und die Schweiz seit 1945*. Baden-Baden–Wien–Bern, 2018.

[5] FLOSSMANN, U., Von der beschränkten Grundrechtssubjektivität zur "positiven Diskriminierung" der Frau. In: FLOSSMANN, U. (Ed.), *Offene Frauenfragen in Wissenschaft. Recht. Politik*. Linz, 1991, p. 71-103, p. 84.

[6] Gesetz […], womit die Republik Österreich als Bundesstaat eingerichtet wird (Bundes-Verfassungsgesetz), Bundesgesetzblatt (BGBl) 1920/1.

[7] On this, see below p. 4 and p. 5.

[8] See for example SAUER, B., *Die Asche des Souveräns. Staat und Demokratie in der Geschlechterdebatte*. Frankfurt/Main, 2001, p. 137.

[9] SZONTAGH, V., Die Richtervereinigung 1918-1938 im Spiegel der Richterzeitung. In: HELIGE, B., OLECHOWSKI, Th. (Ed.), *100 Jahre Richtervereinigung – Beiträge zur juristischen Zeitgeschichte*. Wien, 2007, p. 51-66, p. 56f.; also MATTL, S., Zu Sozialgeschichte und Habitus der österreichischen RichterInnnen seit 1924. In: *ibid*., p. 67-88, p. 72.

[10] Kalte Justizreform. In: *Österreichische Richterzeitung*, vol. XXIII, Nr. 11, 1930, p. 209-212, p. 210.

[11] KÖHL, F., Die Gerichtspraxis – Eine seit über 100 Jahren bewährte Einrichtung zur Juristenausbildung in Österreich. In: *Kriminalsoziologische Bibliographie*, vol. 14., Nr. 54, 1987, p. 37-43.

[12] LIST-GANSER, B., Überblick über die Entwicklung des akademischen Frauenstudiums in Österreich. In: *Festschrift Dreißig Jahre Frauenstudium in Österreich 1897 bis 1927*. Wien, 1927, p. 26-38, p. 29.

These came from Dr Gustav Hanausek, professor of Roman law at the universities of Vienna, Graz and Prague. Hanausek hoped that expanding the career opportunities for female law graduates would raise the extremely low number of women among law students. According to him, this was a matter of 'very real public interest'. Because of the voting rights accorded to them in the course of the democratisation process, women – who constituted the majority of the population – now had a significant influence on the composition of representative bodies at all levels of the state.[13] Having a greater number of 'legally trained women' could also help to 'support the improvement of the situation of women in both Austrian and international law'. In Hanausek's legal opinion, women ought to be admitted to all offices, including the judiciary, on the sole basis of the equality principle anchored in Article 7 of the Federal Constitutional Law (*Bundes-Verfassungsgesetz: B-VG*). Even if this provision were only viewed as a constitutional objective, he argued, 'the constitution thus gives women a right to the issuance of special laws allowing them access to all positions on an equal footing with men'. In view of the 1927–1929 hiring freeze on judicial posts, Hausanek's demands received no further attention.

It is in 1929, exactly a decade after women were admitted to study law, that we finally see the first attempts by young female law graduates to be admitted to the judicial preparatory service.[14] Most likely, this was primarily related to the entry into force of the 1928 Juvenile Court Act (*Jugendgerichtsgesetz*),[15] which nourished women's hopes of being admitted to the judiciary; the juvenile court system was considered to be a branch of law for which women were particularly suited on the grounds of the qualities ascribed to them, such as empathy and patience. Furthermore, the admission of women judges in other European countries – such as Germany in 1922, and Poland in 1928 – also encouraged female law graduates to hope that this might set an example for Austria.

These first instances of women applying to the judicial training course unleashed a short, but intensive and fierce debate about women in the judiciary. At the centre of this debate were two main questions: one, whether women were suitable to be judges; and, two, whether the legal situation of the time allowed women to be admitted to the judiciary/judicial training course. The question of whether women were suited to the profession of judge, in particular, created controversy between those who advocated the admission of women to the judiciary and those who opposed it. It also aroused considerable interest, not only in legal circles and in the women's movement, but also in the daily newspapers.[16]

The judicial administration and the male judges were themselves among the most vehement opponents of women in the judicature. The Austrian Association of Judges insisted that 'a position emphatically must be taken' against the 'efforts for the acceptance of […] women into the judiciary'.[17] The arguments in support of this viewpoint, which referred to traditional stereotypes, ranged from the assertion that women lacked not just the intellectual abilities required to perform the duties of a judge – in particular, logical thinking, the capacity for abstract thought, and objectivity – but also the authority required by the judicial bodies, to the view that the wider population would not accept female judges. Dr Ernst Swoboda, vice president of the association, presented a study on the question of whether women should be admitted to the judiciary 'according to purely objective criteria, without any prejudice', in which he concluded that the unequal treatment of women with regard to admission to the judicial training course was not against the constitution.[18] He backed up his opinion with a decision of the Constitutional Court from 1926. According to this decision, unequal treatment of women was justified whenever this was founded 'in the nature of the sex itself' – and, he argued, the emotional nature of women was the reason for their exclusion here. Specifically, this implied a tendency to partisanship, which supposedly made it impossible for women to render a balanced judgement. This meant that women might be suitable as lawyers, but not as judges. In addition, according to Swoboda, there was no need of women in the judiciary at that time.

Dr Marianne Beth, Austria's first female lawyer and a representative of the women's movement who repeatedly called for better career opportunities for women in law, countered Swoboda's statements with a detailed statement of position,[19] in which she particularly addressed the partisanship Swoboda ascribed to women. In response, she argued that this was not a deliberate, conscious partisanship; such a characteristic could be identified on a case-by-case basis during training, and would, in any case, make the individual concerned ineligible for the judiciary. On the contrary: the type of behaviour criticised by Swoboda, in Beth's view, was in fact the kind of 'keen nose' that enables an experienced judge to predict the outcome of a trial with 80% probability as soon as the evidence is presented in the first hearing. It was true that not all women were suitable to become judges; but then, as Swoboda himself had admitted, not all men were capable of doing the job either. Beth was not convinced that women would have to contend with a lack of authority; she argued that the people would very quickly get used to female judges. Rather, Swoboda's arguments demonstrated

[13] HANAUSEK, G., Die rechts- und staatswissenschaftlichen Studien der Frauen. In: *ibid*., p. 22-24, p. 23.
[14] Stenographische Protokolle des Nationalrates (StProtNR), 3. Gesetzgebungsperiode (GP), p. 2162; also FÜRTH, E., Was wird aus unseren Juristinnen? In: *Die Österreicherin*, vol. 2, Nr. 4, 1929, p. 3.
[15] Bundesgesetz […] über die Behandlung junger Rechtsbrecher (Jugendgerichtsgesetz), BGBl 1928/234.
[16] See e.g. *Wiener Zeitung* Nr. 280, 05/12/1929, p. 3; *Neues Wiener Tagblatt* Nr. 336, 05/12/1929, p. 4; *Arbeiterzeitung* Nr. 336, 05/12/1929, p. 3.
[17] *Österreichische Richterzeitung*, vol. XXIII, Nr. 2, 1930, p. 54.
[18] SWOBODA, E., Die Zulassung der Frauen zum Richteramt. In: *Österreichische Richterzeitung*, vol. XXIII, Nr. 12, 1930, p. 245-247.
[19] BETH, M., Die Eignung der Frau zum Richterberuf. In: *Die Österreicherin*, vol. 4, Nr. 1, 1931, p. 2. On Beth, see REITER-ZATLOUKAL, I., SAUER, B., Die Pionierinnen der österreichischen Rechtsanwaltschaft. In: *Österreichisches Anwaltsblatt* Nr. 3, 2013, p. 109-112; GOLTSCHNIGG, D. (Ed.), *Marianne Beth – Frauenrechtlerin, Friedensaktivistin und Universalgelehrte*. Wien, 2022.

that 'if women are excluded from the judiciary, it is not because of the nature of their sex, but rather because their exclusion is habitual practice. For this reason, we ought to become used to the idea that not every woman who applies must be accepted, but only those who are truly capable – and this is an obligation towards the people, not to keep any talented judge from them'.

Those who opposed admitting women to the judiciary also met with sharp criticism from other figures in the women's movement: for example, Ernestine Fürth, who saw the exclusion of female law graduates from the upper civil service as a violation of the rights accorded to women in the constitution.[20] She demanded that women be immediately admitted to the judicial preparatory service, since – given that the majority of the classical legal professions excluded women – the career prospects for women in law were disheartening. The Austrian Women's Party, founded in 1929 under the leadership of Marianne Hainisch, also advocated the admission of women to the judiciary, sending a petition to the then-Minister of Justice, Dr Franz Slama.[21] The minister appeared open to discussion in principle; however, he pointed out that the Ministry of Justice alone could not decide on the question of admitting women as judges. Rather, a regulation needed to be issued for the whole of the upper civil service.[22]

The second question raised by these applications by women to the judicial preparatory service concerned the legal basis for admission. On this question, Dr Demeter Koropatnicki – former council secretary to the Imperial High Court of Cassation and Justice – submitted a comprehensive investigation in 1930. He concluded that the judiciary should be directly accessible to women based on the equality principle contained in Article 7 B-VG. 'Women are treated as an equal factor in civic life. […] Accordingly, women may exercise any civil profession. They must not be excluded from performing judicial or administrative duties.'[23] Dr Ernst Swoboda thought otherwise. He stated that the equality principle 'was only a programme for legislation, which has to be applied through special implementation laws'.[24]

The interest around the issue of women in the judiciary did not last long. Soon, the discussion once again fell quiet. The catalyst for the debate – the applications of young female law graduates for acceptance to the judicial preparatory service – received no further attention from the Ministry of Justice. The applications were simply not processed. No justification was made and no administrative decision issued. The explanation the female applicants received was that they could not expect to be accepted into public service. Since a rejection was not issued, the women concerned had no possibility of challenging the decision.[25]

According to the current state of research, we do not know of any further attempts by women to gain admission to the judicial training course. It is also unlikely that any were submitted. Due not only to the political and economic conditions but also to the socio-political situation – which was oriented towards the reduction of paid work by women – the professional outlook for women in the justice system was worse than ever. Measures such as the 'double-earner act' (*Doppelverdienergesetz*) were explicitly intended to oppose female employment.[26]

2.2 Adoption of the German legal education system, 1939

Following the takeover of power by the National Socialist regime in 1938 and Austria's incorporation into the German Reich, the existing post-graduate professional training for lawyers, judges (or public prosecutors) and notaries was replaced by adoption of the German legal education system.[27] This system had two stages. The first stage began with the Basic studies in law and ended with the articled clerk's examination (*Referendarprüfung*). The second stage, the Major studies in law, consisted in a clerkship (*Referendardienst*) ending with the second state examination (*Assessorexamen*), which qualified the candidate for the classical legal professions such as judge, lawyer and notary, as well as for the upper administrative service.

The German regime strictly opposed female lawyers, seeing them as 'a breach in the time-hallowed principle of the masculinity of the state';[28] from 1936, women were banned from the German judiciary. However, it was precisely in this period that women first gained a foothold in areas of jurisdiction extending beyond the court practice that had already been available to them. Despite the ban on female judges, the clerkship was still open to women. However, before their appointment, female clerks had to sign a declaration in which they acknowledged that, after passing the second state examination, they

[20] FÜRTH, Was wird aus unseren Juristinnen?, p. 3.
[21] *Innsbrucker Nachrichten* Nr. 69, 25/03/1930, p. 8; *Oesterreichs Frauenzeitung* Nr. 2, April 1930, p. 2.
[22] *Wiener Zeitung* Nr. 281, 06/12/1929, p. 4; *Tages-Post Abendblatt* Nr. 70, 24/03/1930, p. 2.
[23] KOROPATNICKI, D., Die Gleichheit vor dem Gesetz. In: *Österreichische Richterzeitung*, vol. XXIII, Nr. 10, 1930, p. 182-192, p. 186; LIST-GANSER, B., Die Frau in den akademischen Berufen. In: BRAUN, M.-St., FÜRTH, et al. (Ed.), *Frauenbewegung, Frauenbildung und Frauenarbeit in Österreich*. Wien, 1930, p. 295-300, p. 298.
[24] SWOBODA, Zulassung der Frauen zum Richteramt, p. 246.
[25] StenProt 3. GP 2162; also FÜRTH, Was wird aus unseren Juristinnen?, p. 3.
[26] See for example BANHAUER-SCHÖFFMANN, I., Der "Christliche Ständestaat" als "Männerstaat"? Frauen und Geschlechterpolitik im Austrofaschismus. In: TALOS, E., NEUGEBAUER, W. (Ed.), *Austrofaschismus. Politik-Ökonomie-Kultur 1933-1938*. Wien, [5]2005, p. 254-280.
[27] Kundmachung des Reichsstatthalters in Österreich, wodurch die Verordnung über die Befähigung zum Richteramt, zur Staatsanwaltschaft und zur Rechtsanwaltschaft […] bekanntgemacht wird, dRGBl I, p. 5 –20; Gesetzblatt für das Land Österreich (GBlLÖ) 1939/116.
[28] DIETRICH, O., Der Beruf der Frau zur Rechtsprechung. In: *Deutsche Juristen-Zeitung*, vol. 38, Nr. 19, 1933, p. 1255-1259, p. 1255. On the discrimination of women lawyers cf. a.o. BAJOHR, St., RÖDINGER-BAJOHR, K., Die Diskriminierung der Juristin in Deutschland bis 1945. In: *Kritische Justiz*, vol. 13, Nr. 1, 1980, p. 38-50, p. 39; MEIER-SCHERLING, A.-G., Die Benachteiligung der Juristin zwischen 1933 und 1945. In: *Deutsche Richterzeitung*, vol. 53, Nr. 1, 1975, p. 10-13, p. 10.

would be accepted neither to the judiciary nor to the public prosecutor's office.[29] Years later, these women would nonetheless be entrusted with judicial responsibilities due to the acute staffing shortage of the late 1930s. The shortage arose from the fact that almost 15% of judges and public prosecutors were dismissed as early as March 1938 on political or racial grounds, but also, primarily, from the conscription of men into the Wehrmacht during the Second World War.[30] Because of this staffing shortage, in 1942, the National Socialist regime was forced to ease the ban on female judges.[31] The Austrian Dr Margareta Haimberger, who subsequently became a public prosecutor, compared the situation of the time to a vacuum; 'and women were inevitably sucked into this vacuum […]. Finally, they remembered the female assessors and female-articled clerks. […] However, these women had to stay strictly behind the scenes to save the face of National Socialism, which did not want to betray its own maxims, at least not in public'.[32] Accordingly, women were deployed exclusively in cadastral and registry matters at first and then, later, in non-litigious proceedings: in other words, areas of the law in which they would primarily remain in the background.

3. The first women in the judiciary and the public prosecutor's office

After the Second World War ended, these female law graduates who had been active in the court system from the early 1940s onwards were transferred into the Austrian judicial service, where they continued to work as assessors or assistant judges. Finally, in 1947, two of them succeeded in being appointed independent judges: Dr Gertrud Sollinger and Dr Johanna Kundmann.[33] In view of women's long, obstacle-ridden path into the judiciary, the appointment of the first female judges was, in fact, nothing short of sensational. However, in the post-war period, overshadowed as it was with economic and socio-political problems, hardly anyone took notice. Only a few brief reports appeared in the daily press of 13 August 1947.[34]

The appointments of the first female law graduates, as judges did not level the path of women into the public prosecutor's office by a long way, despite its permeability with the judiciary. The public prosecutor's task – defending the public interest in the system of criminal courts – was still considered inherently unsuited to women. The first female public prosecutor, Dr Gerda Meissl, was appointed as late as 1959, over ten years after the appointment of the first female judges. She remained the only woman in this position in Austria for a further five years until the second female public prosecutor, Dr Margareta Haimberger, was appointed in 1964.[35]

Only a few women followed in the footsteps of these Austrian legal pioneers. Female judges and public prosecutors remained the exception for years to come, as the numbers below demonstrate. In 1953 – six years after the first set of appointments – there were twelve women in the Austrian judiciary. Even by 1961, the number had only risen to thirty-two, including candidates: a share of about 2%. The generally small proportion of women amongst law students, the extremely restrictive admissions policy for women in the judicial preparatory service, and the ongoing scepticism about female judges were all reasons for the scarcity of women in the judiciary. The descriptions of a contemporary witness, Dr Liselotte Morent – who later became a lawyer – paint a vivid picture of the admissions practices of the late 1950s: 'Many women in the cohort wanted to be judges, but that was wholly impossible. Ladies were, on principle, not accepted into the judicial preparatory service in those days.'[36] The future public prosecutor Dr Margareta Haimberger and Dr Alice Nargang, who was head of a District Court from 1964, made similar statements. Although they did not describe the complete exclusion of women, they did testify to massive discrimination.[37] The judicial administration justified its unequal treatment of men and women in preparatory service admissions with the argument that men had to support a family, and therefore should be given priority on societal grounds. Alongside this discrimination, female lawyers still also had to confront a stubbornly persistent scepticism about women in the judiciary. For example, a 1953 careers advice brochure published by the Federal Ministry of Education did not deny that women were suitable, in principle, to practice the law; 'however, the legal professions can only be recommended for women subject to certain reservations. […] There can be no doubt that a mentally and emotionally healthy, normally developed woman must find the career of judge or public prosecutor to be out of keeping with her nature'.[38]

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[29] PALANDT, O., RICHTER, H., STAGEL, F., *Die Justizausbildungsordnung des Reiches*. Berlin, [2]1939, p. 82.

[30] BRODA, Ch., 1938-1974: Was ist geblieben? In: *Zeitgeschichte*, vol. 1, Nr. 8, 1973/1974, p. 181-186, p. 182; SCHWARZ, U., NS-Richter in Österreich. In: KOHL, REITER-ZATLOUKAL, *RichterInnen*, p. 125-144, p. 130.

[31] MEIER-SCHERLING, Benachteiligung, p. 12.

[32] HAIMBERGER, M., Die Juristin in der Strafrechtspflege. In: BUNDESMINISTERIUM FÜR JUSTIZ (Ed.), *Die Juristin in der Justiz. Tagung des Bundesministeriums für Justiz*. Wien, 1968, p. 39-47, p. 41.

[33] For more details about Sollinger and Kundmann, see the annex 'Short biographical sketches of female judges' below p. 9-10.

[34] *Wiener Zeitung* Nr. 195, 23/08/1947, p. 1; *Wiener Kurier* 22/08/1947, p. 2; *Linzer Volksblatt* Nr. 195, 25/08/1947, p. 3; *Salzburger Nachrichten* Nr. 194, 26/08/1947, p. 2.

[35] For more details about Meissl and Haimberger, see the annex 'Short biographical sketches of female public prosecutors'. On women in the public prosecutor's office in general, see SCHNEIDER, G., Frauen in der österreichischen Staatsanwaltschaft – Ein historischer Rückblick. In: KOHL, G., REITER-ZATLOUKAL, I. (Ed.), *"… das Interesse des Staates zu wahren". Staatsanwaltschaften und andere Einrichtungen zur Vertretung öffentlicher Interessen*. Wien, 2018, p. 303-318.

[36] MORENT, L., Podiumsdiskussion. In: *Frauen im Rechtsstaat. Zum heutigen Bild der Justiz. Schriftenreihe des Bundesministeriums für Justiz,* vol. 98, Wien, 1999, p. 110-114, p. 112.

[37] HAIMBERGER, Juristin, p. 39; NARGANG, I., Die Frau als Gerichtsvorsteherin und Strafrichterin auf dem Land. In: *Tagung* 1968, p. 25-38, p. 36.

[38] MORAWEK, R., Der Jurist. In: TIMP, O. (Ed.), *Schule und Beruf,* vol. 46/48, Wien, 1953, p. 29-30.

All this demonstrates that it was not easy for the first generation of female judges and public prosecutors to gain a foothold in a professional field previously occupied exclusively by men. By their own accounts, they had to fight for a long time to gain recognition, and were sometimes greatly pressured to justify themselves.[39] Moreover, their legal abilities were frequently viewed with suspicion. Even in 1968 – over two decades after the appointment of the first female judges – the unequal treatment of female and male applicants in the admissions process continued. As Dr Felix Sinzinger, later president of the Supreme Court of Justice, observed: 'One thing will always have to be clear – at least, it will still apply in the next years – that a woman is subject to significantly closer scrutiny regarding her suitability for the profession of judge […]'.[40] Sinzinger stressed that the misgivings about women in the justice system came primarily from the ranks of judges and public prosecutors: '[…] most notably, the population at large is more prepared to accept a female judge than, perhaps, we lawyers are amongst ourselves […]. Consequently, in professional circles, there is more opposition; perhaps in part for objective reasons but perhaps for emotional reasons, too'.

This scepticism about women in the judiciary, and the inequality of treatment to which it gave rise, were also reflected in the division of responsibilities (*Geschäftseinteilung*) within the courts.[41] In the 1950s and 1960s, female judges were almost exclusively deployed in the area of the court system dedicated to non-contentious matters (*Außerstreitgerichtsbarkeit*), where, in most cases, no public proceedings take place. (At that time, the non-contentious court system comprised probate proceedings, child maintenance and custody, adoptions, land registry and company registry matters.) Furthermore, the juvenile justice system was considered as a field of law suitable for female lawyers. Women appeared particularly appropriate to work in these two areas of practice because of the abilities and character traits ascribed to them by traditional stereotype. In contrast, criminal law was seen as an unsuitable area for women, so female judges were also viewed as incapable of taking on a 'one-horse' District Court – a court with only one judge, covering both civil and criminal law.[42] The application of Dr Johanna Kundmann for the post of court manager at a District Court in Upper Austria exemplifies the limitations the first female judges had to face in their sphere of influence. Her application was not shortlisted by the then personnel panel – for reasons of principle, it was emphasised – 'because no woman, even with the best professional training, can manage all the tasks of a judge'.[43]

The unequal treatment of women in the justice system was also manifested in the question of whether women could even wear the official dress of a judge: the gown (*Talar*). This question was still being raised even in the late 1950s. Wearing a piece of clothing like the judge's gown symbolises that the wearer has the power – or has been invested with the power – to dispense justice, to speak on behalf of the state and to act as its representative. According to the widespread opinion of the time, women employed in the justice system were supposed to carry out their legal work in the background rather than appearing publicly as representatives of the judiciary. Dr Haimberger had this same experience during her own training. She wanted to be able to act in place of the public prosecutor in court, as her male colleagues did. This was denied to her on the following grounds: 'But you would have to wear a gown in court, and a woman cannot do that!'[44]

4. Female judges and public prosecutors on the way into the twenty-first century

The first decisive step towards improving the position of women in the justice system was made by then-Minister of Justice Dr Hans Klecatsky in 1968, when he hosted a conference on the subject of 'Female law graduates in the justice system'. By doing so, he created a forum for female judges and public prosecutors to present their concerns and compare notes on their experiences. In his opening address, the minister emphasised that the judicial administration was 'looking for practical suggestions as to how it could better do this or that, so as to create favourable working conditions for female lawyers'.[45]

Although the working environment for female judges and public prosecutors over the following years was still characterised by misogyny,[46] the situation for female lawyers in the justice system became increasingly better, and their numbers began to grow. At the start of the 1970s, the proportion of women judges in the ordinary court system was still around 2%. However, just ten years later it was already around 10%, growing to around 18% by 1987. We can see a similar development in the public prosecutor's office, with a proportion of around 1.5% in 1968 and 10% ten years later. In addition, this trend continued to hold in the following decades: In 1995, the proportion of female judges was 25%. By 2005, it rose to 42% and today it is just over 58%.[47] Almost the same can be said for the public prosecutor's office. The proportion of women among public prosecutors rose to around 18% by 1995, doubling within the next ten years to just over 36% and passing the 50% mark for the first time in 2012. The proportion has barely increased since that point. Today, the proportion of women in the public prosecutor's office is around 54%.[48]

[39] Compare HAIMBERGER, Juristin, p. 39, 42; HAIMBERGER, Diskussionsbeiträge. In: *Tagung* 1968, p. 113.
[40] SINZINGER, F., Diskussionsbeiträge. In: *Tagung* 1968, p. 110-112, p. 111.
[41] The division of responsibilities was drawn up by the personnel panels, which at that time were exclusively staffed by men.
[42] NARGANG, Gerichtsvorsteherin und Strafrichterin, p. 25, 31.
[43] On this, see below p. 9-10.
[44] HAIMBERGER, Juristin, p. 42. Compare below p. 10-11.
[45] KLECATSKY, H. R., Die Juristin in der Justiz. In: *Tagung* 1968, p. 9-11, p. 10.
[46] HOFMEISTER, L., Analyse und Perspektiven. In: *Frauen und Recht. Schriftenreihe der Frauenministerin*, vol. 4, Wien, 1994, p. 31-43, p. 31, 33.
[47] As of 01/01/2022.
[48] As of 01/01/2022. It should be borne in mind, however, that these percentages represent the average proportion of women in the judiciary and the public prosecutor's office across the whole of Austria. If we look at individual courts, we can see that, the higher the court, the lower the proportion of women.

There is a wide range of reasons for the marked increase in the proportion of women since the late 1970s. Along with the general socio-political development – which brought with it a change in the understanding of gender roles and a difference in attitude to women's professional activity – it was primarily also legal measures that contributed to improving working conditions for female judges and public prosecutors and therefore to making these professions more attractive to women. First in this regard was the 1993 Federal Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz*),[49] which formed the basis for numerous further measures, such as the anchoring of the rights of Equal Treatment Compliance Officers in the judicial appointments procedure.[50] Female empowerment initiatives were also drawn up for the relevant ministries, including the Ministry of Justice, to put the desired equality of treatment into action.[51] However, the Ministerial Working Group for the Equality of Opportunity and Equal Treatment of Female Officials in the Ministry of Justice[52] (*Ministerielle Arbeitsgruppe für die Chancengleichheit und Gleichbehandlung der weiblichen Bediensteten im Justizressort*), established in 1982, also made a fundamental contribution to bettering the legal and professional situation of female judges and public prosecutors. This group worked tirelessly to make gender democracy in the justice system a reality. The justice conferences (*Justiztagungen*) of 1987, 1997 and 2007 – following in the tradition of 1968 – served as forums for collegial discussion and for female lawyers in the justice system to present their concerns. The introduction of flexible work models and the regulations on substitute posts for maternity cover made it easier to reconcile work and family life. Moreover, finally yet importantly, the marked increase in the number of female law students over the previous decades led to an increased proportion of women in the judiciary and the public prosecutor's office. (At the University of Vienna in 2018, women made up around 61% of law graduates).[53]

5. Summary

When the first female law graduates set out on their professional careers in the early 1920s, the 'upper civil service' (*höherer Staatsdienst*) – including the judiciary and the public prosecutor's office – was considered accessible to men only; this in spite of the equality principle anchored in the constitution, which excluded any gender-based privilege. Both this and the sweeping economy measures in the civil service – together with job cuts in the justice system in consequence of the disastrous economic situation in the post-war years – were arguably the reasons why the first women to graduate with the law degree made no attempt to be admitted to the judicial training course. Only in 1929 – ten years after women were first admitted to study law – did women begin actively to aspire to the judiciary, applying for acceptance to the judicial preparatory service. However, they were not successful. Both the judicial administration and the judiciary itself, underpinned by traditional stereotypes, emphatically declared their opposition to female judges. Nonetheless, the applications not only provoked the first ever wide-ranging discussion around women in the judiciary, they also called forth demands for the immediate acceptance of female judges, primarily from representatives of the women's movement. All these efforts were unsuccessful and, in view of the measures taken to suppress women's employment from the early 1930s onwards, the chances of female law graduates gaining a foothold in the judiciary were worse than ever.

When Austria was incorporated into the German Reich in 1938, female lawyers were initially subject to further repression. The German regime was fundamentally opposed to women in the legal professions, and had banned them from the judiciary in 1936. Women could still access the law degree, which from 1939 onwards was conducted in accordance with the German legal training system, with uniform, standardised training for all the legal professions (judge, public prosecutor, notary, and advocate) at the second stage of the process, the clerkship. However, before beginning the clerkship, they would be informed that once they had passed the second state examination, which concluded the degree course, they would be admitted neither to the judiciary nor to the public prosecutor's office. In the early 1940s, the acute shortage of personnel during the Second World War forced the German regime to loosen its ban on women in the justice system. Women were called upon to perform duties pertaining to the judiciary and the public prosecutor's office. However, they could only carry out these duties 'behind the scenes' of the court. The National Socialist perception of women could not be reconciled with their public appearance as representatives of the judiciary. Some of these women were eventually taken on by the judicial service of the restored Austrian state. These included Dr Gertrud Sollinger and Dr Johanna Kundmann, who were appointed as Austria's first female judges in 1947.

None of this paved the way for female law graduates to enter the public prosecutor's office. In the justice system, criminal law was still considered a typically masculine domain: the work of safeguarding the public interest, which was delegated by the state to the public prosecutor's office, was seen as incompatible with women. Only twelve years after the appointments of the first female judges was a woman first appointed public prosecutor: Dr Erika Meissl, in 1959. The second female appointee, Dr Margareta Haimberger, followed five years later.

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[49] Bundesgesetz über die Gleichbehandlung von Frauen und Männern und die Förderung von Frauen im Bereich des Bundes (Bundes-Gleichbehandlungsgesetz – B-GBG) […], BGBl 1993/100.

[50] Bundesgesetz mit dem das Gerichtsorganisationsgesetz, das Richterdienstgesetz, das Staatsanwaltschaftsgesetz, […] geändert werden […], BGBl 1994/507.

[51] See for example: Verordnung der Bundesministerin für Justiz über den Frauenförderungsplan des Justizresorts für den Zeitraum bis 31/12/1993, BGBl 1993/2012.

[52] SCHWEIZER, M., Rückblick und Perspektiven der AGG Justiz. In: *Frauen im Rechtsstaat – Zum heutigen Bild der Justiz. Schriftenreihe des Bundesministeriums für Justiz*, vol. 98, Wien, 1999, p. 75-107.

[53] *Gender im Fokus 6 – Studium und Karrierewege an der Universität Wien*. Wien, 2018, p. 31.

In the first decades following the admission of female judges, women as representatives of the judiciary remained an exception. In the long term, they had to confront persistent and stubborn anti-woman prejudice in the justice system, and they were placed under particular pressure to justify themselves. Only in the 1970s can we see some slight improvement in the professional situation of female judges and public prosecutors and, in consequence, a slow rise in the number of women in these professions.

The 1980s finally brought lasting change in the professional situation of women in the justice system. This was due not only to general social and political developments, but also, and primarily, to various measures regarding equal treatment and the advancement of women. Legal regulations facilitating a better balance of work and family, and protection through provision of maternal and parental leave, also contributed. The number of female students at the law faculty has also risen markedly in the last decades. All this has contributed to a striking increase in the proportion of women in the judiciary and the public prosecutor's office. Today, the Austria-wide proportion of women in the system of ordinary courts is around 58% on average; just over 54% in the public prosecutor's office.

Appendix [54]

1. Short biographical sketches of female judges

Dr Gertrud Jaklin (née Sollinger): Appointed judge as of 13 August 1947.[55]

Photograph: personnel file

Gertrud Jaklin (née Sollinger) was born into a solidly middle-class family in Vienna on 6 April 1916. Her father was a technical officer. Immediately after her school leaving examination, in the autumn of 1936, she enrolled in the law degree at the University of Vienna. She passed her first examination (in legal history) in January 1938. From the summer semester of 1939 onwards, Sollinger continued her study in accordance with the German legal educational system. In 1940, she passed the articled clerk's examination and, in the autumn of that year, began her service as a judicial trainee at the District Court in Aspang, Lower Austria. During this time, she obtained her doctoral degree, in 1942, and in 1944 sat the second (major) state examination. Following this, she initially worked as an assessor in the juvenile court system and the non-litigious judicial service in Vienna. Towards the end of the Second World War, in early 1945, she was transferred into the restored Austrian court system. On 19 February 1947, Sollinger was appointed assistant judge at the District Court Vienna, Innere Stadt, in a non-litigious department, which she finally took over as independent judge on 13 August 1947. She conducted her further career almost exclusively in non-litigious practice. The high point was her appointment as panel chair at the Vienna Regional Civil Court in 1974. She retired on her sixtieth birthday.

From 1952, Sollinger was married to Friedrich Jaklin, a special education teacher. The couple had no children. She died in Vienna on 9 December 1998.

Dr Johanna Kundmann: Appointed judge as of 13 August 1947.[56]

Photograph: personnel file

Johanna Kundmann, the daughter of a police cavalry captain, was born on 24 April 1914 in Mistelbach (Lower Austria). Following her school leavers' examination, Kundmann studied law from 1934 to 1939; first at the University of Vienna and then at the University of Graz, where she graduated with the doctoral degree in June 1939. She undertook her court practice as a junior lawyer in Gmunden (Upper Austria), Linz and Innsbruck. In January 1943, after passing the second (major) state examination at the judiciary examination office in Vienna, she took up a post as assessor in a non-litigious department at the District Court of Bad Ischl (Upper Austria). In January 1947, Kundmann was appointed assistant judge and then, on 13 August 1947, was finally appointed judge at Linz Regional Court. She was assigned to Linz District Court a few months later. In 1949, the young judge applied for the post of court manager at Haag am Hausruck (Upper Austria). She was completely excluded from the personnel panel's shortlist 'on a matter of principle, since she would have to deal with all the tasks of a judge, this meant that she would have to take on a post which – even with the best professional training – she, as a woman, would never be able to fulfil, especially given that this is a district with an over-

[54] These short biographical sketches are based on the personnel files of female judges and public prosecutors. I am extremely grateful to the Federal Ministry of Justice for kindly providing these.

[55] For Jaklin's career and personal life in detail, see SCHNEIDER, G., Österreichs Pionierinnen im Richteramt. Zwei biographische Kurzskizzen. In: *BRGÖ*, vol. 7, Nr. 1, 2017, p. 117-131, p. 121ff.

[56] For Kundmann's career and personal life in detail, see SCHNEIDER, Österreichs Pionierinnen, p. 117-131, p. 125ff.

whelmingly rural population'. Therefore, Kundmann stayed for a further fifteen years as judge in a non-litigious department of Linz District Court before becoming juvenile magistrate at the Linz-Land District Court in 1964. Shortly before retiring, she became court manager of the Urfahr-Umgebung District Court. She retired on 31 August 1975.

Johanna Kundmann, who never married and had no children, died in Linz on 8 May 2000.

2. Short biographical sketches of female public prosecutors

Dr Gerda Meissl: Appointed as public prosecutor as of 1 July 1959.

Photograph: personnel file

Gerda Meissl came into the world on 2 April 1913 in Vienna. She grew up as her parents' only child within an upper-class legal family; her father was a lawyer. After passing her school leaving examination in 1932, the young Meissl completed a one-year college course at the Handelsakademie der Wiener Kaufmannschaft before beginning the law degree at the University of Vienna, graduating in January 1937. She began her court practice immediately on graduation. However, after a few months she moved into the industrial sector, where she worked first of all at the Donau-Save-Adria Eisenbahngesellschaft and then in the legal department of the Erste Donau-Dampfschiff-fahrts-Gesellschaft. She subsequently returned to the courts, since – as she stated in a curriculum vitae – she wanted to make a career as an independent lawyer. She started out as a junior lawyer in the judicial district of the Higher Regional Court of Vienna in 1941. After completing her court practice and passing the second state examination in 1943, she was taken on as an employee at the public prosecutor's office in Vienna. Her tasks there were wide-ranging, as her later colleague Dr Margareta Haimberger, looking back in 1968, describes in the following words: 'Our colleague Meissl is especially important to us – important precisely because she was deployed in the function of a public prosecutor, meaning in the criminal justice system, and had to carry out a public prosecutor's duties. According to the German penal procedure code, the public prosecutor also had to conduct the investigation, thus carrying out the activities of an investigating magistrate; this meant being in direct contact with witnesses and with the accused. Our colleague Meissl had to fulfil all these obligations. The only thing she was not allowed to participate in was the trial, because in those days it was unthinkable for a woman to appear publicly in the courtroom.'[57]

In April 1945, shortly before the end of the Second World War, Meissl left the judicial service. She subsequently lived in Serfaus (Tyrol) for about a year before returning as an employee to the senior public prosecutor's office in Vienna. In 1951, she was appointed judge at the Higher Regional Court judicial district of Vienna, and on 1 July 1959 she was the first woman in Austria to be appointed public prosecutor (public prosecutor's office, Vienna). In 1963 she was appointed deputy senior public prosecutor (senior public prosecutor's office, Vienna) and she occupied this position until her retirement in 1974.

Little is known about the private life of Austria's first female public prosecutor. Meissl never married and had no children. She died in 2005 at the age of 92 in Wörschach, a small parish in Ennstal (Styria).

Dr Margareta Haimberger (née Eisenstädter, widowed as Tanzer): Appointed as public prosecutor as of 1 January 1964.

Photo: private source

Born on 25 May 1916 as Margareta Eisenstädter in Vienna, she came from a traditional legal family. Her father Dr Gustav Eisenstädter was a lawyer, as was her grandfather. Following her school leaving examination, young Margareta enrolled to study law at the University of Vienna in the winter semester of 1935/36. Alongside her studies, she also worked at her father's chambers. In May 1940, shortly before taking her first state examination – so, just before finishing her degree (in the meantime, she had had to change over to the German legal training regulations) – she was denied the right to continue her studies on racial grounds, as a '*Mischling* of the first degree'. Eisenstädter – by then already Margareta Tanzer, since she had married Georg Tanzer, an art dealer, at the age of twenty – then moved into the industrial sector, where she worked until the end of the war. She resumed her studies immediately afterwards, passing the doctoral *viva voce* examination in December 1945 after completing her dissertation. This was evaluated in combination with the legal history state examination taken in 1937 and the judicial state examination taken in May 1946 as equivalent to the first state examination. This meant that she could enter the judicial service as a trainee lawyer.[58] At her own

[57] HAIMBERGER, Juristin, p. 42.

[58] At that time 'trainee lawyer' (*Rechtsanwaltsanwärter*) was the current designation for law graduates during the court practice (see the modern term *Rechtspraktikant*: legal trainee), as opposed to 'candidate judges' (*Richteramtsanwärter*) for those in the judicial preparatory service.

request, she was initially assigned to an investigating magistrate at the Regional Criminal Court in Vienna, where she 'was called to undertake all the activities of an investigating magistrate […]. And nobody found in this any cause for concern, since my deployment was not a public one […]'.[59] From the autumn of 1946, she was allocated to the public prosecutor's office at the Juvenile Court in Vienna, and 'there the difficulties began. Namely, back then – precisely because of the lack of manpower – trainee lawyers were also assigned to appear in court and had to exercise all the functions of a public prosecutor during the trial. Unlike my male colleagues, I was not assigned any court appearances, and I initially believed that this was an accident. When it became apparent that it was not a coincident but intentional, I did not want to let the matter rest. The questions I directed to the relevant bodies in this regard were answered as follows […]: But you would have to wear a gown in court, and a woman cannot do that!' [60] A few weeks later, 'after a very dogged, intensive and successful fight', she finally managed to appear 'openly and in public, on behalf of the public prosecutor's office at the Juvenile Court in Vienna'.[61] When she was subsequently transferred to the Vienna public prosecutor's office, a bizarre situation arose: the public prosecutor's office did not allow her to go to court, but she continued to be sent to trials at the Juvenile Court.

In early 1947, the young woman finally managed to secure a post as a trainee judge. Since both her court practice and the period during which she was prevented from studying law were counted towards the judicial preparatory service, she was able to complete her training with excellent results as early as May 1948. Following her appointment as judge in the same year, she worked as an investigating magistrate and as substitute chair of the Regional Criminal Court in Vienna. In 1950 and 1951 respectively, she also worked for a few months at Bad Ischl District Court (Upper Austria), where she successfully ran a criminal department after some initial resistance from the Higher Regional Court in Vienna, which held the view that 'a woman will not be able to assert herself as a criminal judge with a rural population'. Despite 'the greatest resistance', she strove to attain a chairship at the Regional Criminal Court in Vienna, and 'in April 1956 there came about what one really must call a "miracle": namely, that a woman presided over jury trials'.[62] From 1961 to 1963, Haimberger – who had married her second husband, Dr Georg Haimberger, after her first husband's death – was chair of the Juvenile Court in Vienna. In early 1963, she returned to the public prosecutor's office in Vienna, where she was finally appointed public prosecutor on 1 January 1964. This makes her the second woman in Austria to achieve such a position. On 1 January 1976 came another significant career milestone: her appointment as vice president of the Regional Criminal Court in Vienna. She retired in 1980.

Alongside her professional career in the justice system, Margareta Haimberger had an eventful personal life. She was married twice, remarrying after the death of her first husband; however, this marriage ended in divorce after a few years. She had two sons. In 1987, Haimberger died at the age of 71 in Vienna.

[59] HAIMBERGER, Juristin, p. 44.
[60] Ibid., p. 42.
[61] Ibid., p. 44.
[62] Ibid., p. 46.

Die gelenkte Wirtschaft, ihre Rechtsgrundlage und ihr strafrechtlicher Schutz im Protektorat Böhmen und Mähren (1939–1945)*

(The Controlled Economy, its Legal Basis and Criminal Protection in the Protectorate of Bohemia and Moravia /1939–1945/)

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Abstract

Immediately after the establishment of the Protectorate of Bohemia and Moravia, the government of the Protectorate began to enact legislation for the transition to a controlled economy, following the Reich model. Its nature varied, but at least two basic groups can be distinguished: legislation regulating the market and legislation regulating the rationing system. One of the main features controlled economy of the Protectorate was the freezing and control of prices, for which the Supreme Price Office was created. In practice, restrictions on the free sale of food, fuel and other commodities played a crucial role. At the same time, Czech-Moravian associations were created – they managed and controlled the production and distribution of food and other commodities, and some state functions were delegated to them. In course of the implementation of the controlled economy, essential management and control tasks were also delegated to the provincial and district authorities, which also prosecuted offences against maintenance economy and controlled economy.

In the course of time, repression took hold, and the German special courts punished with all the vigour and severity they could, even in the case of Protectorate citizens, acts against economic regulations.

Keywords: *Protectorate of Bohemia and Moravia; Third Reich; controlled economy; price controls; emergency courts; agriculture; food stamps; private law.*

1. Einführung

Wie im Reich spielte auch im Protektorat Böhmen und Mähren beim Aufbau des neuen Wirtschaftssystems das Recht eine grundlegende Rolle. Es galten zwei Rechtssysteme: das autonome (tschechische) und das deutsche Recht.[1]

Die Gesetze zur Regulierung der Wirtschaft und Landwirtschaft wurden größtenteils von der Protektoratsregierung erlassen, also der sogenannten autonomen (tschechischen) Linie der Verwaltung. Der Reichsprotektor in Böhmen und Mähren oder die mit Gesetzgebungsbefugnissen ausgestatteten Stellen im Reich (Reichsregierung bzw. Reichsministerien) erließen nur einen kleinen Teil dieser Vorschriften. Gleichzeitig und im Zusammenhang mit den Veränderungen in der Wirtschaft erfolgten auch Eingriffe in das Zivil-, Handels- und Arbeitsrecht, über die ich bereits in früheren Beiträgen in dieser Zeitschrift berichtet habe.[2] Der vorliegende Beitrag zeigt die Umwandlung der bisherigen Marktwirtschaft in eine gelenkte Wirtschaft auf.

2. Allgemeine Charakteristik des Wirtschaftssystems des Protektorats

Nach der Errichtung des Protektorats Böhmen und Mähren wurde das Hauptaugenmerk auf den Aufbau einer neuen Wirtschaftsorganisation und eines neuen Wirtschaftssystems gelegt, das sich deutlich von dem bisherigen System der Ersten Tschechoslowakischen Republik unterscheiden sollte. Die legislativen, administrativen und politischen Veränderungen nach dem 15. März 1939 betrafen auch die Wirtschaft. Eine der Grundvoraussetzungen war die Integration des Wirtschaftslebens in

* Diese Studie wurde an der Masaryk-Universität Brünn im Rahmen des Projekts MUNI/A/1215/2022 *„Wandlungen des tschechischen Justizwesens im 20. Jahrhundert“* verfasst, das vom Ministerium für Schulwesen im Jahre 2023 mit einem zweckgebundenen Zuschuss für spezifische Hochschulforschung gefördert wurde.

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[1] Aus dem deutsch- oder englischsprachigen Schrifttum zum Rechtssystem des Protektorats Böhmen siehe: TAUCHEN, J., Das Protektorat Böhmen und Mähren und seine Rechtsordnung (1939–1945). In: *Beiträge zur Rechtsgeschichte Österreichs*, vol. 10, Nr. 2, 2020, S. 260-268; TAUCHEN, J., Law in the Protectorate of Bohemia and Moravia. In: *Plundered, But By Whom? Protectorate of Bohemia and Moravia and Occupied Europe in the Light of the Nazi-Art Looting.* Prag, 2015, S. 43-56; SCHELLE, K., TAUCHEN, J., *Recht und Verwaltung im Protektorat Böhmen und Mähren*. München, 2009.

[2] TAUCHEN, J., Die Grundcharakteristik des Privatrechts im Protektorat Böhmen und Mähren. In: *Journal on European History of Law*, vol. 2, Nr. 1, 2011, S. 56-60; TAUCHEN, J., Das Handelsrecht und seine Entwicklung im Protektorat Böhmen und Mähren (1939–1945). In: *Journal on European History of Law*, vol. 12, Nr. 1, 2021, S. 56-67; TAUCHEN, J., Einige Bemerkungen zur Entwicklung des Arbeitsrechts im Protektorat Böhmen und Mähren. In: *Journal on European History of Law*, vol. 1, Nr. 2, 2010, S. 50-54; TAUCHEN, J., Die Arbeitsverwaltung im Protektorat Böhmen und Mähren (1939–1945). In: *Journal on European History of Law*, vol. 10, Nr. 2, 2019, S. 2-14.

Böhmen und Mähren in das System der Reichswirtschaft. Die Propaganda in Zeitungen und Fachzeitschriften versuchte die Leser davon zu überzeugen, dass die gesunde Entwicklung der tschechischen Nation nur im Deutschen Reich gesichert werden könne.[3] Es wurde darauf hingewiesen, wie unterschiedlich der Westen und der Osten in der Vergangenheit in Bezug auf die Wirtschaft vorgegangen sind. Während im Westen der gepflegte Liberalismus das Individuum und seine Rechte an erste Stelle setzte und erst danach die Pflichten folgten, zeigte sich in Sowjetrussland das andere Extrem, wo das Individuum praktisch nichts bedeutete. Der neue wirtschaftliche Aufbau im Reich und im Protektorat sollte einen Mittelweg darstellen, d.h.:

> *„Der Unternehmer kann seine individuellen Fähigkeiten entwikkeln, muss sich aber immer bewusst sein, dass er Teil des Ganzen ist und seinen Beitrag zu dessen übergeordneten Interessen leisten muss."*[4]

Das Unternehmen sollte nicht zur persönlichen Bereicherung des Unternehmers dienen, sondern eine viel höhere Aufgabe erfüllen. So geriet die privatwirtschaftliche Konzeption des Unternehmers, wie sie im liberal-kapitalistischen System angewandt wurde, in die Kritik. Hervorgehoben wurde hingegen die volkswirtschaftliche Konzeption, die nicht die gewinnbringenden Aspekte des Geschäfts betonte. Der Gewinn des Unternehmers sollte nicht *„das Ergebnis einer zufällig erfolgreichen Spekulation sein, sondern Entlohnung für einen Dienst an der Gemeinschaft"*. Die Wirtschaft sollte möglichst den Bedürfnissen der gesamten Bevölkerung dienen. Zu Kriegszeiten diente die Protektoratswirtschaft jedoch ausschließlich den Interessen der deutschen Besatzer zur Verwirklichung ihrer Ziele, obwohl die offizielle Propaganda das Gegenteil besagte.[5]

Die organisatorische Einbindung des Unternehmers in diese Einheit erfolgte dann über die Zentralverbände (s.u.), denen er als Pflichtmitglied angehören musste. Diese Verbände wurden somit zum Fundament des gesamten wirtschaftlichen Aufbaus. Die Zwangsorganisation der Industrie basierte auf vier Hauptprinzipien:

- Zwangsmitgliedschaft,
- Vertretung öffentlicher Interessen,
- Unterordnung eines niedrigeren Zweiges einer Industrieorganisation unter einen höheren Zweig und die Möglichkeit für den Vorsitzenden des höheren Zweiges, den niedrigeren Zweigen und Mitgliedern verbindliche Anweisungen zu erteilen,
- Ernennung des Präsidiums des Zentralverbandes und seiner Wirtschaftsgruppen (keine gewählten Gremien, obwohl sie als Verbände organisiert sind).[6]

Das Wirtschaftssystem galt als anschaulicher Ausdruck bestimmter wirtschaftlicher Bedingungen und musste demzufolge auf Basis eines Wirtschaftsplans entworfen werden, auf Grundlage dessen die allgemeinen wirtschaftlichen Entwicklungsrichtungen umgesetzt wurden. Es handelte sich dabei um eine Sammlung an Grundthesen, die zu grundlegenden Leitlinien der Wirtschaftsorganisation werden sollten. Alle weiteren wirtschaftlichen Entwicklungen sollten sich an diesen Richtlinien orientieren und sämtliche Praktiken sollten darauf abgestimmt sein. Im Wirtschaftsplan sollte der Privatinitiative ausreichend Raum gegeben werden. Sie sollte zusammen mit den Grundsätzen des Privateigentums und der privaten Unternehmensformen unter der Voraussetzung gewährt werden, dass die Verantwortung gegenüber der Wirtschaftsgemeinschaft gewahrt bleibt. Im wirtschaftlichen Bereich sollten Privatinitiative und Selbstverantwortung dem Unternehmer ermöglichen, seine Fähigkeiten optimal zu nutzen und somit seine Leistung zu steigern. Man kann auf die Forderung nach einer zentralen Planung stoßen.[7]

Nach den Vorstellungen der Zeit sollte die Wirtschaft jedem Einzelnen nicht nur dessen Rechte, sondern auch dessen Pflichten gegenüber der Gesellschaft vor Augen führen. Das folgende Zitat aus der zeitgenössischen Presse veranschaulicht dies sehr gut:

> *„Früher ist jede Person zum Staat oder ihrer Organisation gegangen und hat gesagt: Ich möchte dieses oder jenes. […] Heutzutage kommen viele Menschen zu ihrer Zwangsorganisation und erfahren, dass sie auch Verpflichtungen haben. Sie müssen es tun, weil es im Interesse aller ist… Das ist der neue Geist, auf dem der heutige Wirtschaftsaufbau basiert"*.[8]

Wie bereits zuvor erwähnt, war die Wirtschaft in Böhmen und Mähren darauf ausgerichtet, Kriegszwecken zu dienen. Im April 1941 wurde die Kriegswirtschaft im Protektorat Böhmen und Mähren auch auf die Angehörigen des Protektorats (Tschechen) ausgeweitet.[9]

Die wirtschaftlichen Maßnahmen lassen sich im Wesentlichen in zwei Gruppen unterteilen. Die erste Gruppe bezieht

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[3] Dazu siehe SVOBODA, V., Evropský problém ve vývoji hospodářství. In: *Revue živnostenského (průmyslového) vlastnictví. Časopis pro průmysl, obchod a živnosti Protektorátu Čechy a Morava*, vol. 5, Nr. 6-7, 1939, S. 37-38; HRNČÍŘ, J., Třetí výročí Protektorátu. In: *Brázda*, 1940, vol. 5 (23), Nr. 10, S. 109.

[4] KRATOCHVÍL, J., Co očekáváme od výstavby našeho hospodářství. In: *Revue živnostenského (průmyslového) vlastnictví. Časopis pro průmysl, obchod a živnosti Protektorátu Čechy a Morava*, vol. 7, Nr. 2-3, 1941, S. 11-12.

[5] KAŠÍK, J., Změněné poslání a úkoly podnikatele. In: Brázda, vol. 3 (21), Nr. 44, 1940, S. 521; HORA, K., Úprava trhu. In: *Brázda*, 1940, vol. 3 (21), Nr. 41, 1940, S. 481-482.

[6] KRULIŠ-RANDA, O., Co očekává průmysl od organické výstavby našeho hospodářství. In: *Revue živnostenského (průmyslového) vlastnictví. Časopis pro průmysl, obchod a živnosti Protektorátu Čechy a Morava*, vol 7, Nr. 2-3, 1941, S. 20.

[7] SVOBODA, V., Principy hospodářské organisace. In: *Revue živnostenského (průmyslového) vlastnictví. Časopis pro průmysl, obchod a živnosti Protektorátu Čechy a Morava*, vol. 5, Nr. 2-3, 1939, S. 13-15.

[8] KRATOCHVÍL, J., Co očekáváme od výstavby našeho hospodářství. In: *Revue živnostenského (průmyslového) vlastnictví. Časopis pro průmysl, obchod a živnosti Protektorátu Čechy a Morava*, vol. 7, Nr. 2-3, 1941, S. 11.

[9] Verordnung über die Einführung der Kriegswirtschaftsverordnung im Protektorat Böhmen und Mähren vom 2. April 1941 (RGBl. I, S. 199). Die Kriegswirtschaftsverordnung vom 4. September 1939 (RGBl. I, S. 1609) enthielt u.a. die Festsetzung eines Kriegszuschlags zu einigen Steuern (Einkommensteuer) oder Erzeugnissen (Bier, Tabak, Wein) oder die Pflicht, dass die Preise und Entgelte für Güter und Leistungen jeder Art nach den Grundsätzen der kriegsverpflichteten Volkswirtschaft gebildet werden mussten.

sich auf die Reorganisation der Wirtschaft in Böhmen und Mähren sowie auf die Eingliederung in das Wirtschaftssystem des Deutschen Reiches. Dazu gehören auch die zuvor erwähnten Maßnahmen, die als Folge der Kriegswirtschaft durchgeführt wurden. Beispiele hierfür sind die Angleichung von Preisen und Löhnen an die des Reiches,[10] einige sozialpolitische Maßnahmen sowie Gesetze wie das neue Wechselgesetz, das Patentgesetz, die Regulierung von Kartellen, Verordnungen und die wirtschaftliche Anwerbung. Außerdem wurden zahlreiche Anpassungen der Zahlungsbeziehungen mit einigen europäischen Ländern durchgeführt.[11] Die zweite Gruppe umfasste die Regulierung der Produktion, des Handels und des Verbrauchs sowie andere Maßnahmen zur Umsetzung der Kriegswirtschaft.[12]

3. Wirtschaftsverbände

Bereits im Juni 1939 wurden erste gesetzliche Regelungen zur Organisation der Protektoratswirtschaft erlassen. Die Initiative zur Organisation der Protektoratswirtschaft wurde hauptsächlich vom Ministerium für Industrie, Handel und Gewerbe ergriffen. Das Ministerium erkannte die bestehenden Wirtschaftsverbände und -vereinigungen als ausschließliche Vertreter ihres Wirtschaftszweiges an, gründete Wirtschaftsverbände, löste diese auf oder legte sie zusammen und änderte bzw. ergänzte die Satzungen und Gesellschaftsverträge der Wirtschaftsverbände. Eine obligatorische Mitgliedschaft von Unternehmern und Betrieben in den Wirtschaftsverbänden wurde festgelegt. Die Ernennung und Entlassung der Leitung der Wirtschaftsverbände fiel ebenfalls in den Zuständigkeitsbereich des Industrieministers.

Gemäß dem Wortlaut der entsprechenden Regierungsverordnung sollten die Wirtschaftsverbände die wirtschaftlichen Interessen der Unternehmer und Betriebe aus Industrie, Handel und Handwerk vertreten.[13] Sie hatten jedoch eine über die bloße Interessenvertretung hinausgehende Bedeutung, da der Staat sie zur Kontrolle und direkten Lenkung der Unternehmen einsetzte. Auf diese Weise erfüllten die Wirtschaftsverbände öffentliche Aufgaben zum Wohle des Staates. Ein charakteristisches Merkmal der Wirtschaftsverbände war die obligatorische Mitgliedschaft der einzelnen Betriebe und Fabriken.

Nach dem Vorbild des Reiches entstanden auch im Protektorat Zentralverbände, die teilweise auf bereits bestehende Organisationsstrukturen zurückgriffen. Der Hauptunterschied bestand darin, dass die Gewerkschaften zuvor auf freiwilliger Basis von unten entstanden waren (einzige Ausnahme: das Handwerk), während nach 1939 eine Pflichtmitgliedschaft bestand. Die Zentralverbände sollten als ständische Organisationen einerseits die Interessen ihrer Mitglieder vertreten, andererseits ihnen aber auch bestimmte Pflichten auferlegen. Das System der Zentralverbände im Protektorat unterschied sich von dem der liberalen Zeit dadurch, dass letzteres *„fast ausschließlich auf Rechte und eine ständige Betonung von Rechten ohne Pflichten beruhte“*.[14]

Wie im Reich stellte die Schaffung von Zentralverbänden die Verwirklichung des Ständewesens dar, durch das die sozialen Angelegenheiten der Nation geregelt werden sollten. Das Ständewesen sollte dazu dienen, alle Stände zu Gleichberechtigung zu verhelfen. Die Forderungen der einzelnen Stände sollten stets im Hinblick auf das Ganze beurteilt werden; daher sollte jeder Stand lediglich einen Sprecher haben, nämlich den jeweiligen Zentralverband.[15]

Bis August 1939 bestand die Möglichkeit für Unternehmen, sich freiwillig in zwei öffentlichen Verbänden zu organisieren: in den Handels- und Gewerbekammern auf der einen Seite[16] und in den Gewerbegenossenschaften und ihren Dachverbänden auf der anderen Seite.[17] Außerdem bildeten sich inoffizielle Verbände auf föderaler Basis und mehr oder weniger organisierte Kartelle. Diese freiwilligen Organisationen verloren ihre eigene Rechtsfähigkeit, indem sie in öffentlich-rechtliche Körperschaften umgewandelt wurden.[18] Die Wirtschaftsstruktur wurde gemäß einem strengen deutschen Führungssystem geregelt.[19] Die neuen organisatorischen Regeln erforderten die Organisation der Industrie entweder auf territorialer Basis oder auf dem Berufsausübungsprinzip.

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[10] Zur Rechtsregelung der Lohnpolitik s. TAUCHEN, J., Právní úprava mzdové politiky v Protektorátu Čechy a Morava. In: *Právněhistorické studie*, vol. 44, Nr. 2, 2014, S. 116-127.

[11] Dazu ausführlich TAUCHEN, J., Das Handelsrecht und seine Entwicklung im Protektorat Böhmen und Mähren (1939–1945). In: *Journal on European History of Law*, vol. 12, Nr. 1, 2021, S. 56-67.

[12] NAXERA, V., Výsledky hospodaření Protektorátu Čechy a Morava v roce 1941. In: *Revue živnostenského (průmyslového) vlastnictví. Časopis pro průmysl, obchod a živnosti Protektorátu Čechy a Morava*, vol. 8, Nr. 1, 1942, S. 2.

[13] Regierungsverordnung vom 23. Juni 1939 Nr. 168/1939 Slg., über den organisatorischen Aufbau der Wirtschaft; zu dieser Verordnung siehe z. B. HUSTY, F., Organisation der gewerblichen Wirtschaft im Protektorat. In: *Prager Archiv für Gesetzgebung und Rechtsprechung*, vol. 21, 1939, S. 568-570.

[14] KRATOCHVÍL, J., Co očekáváme od výstavby našeho hospodářství. In: *Revue živnostenského (průmyslového) vlastnictví. Časopis pro průmysl, obchod a živnosti Protektorátu Čechy a Morava*, vol. 7, Nr. 2-3, 1941, S. 11.

[15] VRBA, J., Ústřední svaz obchodu. In: *Brázda*, roč. 3 (21), Nr. 19, 1940, S. 219 ff.

[16] Zur Organisation der wirtschaftlichen Selbstverwaltung in Böhmen und Mähren, sowie zur Funktion der Handelskammern vgl. FAFL, Z., Obchodní komory v hospodářské organizaci Protektorátu. In: *Obzor národohospodářský*, vol. 45, Nr. 7, 1940, S. 293-300.

[17] Seit 1941 konnte die Landesbehörde auf Antrag oder nach Anhörung des Zentralverbandes des Handwerks für Böhmen und Mähren Gewerbegenossenschaften oder deren Verbände errichten, ferner Änderungen an dem Umfang der Gewerbegenossenschaften anordnen, und zwar sowohl in Bezug auf die zugewiesenen Gewerbekategorien, als auch in Bezug auf den Sprengel und Sitz (Regierungsverordnung vom 26. Juni 1941 Nr. 311/1941 Slg., betreffend die Errichtung von Gewerbegenossenschaften und deren Verbänden).
Seit 1942 konnte das Ministerium für Wirtschaft und Arbeit aus besonders rücksichtswürdigen Gründen Gewerbegenossenschaften mit einem den Sprengel eines Landes überschreitenden Sprengel errichten (Regierungsverordnung vom 23. Mai 1942 Nr. 197/1942 Slg., über die Abänderung und Ergänzung der Vorschriften des VII. Hauptstückes der Gewerbeordnung).

[18] HOFFMANN, J. (Hrsg.), *Nové zákony a nařízení Protektorátu Čechy a Morava. Jg. III. (1941).* Prag: V. Linhart, 1941, S. 190.

[19] *Dějiny státu a práva na území Československa v období kapitalizmu. Band II. 1918–1945*. Bratislava: Vydavatelstvo slovenskej akadémie vied, 1973, S. 515.

Je nach Art des Unternehmens wurden neue Verbände aufgebaut. Mit Hilfe von fünf grundlegenden Zentralverbänden, die in den ersten Jahren des Protektorats nach und nach gegründet wurden, erfolgte die obligatorische Organisation der Wirtschaftszweige:

- Zentralverband der Industrie für Böhmen und Mähren (1939),[20]
- Zentralverband des Handels für Böhmen und Mähren (1940),[21]
- Zentralverband des Handwerks für Böhmen und Mähren (1940),[22]
- Zentralverband der Fremdenverkehrswirtschaft für Böhmen und Mähren (1940),[23]
- Zentralverband des Verkehrs für Böhmen und Mähren (1940).[24]

Die Gründung des Zentralverbands der Industrie für Böhmen und Mähren stellte die erste und wichtigste Maßnahme zur Steuerung der Protektoratswirtschaft dar und dieser Verband spielte eine entscheidende Rolle bei der Zwangsorganisation der Industrie.[25] Der Hauptzweck des Verbands bestand darin, die Protektoratswirtschaft mit den wirtschaftlichen Bedürfnissen des Großdeutschen Reiches und der gelenkten Wirtschaft im Allgemeinen in Einklang zu bringen. Der Zentralverband der Industrie organisierte die Protektoratsindustrie direkt und setzte den Willen der deutschen Besatzer um; die Tätigkeit des Verbandes trug auch zur Konzentration der Industrie bei.[26]

Der Zentralverband der Industrie, als Körperschaft des öffentlichen Rechts, war in Wirtschaftsgruppen unterteilt, die sich jeweils nach ihren Tätigkeitsbereichen richteten. Diese Wirtschaftsgruppen konnten je nach Bedarf weiter in Fachgruppen und Abteilungen untergliedert werden. Es war möglich, dass Gruppen verwandter Wirtschaftszweige Arbeitsgemeinschaften bildeten. Die Bildung von Fachgruppen und Abteilungen innerhalb der einzelnen Wirtschaftsgruppen oblag dem Präsidenten des Zentralverbands. Der Vorstand des Zentralverbandes bestand aus einem Vorsitzenden, der den Zentralverband nach außen vertrat, und einem oder mehreren Stellvertretern. Die Amtszeit des Vorsitzenden betrug zwei Jahre und er wurde vom Industrieminister ernannt. Die Funktion im Präsidium war ehrenamtlich.

Die bestehenden Wirtschaftsverbände wurden entweder in die fachliche oder territoriale Gliederung des Zentralverbandes eingegliedert oder aufgelöst. Falls die bestehenden Verbände ihre Eingliederung oder Auflösung nicht selbst vornahmen, wurde der Minister für Industrie dazu ermächtigt. Es war unzulässig, von dem Zentralverband unabhängige Wirtschaftsverbände zu gründen. Die individuellen Wirtschaftsgruppen und ihr Tätigkeitsbereich wurden vom Industrieminister festgelegt.

Unternehmer und Betriebe, die in dem betreffenden Wirtschaftsbereich tätig waren, wurden ex lege Mitglieder der betreffenden Wirtschaftsgruppen. Unternehmer und Unternehmensvertreter waren verpflichtet, Informationen über die Art der ausgeübten Tätigkeit, welche die Mitgliedschaft im Zentralverband begründete, an den Zentralverband und die zugehörige Wirtschaftsgruppe zu melden. In der Praxis kam es selbstverständlich vor, dass die Tätigkeit eines Unternehmens in zwei Wirtschaftsbereiche fiel, z.B. entweder in den Bereich der Industrie oder in den Bereich des Handwerks. Zur Lösung strittiger Fälle wurde ein Verfahren für die Aufnahme eines Unternehmens in die Zwangsorganisation der gelenkten Wirtschaft festgelegt.[27]

Der Zentralverband und seine Gruppen hatten eine beratende Funktion, um die gemeinsamen Interessen ihrer Mitglieder zu wahren und zu vertreten. Sie waren auch befugt, ihren Mitgliedern bestimmte Aufgaben aufzuerlegen. Der Vorstand des Zentralverbands und der einzelnen Gruppen hatte die Angelegenheiten des Zentralverbands und seiner Mitglieder im Hinblick auf die wirtschaftlichen Interessen des Protektorats Böhmen und Mähren im Einklang mit den wirtschaftlichen Bedürfnissen des Reiches zu verfolgen. Die Leitungen der Zentralverbände der Industrie, des Handels und des Handwerkes sowie deren Wirtschaftsgruppen wurden ermächtigt, für ihre Mitglieder mit verbindlicher Wirkung die Maßnahmen anzuordnen, die erforderlich waren, um eine geregelte Angleichung der Erzeugungs- und Absatzbedingungen der Wirtschaft des Protektorats Böhmen und Mähren an die Erzeugungs- und Absatzbedingungen des Großdeutschen Reiches zu ermöglichen. Diese Anordnun-

[20] Verordnung des Ministers für Industrie, Handel und Gewerbe vom 29. August 1939 Nr. 197/1939 Slg., womit Durchführungsvorschriften zur Regierungsverordnung über den organischen Aufbau der Wirtschaft erlassen werden; dazu siehe ADOLF, B., Der fachliche Aufbau des Zentralverbandes der Industrie. In: *Prager Archiv für Gesetzgebung und Rechtsprechung*, vol. 21, Nr. 19, 1939, S. 962-978.

[21] Verordnung des Ministers für Industrie, Handel und Gewerbe vom 27. Januar 1940 Nr. 37/1940 Slg., womit Durchführungsvorschriften zur Regierungsverordnung über den organischen Aufbau der Wirtschaft erlassen werden; dazu VRBA, J., Ústřední svaz obchodu. In: *Brázda*, vol. 3 (21), Nr. 19, 1940, S. 219 ff.

[22] Verordnung des Ministers für Industrie, Handel und Gewerbe vom 8. März 1940 Nr. 85/1940 Slg., womit Durchführungsvorschriften zur Regierungsverordnung über den organischen Aufbau der Wirtschaft erlassen werden; dazu HOLMAN, J., Nová organizace živností. In: *Sborník věd právních a státních*, vol. 17, 1942, S. 265-276.

[23] Verordnung des Ministers für Industrie, Handel und Gewerbe vom 9. September 1940 Nr. 386/1940 Slg., womit Durchführungsvorschriften zur Regierungsverordnung über den organischen Aufbau der Wirtschaft erlassen werden.

[24] Verordnung des Ministers für Industrie, Handel und Gewerbe vom 16. Dezember 1940 Nr. 451/1940 Slg., womit Durchführungsvorschriften zur Regierungsverordnung über den organischen Aufbau der Wirtschaft erlassen werden.

[25] Dazu ausführlich Nová organisace našeho průmyslu. In: *Revue živnostenského (průmyslového) vlastnictví. Časopis pro průmysl, obchod a živnosti Protektorátu Čechy a Morava*, 1939, vol. 5, Nr. 8-9, S. 50-54; KRULIŠ-RANDA, O., Co očekává průmysl od organické výstavby našeho hospodářství. In: *Revue živnostenského (průmyslového) vlastnictví. Časopis pro průmysl, obchod a živnosti Protektorátu Čechy a Morava*, vol. 7, Nr. 2-3, 1941, S. 19 ff.

[26] *Dějiny státu a práva na území Československa v období kapitalizmu. Band II. 1918–1945*. Bratislava: Vydavatelstvo slovenskej akadémie vied, 1973, S. 515.

[27] Regierungsverordnung vom 12. Juni 1941 Nr. 252/1941 Slg., betreffend die Einreihung von Unternehmungen in den Zentralverband der Industrie und den Zentralverband des Handwerkes; dazu z.B. SOCHOR, E., Povinná organizace řemesla. In: *Obzor národohospodářský*, vol. 45, Nr. 5, 1940, S. 220-222.

gen durften nur mit Zustimmung des Ministers für Industrie oder ggf. der Obersten Preisbehörde erlassen werden.[28]

Die Mitglieder des Verbandes hatten die Anweisungen des Präsidenten zu befolgen, die darauf abzielten, eine einheitliche Vorgehensweise für die gewerbliche Wirtschaft in Böhmen und Mähren sicherzustellen. Wenn Mitglieder vorsätzlich oder fahrlässig gegen die Anweisungen handelten, wurden sie mit einer Disziplinarstrafe belegt, gegen die sie Beschwerde beim Präsidium des Zentralverbands oder beim Ministerium für Industrie, Handel und Gewerbe einlegen konnten. Das Präsidium des Zentralverbands oder einer Wirtschaftsgruppe konnte auch eine Ordnungsstrafe verhängen, wenn in der Einladung darauf hingewiesen wurde, dass die Teilnahme an der Sitzung ohne triftigen Grund obligatorisch sei.

Wie bereits erwähnt, war die Bildung von Wirtschaftsgruppen Sache des Ministers für Industrie, Handel und Gewerbe, der dies per Verordnung anordnete. Im Rahmen des Zentralverbands der Industrie für Böhmen und Mähren wurden 23 Gruppen gebildet, die als einzige Vertreter ihrer jeweiligen Wirtschaftszweige anerkannt wurden:[29]

I. Wirtschaftsgruppe Bergbau;
II. Wirtschaftsgruppe Zuckerindustrie;
III. Wirtschaftsgruppe Spiritusindustrie;
IV. Wirtschaftsgruppe Brauindustrie;
V. Wirtschaftsgruppe Malzindustrie;
VI. Wirtschaftsgruppe Müllindustrie;
VII. Wirtschaftsgruppe Lebensmittelindustrie;
VIII. Wirtschaftsgruppe Fleisch- und Milchindustrie;
IX. Wirtschaftsgruppe Eisen schaffende Industrie;
X. Wirtschaftsgruppe Elektrizitätswerke;
XI. Wirtschaftsgruppe Sägeindustrie;
XII. Wirtschaftsgruppe holzverarbeitende Industrie;
XIII. Wirtschaftsgruppe Papierindustrie;
XIV. Wirtschaftsgruppe chemische Industrie;
XV. Wirtschaftsgruppe keramische Industrie;
XVI. Wirtschaftsgruppe Bauindustrie;
XVII. Wirtschaftsgruppe Glasindustrie;
XVIII. Wirtschaftsgruppe Textilindustrie;
XIX. Wirtschaftsgruppe Bekleidungsindustrie;
XX. Wirtschaftsgruppe Lederindustrie;
XXI. Wirtschaftsgruppe Filmproduktion;
XXII. Wirtschaftsgruppe Gas- und Wasserwerke;
XXIII. Wirtschaftsgruppe Edelmetall-, Edelstein- und Halbedelsteinerzeugnisse.

Während des Protektorats wechselten die einzelnen Wirtschaftsgruppen häufig. In den Jahren 1940 und 1941 wurden weitere Zentralverbände gegründet, die in ihrer Struktur dem Aufbau des Zentralverbands der Industrie für Böhmen und Mähren entsprachen. Die Verordnungen zur Gründung dieser Zentralverbände waren identisch und unterschieden sich in der Praxis lediglich durch die Namen der einzelnen Zentralverbände.

Im Rahmen des 1940 gegründeten Zentralverbandes des Handels für Böhmen und Mähren wurden die nachfolgenden Wirtschaftsgruppen gebildet:[30]

I. Wirtschaftsgruppe des Groß- und Außenhandels;
II. Wirtschaftsgruppe des Kleinhandels;
III. Wirtschaftsgruppe der Vermittler;
IV. Wirtschaftsgruppe ambulanter Unternehmen.

Im September 1940 kam es zu einer Zusammenführung des Fremdenverkehrs im Zentralverband der Fremdenverkehrswirtschaft für Böhmen und Mähren, der aus zwei Wirtschaftsgruppen bestand: a) Gastgewerbe und b) Kurorte und Sportstätten.

Am Ende des Jahres 1940 wurde im Zentralverband des Verkehrs für Böhmen und Mähren eine obligatorische Organisation des Verkehrswesens eingeführt, welches in folgende Verkehrsgruppen unterteilt war:[31]

I. Binnenschifffahrt;
II. Spedition und Lagerei;
III. Kraftfahr- und Fuhrgewerbe;
IV. Hilfsgewerbe des Verkehrs.[32]

Im Jahre 1941 wurden umfassende restriktive Maßnahmen gegen die Gewerbegenossenschaften ergriffen, die bisher als freiwilliger Zusammenschluss zum Schutz der wirtschaftlichen Interessen der Unternehmen dienten. Die Genossenschaften der Handelsgewerbe und deren Landesverbände wurden mit Wirkung vom 31. Dezember 1941 aufgelöst und an ihre Stelle traten die regionalen Gliederungen des Zentralverbandes des Handels für Böhmen und Mähren. Die Einrichtungen, welche laut Bestimmungen der Gewerbeordnung zur Erfüllung der Aufgaben der aufgelösten Genossenschaften (wie z. B. Krankenunterstützungskassen für die Mitglieder, wirtschaftliche Unternehmungen, Schulen oder Unterstützungsfonds) errichtet wurden, waren entweder aufzulösen oder auf den zuständigen Verband zu übertragen.[33]

In ähnlicher Weise wurden die Genossenschaften der Gastgewerbe und der Zentralverband der Landesverbände der Gast-

[28] Regierungsverordnung vom 19. September 1940 Nr. 309/1940 Slg., betreffend die Anpassung der Wirtschaft des Protektorates Böhmen und Mähren an die Wirtschaft des Großdeutschen Reiches.

[29] Kundmachung des Ministers für Industrie, Handel und Gewerbe vom 4. November 1939 Nr. 268/1939 Slg., mit welcher die allgemeine Anordnung über die Bestimmung der Wirtschaftsgruppen der fachlichen Gliederung des Zentralverbandes der Industrie für Böhmen und Mähren und die Abgrenzung ihrer Fachgebiete erlassen wird.

[30] Kundmachung des Ministers für Industrie, Handel und Gewerbe vom 29. Februar 1940 Nr. 82/1940 Slg., womit die Wirtschaftsgruppen des Zentralverbandes des Handels für Böhmen und Mähren und deren Fachgebiete bestimmt werden und das Meldeverfahren geregelt wird.

[31] Verordnung des Ministers für Industrie, Handel und Gewerbe vom 16. Dezember 1940 Nr. 451/1940 Slg., womit Durchführungsvorschriften zur Regierungsverordnung über den organischen Aufbau der Wirtschaft erlassen werden; Kundmachung des Ministers für Industrie, Handel und Gewerbe vom 5. März 1941 Nr. 104/1941 Slg., womit die Wirtschaftsgruppen des Zentralverbandes des Verkehrs für Böhmen und Mähren und deren Fachgebiete bestimmt werden und das Meldeverfahren geregelt wird.

[32] Im Jahre 1943 wurde noch fünfte Verkehrsgruppe – V. Bahn errichtet (Kundmachung vom 20. Januar 1943 Nr. 48/1943 Slg.).

[33] Regierungsverordnung vom 17. Dezember 1941 Nr. 447/1941 Slg., über die Auflösung der Genossenschaften der Handelsgewerbe (Handelsgremien) und ihrer Landesverbände sowie über die anderen damit zusammenhängenden Maßnahmen.

wirtgenossenschaften aufgelöst. An ihre Stelle traten die regionalen Gliederungen der Wirtschaftsgruppe Gastgewerbe des Zentralverbandes der Fremdenverkehrswirtschaft für Böhmen und Mähren.[34]

Auch die bestehenden Erwerbs- und Wirtschaftsgenossenschaften wurden in folgenden Verbänden zwangsweise organisiert:

- alle landwirtschaftlichen Genossenschaften und Vereine mit Sitz in Böhmen wurden im Verband der landwirtschaftlichen Genossenschaften in Böhmen organisiert;
- alle landwirtschaftlichen Genossenschaften und Vereine mit Sitz in Mähren wurden im Verband der landwirtschaftlichen Genossenschaften in Mähren organisiert;
- alle Wohnungsunternehmen wurden im Verband der Wohnungsunternehmen für Böhmen und Mähren organisiert;
- alle Verbrauchergenossenschaften und Konsumvereine wurden im Verband der Verbrauchergenossenschaften für Böhmen und Mähren organisiert;
- alle übrigen Genossenschaften und Konsumvereine wurden im Allgemeinen Genossenschaftsverband der Verbrauchergenossenschaften für Böhmen und Mähren organisiert.[35]

Nicht nur die Industrie, das Handwerk, der Handel oder der Verkehr waren durch Berufsverbände zwangsorganisiert und -verwaltet, sondern während des Krieges betraf dies auch einige andere Bereiche. In der Land- und Forstwirtschaft sowie im Garten- und Weinbau, in der Fischerei und Imkerei wurden die Erwerbstätigen im Verband der Land- und Forstwirtschaft für Böhmen und Mähren zwangsorganisiert. Die Aufgabe des Verbandes bestand darin, die landwirtschaftliche Produktion zu fördern und die Interessen des land- und forstwirtschaftlichen Berufsstandes zu vertreten. Der Verband gliederte sich in:

- den Landesverband der Land- und Forstwirtschaft für Böhmen in Prag und den Landesverband der Land- und Forstwirtschaft für Mähren in Brünn;
- die Bezirksvereine der Land- und Forstwirtschaft;
- die Ortsvereine der Land- und Forstwirtschaft.

In jedem politischen Bezirk sollte ein Bezirksverein und in jeder Gemeinde ein Ortsverein errichtet werden.[36] Die internen Verhältnisse des Verbandes wurden durch eine Satzung geregelt. Jeder Eigentümer von landwirtschaftlichen Flächen von mehr als 0,25 ha oder Besitzer eines Waldes von mindestens 1 ha wurde praktisch Mitglied des Verbandes.[37] Mit seiner sehr großen Mitgliederzahl war der Verband die größte und eine der wichtigsten öffentlichen Organisationen im Protektorat.[38] Die Aktivitäten des Verbandes wurden durch Mitgliedsbeiträge finanziert, die als Zuschlag zur Grundsteuer erhoben wurden, und z.B. für das Jahr 1943 betrug dieser Zuschlag 100% der Grundsteuer.[39] Für die anderen landwirtschaftlichen Bereiche wie Fischerei und Imkerei wurde eine Beitragsordnung erlassen, welche die Berechnung der Beiträge festlegte.

4. Gelenkte Wirtschaft und Marketinginterventionen

Zunächst ist es notwendig, den Begriff „gelenkte Wirtschaft" zu definieren, der häufig im Vokabular der Juristen des Protektorats vorkam. Nehmen wir dafür folgende zeitgenössische Definition:

> *„Eine Situation, in der der Staat autoritär die Preise für Waren, Produktion oder Vertrieb reguliert, entweder einzeln oder alle zusammen, um bessere wirtschaftliche Ergebnisse für das nationale Ganze zu erzielen als diejenigen, die sich aus freiem Wettbewerb oder autonomen Vereinbarungen zwischen interessierten Parteien ergeben".*[40]

Das Ziel einer gelenkten Wirtschaft war es, Kontinuität bei effizienter und gerechter Produktion, Verteilung und Preisbildung zu gewährleisten. Die Realität sah jedoch anders aus. Die Kriegswirtschaft, die auf wirtschaftlicher Lenkung und Planung beruhte, schränkte die unternehmerische und gewerbliche Tätigkeit im Protektorat ständig und drastisch ein, denn der Produzent, Lieferant oder Händler konnte nicht mehr frei entscheiden, an wen er seine Waren zu welchem Preis und in welcher Menge verkaufte. Ab September 1939, dem Beginn des Zweiten Weltkrieges, wurden Dutzende von Rechtsvorschriften erlassen, welche die Absatzfragen regelten. Die Einschränkungen der wirtschaftlichen und unternehmerischen Freiheit waren enorm, denn der Verkauf von nahezu allen Gütern des täglichen Bedarfs wurde reguliert.[41] In den meisten Fällen war der Verkauf nur gegen Vorlage eines Bezugsscheins möglich, der in verschiedenen Formen ausgegeben wurde (wie beispielsweise die bekannten Lebensmittelkarten).[42] Die Gutscheine blieben bis zum Ende des Krieges und bis in die frühen 1950er Jahre gültig. Das Ziel der staatlichen Eingriffe bestand darin, die Versorgung der Bevölkerung sicherzustellen, insbesondere die

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[34] Regierungsverordnung vom 17. Dezember 1941 Nr. 448/1941 Slg., über die Auflösung der Genossenschaften der Gastgewerbe und ihrer Landesverbände der Gastwirtgenossenschaften sowie über die anderen damit zusammenhängenden Maßnahmen.

[35] Regierungsverordnung vom 3. Juli 1942 Nr. 242/1942 Slg., über die Verbände der Erwerbs- und Wirtschaftsgenossenschaften.

[36] Regierungsverordnung vom 22. August 1942 Nr. 294/1942 Slg., über die Organisation der Land- und Forstwirtschaft in Böhmen und Mähren.

[37] Kundmachung des Ministers für Land- und Forstwirtschaft vom 5. November 1942 Nr. 375/1942 Slg., zur Durchführung der Regierungsverordnung Nr. 294/1942 Slg., über die Organisation der Land- und Forstwirtschaft in Böhmen und Mähren.

[38] HOFFMANN, J. (Hrsg.), *Nové zákony a nařízení Protektorátu Čechy a Morava. Jg. V. (1943).* Prag: V. Linhart, 1943, S. 437.

[39] Kundmachung des Ministers für Land- und Forstwirtschaft vom 25. Januar 1943 Nr. 21/1943 Slg., zur Durchführung der Regierungsverordnung Nr. 294/1942 Slg., über die Organisation der Land- und Forstwirtschaft in Böhmen und Mähren.

[40] POLÁČEK, V., K terminologii a definicím řízeného hospodářství (vývojový přehled). In: *Všehrd*, vol. 21, Nr. 10, 1940, S. 319.

[41] Zur staatlichen Regulation und ihrem Einfluss auf die Privatrechtsentwicklung im Protektorat Böhmen und Mähren siehe TAUCHEN, J., Die Grundcharakteristik des Privatrechts im Protektorat Böhmen und Mähren. In: *Journal on European History of Law*, vol. 2, Nr. 1, 2011, S. 56-60; VOJÁČEK, L., SCHELLE, K., TAUCHEN, J. (Hrsg.), *Die Entwicklung des tschechischen Privatrechts*. Brünn, 2011; VOJÁČEK, L., SCHELLE, K., TAUCHEN, J. (Hrsg.), *An Introduction to History of Czech Private Law*. Brünn, 2011.

[42] Dazu ausführlich siehe ŠTĚPEK, J., Přídělové systémy na území Československa 1915–2015. První část (1915–1945). Prag: MV ČR, 2018 und ŠTĚPEK, J., Přídělové doklady z období tzv. Protektorátu. Prag: MV ČR, 2010.

Verfügbarkeit von Lebensmitteln und Brennstoffen, da ein großer Teil dieser Güter zur Unterstützung des Krieges verwendet wurde. Ein weiterer Grund war die Unterbindung des spekulativen Handels mit diesen Gütern. Die Kriegswirtschaft sah sich damit konfrontiert, dass im Verlauf des Krieges immer weniger Lebensmittel und andere Waren in den Geschäften verfügbar waren.

Sowohl die Protektoratsregierung als auch der Reichsgesetzgeber ergriffen Maßnahmen, um den Verbrauch zu regulieren. Am 5. September 1939 wurden die ersten Beschränkungen eingeführt, die den Verbrauch von Mineralöl und Kohle regulierten. Die Verbraucher durften alle Mineralölprodukte (Kraftstoffe und Öle) nur mit einem von den Oberlandräten oder von ihnen beauftragten Stellen ausgestellten Bezugsschein (Tankgutschein) beziehen.[43] Die Kohlenwirtschaftsstelle als juristische Person des öffentlichen Rechts wurde eingerichtet, um die Kontrolle der Kohle, die ein wichtiges Gut für die Industrie und den Normalverbraucher darstellte, zu gewährleisten. Sie war dem Reichsprotektor[44] unterstellt, was ihre Bedeutung unterstreicht.[45] Um Brennstoff zu erhalten, mussten Gewerbetreibende ihren Durchschnittsverbrauch und ihre Bestände für den vorangegangenen Zeitraum melden. Bäckereien, Kaufhäuser, Kurorte, Gesundheitszentren, Schulen, Krankenhäuser und ähnliche Einrichtungen waren von der Meldepflicht ausgeschlossen. Der Meldebogen, der als Bestellung fungierte, musste sowohl an das Amt als auch an den Lieferanten geschickt werden.[46] Ab 1942 konnten Verbraucher Kerosin nur mit einer „Kerosinbezugskarte" beziehen, die zum Kauf von Kerosin für Beleuchtungs-, Koch- und Heizzwecke berechtigte. Nur Haushalte ohne Strom- oder Gasanschluss waren berechtigt, sich an die Gemeindeverwaltung mit einem Antrag zu wenden. Die Kohlenwirtschaftsstellewurde im Jahr 1944 aufgelöst[47] und durch eine gleichnamige Einrichtung ersetzt, die der Protektoratsverwaltung untergeordnet war.[48]

Was die Industrieerzeugnisse betrifft, wurde die Verbrauchsregelung zunächst für Seife eingeführt. Der Zweck dieser Maßnahme war, eine ständige Versorgung der Verbraucher mit Seife und Waschmitteln zu gewährleisten, die nur gegen Vorlage von Bezugsscheinen an die Verbraucher abgegeben werden durften. Von rechtlicher Bedeutung war, dass alle Rechtsgeschäfte in Bezug auf die ausgewählten Waren rechtsunwirksam waren, wenn der Verbraucher dem Verkäufer nicht die erforderliche Anzahl von Bezugsscheinen übergab, die ihn zur Entnahme der Waren berechtigten. Die Bezugsscheine waren nicht übertragbar, konnten aber einer anderen Person übergeben werden, die den Kauf für den Berechtigten besorgte. Es ist jedoch zu beachten, dass die Ausstellung des Bezugsscheins keinen Anspruch auf die Lieferung der Ware begründete; die Ware konnte dem Berechtigten nur ausgegeben werden, wenn sie sich tatsächlich im Besitz des Verkäufers befand. Die Bezugsscheine wurden von den Gemeindebehörden an die Verbraucher ausgegeben, die sie von den Bezirksbehörden erhielten. Nach der Ausgabe der Waren mussten die Bezugsscheine und ihre Abschnitte durch Lochen oder Durchstreichen entwertet und zur Kontrolle sorgfältig aufbewahrt werden. Die Ladeninhaber durften die betreffenden Waren nicht behalten, sondern mussten sie zu gleichen Teilen an berechtigte Verbraucher verteilen. Alle Verkaufsstellen waren verpflichtet, eine Inventur durchzuführen und ein Verzeichnis der Waren unter Angabe von Art und Menge anzulegen.

Im Dezember 1939 wurden Textilien und Schuhe zu den anderen industriellen Produkten hinzugefügt, welche Einschränkungen unterlagen. Der Verkauf dieser Produkte war ausschließlich über Bezugskarten oder Bezugsscheine möglich. Waren für Kinder bis zum Alter von 14 Jahren wurden nur gegen Bezugskarten ausgegeben. Die Bezugsscheine wurden nicht automatisch verteilt, sondern auf Antrag von den Gemeindebehörden ausgestellt. Die Regelungen für den Textilverbrauch wurden während des Protektorats mehrmals angepasst.

Am 20. September 1939 führte die Verordnung des Ministers für Industrie, Handel und Gewerbe eine Beschränkung des Verkaufs von Grundnahrungsmitteln[49] wie Fleisch, Milch, Butter, Schmalz, Kunstfette, Eier, Zucker, Kaffee und Tee an die Verbraucher und eine Regulierung des Lebensmittelkonsums ein, um eine ausreichende Versorgung der Bevölkerung mit lebensnotwendigen Gütern sicherzustellen.[50] Ab 1942 galt die Regulierung auch für Lebensmittel und Esswaren, die bisher an die Lebensmittelkarten nicht gebunden waren.[51]

Die Lebensmittelkarten, die zum Bezug der genannten Lebensmittel berechtigten, wurden von den Gemeinden an Haushalte, Anstalten (Krankenhäuser, Strafanstalten), Unternehmen (Hotels, Gaststätten, Kantinen) und Privatpersonen ausgegeben. Wehrmachtsangehörige und vom Reich abgestellte Beamte erhielten Bezugsscheine von den Oberlandräten.[52] Auf jeder Lebensmittelkarte für einen Haushalt waren eine laufen-

[43] Verordnung über die Mineralölbewirtschaftung im Protektorat Böhmen und Mähren vom 5. September 1939 (VBlRProt. S. 107).

[44] Durchführungsverordnung zur Verordnung über die Kohlenbewirtschaftung betreffend Rechtsstellung der Kohlenwirtschaftstelle für Böhmen und Mähren vom 21. Januar 1941 (VBlRProt. S. 46).

[45] Verordnung des Reichsprotektors vom 5. September 1939 über die Kohlenbewirtschaftung (VBlRProt. S. 109).

[46] Zweiter Durchführungserlass zur Verordnung des Reichsprotektors in Böhmen und Mähren über die Kohlenbewirtschaftung vom 5. September 1939 über die Brennstoffversorgung der Haushaltungen, der Landwirtschaft und des Kleingewerbes vom 23. Oktober 1939 (VBlRProt. S. 215).

[47] Verordnung des Deutschen Staatsministers für Böhmen und Mähren über die Aufhebung von Bestimmungen betreffend die Kohlenwirtschaftsstelle für Böhmen und Mähren vom 5. Oktober 1944 (VBlBM. S. 138).

[48] Regierungsverordnung vom 3. Oktober 1944 Nr. 223/1944 Slg., über die Kohlenbewirtschaftung.

[49] Verordnung des Ministers für Industrie, Handel und Gewerbe vom 20. September 1939 Nr. 82.826/39 über eine gerechte Versorgung der Bevölkerung mit den lebensnotwendigen Gütern, kundgemacht im Amtsblatt vom 22. September 1939, Nr. 216, S. 2960.

[50] Zur Rechtsregelung der Produktion und Lieferungen von Zucker im Protektorat vgl. TAUCHEN, J., Zásahy do právní úpravy výroby a dodávek cukru v Protektorátu Čechy a Morava. In*: Listy cukrovarnické a řepařské*, vol. 128, Nr. 11, 2012, S. 354-357.

[51] Kundmachung des Ministers für Land- und Forstwirtschaft vom 6. Mai 1942 Nr. 166/1942 Slg., über die Regelung der Verteilung von nicht kartengebundenen Lebens- und Genussmitteln.

[52] Zu den Aufgaben der Oberlandräte siehe KOKOŠKOVÁ, Z., PAŽOUT, J., SEDLÁKOVÁ, M., *Úřady oberlandrátů v systému okupační správy Protektorátu Čechy a Morava a jejich představitelé*. Prag: Scriptorium, 2019, s. 19-52.

de Nummer, Name, Vorname und Geburtsdatum des Berechtigten vermerkt, auf den Lebensmittelkarten für Betriebe und Einrichtungen zusätzlich die durchschnittliche Anzahl der dort verpflegten Personen. Die Selbstversorger, die diese genannten Lebensmittel zu Hause selbst anbauten, hatten keinen Anspruch auf den Erhalt dieser Lebensmittel. Es handelte sich hauptsächlich um Landwirte und ihre Familienangehörigen sowie um deren Angestellte. Der Inhaber einer Lebensmittelmarke hatte die Möglichkeit, den Lieferanten der Lebensmittel frei zu wählen, musste aber bei diesem einkaufen. Gemäß den Vorgaben des Gesetzgebers musste der Lebensmittellieferant die Waren entsprechend verteilen, sodass jeder Kunde eine angemessene Menge der verfügbaren Waren des Lieferanten erhielt. Bestimmte Lebensmittelkarten beinhalteten einen Bestellschein, der vom Inhaber mindestens vier Wochen vorab bei seinem Lieferanten (einem einzelnen Lebensmittelhändler, Milchladen oder Metzger) eingereicht werden musste.[53] Personen mit schwerer körperlicher Arbeit, Schwangere, Stillende, Kranke,[54] Personen mit langen Arbeitszeiten oder Nachtschichten[55] hatten berechtigten Anspruch auf eine höhere Lebensmittelration.

Die Einführung von Lebensmittelmarken zur Regelung des Verbrauchs von Grundnahrungsmitteln war nur der erste Schritt hin zu einer kontrollierten Lebensmittelwirtschaft. Die Verantwortung für die Verwaltung der Lebensmittelwirtschaft oblag allein dem Landwirtschaftsministerium, in dem sich diese Agenda konzentrierte. Das Landwirtschaftsministerium war befugt, sowohl den Behörden als auch den Wirtschaftsorganisationen Weisungen zu erteilen.[56] Es war somit berechtigt, Maßnahmen in Bezug auf die Erzeugung, den Ankauf und die Übernahme, die Lagerung, die Verarbeitung, die Vorratshaltung, die Lieferung oder die Rationierung von Waren zu ergreifen.[57]

Die dritte Säule des gelenkten Lebensmittelsystems war die Bildung von Interessenverbänden, die zusammenarbeiteten, um die Produktion einzelner Lebensmittelrohstoffe, deren Handel und Verteilung zu regeln.[58] Gleichzeitig übernahmen sie einen Teil der staatlichen Funktionen, insbesondere die Aufsichtsfunktion. Daraus resultierten 1939 die Tschechisch-Mährische Vereinigung für die Regelung des Handels mit Schlachtvieh,[59] die Tschechisch-Mährische Vereinigung für Milch, Fette und Eier,[60] der Gemeinsame Ausschuss für die Verwaltung von Zichorien, Kaffee-Ersatzstoffen, Kaffee und Tee[61] sowie der Gemeinsame Ausschuss der Rohzuckerfabriken und Raffinerien für Böhmen und Mähren[62] im Jahre 1940 und anschließend der Tschechisch-Mährische Verband für Kartoffeln und Stärke,[63] der Tschechisch-Mährische Verband für Rüben und Zucker[64] sowie der Tschechisch-Mährische Verband für Geflügel, Eier und Honig.[65]

Die Regelung der Lebensmittelbewirtschaftung war häufigen Änderungen unterworfen, und mehrmals im Jahr wurden verschiedene Durchführungsverordnungen erlassen, um das System der gelenkten Verteilung weiter zu präzisieren und zu verbessern. 1940 wurden die bestehenden Vorschriften geändert, als die Stammeslebensmittelkarten durch eine Haushaltskarte ersetzt wurden.[66] Sie diente auch als Grundlage für die Ausstellung anderer Versorgungskarten für den Verbraucher (z.B. Kleiderkarten oder Seifenkarten). Der Haushaltsvorstand gab Haushaltskarten an alle Mitglieder des Haushalts aus, einschließlich der Untermieter. Gleichzeitig wurde auch ein Verfahren für den Fall des Verlusts[67] von Bezugsscheinen oder den

[53] Kundmachung des Vorsitzenden der Regierung vom 29. September 1939 Nr. 215/1939 Slg., über die Einführung der Lebensmittelkarten; Kundmachung des Ministers für Landwirtschaft vom 22. März 1941 Nr. 106/1941 Slg., betreffend die Einführung einer Zusatzkarte für Lang- und Nachtarbeiter.

[54] Kundmachung des Vorsitzenden der Regierung vom 7. Oktober 1939 Nr. 225/1939 Slg., über Lebensmittelzuteilung an Schwer- und Schwerstarbeiter, werdende und stillende Mütter, Wöchnerinnen und an kranke und gebrechliche Personen.

[55] Kundmachung des Ministers für Landwirtschaft vom 7. März 1942 Nr. 86/1942 Slg., betreffend die Einführung einer Zusatzkarte für Lang- und Nachtarbeiter.

[56] Regierungsverordnung vom 18. September 1939 Nr. 206/1939 Slg., betreffend die Ermächtigung des Ministeriums für Landwirtschaft zu Regelung des Wirtschaftens mit gewissen Lebens- und Futtermitteln.

[57] Eine detaillierte Rechtsregelung der Zuständigkeiten des Landwirtschaftsministeriums, der Landes- und Bezirksbehörden wurde in der Kundmachung des Vorsitzenden der Regierung vom 29. September 1939 Nr. 210/1939 Slg., womit die allgemeinen Grundsätze zur Regelung des Wirtschaftens mit Lebens- und Futtermitteln bestimmt werden, festgelegt.

[58] HOFFMANN, J. (Hrsg.), *Nové zákony a nařízení Protektorátu Čechy a Morava. Jg. I. (1939).* Prag: V. Linhart, 1939, S. 1036.

[59] Regierungsverordnung vom 21. September 1939 Nr. 208/1939 Slg., betreffend die Regelung der Vieh- und Fischwirtschaft.

[60] Regierungsverordnung vom 27. September 1939 Nr. 209/1939 Slg., betreffend die Regelung der Erzeugung, der Verarbeitung und des Absatzes von Milch, Milcherzeugnissen, Fetten und Eiern.

[61] Regierungsverordnung vom 30. September 1939 Nr. 217/1939 Slg., betreffend die Regelung des Wirtschaftens mit Zichorie, Kaffee-Ersatzstoffen, Kaffee und Tee.

[62] Kundmachung des Vorsitzenden der Regierung vom 29. September 1939 Nr. 214/1939 Slg., betreffend die Regelung des Wirtschaftens mit Zuckerrüben und Zucker.

[63] Kundmachung des Ministers für Landwirtschaft vom 18. September 1940 Nr. 306/1940 Slg., betreffend die Regelung der Erzeugung und Verwertung von Kartoffeln, Stärke, Hefe, Essig, Branntweinerzeugnissen und weiteren Erzeugnissen aus Kartoffeln und Stärke.

[64] Kundmachung des Ministers für Landwirtschaft vom 19. September 1940 Nr. 310/1940 Slg., betreffend die Regelung der Erzeugung und Verwertung von Zuckerrüben, Zucker, Melasse, zuckerhaltigen Futtermitteln und sonstigen Erzeugnissen aus Rüben.

[65] Kundmachung des Ministers für Landwirtschaft vom 20. September 1940 Nr. 331/1940 Slg., betreffend die Regelung der Erzeugung und Verwertung von Geflügel, Eiern, Honig und Wachs und Erzeugnissen aus Geflügel und Eiern sowie des Aufkaufes von Federn.

[66] Kundmachung des Vorsitzenden der Regierung vom 5. August 1940 Nr. 258/1940 Slg., über die Einführung der Haushaltskarte.

[67] Kundmachung des Vorsitzenden der Regierung vom 27. Juni 1940 č. 234/1940 Slg., über das Verfahren für die verspätete Abnahme von Bezugsscheinen, den Verlust von Lebensmittelkarten und Bezugsscheinen und die Einführung von Gebühren.

Umzug eines Protektoratsangehörigen von einer Gemeinde in eine andere festgelegt.[68]

Ab Ende 1940 unterlagen die bis dahin frei verkäuflichen Kartoffeln einer teilweisen Regulierung, als den Erzeugern vorgeschrieben wurde, an wen und in welcher Menge sie Kartoffeln verkaufen durften. Ein Erzeuger konnte Kartoffeln aus seiner eigenen Ernte an Verbraucher im selben Gerichtsbezirk liefern, jedoch nur in einer Höchstmenge von 10 q.[69]

Im Jahre 1942 wurde die sogenannte Verbraucherkarte zur Beschaffung von Lebensmitteln eingeführt, die noch nicht an Lebensmittelkarten gebunden waren. Diese wurde jedoch nur in großen Städten wie Prag, Brünn, Pilsen oder Olmütz ausgestellt.[70]

Das Verbot, freitags in Gaststätten, Restaurants und Kantinen Fleischgerichte, wie Rind-, Schweine-, Hammel-, Pferde-, Geflügel- und Wildfleisch, zu servieren, stellte einen Eingriff in die unternehmerische Autonomie des Gastgewerbes dar; Fischgerichte wurden nicht als Fleischgerichte angesehen. Mit dieser Einschränkung sollte also der Konsum von Fleisch und fettreichen Produkten gesenkt werden.[71] Im Jahre 1941 wurde der Dienstag als zweiter fleischloser Tag in Gaststätten festgelegt.[72] Ab dem Jahr 1942 durften in Gaststätten Mahlzeiten nur noch montags und donnerstags serviert werden, die Fleischmenge pro Portion durfte 50 g nicht überschreiten.[73]

Die Bevölkerung reagierte auf die ständige Ausweitung der Anzahl von Produkten, die den Verkaufsbeschränkungen unterlagen, dass sie bestimmte Produkte in Geschäften aufkauften und zu Hause horteten. Im Sommer 1941 bildeten sich zum Beispiel Schlangen vor den Kiosken, da Verbraucher Tabakwaren anstanden. Die Regierung des Protektorats reagierte darauf mit der Verhängung von Einkaufsbeschränkungen auch für Tabakwaren.[74]

Um die Versorgung der Bevölkerung mit bestimmten Rohstoffen zu gewährleisten, wurde die freie Verfügung der Erzeuger über manche Kommoditäten vollständig aufgehoben. Ein Beispiel dafür stellt die Verordnung des Landwirtschaftsministers von 1941 dar, die zur Beschlagnahmung der Apfelernte führte. Die Eigentümer durften nicht mehr über das Obst verfügen und mussten die gesamte Ernte zu festgelegten Preisen an eine regionale Erfassungsstelle abliefern. Jegliche entgeltliche oder unentgeltliche Lieferung von Äpfeln an Verbraucher, Händler und Verarbeiter war verboten.[75] Ebenso waren die Besitzer von privaten Jagdrevieren verpflichtet, 50 % des erlegten Wildes an Händler zu verkaufen.[76] Auch Geflügelzüchter durften ihr Geflügel nicht nach Belieben veräußern, sondern mussten es den zuständigen Sammelstellen zum Kauf anbieten. Die Obst- und Beerenernte wurde in der Saison 1942 beschlagnahmt, um die Versorgung der Bevölkerung in den Großstädten sicherzustellen. Davon waren alle Arten von Obst und Beeren betroffen. Es war den Erzeugern (Pflückern) untersagt, ihr Obst und ihre Beeren direkt zu verkaufen oder sie umsonst an Verbraucher, Händler oder Verarbeiter abzugeben. Die Obstbesitzer und Pflücker waren dazu verpflichtet, ihre gesamte Ernte zu den zuständigen Sammelstellen zu bringen. Lediglich eine bestimmte Menge an Obst durften sie für den persönlichen Gebrauch behalten.[77] Die Gemeinde berechnete gemäß späterer Regelung die Ablieferungsmenge für jede Obstsorte jedes Erzeugers in der Gemeinde. Drei Wochen vor der Ernte kündigte sie die Verteilung der Zwangsabgabe an, wogegen die Erzeuger Einspruch erheben konnten. Die Obstbauern waren verpflichtet, das Obst ordnungsgemäß und pünktlich zu ernten, es ordentlich zu behandeln, um ein Verderben zu verhindern, und es gemäß den vom Tschechisch-Mährischen Verband für die Garten- und Weinbauwirtschaft festgelegten Fristen abzuliefern. Der Verband hatte die Befugnis, den Obstbauern eine Abgabepflicht aufzuerlegen.[78]

Einige Produkte durften nur gegen Vorlage einer sogenannten „Bedarfsbescheinigung“ an den Verbraucher verkauft werden; beim Verkauf von Möbeln prüfte die Bezirksbehörde zum Beispiel, ob der Verbraucher diese tatsächlich benötigte. Die Bezirksbehörde entschied auch darüber, ob der Verbraucher Anspruch auf einen Bezugsschein für den Kauf eines Rundfunkempfängers hatte.[79]

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[68] Kundmachung des Vorsitzenden der Regierung vom 30. Juli 1940 Nr. 247/1940 Slg., betreffend die Lebensmittelkarten bei Übersiedlung.

[69] Kundmachung des Ministers für Landwirtschaft vom 30. September 1940 Nr. 332/1940 Slg., betreffend die Regelung des Aufkaufes, Absatzes und der Verteilung von Kartoffeln.

[70] Kundmachung des Ministers für Land- und Forstwirtschaft vom 27. Mai 1942 Nr. 77.258-VII A, über Einführung der Verbraucherkarte, kundgemacht im Amtsblatt vom 28. Mai 1942, Nr. 123, S. 4467.

[71] Kundmachung des Vorsitzenden der Regierung vom 20. Oktober 1939 Nr. 256/1939 Slg., womit der Begriff der Frischwurst festgelegt und ein fleischloser Tag in der Woche eingeführt wird.

[72] Kundmachung des Ministers für Landwirtschaft vom 22. Mai 1941 Nr. 197/1941 Slg., betreffend die Fleischration und die Bestimmung eines zweiten fleischlosen Tages.

[73] Kundmachung des Ministers für Land- und Forstwirtschaft vom 4. April 1942 Nr. 120/1942 Slg., über Verabreichung eines einfachen Gerichtes in den Gaststätten, Kantinen und ähnlichen Unternehmungen an bestimmten Wochentagen.

[74] Erlass des Finanzministeriums vom 21. August 1941 Nr. 80.227/41-IV/13, zur vorübergehenden Regelung des Verkaufs von Tabakerzeugnissen, kundgemacht im Amtsblatt vom 23. August 1941, Nr. 198, S. 6848; Regierungsverordnung vom 24. September 1941 Nr. 342/1941 Slg., über die Regelung des Verschleißes von Tabakwaren.

[75] Kundmachung des Ministers für Landwirtschaft vom 9. September 1941 Nr. 321/1941 Slg., betreffend Beschlagnahme der apfelernte 1941.

[76] Kundmachung des Ministers für Landwirtschaft vom 4. November 1941 Nr. 379/1941 Slg., über die Belieferung der größeren Städte und Betriebskantinen mit Wildbret; Kundmachung des Ministers für Land- und Forstwirtschaft vom 5. Juni 1942 Nr. 213/1942 Slg., über die Pflichtablieferung von Wildbret im Jagdjahre 1942/1943.

[77] Kundmachung des Ministers für Land- und Forstwirtschaft vom 9. Juni 1942 Nr. 204/1942 Slg., betreffend das Verbot unmittelbarer Abgabe von Obst und Waldfrüchten durch Erzeuger (Sammler) an Verbraucher; Kundmachung des Ministers für Land- und Forstwirtschaft vom 17. Juni 1943 Nr. 171/1943 Slg., über die Regelung unmittelbarer Abgabe von Obst, Gemüse, Waldfrüchten und Pilzen durch Erzeuger an Verbraucher.

[78] Kundmachung des Ministers für Land- und Forstwirtschaft vom 6. Juli 1944 Nr. 143/1944 Slg., betreffend die Pflichtablieferung von Obst.

[79] Kundmachung des Ministers für Wirtschaft und Arbeit Nr. 363 vom 30. Dezember 1942 über die Anpassung des Verbrauchs von Rundfunkempfängern, kundgemacht im Amtsblatt vom 31. Dezember 1942, Nr. 307, S. 11.814.

5. Preislenkung

Kurz nach der Errichtung des Protektorats im Mai 1939 wurden der freie Markt und die freie Preisbildung abgeschafft, was erhebliche Auswirkungen auf das tägliche Wirtschaftsleben im Protektorat hatte.[80] Preise von Waren und Dienstleistungen ergaben sich nicht mehr aus der wechselseitigen Beziehung zwischen Angebot und Nachfrage, sondern wurden durch staatliche Regulierung festgelegt. Ein spezielles Gremium für die Preisfestlegung, das angesichts der außergewöhnlichen Bedingungen im Protektorat eine große Rolle spielte, übernahm die Preisgestaltung.[81] Die Errichtung der Obersten Preisbehörde wurde durch die Regierungsverordnung Nr. 121/1939 Slg. vom 10. Mai 1939 rechtlich geregelt.[82] In der Begründung zu diesem Gesetz wird die Notwendigkeit einer staatlichen Regulierung im Bereich der Preise wie folgt erklärt:

> *„Eine Destabilisierung des Marktgleichgewichts und eine Gefährdung der Versorgung der Bevölkerung könnte aufgrund des Abflusses von Geldeinlagen und deren Anlage in unproduktiven Gütern entstehen." Wenn es schon zu einem Mangel an bestimmten Gütern kommt, ist es notwendig, dass der Staat durch seinen Einfluss und seine Macht störende Einflüsse, die den Waren- und Güterverkehr nachteilig beeinflussen könnten, verhindert und nach Möglichkeit beseitigt, um das Wirtschaftsleben in geeigneter Weise wieder zu normalisieren".*[83]

Als ein Mangel an bestimmten Waren im Protektorat auftrat und die Preise infolgedessen anstiegen (was zweifellos Unbehagen in der Bevölkerung auslöste), beschloss die Protektoratsregierung, gegen diese Tendenzen vorzugehen, indem sie die Preise einer staatlichen Kontrolle unterwarf.[84] Die Protektoratsregierung richtete eine Oberste Preisbehörde ein, welche die Preise für Waren und Dienstleistungen festlegte und die Einhaltung dieser amtlich festgesetzten Preise überwachte. Allerdings war sie nicht für die Festlegung von Löhnen und Gehältern, Zinssätzen oder die Bewertung von Wertpapieren zuständig. Die Oberste Preisbehörde konnte allgemeine Verordnungen zu Preisfragen erlassen und war direkt dem Ministerpräsidenten unterstellt. Die Behörde wurde von einem Präsidenten geleitet, der mit beratender Stimme an den Sitzungen der Regierung teilnehmen konnte, wenn diese über Angelegenheiten beriet, die in den Zuständigkeitsbereich der Obersten Preisbehörde fielen.[85] Um wirtschaftlich vertretbare Preise zu gewährleisten, konnte die Behörde alle erforderlichen Maßnahmen ergreifen. Zum Beispiel konnten Mindest- oder Höchstpreise, Richtpreise oder Festpreise für Waren und Dienstleistungen aller Art festgelegt werden. Die Entscheidung, ob der Preis wirtschaftlich gerechtfertigt war, lag im Ermessen des Amtes. Jedermann war verpflichtet, der Behörde schriftliche oder mündliche Erklärungen bezüglich des Warenbestands sowie sämtlicher für die Preisbildung relevanten Faktoren zur Verfügung zu stellen. Die Behörde hatte das Recht, die Geschäfts- und Betriebsräume sowie die Lagerhäuser zu besichtigen, und Zugang zu den Geschäfts- und Wirtschaftsbüchern zu verlangen.

Die oben erwähnte Verordnung galt für Unternehmer, die täglich Lebensmittel anboten oder verkauften. Sie waren dazu verpflichtet, den Preis jedes Lebensmittels an einer gut sichtbaren Stelle in deutlich lesbarer Schrift auszuzeichnen. Die Pflicht zur Preisangabe galt auch für Waren, die in Schaufenstern ausgestellt waren. Sollten Waren nach Gewicht verkauft werden, mussten die Verkäufer den Käufern kostenfrei ihre Waage zur Verfügung stellen, um die verkauften Artikel zu wiegen. Auf Verlangen des Käufers waren die Verkäufer dazu verpflichtet, einen Kaufbeleg auszuhändigen, auf dem Art, Menge und Preis der Ware angegeben waren. Die Gemeinden konnten von der Obersten Preisbehörde, der Landesbehörde und der Bezirksbehörde verpflichtet werden, zur Marktzeit auf den Marktflächen Preislisten auszuhängen, welche die amtlich festgesetzten Höchstpreise der wichtigsten auf dem Markt angebotenen Waren enthielten.

Die Regierungsverordnung über die Errichtung der Obersten Preisbehörde enthielt auch einen Katalog von Sanktionen für Verstöße gegen die in der Verordnung festgelegten Pflichten. Insbesondere wurde derjenige bestraft, der für seine Waren oder Dienstleistungen einen höheren als den amtlich festgesetzten Preis verlangte.

Ab dem 20. Juli 1939 war die Erhöhung der Preise für Waren und Dienstleistungen verboten, sowohl direkt als auch indirekt, ebenso wie alle Maßnahmen, die diese Verbote umgehen würden. An diesem Tag wurde das Preisniveau eingefroren. Die Preisvorschriften galten ebenfalls für importierte Waren.[86] Für eingeführte Waren aus dem Ausland wurde der Höchstpreis aus dem tatsächlichen Einkaufspreis zuzüglich wirtschaftlich begründeter Aufschläge für Kosten und Gewinn festgelegt.[87] Ab 1943 sollten importierte Waren aus dem Ausland nur noch zu dem Preis verkauft werden, der im Protektorat für vergleichbare einheimische Waren zulässig war. Falls im Protektorat keine vergleichbaren Waren vorhanden waren, hatte der Unternehmer vor dem Inverkehrbringen der eingeführten Ware eine Preisgenehmigung bei der Obersten Preisbehörde einzuholen.[88] Der Lieferant durfte bei Waren, die aus anderen Reichsgebieten in das Protektorat Böhmen und Mähren geliefert wurden, höchstens den Preis verlangen, der im Handelsverkehr innerhalb der

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[80] ČERNÝ, B., Tvorba ceny v našem řízeném hospodářství. In: *Obzor národohospodářský*, vol. 45, Nr. 8-9, 1940, S. 374-384; zur Preislenkung weiter z.B. RENTROP, W., Preise im Protektorat. In: *Prager Archiv für Gesetzgebung und Rechtsprechung*, vol. 21, 1939, S. 235-242.

[81] HOFFMANN, J. (Hrsg.), *Nové zákony a nařízení Protektorátu Čechy a Morava. Jg. II. (1940).* Prag: V. Linhart, 1940, S. 1002.

[82] Eine relativ weitreichende Novellierung wurde durch die Regierungsverordnung vom 8. Mai 1940 Nr. 189/1940 Slg. durchgeführt.

[83] Der Motivenbericht zur Regierungsverordnung über die Einrichtung der Obersten Preisbehörde wurde abgedruckt in: HOFFMANN, J. (Hrsg.), *Nové zákony a nařízení Protektorátu Čechy a Morava. Jg. (1939).* Prag: V. Linhart, 1939, S. 584-586.

[84] PATOČKA, L., Z politiky a hospodářství. Nová úprava poměrů vnitropolitických. In: *Moderní stát*, Jg. 12, Nr. 7, 1939, S. 154.

[85] Regierungsverordnung vom 13. Juli 1939 Nr. 230/1939 Slg., über die Zusammensetzung, Organisation und Arbeitsweise der Obersten Preisbehörde.

[86] Kundmachung des Vorsitzenden der Regierung vom 20. Juli 1939 Nr. 175/1939 Slg., betreffend das Verbot von Preiserhöhungen.

[87] Kundmachung des Vorsitzenden der Regierung vom 8. September 1939 Nr. 221/1939 Slg., betreffend die Preise der Ware bei der Ein- und Ausfuhr.

[88] Verordnung des Vorsitzenden der Obersten Preisbehörde vom 12. Mai 1943 Nr. 137/1943 Slg., über die Preisbildung bei Auslandswaren.

anderen Reichsgebiete erlaubt war. Der Reichskommissar für Preisbildung konnte in wirtschaftlich begründeten Fällen oder zur Beseitigung einer unbilligen Härte einen anderen Preis zulassen.[89]

Im Juli 1939 wurden durch Erlass des Innenministeriums die Wirtschaftskontrollämter als nachgeordnete Stellen der Landesbehörden zur Überwachung der Preise für Waren und Dienstleistungen sowie aller für die Preisbildung maßgeblichen Umstände errichtet. Insgesamt 13 Dienststellen, die in den größeren Städten des Protektorats angesiedelt waren, führten Preiserhebungen durch, sammelten statistische Daten und erstatteten Strafanzeigen. Die Ämter wurden von einem Amtsleiter geleitet, welcher der Landesbehörde und dem Innenministerium unterstellt war. Die Zahl der Preiskontrollämter änderte sich in den folgenden Jahren ständig und wurde bis 1941 auf zwanzig erhöht.

Im September 1940 übertrug die Oberste Preisbehörde einen Teil ihrer Zuständigkeiten auf die Landes- und Bezirksbehörden. Die Landesbehörde konnte die Betriebs- und Geschäftsräume eines Unternehmens, dessen Inhaber gegen gesetzliche Verbote verstieß, vorübergehend schließen, dem Inhaber oder Geschäftsführer die Leitung des Unternehmens vorübergehend oder dauerhaft entziehen oder die Weiterführung des Unternehmens untersagen, wenn der Inhaber oder Geschäftsführer wiederholt gegen seine Verpflichtungen aus den Preisvorschriften verstieß. Die Landesbehörde konnte auch einen Stellvertreter für die weitere Leitung des Unternehmens bestellen. Sie konnte ihre Befugnisse nach eigenem Ermessen an die Bezirksbehörden delegieren. Anfang 1943 wurde eine weitere Übertragung der Befugnisse von der Obersten Preisbehörde auf die Landes- und Bezirksbehörden vorgenommen. Die Oberste Preisbehörde war für die Leitung und Lenkung der Preisaufsicht zuständig und entschied als oberste Behörde über Berufungen gegen erstinstanzliche Entscheidungen der Landesbehörde.

Das Prinzip der Preisregulierung war inkompatibel mit den Anforderungen öffentlicher Versteigerungen, deren Ziel darin bestand, den höchstmöglichen Preis zu erzielen. Aufgrund dessen erließen Landesbehörden in Prag und Brünn Rundschreiben, in welchen sie festlegten, dass das Preiserhöhungsverbot auch für die bei öffentlichen Versteigerungen erzielten Preise gelte. Demnach durften erhaltene Versteigerungspreise nicht über den zulässigen oder am 20. Juni 1939 festgesetzten Preis hinausgehen. Der Versteigerer musste notwendige Daten zum Preisniveau rechtzeitig einholen, um diesen Zweck zu erreichen. Wenn es aus volkswirtschaftlichen Gründen notwendig gewesen wäre, den Gegenstand zu einem höheren Preis zu versteigern, hätte der Versteigerer vor der Auktion eine Ausnahmegenehmigung bei der Obersten Preisbehörde einholen müssen.[90] Im Jahr 1940 legte die Oberste Preisbehörde fest, dass bei festgesetzten Mindestpreisen der Angebotspreis nicht niedriger und bei festgesetzten Höchstpreisen der Angebotspreis nicht höher sein durfte. Es war offensichtlich, dass ein Gegenstand, für den bereits ein fester Preis festgelegt wurde, nicht versteigert werden konnte. Die Art und Weise des Verkaufs von beweglichen Sachen zu einem festen Preis wurde durch die Regierungsverordnung Nr. 110/1940 Slg. geregelt.[91]

Es wurde auch diskutiert, welche Auswirkungen die Preisüberschreitungen auf die Gültigkeit der Verträge haben, insbesondere auf Kaufverträge, Werkverträge und Mietverträge. Obwohl die betreffenden Preisvorschriften eine Liste von Preisübertretungen enthielten, war die für die Praxis interessantere Frage, welche Auswirkungen die Nichteinhaltung der Preisvorschriften auf einen ausgehandelten oder bereits ausgeführten Vertrag hatte. Diese Frage wurde von den Protektoratsgerichten behandelt, aber die Rechtsprechung war in dieser Hinsicht uneinheitlich, da einige Gerichte den gesamten Vertrag aufgrund von Gesetzesverstößen für nichtig erklärten, während andere nur eine teilweise Nichtigkeit anerkannten, da die Wiederherstellung des ursprünglichen Zustands bei einigen Verträgen sehr schwierig wäre.[92]

1940 wurde die Preisbindungsverordnung erlassen,[93] um den Einfluss der Preispolitik von Kartellen auf die Verbraucherpreise zu begrenzen. Gemäß dieser Verordnung durften Verbände und sonstige Vereinigungen ihre Preise nur mit Genehmigung der Obersten Preisbehörde zum Nachteil der Abnehmer ändern. Auch Produktions- und Großhandelsunternehmen, welche Preise zum Nachteil der Einzelhandelskunden festlegten, waren durch die gleiche Verpflichtung gebunden.

In demselben Jahre wurden die Zollgrenzen zwischen dem Protektorat und dem Reich aufgehoben, wodurch eine Zollunion entstand. Die Abschaffung der Zölle hatte natürlich eine Auswirkung auf die Preise, genauso wie die Steuerreform, die in einer Änderung der Umsatzsteuer bestand. Wenn die neue Umsatzsteuer zu einem niedrigeren Satz als vor dem 1. Oktober 1940 erhoben wurde, war der Unternehmer verpflichtet, dem Empfänger der Lieferung einen entsprechenden Nachlass auf den Kaufpreis zu gewähren, welcher der Steuerminderung entsprach. In umgekehrter Weise konnte der Unternehmer bei einer Erhöhung der Umsatzsteuer die Steuerlast in Form einer Preiserhöhung an seine Kunden weitergeben. Die Abschaffung der Handelszölle hatte auch eine preissenkende Wirkung. Jedoch wirkte sich die Preissenkung (ggf. Preiserhöhung) nicht auf die festen Verbraucherpreise aus.[94]

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[89] Verordnung über die Preisbildung im Warenverkehr mit dem Protektorat Böhmen und Mähren vom 21. März 1940 (RGBl. I, S. 569).

[90] Runderlass der Landesbehörde in Prag vom 21. November 1939 Nr. 929/1-odd. 28a, über das Verbot von Preiserhöhungen bei öffentlichen Versteigerungen, abgedruckt in HOFFMANN, J. (Hrsg.), *Nové zákony a nařízení Protektorátu Čechy a Morava. Jg. II. (1940).* Prag: V. Linhart, 1940, S. 233-234.

[91] Regierungsverordnung vom 25. Januar 1940 Nr. 110/1940 Slg., womit die Sondervorschriften über Versteigerungen und andere amtliche Verkäufe erlassen werden.

[92] VALEČEK, J., Vliv překročení cenových předpisů na platnost smluv. In: *Časopis pro právní a státní vědu*, vol. 26, 1943, S. 46-55; dazu siehe auch KUBEŠ, V., TAUCHEN, J. (Hrsg.), *Mimořádné poměry a smlouvy úplatné*. Brünn: Masarykova univerzita, 2023.

[93] Kundmachung des Vorsitzenden der Regierung vom 10. Juni 1940 Nr. 191/1940 Slg., über die Preisbindung.

[94] Verordnung des Vorsitzenden der Obersten Preisbehörde vom 26. September 1940 Nr. 319/1940 Slg., über die Regelung der Preise infolge der Änderung der Umsatzsteuer und des Wegfalles der Zollgrenze.

Ab 1941 unterlag auch die Vermittlung von Kauf- und Tauschverträgen für Immobilien, landwirtschaftliche Betriebe und Gewerbebetriebe sowie die Vermittlung von Miet- und Pachtverträgen und Kreditverträgen der staatlichen Preisregulierung. Der Vermittler konnte für die Vermittlung eines Miet- oder Untermietvertrages über eine einzelne Wohnung oder ein einzelnes Zimmer eine „Eintragungsgebühr" verlangen, deren Höchstbetrag per Verordnung festgelegt wurde. Der Vermittler hatte nur dann Anspruch auf eine Vermittlungsgebühr, wenn er dem Auftraggeber innerhalb von drei Monaten mindestens fünf verschiedene Adressen von freien Zimmern oder Wohnungen mitteilte, die den entsprechenden Anforderungen (Größe, Lage, Ausstattung, Mietpreis) entsprachen. Hatte der Vermittler weniger als fünf Adressen mitgeteilt und war diese geringere Anzahl nicht erfolgreich, musste er die Vermittlungsgebühr zurückerstatten. Für die anderen oben genannten Verträge hatte der Vermittler Anspruch auf eine „Verhandlungsgebühr", deren Höchstbetrag als Prozentsatz festgelegt war. Dieser Betrag lag zwischen 2 % und 4 % des Kaufpreises (bei einem Kaufvertrag), des Wertes des Gegenstandes (bei einem Tauschvertrag) oder der für das erste Jahr vereinbarten Miete (bei einem Mietvertrag).[95]

Die Oberste Preisbehörde legte auch die Bedingungen für den Verkauf von Waren fest, die von einem Hersteller oder Händler direkt an Verbraucher auf Teilzahlungsbasis verkauft wurden. Wurde der Preis der Ware in Raten gezahlt, durfte der Verkäufer einen monatlichen Kreditzuschlag erheben, dessen Höchstbetrag zwischen 0,5 % und 1 % des Verkaufspreises betrug. Wurde die Ratenzahlung mit Zustimmung des Käufers von ihm eingezogen, so konnte der Verkäufer eine Einziehungsgebühr in Höhe von bis zu 3 % der jeweiligen Rate auf den Preis aufschlagen. Der Käufer musste jedoch vor Abschluss des Kaufvertrages ausdrücklich auf die Erhebung dieser Einziehungsgebühr hingewiesen worden sein. Kreditzuschläge durften dem Käufer nur für den vereinbarten Zeitraum des Teilzahlungsgeschäfts berechnet werden. Danach wurden nur noch normale Verzugszinsen fällig.[96]

Die Preisregelung galt auch für den Verkauf von gebrauchten Waren durch jedermann, also auch durch Nichtkaufleute. Gegenstände mit Wert als Sammlerstück oder Kunstgegenstand, sowie altes Material, unterlagen nicht der Preisregelung. Der Verkaufspreis von gebrauchten Waren durfte 75 % des zulässigen Höchstpreises für neue Waren gleicher Art nicht übersteigen. Wollte der Verkäufer den Gegenstand mittels Zeitungsannonce vermarkten, musste der Preis des gebrauchten Gegenstands in der Annonce genannt werden.[97]

6. Die Regulierung der landwirtschaftlichen Erzeugung

Wie andere Bereiche des gesellschaftlichen Lebens blieb auch die Landwirtschaft von den ideologischen Einflüssen des Nationalsozialismus nicht verschont.[98] Auf dem Gebiet des Protektorats zeigte sich der Einfluss der nationalsozialistischen Auffassung von der Landwirtschaft vor allem auf ideologischer Ebene, was sich in zeitgenössischen Zeitschriften nachlesen lässt, aber das Gesetz erfuhr keine grundlegenden Änderungen. Vorbild für den tschechischen Bauern sollte die Idee des deutschen Bauerntums sein, wonach der Bauer nicht als souveräner Eigentümer des Bodens galt (er konnte ihn also nicht uneingeschränkt nutzen), sondern nach dem Willen der Volksgemeinschaft damit betraut war, dieses „kostbare Volksgut" so zu bewirtschaften, wie es die Interessen des Ganzen erforderten. So heißt es in einem zeitgenössischen Kommentar:

> *„[ ] aber das Land, das der Bauer bebaut [ ] ist aber die eigentliche Grundlage der nationalen Existenz… Darum hat der Landbesitzer andere Pflichten, Pflichten höherer Ordnung, als Quelle der Rassenreinheit, als Träger des Nationalcharakters. [ ] Aber nicht jeder, der als Landwirt seiner Gemeinschaft die notwendigsten materiellen Güter liefert, kann Träger höherer Pflichten sein".*[99]

Im Protektorat Böhmen und Mähren galt der Bauer als Träger der Ernährung, der Kraft und der Leistungsfähigkeit des Volkes. Wie im Falle der Industrie rühmte sich die Protektoratspropaganda der Leistungen des Reiches. So erklärte Landwirtschaftsminister Adolf Hrubý 1942:

> *„[…] Die Protektoratslandwirtschaft hat im Interesse ihrer ständischen Ehre und Zukunft alle Möglichkeiten ausgenutzt […] und dem deutschen Bauern zur Seite gestanden. Sie hat im vergangenen Jahr bemerkenswerte Fortschritte in der raschen Anpassung an die neuen Produktionsmethoden gemacht und größere und gleichmäßigere Ergebnisse erzielt als in früheren Jahren".*[100]

Die Notwendigkeit der Sicherstellung der Lebensmittelversorgung führte bereits 1940 zur Übertragung dieser Aufgabe auf das Landwirtschaftsministerium. Das Ministerium wurde dazu ermächtigt, alle Maßnahmen im Bereich der Produktion, der Verteilung und des Verbrauchs von Nahrungs- und Futtermitteln zu ergreifen. Nach dem Vorbild anderer Sektoren wurde auch in der Landwirtschaft eine einheitliche Organisation der gelenkten Wirtschaft geschaffen, die sich aus einzelnen Verbänden zusammensetzte. Für die Bewirtschaftung einzelner landwirtschaftlicher Produkte wurden die Böhmisch-Mährischen

[95] Verordnung des Vorsitzenden der Obersten Preisbehörde vom 4. November 1941 Nr. 381/1941 Slg., betreffend die Entgelte in einigen Zweigen der Privatvermittlung.

[96] Verordnung des Vorsitzenden der Obersten Preisbehörde vom 29. Januar 1941 Nr. 52/1941 Slg., über die Festsetzung von Kreditzuschlägen beim Verkauf von Waren an direkte Verbraucher gegen Raten.

[97] Kundmachung der Obersten Preisbehörde vom 20. Mai 1942, Nr. 47.319-VI/5, über die Höchstpreise für gebrauchte Ware, kundgemacht im Amtsblatt vom 22. Mai 1942, Nr. 119, S. 4338.

[98] Zur Landwirtschaft im Protektorat siehe ausführlich ŠTOLLEOVÁ, B., *Pod kuratelou Německé říše: zemědělství Protektorátu Čechy a Morava*. Prag: Karolinum, 2014.

[99] HORA, K., Idea německého selství. In: *Brázda*, vol. 3 (21), Nr. 43, 1940, S. 505-506.

[100] NAXERA, V., Výsledky hospodaření Protektorátu Čechy a Morava v roce 1941. In: *Revue živnostenského (průmyslového) vlastnictví. Časopis pro průmysl, obchod a živnosti Protektorátu Čechy a Morava*, vol. 7, Nr. 1, 1941, S. 1.

Marktverbände gegründet und ausgewählte Handelsgesellschaften (z. B. die Privilegierte Getreidegesellschaft oder die Privilegierte Viehzuchtgesellschaft für Böhmen und Mähren) mit bestimmten Handelsaufgaben im Bereich der Nahrungs- und Futtermittelwirtschaft betraut.[101] Der Verband der Land- und Forstwirtschaft in Böhmen und Mähren wurde gegründet, um die landwirtschaftliche Produktion zu fördern und die Interessen der Land- und Forstwirtschaft zu vertreten.

Während des Krieges und aufgrund der Nahrungsmittelknappheit wurde der Staat gezwungen, durch gesetzliche Regelungen die Landwirte zur Steigerung ihrer Produktion zu verpflichten. Durch diese Maßnahmen wurden die wirtschaftliche Freiheit und das Eigentumsrecht der Landwirte beschränkt. Die Rechtsgrundlage für diesen Eingriff bildete die Regierungsverordnung über die Ausnützung von Grundstücken zum Anbau von Nutzpflanzen von 1940,[102] die auch ein Verfahren für den Fall vorsah, dass die Eigentümer landwirtschaftlicher Flächen die festgelegten Maßnahmen nicht freiwillig umsetzten. Laut dieser Verordnung waren die Eigentümer von nicht ausreichend landwirtschaftlich genutzten Flächen wie Brachland, Bauland oder unproduktives Weideland gezwungen, diese für den Anbau von landwirtschaftlichen Nutzpflanzen zu nutzen. Die Gemeinden spielten dabei eine wichtige Rolle, indem sie eine Liste aller Flächen erstellten, die nicht zur Landwirtschaft genutzt wurden. Diese Listen, die den Namen des Grundstückseigentümers, die ungefähre Fläche des Grundstücks und seine frühere Nutzung enthielten, wurden von den Gemeinden an die Bezirksbehörde weitergeleitet. Die Bezirksbehörde entschied dann, ob und von wem die Flächen für den Anbau von Nutzpflanzen genutzt werden sollten. Um eine ordnungsgemäße Bewirtschaftung zu ermöglichen, konnte die Bezirksbehörde die vorübergehende Nutzung fremder Privatwege oder sonstige Zufahrten und Zugänge über fremde Grundstücke genehmigen.

Falls der Eigentümer (Pächter, Mieter) des betroffenen Grundstücks die Vorbereitungsarbeiten für die Bewirtschaftung des Grundstücks nicht rechtzeitig durchführte, meldete die Gemeinde diesen Umstand der Bezirksbehörde, welche die Bewirtschaftung des Grundstücks für einen Zeitraum von bis zu zwei Jahren einem Dritten oder der Gemeinde übertragen konnte (Zwangsbewirtschafter). Der Zwangsbewirtschafter hatte das Recht, alle notwendigen Maßnahmen für die ordnungsgemäße Bewirtschaftung des Grundstücks zu ergreifen und auch Anspruch auf den Erlös aus der Bewirtschaftung zu erheben. Der Eigentümer war verpflichtet, alles zu unterlassen, was die ordnungsgemäße Bewirtschaftung des Grundstücks behindern könnte. Er hatte auch keinen Anspruch auf Entschädigung dafür, dass jemand anderes das Grundstück bewirtschaftete. Die bestehenden Verbindlichkeiten in Bezug auf das Grundstück wurden durch die Auferlegung der Eigentümerpflichten nicht berührt. Die Nichteinhaltung dieser Verpflichtungen war strafbar. In Ausnahmefällen, wenn es im öffentlichen Interesse lag, konnte ein Treuhänder oder Zwangsverwalter für den Betrieb eingesetzt werden.[103]

Eigentümer von Wiesen und Weiden hatten ähnliche Verpflichtungen wie die Eigentümer von nicht landwirtschaftlich genutzten Flächen.[104] Die Eigentümer solcher Flächen waren dazu verpflichtet, sie zu verbessern, beispielsweise durch Düngung, Bewässerung oder Entwässerung. Die Bezirksbehörde suchte nach solchen Wiesen oder Weiden, die verbessert werden konnten, und legte fest, welche Art von Verbesserungsarbeiten durchzuführen waren und in welchem Umfang. Das Ergebnis der Untersuchung wurde dann dem Landwirtschaftsrat vorgelegt, der einen Vorschlag für die Arbeiten ausarbeitete. Die Bezirksbehörde führte Gespräche mit den Eigentümern der betroffenen Flächen bezüglich der vorgeschlagenen Maßnahmen. Wenn sich eine Zweidrittelmehrheit der Eigentümer für den Vorschlag aussprach, ordnete die Bezirksbehörde die Durchführung der Maßnahme an. Bei abweichenden Meinungen trat die Landesbehörde mit den Eigentümern in Verhandlung.

Unbebautes Land, das weder für den Ackerbau genutzt noch aufgeforstet werden konnte, musste in geeignetes Weideland umgewandelt werden. Diese Verpflichtung wurde auf Vorschlag des zuständigen Landesverbandes für Land- und Forstwirtschaft von der Bezirksbehörde auferlegt. Dabei ist zu beachten, dass auch hier eine Einschränkung der wirtschaftlichen Autonomie der Viehhalter stattfand, die dazu verpflichtet wurden, ihre Tiere in dem von der Weideordnung festgelegten Umfang auf die ausgewiesenen Weideflächen zu treiben. Diese Ordnung wurde von der Gemeinde im Einvernehmen mit der örtlichen land- und forstwirtschaftlichen Vereinigung erlassen. Für die Nutzung der Weideflächen konnte von den Landwirten eine angemessene Gebühr gefordert werden, die jedoch nur die in der Weideordnung festgelegten Kosten (z.B. für den Unterhalt eines Hirten) abdecken sollte.

Die Landwirte hatten die Gebühr zu zahlen, auch wenn sie ihre Tiere nicht auf der für sie festgelegten Weide grasen ließen. Wenn nicht genug Weideland für alle Tiere des Dorfes zur Verfügung stand, erhielten die Tiere, die im Herdbuch eingetragen waren, Vorrang. Angesichts des Inkrafttretens der betroffenen Regierungsverordnung wurden die oben erwähnten Pflichten der Landwirte in der Praxis nicht mehr umgesetzt.[105]

Im Jahre 1942 wurde durch eine Regierungsverordnung über die Aufforstung von nicht voll ertragsfähigen Grundstükken eingegriffen, die keinen oder nur einen geringen landwirtschaftlichen Ertrag brachten (Ödland, Böschungen, Hänge, Sümpfe).[106] Eigentümer und andere Nutzer dieser Flächen waren durch die Bezirksbehörde verpflichtet, Bäume und Sträucher anzupflanzen. Die Gemeinden bereiteten Unterlagen für den Beschluss vor, in denen der Name des Eigentümers, die betroffene Fläche und der Zweck, für den das Land genutzt wurde, vermerkt wurden. Nach Rücksprache mit dem Verband der Land- und Forstwirtschaft für Böhmen und Mähren entschied

[101] SVATUŠKA, L., Nové zemědělské právo. In: *Moderní stát*, vol. 17, 1944, S. 29-39.
[102] Regierungsverordnung vom 22. Februar 1940 Nr. 140/1940 Slg., betreffend die Ausnützung von Grundstücken zum Anbau von Nutzpflanzen.
[103] HORA, K., Idea německého selství. In: *Brázda*, vol. 3 (21), Nr. 43, 1940, S. 506.
[104] Regierungsverordnung vom 14. März 1940 Nr. 141/1940 Slg., betreffend die Instandsetzung von Wiesen und Weiden.
[105] Regierungsverordnung vom 27. November 1944 Nr. 268/1944 Slg., über die Umgestaltung nichtkultivierter Weideplätze zu ordentlichen Weiden.
[106] Regierungsverordnung vom 9. September 1942 Nr. 325/1942 Slg., über die Aufforstung von nicht voll ertragsfähigen Grundstücken.

die Bezirksbehörde, welche Person für die Aufforstung der Flächen verantwortlich war und wie verfahren werden sollte. Wenn der Eigentümer den ihm auferlegten Verpflichtungen trotz des Bescheids nicht nachkam, informierte die Gemeinde die Bezirksbehörde, welche befugt war, die erforderlichen Arbeiten auf Kosten des Eigentümers durchzuführen.

Weitere Dispositionseingriffe in die Eigentumsrechte zur Steigerung der landwirtschaftlichen Produktion erfolgten durch die Regierungsverordnung über die Sicherung des ordentlichen Betriebes der landwirtschaftlichen Unternehmungen,[107] welche die Nutzung beweglicher landwirtschaftlicher Betriebsmittel wie Geräte, Maschinen oder Tiere regelte. Die Betriebsinhaber waren verpflichtet, diese Gegenstände anderen Personen zu überlassen, damit diese die notwendigen landwirtschaftlichen Arbeiten durchführen konnten. Die Verpflichtung zur Durchführung notwendiger landwirtschaftlicher Arbeiten in einem fremden Betrieb wurde eingeführt, wenn durch die Nichtdurchführung der Arbeiten erhebliche Schäden in der Produktion drohten. Entscheidend dabei war die Gemeinde (der Bürgermeister der Gemeinde), die über die Nutzung der landwirtschaftlichen Anlagen entschied. Wenn es nicht möglich war, die für die Durchführung notwendiger landwirtschaftlicher Arbeiten erforderlichen Einrichtungen innerhalb desselben Gemeindebezirks bereitzustellen, bestimmte die zuständige Bezirksbehörde, welche Gemeinde die notwendigen Einrichtungen bereitzustellen hatte. Wenn die Betriebsinhaber für ihre Maschinen und ihren Betrieb ein dringendes Bedürfnis nachweisen konnten, waren sie von der genannten Verpflichtung befreit. Es kam manchmal vor, dass die Geräte beschädigt wurden. In diesem Fall konnte die Gemeinde den Besitzer auffordern, die Geräte wieder funktionsfähig zu machen. Der Eigentümer hatte Anspruch auf eine angemessene Entschädigung für die Überlassung des Geräts und für die aufgrund der behördlichen Anordnung durchgeführten Arbeiten. Ab 1943 waren Pferdebesitzer auf Anordnung der Bezirksregierung verpflichtet, ihre Pferde zu einem angemessenen Preis zu verkaufen.[108]

Im Jahre 1941 wurden die Landwirte nach deutschem Vorbild dazu verpflichtet, eine Hofkarte und einen Hofausweis zu führen.[109] Offiziell wurde die Aufzeichnung wichtiger Fakten über die Bewirtschaftung der einzelnen Betriebe damit begründet, dass die landwirtschaftliche Produktion gesteigert werden sollte. Der eigentliche Grund für die Aufzeichnung war jedoch der Wunsch der deutschen Besatzer, die landwirtschaftliche Produktion und insbesondere die Erfüllung der Lieferverpflichtungen der Landwirte zu kontrollieren. Es war auch ein wichtiges statistisches Instrument, da es die Leistung der Landwirtschaft innerhalb einer Gemeinde oder eines Bezirks überwachte. Jeder Betrieb mit einer landwirtschaftlichen Nutzfläche von mehr als fünf Hektar musste eine Hofkarte führen. Falls mehrere landwirtschaftliche Betriebe demselben Eigentümer gehörten, musste jede Betriebseinheit eine eigene Hofkarte führen. Der Landwirtschaftsminister beschloss, dass Landwirte, die eine Fläche zwischen 2 und 5 Hektar bewirtschafteten, einen Hofausweis führen mussten, welcher zusammen mit dem Betriebsbuch als „Grundlage für praktische Beratungen zur Verbesserung der landwirtschaftlichen Produktivität“ dienen sollte.

Die Daten der Landnutzung und Viehzählung bildeten die Grundlage für das Ausfüllen der Karten. Die Betriebsinhaber mussten den Personen, die für das Ausfüllen der Karten zuständig waren, Zutritt zu ihren Grundstücken gewähren und Aufzeichnungen über die Erzeugung und Verwertung ihrer landwirtschaftlichen Erzeugnisse führen, um die Hofkarten und Hofausweise korrekt und genau ausfüllen zu können.[110] Ab 1942 waren alle Landwirte und Erzeuger landwirtschaftlicher Produkte verpflichtet, das Hilfsbuch zur Hofkarte zu führen, wenn sie der Ablieferungspflicht unterlagen. Eintragungen in das Hilfsbuch konnten auch von Personen vorgenommen werden, die landwirtschaftliche Betriebsmittel (Futtermittel, Saatgut, Düngemittel) bezogen oder verarbeiteten.[111]

Aufgrund des Treibstoffmangels in der Kriegswirtschaft erhielten die Besitzer von landwirtschaftlichen Zugmaschinen ab 1942 die Anweisung, ihre Maschinen auf Generatorgasbetrieb umzurüsten. Gleichzeitig legte das Ministerium für Land- und Forstwirtschaft fest, bis wann welcher Generator in den Traktor eingebaut werden musste und wer für die Umstellung verantwortlich war. Das Ministerium für Land- und Forstwirtschaft konnte die Umstellung auch finanziell unterstützen.[112]

Das Landwirtschaftsministerium hatte die Befugnis, in Krisenzeiten die Bewirtschaftung von Getreide, Kartoffeln, Obst, Gemüse und Fleisch zur Sicherstellung der Versorgung der Bevölkerung zu übernehmen. Zu diesem Zweck konnte es alle notwendigen Maßnahmen im Zusammenhang mit der Erzeugung, dem Ankauf, der Lagerung, der Verarbeitung, der Lieferung und der Zuteilung von landwirtschaftlichen Erzeugnissen treffen. Das Ministerium hatte die Befugnis, landwirtschaftliche Erzeugnisse zu beschlagnahmen, Bestandsaufnahmen durchzuführen oder die abzugebenden Mengen festzulegen. Gleichzeitig war es für die Überwachung der Einhaltung dieser Maßnahmen zuständig.

Das Ministerium übertrug einen Teil dieser Befugnisse auf die Bezirks- und Landesbehörden, wo Ernährungsabteilungen eingerichtet wurden. Die Kontrollbehörden waren berechtigt, Grundstücke, Gebäude, Geschäftsräume und Lagerräume von Erzeugern und Inhabern landwirtschaftlicher Betriebe zu inspi-

[107] Regierungsverordnung vom 29. April 1940 Nr. 159/1940 Slg., über die Sicherung des ordentlichen Betriebes der landwirtschaftlichen Unternehmungen.
[108] Regierungsverordnung vom 25. Januar 1943 Nr. 41/1943 Slg., zur Abänderung und Ergänzung der Regierungsverordnung Nr. 159/1940 Slg.
[109] Regierungsverordnung vom 9. Juli 1941 Nr. 312/1941 Slg., über die Einführung der Hofkarte und des Hofausweises.
[110] Kundmachung des Ministers für Landwirtschaft vom 3. Dezember 1941 Nr. 166.410/VII A, über Führung von Hofausweisen und Hofkarten-Hilfsbüchern, kundgemacht im Amtsblatt Nr. 286 vom 4. Dezember 1941, S. 10080.
[111] Kundmachung des Ministers für Land- und Forstwirtschaft vom 30. Juni 1942 Nr. 231/1942 Slg., über die Verwendung der Hofkarten-Hilfsbücher für die Zwecke der Böhmisch-Mährischen Marktverbände.
[112] Regierungsverordnung vom 16. November 1942 Nr. 392/1942 Slg., über die Umstellung der landwirtschaftlichen Ackerschlepper auf Generatorgasbetrieb.

zieren. Verstöße wurden mit sehr hohen Geldstrafen von bis zu einer Million Kronen oder einer Freiheitsstrafe von bis zu einem Jahr geahndet.[113]

Im Laufe der Zeit hat das Landwirtschaftsministerium verschiedene Verordnungen erlassen, die den Landwirten die Verpflichtung auferlegten, verschiedene von ihnen erzeugte Erzeugnisse abzuliefern. Als Beispiel kann die Kundmachung des Ministers für Landwirtschaft vom 31. Oktober 1941 Nr. 375/1941 Slg., betreffend die Zwangsablieferung von Getreide angeführt werden. Gemäß dieser Kundmachung unterlag das gesamte geerntete Getreide der Zwangsablieferung durch Anbauer und Verpächter zu Gunsten des Protektorats. Die Getreideanbauer waren verpflichtet, die gesamte der Zwangsablieferung unterliegenden Getreidemenge zu den jeweils gültigen Preisen abzuliefern. Von der Zwangsablieferungspflicht waren die Mengen ausgenommen, die für den eigenen Verbrauch und für Saatzwecke bestimmt waren. In folgenden Jahren wurde die Rechtsregelung noch mehrmals ergänzt und abgeändert.[114]

7. Strafverfolgung von Verstößen gegen die Vorschriften der gelenkten Wirtschaft, ggf. der Kriegswirtschaft

Die Rechtsvorschriften, welche die gelenkte Wirtschaft, die Arbeitspflicht oder die Ablieferungspflicht in der Landwirtschaft regelten, wurden von der sog. autonomen (tschechischen) Regierung erlassen. In den meisten Fällen enthielt jede dieser Vorschriften eine Bestimmung über die Strafe für deren Verletzung. In der Regel handelte es sich um Geld- oder Freiheitsstrafen[115], und eine wichtige Rolle spielten dabei die Bezirksbehörden, die vor allem die Übertretungen im Bereich der Landwirtschaft, den Schleichhandel, unrichtige Buchführung, Überteuerung oder Übertretungen bei den Lebensmittelkarten bestraften.[116]

Im Laufe der Zeit wurden jedoch zahlreiche Verstöße gegen die Bestimmungen der gelenkten (Kriegs-)Wirtschaft vor deutschen Gerichten verhandelt, auch wenn es sich bei den Tätern um Angehörige des Protektorats (Tschechen) handelte.[117]

Im April 1941 wurde eine Verordnung erlassen, welche die Reichswirtschaftsverordnung (RGBl. I, S. 199) im Protektorat auch auf nichtdeutsche Staatsangehörige anwendbar machte - mit weitreichenden Folgen. Die Kriegswirtschaftsverordnung vom 4. September 1939 (RGBl. I, S. 1609) diente der Durchführung der staatlich gelenkten Kriegswirtschaft und führte den Straftatbestand des Kriegswirtschaftsverbrechens ein.

Die Verfolgung von Wirtschaftsverbrechen sollte Ruhe und Disziplin an der sogenannten Heimatfront gewährleisten, wie es in der Präambel heißt: *„Die Sicherung der Grenzen unseres Vaterlandes erfordert höchste Opfer von jedem deutschen Volksgenossen. Der Soldat schützt mit der Waffe unter Einsatz seines Lebens die Heimat. Angesichts der Größe dieses Einsatzes ist es selbstverständliche Pflicht jedes Volksgenossen in der Heimat, alle seine Kräfte und Mittel Volk und Reich zur Verfügung zu stellen und dadurch die Fortführung eines geregelten Wirtschaftslebens zu gewährleisten. Dazu gehört vor allem auch, dass jeder Volksgenosse sich die notwendigen Einschränkungen in der Lebensführung und Lebenshaltung auferlegt“*.

Wer Rohstoffe oder Erzeugnisse, die zum lebenswichtigen Bedarf der Bevölkerung gehörten, vernichtete, beiseiteschaffte oder zurückhielt und dadurch böswillig die Deckung dieses Bedarfs gefährdete, wurde nach der Kriegswirtschafsverordnung mit Zuchthaus oder Gefängnis und in besonders schweren Fällen auch mit der Todesstrafe bestraft. Strafrechtlich verfolgt konnte auch derjenige werden, wer Geldzeichen ohne gerechtfertigten Grund zurückhielt. Die Begriffe „Rohstoffe und Erzeugnisse“ wurden breit ausgelegt, sodass darunter nicht nur Lebensmittel, sondern auch z.B. Stoffe verstanden wurden.

Die Staatsangehörigen des Protektorats wurden häufig wegen Verstößen gegen diese Verordnung bei illegalen Schlachtungen oder Nichteinhaltung der Ablieferungspflicht belangt.[118] 1942 wurde die Verordnung um weitere Straftatbestände ergänzt, um den Tausch- und Schleichhandel sowie die Annahme von Bestechungsgeldern durch Gewerbetreibende zur Aufrechterhaltung der Geldwirtschaft wirksamer zu bekämpfen. Beschlagnahmte Rohstoffe und Produkte konnten für das Reich als verfallen erklärt werden.[119]

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[113] Regierungsverordnung vom 18. September 1939 Nr. 206/1939 Slg., betreffend die Ermächtigung des Ministeriums für Landwirtschaft zur Regelung des Wirtschaftens mit gewissen Lebens- und Futtermitteln.

[114] Z.B. Kundmachung des Ministers für Land- und Forstwirtschaft vom 7. Juli 1942 Nr. 246/1942 Slg., über die Zwangsablieferung von Früchten; Kundmachung des Ministers für Land- und Forstwirtschaft vom 24. Mai 1943 Nr. 143/1943 Slg., über den Pflichtanbau und die Lieferkontingente einiger landwirtschaftlicher Fruchtarten.

[115] Zum Strafrecht im Protektorat siehe TAUCHEN, J. Die Anwendung des deutschen Strafrechts im Protektorat Böhmen und Mähren. In: *Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica*, vol. 24, Nr. 1, 2011, S. 141-152; TAUCHEN, J., Zum Verfahren vor deutschen Strafgerichten im Protektorat Böhmen und Mähren. In: *Jog-Állam-Politika*, vol. 4, Nr. 1, 2012, S. 125-135; SCHELLE, K., TAUCHEN, J., *Recht und Verwaltung im Protektorat Böhmen und Mähren*. München: Dr. Hut, 2009; BÜRKLE, F., Der Aufbau der deutschen Rechtspflege in Böhmen und Mähren. In: *Deutsches Recht, Ausgabe A*, 1942, S. 359-361; KRIESER, H., Die deutsche Gerichtsbarkeit im Protektorat Böhmen und Mähren. Ausübung und Umfang. In: *Deutsches Recht, Ausgabe A,* 1940, S. 1745-1754; LORENZ, M., *Das deutsche Strafrecht im Reichsgau Sudetenland und im Protektorat Böhmen und Mähren*. Prag – Berlin: J. G. Calve'sche Univ. Buchhandlung Robert Lerche, 1940; NÜSSLEIN, F., Die deutsche Gerichtsbarkeit im Protektorat Böhmen und Mähren – Strafrechtspflege. *Deutsches Recht, Ausgabe A,* 1940, S. 2085-2091.

[116] Zur Zuständigkeit der Bezirksbehörden im Bereich der gelenkten Wirtschaft und Landwirtschaft siehe ausführlich VONDRÁČEK, J., *Státní moc, politická správa a každodennost: prosazování řízeného hospodářství v politickém okrese Kladno v Protektorátu Čechy a Morava 1939–1945*. Prag: Academia, 2021.

[117] Zur Problematik der reichsdeutschen Staatsangehörigkeit und der Staatsangehörigkeit des Protektorats siehe EMMERT, F., German Citizenship versus Protectorate Membership in the Protectorate of Bohemia and Moravia (1939–1945). In: *Journal on European History of Law*, vol. 12, Nr. 2, 2021, S. 154-160.

[118] Zur Auslegung der Kriegswirtschaftsverordnung siehe RIETZSCHE, O., Die Verordnung zur Ergänzung der Kriegswirtschaftsverordnung vom 25. 3. 1942. In: *Deutsche Justiz*, 1942, S. 222.

[119] Verordnung zur Ergänzung der Kriegswirtschaftsverordnung vom 25. März 1942 (RGBl. I, S. 147); allgemeine Verfügung des Reichsministers der Justiz über den Schleich- und Tauschhandel vom 1. April 1942, Nr. 9.134/1-III.a[4] 571), abgedruckt in *Deutsche Justiz*, 1942, S. 238).

Die Entscheidung über diese Verstöße gegen die Kriegswirtschaftsverordnung wurde den Sondergerichten übertragen. In der Praxis der Sondergerichte im Protektorat findet sich die Verurteilung von Straftätern wegen Wirtschaftsdelikten nach der Kriegswirtschaftsverordnung unter gleichzeitiger Anwendung der Verordnung gegen Volksschädlinge vom 5. September 1939 (RGBl. I, S. 1679). Jede beliebige Straftat konnte mit Zuchthaus bis zu 15 Jahren, mit lebenslangem Zuchthaus oder Tod bestraft werden, wenn diese *„unter Ausnutzung der durch den Kriegszustand verursachten außergewöhnlichen Verhältnisse“* begangen wurde, und wenn *„dies das gesunde Volksempfinden wegen der besonderen Verwerflichkeit der Straftat“* erfordere.

Durch die Verordnung des Generalbevollmächtigten für die Reichsverwaltung über die Zuständigkeit der Strafgerichte, über die außerordentlichen Gerichte und über die sonstige Regelung des Strafverfahrens vom 21. Februar 1940 (RGBl. I, S. 405) wurde in Prag für den Sprengel des Deutschen Landgerichts und in Brünn für den Sprengel des Deutschen Landgerichts Brünn je ein Sondergericht errichtet. Die außerordentlichen Gerichte im Protektorat waren mit drei Berufsrichtern besetzt und verfügten über keine eigene Staatsanwaltschaft; diese war die Staatsanwaltschaft des Landesgerichts, in dessen Sprengel das außerordentliche Gericht seinen Sitz hatte.

Die Sondergerichte im Protektorat waren nicht nur für die Verfolgung politischer Verbrechen wie Widerstand, Abhören ausländischer Rundfunksender oder Waffenbesitz, sondern auch für Wirtschaftsverbrechen zuständig. Von ihnen wurde erwartet, dass sie auch kleinste Verstöße gegen die Kriegsrechtsvorschriften „mit aller Härte“ verfolgten.[120]

Oft wurden die Fleischermeister vor dem Sondergericht angeklagt, Schweine schwarz geschlachtet zu haben, Schlachtsteuer hinterzogen zu haben, Schleich- und Kettenhandel mit Vieh oder Fleisch betrieben zu haben, beim Verkauf von Waren den einen höheren als den amtlich festgesetzten Preis gefordert zu haben, Erzeugnisse, die zum lebenswichtigen Bedarf der Bevölkerung gehören, beiseite geschafft und dadurch böswillig die Deckung dieses Bedarfs gefährdet zu haben oder Kettenhandel betrieben zu haben.

Die Verordnung gegen Volksschädlinge und die Kriegswirtschaftsverordnung wurden also mit weiteren strafrechtlichen Vorschriften angewendet und die Täter wurden auch in Verbindung mit Kettenhandel und Preistreiberei sowie wegen Steuerhehlerei verurteilt. Zum Beispiel beim Sondergericht Brünn bewegten sich die Strafen im Strafausmaß gewöhnlich von 3 bis 8 Jahren Zuchthaus und es wurde auch eine Geldstrafe auferlegt.[121] Für die Beiseiteschaffung von Getreide wurden die Landwirte zu einer Freiheitsstrafe von 10 Monaten verurteilt, wenn dieses Getreide nicht weiterverkauft wurde. Das sichergestellte Getreide oder Mehl wurde eingezogen.

Beim Vorliegen erschwerender Umstände konnten jedoch auch in diesen Fällen Todesurteile verhängt werden. Im Laufe der Zeit wurde die Entscheidungsfindung der Sondergerichte immer repressiver und die verhängten Strafen standen in keinem Verhältnis zur Schwere der begangenen Verbrechen. Während des Zweiten Weltkrieges verhängte das Sondergericht Brünn insgesamt 67 Todesurteile wegen Wirtschaftsdelikten, davon 22 wegen Schwarzhandels, 10 wegen Schwarzschlachtens, 7 wegen Getreideschleichens und 28 wegen anderer Wirtschaftsdelikte.[122]

8. Fazit

Unmittelbar nach der Errichtung des Protektorats Böhmen und Mähren begann die Protektoratsregierung damit, auf Grundlage des Reichs Rechtsvorschriften für eine gelenkte Wirtschaft zu erlassen. Die Rechtsvorschriften unterteilten sich in zwei grundlegende Gruppen: zur Regulierung des Marktes und zur Regulierung des Zuteilungssystems. Eines der Hauptmerkmale der gelenkten Wirtschaft des Protektorats war die Einführung einer speziellen Behörde, der Obersten Preisbehörde, zur Einfrierung, Festsetzung und Kontrolle der Preise. In der Praxis spielten die Beschränkungen des freien Verkaufs von Lebensmitteln, Brennstoffen und anderen Waren eine entscheidende Rolle. In Böhmen und Mähren wurden gleichzeitig Verbände gegründet, denen einige staatliche Aufgaben übertragen wurden. Sie verwalteten und kontrollierten die Produktion und Verteilung von Lebensmitteln und anderen Gütern.

Im Rahmen der gelenkten Wirtschaft wurden auch wichtige Verwaltungs- und Kontrollaufgaben an die Landes- und Bezirksbehörden delegiert, die zudem Verstöße gegen die Vorschriften der gelenkten Wirtschaft verfolgten.

Im Laufe der Zeit wurde die Repression immer stärker und die deutschen Sondergerichte bestraften Verstöße gegen die Wirtschaftsordnung mit aller Härte - selbst wenn es sich um Staatsangehörige des Protektorats handelte.

[120] WECKBECKER, G., *Zwischen Freispruch und Todesstrafe. Die Rechtsprechung der nationalsozialistischen Sondergerichte Frankfurt/Main und Bromberg*. Baden-Baden: Nomos Verlagsgesellschaft, 1998, S. 52.

[121] Es wurden die Fälle des Sondergerichts Brünn in den Jahren 1940–1945 ausgewertet. Die Akten sind im Mährischen Landesarchiv Brünn (MZA), Bestand C 43, Deutsches Landgericht Brünn *(Německý zemský soud Brno)*, Kartons 177-179, 196-320 und 333-334 aufbewahrt.

[122] VAŠEK, F., Německý zvláštní soud (Sondergericht) v Brně – součást nacistického teroru na Moravě. In: *Časopis pro právní vědu a praxi*, vol. 5, Nr. 3, 1997, S. 432.

The Legal Education Revolution that Failed – Attempts to Establish a Legal University in Victorian Britain

*Andrew Watson**

Abstract

Concern about the quality of legal education of solicitors and barristers in England led to the House of Commons Select Committee 1846, which recommended major reform, as did the Royal Commission of 1855: Both advocated a "College of Law" or "Legal University", though not including solicitors' articled clerks, who were to have their own "cognate" institution. Against this, the campaign in the 1870 s, initially well supported, to establish a comprehensive "General School of Law" or "University of Law", which would have amounted to a revolution in legal education in England, is described. Reasons are advanced for its failure and the consequences of this outlined. Speculation follows what might have been if the General School of Law/ University of Law had been established.

Keywords*: England; Nineteenth Century; Professional Legal Education; "University of Law".*

1. Introduction

The Nineteenth Century was a time when the purpose and aims of legal education, who should receive it and how it should be imparted was much discussed in Britain. Comparisons were made with other parts of the world, where it appeared more advanced, notably the civil law countries of continental Europe, where universities took the lead in educating aspiring lawyers, and the United States in the common law world.[1] It is a remarkable in the mid-nineteenth century, when Britain was at the height of its industrial, commercial and political power there was virtually no institutional legal education.

Both the University of Law and City, University of London, and many others in Britain, provide both academic courses, under -graduate law degrees, Graduate Diploma in Law, Masters degrees in law, as well as professional courses for those wishing to become solicitors and barristers, who have often shared academic courses together.[2] This contrasts markedly with the Nineteenth Century when teaching of law at university, unlike Germany, France and other civil law countries, was very limited and education in the law was principally based on forms of apprenticeship to acquire practical knowledge. A proposal to establish in London a "General School of Law" or "University of Law" was put forward in the 1870s, by the Legal Education Association, spearheaded by Sir Roundell Palmer, later to become Lord Selborne, Lord Chancellor, "to effect a complete revolution in the study of jurisprudence in England"[3] by creating a legal education upon a "broad plan to match what was offered in Germany and other continental nations".[4] The institution originally envisaged would not only teach but would also set and administer compulsory examinations and be the only route into the bar or profession of solicitor, although later it appeared not to seek a monopoly of education, merely a prominent role. It would also open its doors to those with no professional aspirations but who, for a variety of reasons, wanted to study law. Efforts to establish a comprehensive University of Law are explained, against the backcloth of 19th Century legal education, largely controlled by the Inns of Court and the Law Society, and in which great deficiencies were observed. Although well supported including by several judges, Queens Counsels, more than four hundred barristers and the Law Society, contrary to many expectations, nothing came of it and lacking government support was abandoned. Its failure was attributed to hostility from the London University which feared being eclipsed, suspicious conservatism of the Inns of Court opposed to any transfer of powers from them and their rooted objection to any combined education with solicitors. Had the University of Law been cre-

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1 See HOEFLICH, M. H., The Americanisation of British Legal Education in the Nineteenth Century, In: *Journal of Legal History*, 1987, p. 244.

2 *In the half century since the Report of the Committee on Legal Education HMSO 1971 ("The Omerod Report"*), teaching professional legal courses at universities has largely replaced that done by law schools run by the profession itself – their existence of such schools seen fifty or so years ago, as a "striking" difference with other countries including Scotland and Ireland where much professional education was conducted within the universities, p. 3.

3 The Legal Education Association (1870 -1)30n(s3) In: *Law Magazine and Law Review,* 1871, p. 126)

4 SELBORNE, L., *Memorials Part Two: Personal and Political*, 2 vols, MacMillan, 1998, volume I, p. 49.

ated legal education in this country would have taken a markedly different path.

Although the influence of legal professional bodies may be less strong their requirements exert considerable influence on the curriculum in universities today. The relationship between the professions and university teaching remains highly relevant, as is the balance between academic teaching and the acquisition of legal skills, seen as useful for practice, on courses within universities.

This article examines legal education of solicitors and barristers throughout much of the 19th century. It then turns to the House of Commons Select Committee, established in 1846, because of concerns about legal education in England, Wales and Ireland, and the important recommendations for change made by it to raise the intellectual standard of the legal profession. Reference is also made to reforms proposed by the Royal Commission of 1855, set up to inquire into the educational arrangements made by the Inns of Court and their financial affairs: Both the Select Committee and the Royal Commission advocated a "College of Law" or "Legal University", not, though, to include articled clerks who were to have their own "cognate" institution". In this setting, the campaign to establish a "General School of Law" or "University of Law" is described next, reasons advanced for its failure, and what followed from its lack of success, are set out. Finally, some unanswerable questions are asked about what might have been if the General School of Law/ University of Law had been established.

2. The education and training of solicitors and attorneys

After widespread concern about professional standards, and amounting to a national recognition that solicitors and attorneys should be adequately trained, the Attorneys and Solicitors Act, for "better regulation of attornies and solicitors" was passed in 1729. Those aspiring to be solicitors or attorneys were required to enter into a formal apprenticeship by taking out written articles of clerkship for five years with a duly and legally sworn attorney or solicitor.[5] Written proof of serving articles was necessary in order to become enrolled to practise in either the central or local courts[6]. In addition common law judges were supposed to examine a candidate's moral and technical fitness before he could be sworn. In practice the quality of this method depended largely on the ability and conscientiousness of the master. There were many complaints that masters did not take their obligation to provide instruction seriously and from the 1790s criticism arose that mere presentation of formal articles of apprenticeship, and the ability to pay the extraordinary high rate of stamp duty which they attracted, was of much greater importance to entering the profession than the largely perfunctory oral examination of competence carried out by the judges.[7]

In 1836 new rules laid down by the judges specified admission to practice would be contingent on passing a written examination consisting of six papers[8] to be taken in the hall of the Law Institution, owned by the Incorporated Law Society, founded in 1827 as successor of earlier Society of Gentleman Practitioners.[9] Control of the examination lay with the judges. The Solicitors Act 1843[10] entrusted to the Incorporated Law Society the office of registrar for the registration of all admitted attorneys and solicitors.

Within the profession there was ambivalence about the move from oral to written examinations. Some members saw this as a distinct advance, masters would have to provide more careful supervision, give clerks time to study and spare them office drudgery. Others argued no useful purpose would be served. Crammers would be encouraged to help students pass. Examinations could never assure professional probity: a clever person could pass an examination but still be an immoral character. Some articled clerks feared examinations might be made more difficult or favour London over the provinces. Others wanted a system of honours so that the Law List would reflect those who had worked hard and done well.[11]

Though the examination was compulsory for all article clerks, few lectures were available. Those at the Law Institute were only open to those who were members of the Law Society – initially a minority even in London. Non - members were also unable to use the Society's library. The vast majority of articled clerks who lived outside the capital had no access to lectures at all and training for solicitors remained firmly within offices. In 1845, following calls for lectures to be available in provincial towns, the Manchester Law Association initiated a course of lectures for articled clerks and introduced a prize for the best student essay on a legal subject. Faced with the absence of lectures elsewhere, provincial clerks devised schemes to help each other: Knowledge exchanged through letters; the Law Student's Magazine, launched in 1844, was organised around requirements

[5] In 1821 Oxford and Cambridge graduates required to serve three years articles only – an attempt by parliament to raise the social status of the attorney. By statute 6 & 7 Victoria, c.73 clerks were allowed to spend one year in the chambers of a barrister or pleader instead of a solicitor's office.

[6] Attorneys were regarded as officers of the respective courts in which they were admitted and as such subject to judicial supervision. Practice in the Court of Chancery necessitated admittance as a "solicitor", in effect a species of attorney. To be a solicitor was to be more socially respectable than to be an attorney, some of whom enjoyed a less than unalloyed reputation, and so by the mid – nineteenth century lawyers preferred to call themselves solicitors rather than attorneys. See MANCHESTER, A. H., *A modern legal history of England and Wales 1750 – 1950.* London, 1980, p. 53.

[7] See BROOKS, C. W., LOBBAN, M., Apprenticeship or Academy? The Idea of a Law University 1830–1860. In: BUSH, A., WIJFFELS, A. (eds.), *Learning the Law Teaching and Transmission of Law in England 1150–1900.* London, 1997, p. 355.

[8] These were a preliminary examination, a paper on common and statute law and the practice of the courts, conveyancing, equity courts and practice, bankruptcy practice and criminal law and proceedings before the Justices of the Peace.

[9] From 1833, the Law Society began to provide lectures, given by barristers, in its hall drawing audiences of up to two hundred articled clerks, as well as attorneys. Lectures covered included common law, conveyancing, equity, bankruptcy, and criminal law.

[10] Section 21.

[11] See BROOKS, C. W., LOBBAN, M., Apprenticeship or Academy? The Idea of a Law University 1830–1860. In: BUSH, A., WIJFFELS, A. (eds.), *Learning the Law Teaching and Transmission of Law in England 1150–1900.* London, 1997, p. 355.

of the examination;[12] establishment of local debating societies; and Law Student Societies were founded in Bath, Liverpool, Manchester, Plymouth, Devonport and Worcester. By 1855 the Norwich based law Students' Mutual Corresponding Society had fifty members. The General Law Students Society, formed in 1846 by London clerks, campaigned strongly for improving educational provision for articled clerks. Clerks also read periodicals which republished lectures given at the Law Society.

A preliminary and an intermediate examination was introduced by the Solicitors Act 1860. The preliminary examination sought to ensure candidates had a sound general education, initially testing them in Latin, French, English, History, Geography and Arithmetic.

The purpose of the intermediate examination was to ensure clerks acquired some substantive legal knowledge during their articles. Candidates were required to answer thirty questions based entirely on Stephen's *Commentaries*. It was noted that this material was ideal for the crammers which burgeoned further after the introduction of this examination.

In 1877 Law Society acquired control of education and qualifying arrangements for admission to the Roll, but subject to detailed statutory regulation. Before then all examinations were under direct control of the judges and no contact between examiners and teachers existed.[13]

3. The education of Barristers

The disruption of the Inns of Court by the Civil War in the mid -17th Century effectively ended their educational functions. Nothing else took their place. Training for both branches of the profession afterwards depended entirely on apprenticeship. Although made compulsory for attorneys and solicitors, under the Attornies and Solicitors Act 1729, apprenticeship was not for those desirous join the Bar. In addition to being of fair character, evidenced by a certificate of respectability, all that was required was membership of an Inn of Court for five years – reduced to three for university graduates – and keeping twelve terms by being present when grace was said at dinner on a certain number of days in each term during three years. Intending barristers who wished to practice, invariably became the pupil of a special pleader, or equity draftsman or conveyancer for at least two and generally three years with some spending one year with each.[14] By the Nineteenth Century the conventional annual fee was a one hundred guineas.

Those who took pupils were under no obligation to teach them. It was left to the pupil to copy out precedents and learn the law by observing the business of the chamber and attending court. By the 1820 s this system was frequently criticised by those called for a more scientific form of legal education and for fixed hours of instruction from the pupil master but defended by those who maintained law could not be learned simply by hearing lectures and reading books but only by observing material which came into the office under the supervision of a competent teacher.[15]

Although many pupils were left to their own devises some were taught by pupil masters who took their education seriously. For instance Joseph Chitty, who had more than twenty pupils, gave lectures which formed the basis of many of the treatises he wrote. Chitty's pupils also started their own Forensic Society which was open to pupils from other chambers. Also in the 1820s Andrew Amos gave well attended private classes in his chambers in seminar form for which he directed students on their reading and discussed key points. Pupils established debating societies and mooting clubs. Amos attended one formed by his students offering assessments of their reasoning and performances.

Advice about what would be helpful to read to explain legal points likely to be encountered in chambers and court was offered to students in books written for them[16] and in legal journals, including the Law Times. Pupils were urged in this literature to attend their debating clubs. From the 1820s a wider range of legal literature from which they could acquire knowledge became available to students with the growth of printed treatises and of a legal periodical press republishing lectures and presenting readers with treatises on various aspects of law in weekly instalments. As the century wore on a new generation of textbooks helped to impose greater coherence and illuminate hitherto difficult to discern principles of law for the benefit of practitioners and students alike.

4. The Select Committee on Legal Education 1846

A Select Committee on Legal Education was established by the House of Commons in 1846 to investigate and report on the state of legal education in both England and Ireland. This followed a petition presented to Parliament calling for improvements in legal education, strong support for reform in legal periodicals, such as the Law Times and Legal Observer, and calls by Lord Henry Brougham and other members of the Law Amendment Society to establish in London a legal university open to all preparing to be barristers, attorneys, advocates or proctors, or already practising as such.[17]

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[12] After introduction of the solicitor's final examination in 1836, a number of pedagogical journals sprang up. They were the printed equivalent of crammers, ruthlessly discarding all unnecessary material in their aim to project students through examinations. Few of these publishing ventures lasted very long. See LOBBAN, M., The Education of Lawyers. In: *Oxford History of the Laws of England,* Vol. XI, Part 4, p. 1209-1210.

[13] For a summary of developments later in the 19th Century in the education of solicitors, particularly how the Law Society responded to the problem of teaching articled clerks, dispersed throughout the country, See the Report on the Committee on Legal Education ("The Omrod Report"), HMSO, 1971, p. 12-13. Further LOBBAN, M., The Education of Lawyers. In: *Oxford History of the Laws of England,* Vol. XI, Part 4, p. 1198-1202, which also deals with the large role played by Cram Schools.

[14] Time was also frequently spent time in the office of an attorney, whilst future attorneys often finished their training in the chamber of a barrister.

[15] LOBBAN, M., The Education of Lawyers. In: *Oxford History of the Laws of England,* Vol. XI, Part 4, p. 1176-1178.

[16] For example by WARREN, S., *A Popular and Practical Introduction to Law Studies*. London, first of many editions published in 1835.

[17] BROOKS, C. W., LOBBAN, M., Apprenticeship or Academy? The Idea of a Law University 1830–1860. In: BUSH, A., WIJFFELS, A. (eds.), *Learning the Law Teaching and Transmission of Law in England 1150–1900.* London, 1997, identify at least twenty years of agitation about the need to reform legal education preceding the setting up of the Select Committee, p. 370.

In its Report[18] the Committee revealed there was almost no institutional law teaching in England with the exception of Professor Andrew Amos's teaching at University College London, popular with an audience mostly of articled clerks, and the rather more abstract and less well attended dryly philosophical lectures delivered by John Austin.[19] Legal Studies at Oxford were virtually non-existent.[20] The position in Cambridge was on a par with Oxford.[21]

The absence of formal legal education in the Inns of Court and no test of proficiency before Call to the Bar was noted. Lord Campbell, a distinguished lawyer who was later to become Lord Chancellor, told the Committee: -

"all that has been required has been, that the candidate called to the Bar should be of fair character; that he should have been a certain number of years upon the books of the Society; that he should have kept a certain number of terms, by eating a certain number dinners in Hall each term, and have gone through the form of performing what are still called Exercises, but which consist of a mere farce of a case being stated, and a debate on each side; but the parties being stopped by the time they have read three words of the case, or the argument on either side, the case and the argument being furnished to them by an officer of the Society".[22]

With regard to the solicitors' system of articles the Committee stated:-

"Indeed, it is a general complaint on the part of articled clerks themselves that very little attention is paid by the solicitor to the direction of their studies; in fact, it can scarcely be expected from solicitors in any degree of practice; their time is so much occupied with duties of their profession that they can scarcely take up points which are requisite for looking after their education. There is no prescribed course of occupation during the day…it very much depends upon the articled clerk himself; he is left almost entirely to his own discretion; and therefore, unless he qualifies himself for that purpose, nothing will be put into his hands beyond what any person could do, namely, copying.".[23]

The Committee considered the examination, introduced in 1843, that articled clerks were required to pass as "altogether inadequate to the purposes for which… it was designed" and "merely a guarantee against absolute incompetency". The work of voluntary associations of solicitors such as the Incorporated Law Society and the Manchester Law Association in providing lectures was noted but seen as necessarily limited.

The Committee noted legal education provided at Haileybury College. From 1806 to1858, the year Britain took direct rule of India as a consequence of the Indian Uprising, the East India Company provided legal education, as part of a wider curriculum, for administrators sent to India where they could serve as magistrates or judges.[24] During their two year period of residence, usually beginning at the rather early age of seventeen, students, under a professor of law, received a broad legal education which included the connection and differences between morality and law, property law, individual duties and rights, in both common and civil law, Roman Law, criminal law, evidence, international law and constitutional law. Instruction was by compulsory lectures, before which questions requiring answers were set, and undertaking individual reading.[25] Note books were by custom inspected monthly and students took termly examinations. There can be no doubt that as regards structure, width and depth formal legal education at Haileybury far exceeded any other available in Britain. However it made no real impact on the training of the legal profession.

5. Lack of systematic education in law

The Select Committee considered the absence of a systematic education in law particularly in what it termed its "scientific"[26] or "philosophical" aspects and concluded that it led to a "hypercritical attention to the technicalities" and reduced arguments before the courts to the "citation of what are more or less apt instances of adjudication of similar points found in the

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[18] *Report from the Select Committee on Legal Education*, 25th August 1856, House of Commons, p. 686.

[19] See MANCHESTER, A. H., *A Modern legal history of England and Wales, 1750–1950,* Butterworths, 1980, p. 55.

[20] At Oxford there were two professors, one of whom provided no course at all whilst the other offered twenty four lectures on common law during the year, although there were no examinations. No chair in canon law existed.

[21] In 1753 William Blackstone, a Fellow of All Souls, gave the first of a series of formal lectures at Oxford on the Common Law. His appointment as the first Vinerian professor in 1758, marked the entrance of municipal law into the university curriculum – England being the last European country to admit it. Blackstone delivered lectures which were subsequently published as his famous Commentaries in 1765, but after his resignation teaching of Common Law at Oxford fell again into abeyance. His lectures were not aimed at professional law students but at country gentlemen and clergymen. Blackstone's exposition of the law in the Commentaries on the Laws of England was the first successful survey and exposition since Bracton in the 13th Century of the whole of law in an elementary but rational method. Considered as perhaps the most ever stylish and readable contribution to English legal literature, it became a primer for law students. However its use became more limited following a subsequent wave of massive reform. See BAKER, J., *An Introduction to English Legal History*. Second Edition. London, 1979, p. 148 and p. 166-167.

[22] *Report from the Select Committee on Legal Education*, 25th August 1856, House of Commons, 686, p. xi.

[23] Ibid., p. xiv.

[24] See COCKS, R., Sustaining the Character of a judge. Conflict within the Legal Thought of British India. In: *Journal of Legal History, vol.* 35, 2014, p. 44.

[25] *Report from the Select Committee on Legal Education*, 25th August 1856, House of Commons, 686, p. ix-x.

[26] The essence of a scientific approach was that law was essentially a principled discipline amenable to systematic study, able to transcend a purely ad hoc case by case approach. It was perhaps best explained in a lecture in 1838,delivered in the United States by Simon Greenleaf, Dane Professor at Harvard and reported in the Law Reporter Vol. 1, p. 1 (1838) *"The law is to be regarded not as a mere collection of arbitrary rules and maxims – or of ancient usages – retained, perhaps, long after their value and application to the real wants of society ceased but as a liberal science – an harmonious arrangement of principles essential to the well being of a society – not as a trade – or a mere instrument of litigation – or of political advancement- but as a department of labour in which we are to discharge our duty to our contemporaries…These principles to be collected from Codes, from the writings of jurisconsults and from adjudged cases, found in books of reports – These cases serve to the philosophical student of law, as facts serve to the student of natural science."*

Reports" and to the absence of the "enunciation and application of legal principles".[27] Serious consequences followed including absence of men comparable to the jurists in continental Europe, no adequate text - books and poor drafting of legislation. Witnesses before the Committee argued for an academic education for lawyers to help cultivate a more sophisticated and learned legal culture in England and pointed to the unscientific nature of English legal literature compared with treatises by continental jurists such as Savigny or Americans such as Joseph Story.

How different, noted the Select Committee, legal education was in a German University where a high level of preparatory study was necessary before being admitted to any course; the immense number of professors and minute subdivision of subject and labour, compulsory attendance at lectures and the requirement to pass examinations.[28]

The Committee recognised that eminent lawyers had been produced under the existing system but maintained the superiority of the few was not conclusive as to the abilities of the many. "Now as the public have to do not only with the few but also with the many of the Profession, it is the same importance to the public as in the other two (i.e. the Church and Medicine) that they should be enabled to assure themselves, with as near an approach to truth as may be, of how far the many as well as the few are qualified to perform satisfactorily their respective duties".[29]

6. Select Committee's main recommendations

To raise the intellectual standard of the profession the Committee recommended that a stricter system of qualification was necessary to induce students to undergo the education they thought was required and urged entrance examinations for both branches of the profession to be followed by final qualifying examinations. The Committee wanted terms to be kept by attendance at lectures instead of eating dinners.

Members also agreed universities should play a leading role in providing legal education not only for future lawyers but also legislators, administrators and magistrates. The Committee advised the creation of new university chairs in International, Comparative and Administrative Law, additional chairs in English Law and a proper system of examinations for degrees. Recognising they were not designed for, or were unwilling to take the role of continental universities in providing professional training, it was recommended that a "special institution" be established for that purpose, whilst the "province of the university is to teach the philosophy of the science, and to secure instruction in those branches for which it might be apprehended the more technical character of the special institution would inadequately provide".[30] It therefore proposed the Inns of Court should combine together to establish a "College of Law", similar to Colleges of Physicians and Surgeons. Greater difficulties were foreseen for solicitors. While articles trained men in "mechanical aspects" of the profession insistence on daily attendance at the office prevented a wider legal education. Rather than recommending articled clerks attend the College of Law formed by the Inns, although they might attend some lectures there, the Committee proposed a "separate but cognate institution for the solicitor" established by the Incorporated Law Society to broaden their knowledge of law.

7. After the Select the Report of the Select Committee

7.1 The Universities – a slow development

Spurred by the Select Committee, and by the Royal Commissions on Oxford and Cambridge which reported in 1852 (and had found that the recommendations of the Select Committee had been ignored), Oxford University set up that year the B.C.L. degree and Cambridge, after creating a new board of studies, established the LLB three years later, both of them teaching common law. The Honour School of Jurisprudence was founded as a separate law faculty in Oxford in 1872 and the Law Tripos established in Cambridge the following year. New professorial chairs in law were established and attracted some highly distinguished scholars. Law faculties concentrated on teaching law as one of the liberal arts. Emphasis was upon case law and common law logic with little attention on statute law and other more practical aspects. In an age of university reform tentative signs appeared that a law degree might become part of the education of a gentleman and a foundation for those wishing to enter practice. However difficulty was encountered at Oxford and Cambridge in attracting students and only gradually over the years did their numbers grow. The experience of University College, London, where only a handful of graduated each year, was not much better.[31] A similar picture existed at Kings College where a law faculty had been established. As a university law degree was not a prerequisite for admission to the Inns, and since the bar continued to consider what happened at the universities as unrelated to their activities, the majority of intending barristers continued to read subjects other than law, usually Classics, knowledge of which was strongly associated with erudition and the status of a gentleman. After 1846 efforts were made to create a scholarly form of professional legal education at Queen's College, Birmingham. However there by the late 1850 s education became directed to the practical needs of article clerks and by the mid-1860s the college's law department closed.[32]

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[27] *Report from the Select Committee on Legal Education*, 25th August 1856, House of Commons, 686, p. xxxix.

[28] Ibid., p. xxii-xxviii.

[29] Ibid., p. xxxi.

[30] Ibid., p. xivii.

[31] According to reports of the College's Annual General Meetings between 1858 and 1868, less than four graduated on average each year. For the state of law teaching in the mid-nineteenth century, see BAKER, J. H., University College and Legal Education 1826-1976. In: *Current Legal Problems,* vol. *30,* 1977, p. 1

[32] PUE, W. W., Guild Training vs. Professional Legal Education: The Committee on Legal Education and the Law Department of Queen's College, Birmingham in the 1850s. In: *American Journal of Legal History*, vol. 33, 1989, p. 241-287.

7.2 The Inns

Shortly before the Report of the 1846 Select Committee the Inns took the first step to reintroduce law teaching Bar students by appointing three Readers to deliver lectures after being urged to do so by leading members such as Lord Brougham, Lord Campbell and others who in their evidence to the Committee expressed intense dissatisfaction with existing arrangements for legal education. Largely on the initiative of the Solicitor General, Sir Richard Bethell (Later Lord Westbury, Lord Chancellor 1861 – 1865), the Inns in 1852 jointly founded the Council of Legal Education, to supervise the education of bar students, and appointed two more readers, making five in all, to teach Constitutional Law and Legal History, Roman Law and Jurisprudence, Common Law, Equity and Real Property. Call to the bar was henceforth conditional on attending lectures of two of the readers for a full year, or passing a public examination, in which those who distinguished themselves would receive awards. A compulsory examination was not introduced to the disappointment of many reformers.

7.3 Royal Commission 1855

The Inns were opposed to the recommendation by the Select Committee that they should combine together to form a College of Law as a separate institution. Supporters of the College were not prepared to accept the Council of Legal Education in lieu and secured the appointment of a Royal Commission to inquire into the educational arrangements made by the Inns of Court and their financial affairs. For some time they had been criticised as wealthy institutions which had lost sight of their original function as educators and instead of being taught students were merely subsidising benchers' fine dining.[33]

The Commissioners found no untapped riches that could be devoted to legal education. They declared in view of the privileges given to barristers, the public were entitled to "require some guarantee – first for the personal character and next for the professional qualifications of the individuals called to the Bar. As regards intellectual qualifications and professional knowledge of a barrister, we are of the opinion that there is not such security as the community is entitled to require".[34] The English system of educating lawyers, the Commissioners found, compared woefully with that of continental Europe. Accordingly they recommended an entrance examination for non- graduates, compulsory lectures and pupillage and a final examination before call to the bar. To secure an adequate system of instruction the Commissioners proposed uniting the Inns into a university which would conduct examinations and confer degrees. The four Inns would however remain independent as to their property and internal arrangements. Bethell, now Attorney General, vigorously supported federating the Inns to establish a legal university, not only for the profession but also the public at large. Although Inner and Middle Temple wanted to implement the plan, Lincoln's Inn and Gray's Inn opposed it and because unanimity was required nothing came of it.

The Law Society, which did not yet represent the majority of solicitors in the country, was unable to found the "cognate institution", recommended for the education of articled clerks by the Select Committee of 1846, but did improve its library and expand its system of law lectures.

During the 1860s the benchers of the Inns became more willing to consider major changes in the education they offered. Sir Roundell Palmer by 1865 had persuaded the benchers of Lincoln's Inn to support the founding of a Legal University. It was at least possible that the benchers of the other Inns might have also agreed.[35] But at this time a new element was added – the campaign for a "University of Law" or a "General School of Law".

8. The project for a "General School of Law" or a "University of Law"

The 1846 Select Committee and the 1855 Royal Commission recommendations for a College of Law excluded solicitors, composing three quarters of the legal profession, whose education was regarded as a separate matter. By the 1860s the status of solicitors had risen. Reformers believed it was no longer tenable that such an institution should only cater for barristers. Articled clerks, especially in the provinces, faced real difficulties in attending lectures to prepare themselves for the intermediate and final exams now necessary in order to qualify as a solicitor.[36] The case for a university to provide a common initial education for both branches was developed by a Liverpool solicitor W. A. Jevons in a paper and discussed at a conference of provincial law societies. It attracted much support including that of the Attorney General, Sir Roundell Palmer. An organisation was in place by 1867.

On July 6th 1870 the Legal Education Association was formed at a meeting in Middle Temple Hall with Palmer elected as president. In his speech he reviewed past attempts to promote legal education and their failure and then set forth the object of the Association to press for reforms - uppermost being for the establishment of a "University of Law" or "General School of Law", based on the Inns, to provide joint education for bar students and articled clerks and for others who wished

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[33] Legal Education. In*: Law Review*, vol. 6, 1847, p. 225-242 at 229. Also see COCKS, R., *Foundations of the Modern Bar*. London, 1983, p. 97.

[34] *Report of the Commissioners appointed to inquire into Arrangements in the Inns of Court and Inns of Chancery for promoting the Study of Law and Jurisprudence,* 1855, p. 13.

[35] ABEL, B.-S., STEVENS, R., *Lawyers and the Courts; a sociological study of the English Legal System*. London, 1967, p. 71.

[36] See The Education of Attorneys. In: *Law Magazine and Review; a Monthly Journal of Jurisprudence for Both Branches of the Legal Profession at Home and Abroad*, vol. 2, no. 1, January 1873, p. 47-62. Delegates at the First General Congress of Law Students' Societies, held at Birmingham in May, 1872 described numerous difficulties in preparing for examinations and general shortcomings of articles as a means of training. Warm support was extended to the Legal Education Association, led by Lord Selborne, and its campaign for a University of Law where articled clerks could receive a broad and scientific education in the underlying principles of law, jurisprudence and Roman Law. One delegate, a Mr Woodhouse, described the advanced systems of legal education prevailing in Scotland, France, and Germany where law "is looked upon as a science and not as an ingenious puzzle, which the initiated may use for their own aggrandisement", p. 55.

to study law. It was intended to provide legal education upon a broad and liberal plan to match what was offered in Germany and other continental nations.[37] Not only would it deliver the teaching it would set and administer compulsory examinations which would be the only route into either legal profession. It was to be governed by a senate drawn from all the main constituencies. Whilst eventually envisaged as self - financing by fees from students, the Inns would be asked for some initial funding. In short Palmer considered his plans would "effect a complete revolution in the study of jurisprudence in England".[38]

Palmer obtained the backing of a number of distinguished barristers including the Lord Chancellor, Lord Hatherley, who had chaired the Royal Commission of 1854 and eleven judges. A petition from members of the Bar with over four hundred signatures, including those of eighteen Queen's Counsel, was organised. The benchers of Gray's Inn and the Middle Temple communicated their support, but the Inner Temple and Lincoln's Inn opposed it, notwithstanding in 1865 the latter had approved the idea of a University of Law in principle. The Council of the Law Society were against the Legal Education Association's proposals but at a general meeting of the Society they were out voted mainly by younger members and so the Society supported it. The Metropolitan and Provincial Law Association was in favour of a joint law school from the start, as were local law societies. Articled clerks, for whose formidable examination preparation problems it seemed a convenient solution, approved in great numbers.

9. Resolutions in the House of Commons

In July 1871, not intending the matter to be put to a vote, Palmer proposed a resolution in House of Commons that a General School of Law for both branches of the legal profession be established under a Royal Charter and that all new entrants to the profession should be required to have a certificate of proficiency granted by that School of Law before being permitted to practice in either branch.[39] In his speech he condemned existing legal education as "unscientific", unsystematic, desultory and empirical".[40] Inadequate legal education had led to "great and notorious defects of form and consistency in our legislation", "the want of governing principles" and "the incoherent character in our jurisprudence". With multiplication of judges had come "consistently diverging views, a continually increasing variety of precedents and increasing uncertainty in their application".[41] Answering the assertion it was "an alarming idea" for students of the two branches of the legal profession to be educated together Palmer said there was no evidence "one class was of purer blood than the other". If barristers and solicitors were educated together, a reputation for learning and ability would be more likely to procure work for a young barrister[42]. Palmer's motion in support of the proposal was opposed by George Jessel[43] and Mr G. B. Gregory, a solicitor, who said the suggestion for a General School of Law has been made by "young and ambitious spirits who desired an absolute fusion of the two branches of the profession".[44]

Despite the backing of the Lord Chancellor, Lord Hatherley, the Liberal government, perhaps concerned about expense to the treasury that might be entailed, failed to support the reforms advocated by Palmer and the Legal Education Association. In March 1872 Palmer moved two further Resolutions:

"1.That it is desirable that a General School of Law should be established in the Metropolis, by public authority, for the instruction of students intending to practise in any branch of the legal Profession, and of all other Subjects of Her Majesty who may desire to resort thereto. ". 2. That it is desirable, in the establishment of such a School, to provide for examinations to be held by Examiners impartially chosen, and to require certificates of the passing of such examinations as may respectively be deemed proper for the several branches of the legal Profession, as necessary qualifications (after a time to be limited), for admission in those branches respectively". Indicating apathy amongst laymen the debate was dominated by lawyers.

In the course of what has been described as a "masterly, impassioned and sustained speech which obviously sought to turn traditional ideas upside down",[45] Palmer attacked the way law was taught at the universities of London, Oxford and Cambridge. Anticipating contributions to the debate that would claim these institutions rendered a General School of Law unnecessary, he declared that in this country there was no law school to rival those in other countries. "Indeed practically, it may be said, without much exaggeration, that we have no great law school in England at all".[46] Our present approach was a hand to mouth system "Everybody is left to pick up his own instruction in law as well as he can, entirely with a view to practise, and by doing it in that manner, with the assistance of those who are themselves engaged in practice, it is impossible that any foundation of a scientific knowledge of law can be laid…"[47] Palmer saw this resulting in serious consequences for the law itself. " There

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37 SELBORNE, L., *Memorials Part Two: Personal and Political, 1865–1895*, 1898, vol. 1, p. 49.
38 The Legal Education Association (1870-1871). In: *Law Magazine and Law Review,* 1871, p. 126.
39 Hansard 3rd Series (H. of C.), Vol. CCVII,11th July 1871, Col 1482.
40 Ibid., Cols 1483 -4.
41 Ibid., Col 1485. On the difficulties that had arisen by the proliferation of case law reporting, especially in the lower courts, submerging guiding principles in a welter of fact- dependent, incoherent precedents, denounced by Lord Westbury in a parliamentary debate as " a great chaos of judicial legislation, See LOBBAN, M., The Education of Lawyers. In: *Oxford History of the Laws of England*, vol. XI, Part 4, p. 1214-1215.
42 Hansard 3rd Series (H. of C.), Vol. CCVII,11th July 1871 Col. 1499.
43 Later to become one of the most influential commercial law and equity judges of his time and who was to serve as solicitor general and then Master of the Rolls.
44 Hansard, Vol. CCXXIV p. 15.
45 COCKS, R., *Foundations of the Modern Bar*. London, 1983, p. 179.
46 Hansard, H. C. Vol CCIX, sr3, Col 1222.
47 Ibid., Col 1224.

is no doubt the body of our law contains many most excellent things; yet it is, on the whole, a very immethodical and undigested mass". The science of law had not made much progress with us and this was "the inevitable result of the system of learning by practice, and practice only…"[48] Instead we should develop the means whereby students should "lay the foundation of their legal knowledge in principles and…study the law upon a large, wide, liberal and scientific basis"[49]. Repeatedly Palmer returned to his grand theme that legal education must be placed on a sound theoretical basis to produce the best practising lawyers and ultimately the best law. Nothing about legal education should be "narrow or merely professional".[50]

Palmer then attacked strongly the Inns, "irresponsible bodies who acknowledge no public trust, who are under no public constitution, who are not even incorporated"[51] for their failure to bring about necessary reforms of legal education.

Opposing the resolutions, the Attorney General argued that "to teach English law, understood in the ordinary sense, by means of lectures is pure delusion.[52] It must be learned by practice in the Courts of Common Law and Equity, and by that means alone…our legal system has come down to us from the Middle Ages in the unscientific form in which it now is…That is why, in my opinion, a knowledge of English Law can only be obtained by practice".[53] The Attorney General hoped to see codification of law in this country, but only then would a teaching institution be required.[54]

J. Locke, a Middle Temple bencher and MP for Southwark, opposed the very idea of examinations in the professions generally: "the system was being carried to such an extreme that it would soon descend to the cases of chimney – sweeps and others of that class".[55] He suggested "the new college would no doubt, improve the Inns of Court and their educational and social system off the face of the earth. It would bring in a system of all work and no play, which proverbially made dull boys, and, although it would probably turn out some exceedingly clever men, it would probably turn out few lively ones" and added later, fatuously or facetiously, or both, "Cicero was not examined before he pleaded".[56] Others, less shrill and more balanced in tone, stressed the only real test of a good lawyer was success in practice – exams were irrelevant. Implicit in Locke's speech was that the government should not be endangering the liberties of Britons by meddling with the affairs of lawyers.

Other speakers emphasised what they saw as the communal virtues of the traditional training at the Inns. Sir Francis Goldsmid MP for Reading, and much concerned in the management of University College, London expressed the fear the General School of Law would be a "monster establishment" and, although Sir Roundell – Palmer, Goldsmid conceded, did not seek it, would inevitably become a monopoly at the expense of university and other small law schools.[57] Gathorne Hardy, reiterating what was said by George Jessel during the debate the previous year, expressed fears article clerks would "swamp" bar students at the School by their far greater numbers.[58]

William Gladstone, the Liberal leader, contributed to the debate. His was a temporizing speech and produced the greatest obstacle to the success of resolutions. He stated the debate was not about the desirability of reform but the desirability or otherwise of immediate reform. As the latter was clearly debatable he ventured some delay was necessary. The Resolutions were defeated by 116 votes to 103.

Later in 1872 Sir Roundell Palmer was appointed Lord Chancellor with the title of Lord Selborne and became much preoccupied with the reform of the superior courts for which he is chiefly remembered. He did, however, draft a Bill to reform the constitution of the Inns of Court to compel them to join in the foundation of a General School of Law, but did not proceed with it. Later, in 1874 and 1875, in opposition and when Lord Cairns was Lord Chancellor, assisted by strong support of the solicitors, he presented a series of Bills to secure that benchers of the Inns were elected, that any surplus income possessed by the Inns be spent on legal education and to create a combined school of law.[59]

A Bill introduced into the House of Lords in 1875 passed through all its stages, although few speakers took part in the debate. There was but languid press and public interest. In one of his speeches in the House of Lords Lord Selborne claimed the backing of eight thousand out of the ten thousand solicitors in the country.[60] However the Bill went no further. With

[48] Ibid., Col 1224.
[49] Ibid., Col 1225.
[50] Ibid., Col 1230.
[51] Ibid., Col 1230.
[52] BROOKS, C. W., LOBBAN, M., Apprenticeship or Academy? The Idea of a Law University 1830–1860. In: BUSH, A., WIJFFELS, A. (eds.), *Learning the Law Teaching and Transmission of Law in England 1150–1900.* London, 1997, p. 354 explains that from the 1840s there was considerable uncertainty within the legal profession and beyond about the relative pedagogic merits of older forms of teaching, based on apprenticeship, and newer ones which stressed the importance of lectures and examinations.
[53] Hansard, H. C. Vol CCIX, sr3, Col 1243-4.
[54] COCKS, R., *Foundations of the Modern Bar*. London, 1983, p. 179-180, describes the Attorney General's argument, curious to modern lawyers and academics, but at the time having some weight, as: the state of the was so deplorable as to be scandalous; it was so bad that it was unteachable; therefore we should not have a teaching institution until the law was reformed. Cocks considered this to be in realty an argument against any change at all as there was no foreseeable prospect of total codification of English Laws.
[55] Hansard, H. C. Vol CCIX, sr3, Col 1251.
[56] Ibid., Col 1249 -54.
[57] Ibid., Col 1262.
[58] Ibid., Col. 1279-80.
[59] Eg Hansard 3rd Series (H. of L.), Vol CCXX, 10th July, 1874, Cols.1460-1; Vol.CCXXIV,4th May 1875, Col. 7; Ibid., Vol. CCXXVIIII, Ist May 1876, Col.1893.
[60] Hansard, Vol. CCXXIV, 4th May 1875, Col. 15.

barrister supporters defecting, perhaps because they thought sufficient had been achieved when the Bar Final examination became compulsory in 1872, and a lack of government support Selborne eventually abandoned the project. To carry his reforms through parliament would have needed, if not united, convincing support from the Bar whose members were so strongly represented in both Houses.

Lord Cairns, the previous Conservative Lord Chancellor and earlier in his career critic of the state of legal education (for example in evidence to the Royal Commission of the 1850s), wrote to Roundell – Palmer to congratulate him on his elevation to Lord Chancellor on October 11th 1872 and expressed the hope he would continue his campaign to improve legal education, make the Inns of Court representative and roll them all into a legal university.[61] The two Lord Chancellors later collaborated with each other to make the Judicature Acts possible. Selborne had thought Cairns was "favourable to the principle" of a legal university, "though cautious in pressing it".[62] His ambitions, however, were far more modest and stretched no further than legislation to establish a strong examining body overseeing barristers, significantly not solicitors, and to ensure the Inns individually or collectively could not abandon their educational obligations.[63] A Bill to do this was introduced in 1877, passed through the House of Lords but was abandoned after the Committee stage in the House of Commons. It was put again before the Commons the following year, by the Attorney General Sir John Holker, where it received a second reading, but was then rather mysteriously withdrawn in favour of Committee proceedings on the Contagious Diseases Animal Bill with no commitment for its reintroduction.[64] This was the last attempt to set up a University of Law, or General School of Law, by legislation.

10. Reasons for failure of the scheme

The puzzling disappearance of an attempt to create even a much reduced body contrasts with the beginning of the decade when a very full scheme seemed to have every chance of success. Then, in the words of Lord Selborne, " it seemed to be largely felt, that the existing methods of preparation for the practice of law were too loose and empirical, that our text – books were too generally mere digests of reported cases, and it would be of great benefit if a more liberal and scientific spirit could be infused by a well-directed study of general, historical, and comparative jurisprudence. What was done in Germany, might be done with as much advantage here".[65] Reforms advocated by the Legal Education Association appeared so much in keeping with developments in other professions.[66]

In his memoirs Lord Selborne attributed his failure to bring about the Legal Education Association's scheme to three causes, or "adverse influences". The first was what he described as "jealousy on the part of the University of London", which had a law – school of its own. Although its efforts were puny with few students, several eminent men at the Bar had graduated from it including George Jessel who when solicitor general in 1871 had spoken in parliament strongly against Palmer's Resolution and whom Selborne described as "my vigorous and effective opponent".[67] The opposition of Sir Francis Goldsmid, much involved in the management of University College, London, in the debate the year after has already been noted. Selborne observed he had been deprived of the support of Robert Lowe, then MP for the University of London and a powerful figure in the Liberal Party, who at the beginning of the movement for reform had been one of its well – wishers.

Second in ascending order of adverse influences, Selborne identified "the inert and suspicious conservatism of the Inns of Court". Under his proposals they and the Incorporated Law Society would co- operate, at least for some of the time, in using buildings belonging to them. Contributions from the funds of the Law Society and the Inns would also be necessary as it would not be possible for the new school to be self – financing, at least from the outset, by fees, and other sources. Despite the financial responsibilities they would bear it was not proposed that the school be under the control of the Law Society or the Inns; they were to be proportionately represented on a governing senate.[68] Fear that the Inns might loose their independence and control over their own funds to outsiders moved the Inns from an attitude of hesitation, in which some of them were more, and others less, favourable, into one of united opposition. Selborne believed a private club spirit pervaded government of the Inns. They were not in the hands of the most active members of the Bar rather in those who had little business of their own but ample time. Amongst such men, never absent from the dining -hall or the council -chamber of their Inn, habit and esprit de corps was stronger than zeal for reform which led them to oppose his plans.

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[61] SELBORNE, L., *Memorials Personal and Political*, Part II, Vol. 1, p. 50. "Many things especially those connected with legal education on which we shall be substantially agreed. On legal education I hope you may feel able to deal with the Inns of Court: to make their governing bodies really representative and to toll them with a legal university. Their public rights and privileges that they enjoy are amply sufficient to justify public interference and control".

[62] Ibid., p. 50.

[63] Cairns argued that as teaching institution a General School of Law would either fail to get started because of lack of funds, or if successful would annihilate others, particularly the Inns.

[64] ABEL, B.-S., STEVENS, R., *Lawyers and the Courts; a sociological study of the English Legal System*. London, 1967, p. 75.

[65] *Memorials, Personal and Political*, Part II, Volume 1, p. 48-49.

[66] See CARR-SAUNDERS, A. M., WILSON, P. A., *The Professions*. Oxford, 1933 and READER, W. J., *Professional Men: The Rise of the Professional Classes in Nineteenth Century England.* New York, 1966. It was the age when great faith was beginning to be placed on examinations, preparation and training to pass them to protect the public from unqualified or incompetent professional men.

[67] *Memorials, Personal and Political*, Part II, Volume 1, p. 51.

[68] On such a body it was proposed both branches of the profession be equally represented; judges and other ex officio members would have places and there would be a certain proportion nominated by the Crown. Lord Selborne on Legal Education. In: *Law Magazine and Review: A Monthly Journal of Jurisprudence and International Law, for Both Branches of the Legal Profession at Home and Abroad*, vol. 4, no. 7, July 1875, p. 677-678.

The third, and perhaps most potent, adverse influence, denounced by Selborne as "neither liberal or reasonable", was what he described as "the prejudice of bringing future barristers and future solicitors under a system of preliminary instruction".[69] What gave power to this prejudice was the notion such common education might lead to fusion of the two branches of the profession. Selborne repeatedly and vehemently denied his plan was a stalking horse to further this, but opponents of reform played much on such fears. A justification advanced by antagonists for their opposition was that most articled clerks would be several years younger than bar students, many of whom would have attended university - age and educational differences therefore making it impossible for them to be taught together. Fears were also expressed that the clerks would overwhelm bar students by sheer numbers. Undoubtedly social snobbery and condescension lay behind some of these objections. Commenting upon this Selborne in his memoirs wrote, "From a social point of view, to treat barristers as if they ought to belong to a different caste from solicitors, whose sons, brothers, or sons – in – law many of the most successful and honourable among them were, would simply be absurd".[70]

After appointment to Lord Chancellor Selborne principally devoted his prodigious energies to the gigantic task of reforming the structure of the superior courts. In effect reform of legal education was put to one side and the House of Commons devoted what attention it could spare for legal matters to the Judicature Acts. The delay and consequent loss of momentum, before Selborne resumed his attempts in parliament in 1874 and 1875 has been seen as important, if not fatal, in explaining the failure to establish a General School of Law.[71]

After the Law Society won control completely from the judges of the syllabus and solicitors examinations in 1877, support amongst solicitors and the Law Society, which had ardently supported the creation of General School of Law, fell away - a further factor in the failure to accomplish a General School of Law.

11. "Conservatism Triumphant", but at some cost

Against general expectations at the start of the 1870s the scheme for a General School of Law or a University of Law came to nothing. Opponents of reform in the Inns had seen off the threat to their autonomy as well as the mortification of being linked to the lower branch of the legal profession in teaching and examinations.[72] Indeed it has been seen as an example of "conservatism triumphant".[73] It undoubtedly showed the superior position of the bar, a largely conservative profession, over solicitors; its strength in Parliament and society and of the appeal it could make, especially under a Conservative government. Although Acts were passed in the Nineteenth Century regulating entry to occupations from medicine to midwifery and indeed solicitors, the legislature, in which barristers were always strongly represented, failed to pass legislation stipulating educational qualifications for those who at a higher level, interpreted laws enacted by it. But the campaign for a General School of Law, with what looked like a real possibility of a statute to create it, undoubtedly resulted in the introduction of compulsory examinations for the bar in 1872[74] enabling them to assert their system of education should be given the opportunity to prove itself. This almost "deathbed conversion" by the Inns may have tipped the balance amongst barristers, crucial in parliament, against a General School. What is certain is that it was no longer possible for the Inns to pretend they were purely private societies immune from state interference in the performing their functions. Selborne and the Legal Education Association accomplished this at least.[75]

If the General School of Law, had been established in the 1870s, but not as a monopoly provider of legal education, a position seemingly accepted by Lord Selborne and the Legal Education Association by 1875 (although relationship of the School with the Inns, the Law Society, the Universities and the crammers, which had proliferated, seems never clearly set out),[76] it is unlikely to have been unable to finance itself by student fees. The institution would have faced, as Michael Lobban, put it, " the extremely demanding task of providing what students wanted in order to pass their professional examinations either at a more attractive rate or on more appealing terms than its commercial or academic rivals, while also persuading enough men to subscribe to classes in the less practical subjects", to broaden their intellectual horizons on law including principles of jurisprudence, history and comparative law.[77] Lobban points to the failure to achieve this mission at Queen's College, Birmingham in the 1850s.[78] Although a London school would have had a large pool of potential students and teachers to draw on the competitors, especially the cram schools and coaches that had become established for the bar and solicitors examinations, "were formidable and most articled clerks (and many aspiring barristers) were understandably hard- headed and instrumental in seeking only the knowledge they felt professionally useful." Given a General School of Law would have been

[69] *Memorials, Personal and Political*, Part II, Volume 1, p. 52.
[70] Ibid., p. 53.
[71] COCKS, R., *Foundations of the Modern Bar.* London, 1983, p. 180.
[72] See LOBBAN, M., The Education of Lawyers. In: *Oxford History of the Laws of England*, Vol.XI, Part 4, p. 1190-1191;
[73] ABEL, B.-S., STEVENS, R., *Lawyers and the Courts; a sociological study of the English Legal System*. London, 1967, p. 165.
[74] For the context of their inception and content see Edgar, Andrew.The New Scheme of Legal Education. In: *Law Magazine and Review; a Monthly Journal of Jurisprudence for Both Branches of the Legal Profession at Home and Abroad,* vol. 2, no. 1, January 1873, p. 62-66.
[75] LOBBAN, M., The Education of Lawyers. In: *Oxford History of the Laws of England*, Vol. XI, Part 4, p. 1190-1191.
[76] Lord Selborne on Legal Education. In: *Law Magazine and Review: A Monthly Journal of Jurisprudence and International Law, for Both Branches of the Legal Profession at Home and Abroad*, vol. 4, no. 7, July 1875, p. 683-685.
[77] The Education of Lawyers. In: *Oxford History of the Laws of England*, Vol. XI, Part 4, p. 1192.
[78] PUE, W. W., Guild Training vs. Professional Legal Education: The Committee on Legal Education and the Law Department of Queen's College, Birmingham in the 1850s. In: *American Journal of Legal History*, vol. 33, 1989, p. 241-287; ABEL, B.-S., STEVENS, R., *Lawyers and the Courts; a sociological study of the English Legal System*. London, 1967, p. 169.

unable to survive on student income substantial financial support would have been necessary, at least in early years, from the Law Society and the Inns. In view of Lord Cairns' objections to the school on economic grounds, it is improbable assistance from government sources was ever seriously contemplated by either Liberal or Conservative governments.

12. Later attempts to found something similar to a general law school

In his memoirs Lord Selborne expressed a wish that the movement in which he was so much interested be revived "perhaps under better auspices, and in some more perfect form".[79] First made in 1884 and renewed in 1891 proposals were made, as part of a long sustained campaign to alter the structure of the University of London, to achieve something along the lines of a general school of law by merging the teaching functions of the Council of Legal Education and the Law Society with the law schools at University College London and Kings College. Strongly opposed by the Inns they eventually amounted to nothing.[80]

Shortly before Selborne's death in 1895, Lord Chief Justice Russell urged vigorously the creation of a general school of law but no progress was made.[81] Another effort which this time came close to success was made in 1900. The dissolution of the last two Inns of Chancery, Clifford's Inn and New Inn, produced a large windfall of available charitable funds[82]. Promoted by the Attorney General, Sir Robert Finlay, a committee of the Inns of Court and the Law Society was established to prepare a scheme for using this money to set up a general school of law. Strongly supported by the Law Society and by some of the Inns, plans reached the stage of a draft charter which provided for equal representation on the governing body by the Inns and the Society. They were resisted, however, by the Inner Temple, where Lord Halsbury, the Lord Chancellor, a forthright opponent, was highly influential, and the Bar Council which was also hostile. Because agreement of the four Inns was necessary opposition from the Inner Temple was sufficient to defeat the scheme.[83]

In 1913 the Haldane Commission on University Education in London recommended against further attempts to establish a general school of law or university of law:

"The proposal to found a great school of law in London has been made more than once, and has come to nothing. In our view the real seat of learning, and the source of scientific instruction, is a university, and we think it is a Faculty of the University, in its proper relation to all other departments of learning, that a great school of law can be developed, and the scientific study of law pursued in a spirit of freedom and independence".[84]

13. Following the failure to create the General School of Law/ University of Law

Barristers and solicitors continued to be educated separately; their education remained controlled by their professional body though for most it was undertaken by crammers and the role of university legal education remained peripheral. The ethos of both the bar and solicitors in matters of legal education remained practical and pragmatic.

The great majority of barristers studied subjects other than law, most frequently classics, at university. Academic study of law at university, intended by the Select Committee of 1846 to raise the standards of the average barrister and solicitor, increased, but only slowly.[85] The Council of Legal Education provided lectures in Roman Law, Public and Private International Law, Constitutional Law, Legal History and Jurisprudence. Most lecturers made no attempt to relate their courses to the examinations. None gave tutorials. Unsurprisingly many students resorted to crammers and coaches in order to pass.[86]

Most graduates who became solicitors did not study law at university. Indeed graduates in any discipline were a minority of the profession. The Final Examination taken by solicitors consisted of four papers spread over two days comprising sixty questions covering property and conveyancing (15); equity (15); common law 11); bankruptcy (4) criminal law and magistrates (6), probate(3), divorce (3), Admiralty (2), and ecclesiastical law (1). A candidate did not need to pass each subject. After the Law Society won control of the syllabus and examinations in 1877 there was no room for "the theoretical " subjects and the questions continued to be of a severely practical kind.[87] Whilst the Law Society provided some lectures, difficult for many clerks, particularly outside London and other metropolitan centres to attend, cram schools often provided instruction for both the solicitors Intermediate and Final Examination. A President of Law Society J. M. Clabon, who was a leading figure in the Legal Education Association and campaigner for a General School of Law, lamented this "baneful system" in 1881[88] far different from what he had sought.

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[79] *Memorials, Personal and Political*. Part II, Vol. I. Chapter III, MacMillan, 1896, p. 54.

[80] Report of the Committee on Legal Education ("The Omerod Report") 1971, p. 10-11. Also see LOBBAN, M., The Education of Lawyers. In: *Oxford History of the Laws of England,* Vol. XI, Part 4, p. 1192-1194.

[81] COCKS, R., *Foundation of the Modern Bar*. London, 1983, p. 191-194.

[82] The case of *Smith v. Kerr* [1900] 2 Ch.511 decided that the property of Clifford's Inn to be held on charitable trusts. The Inn was subsequently sold.

[83] The charitable funds which could have been used for a General School of Law were held by the court and interest paid to the Council of Legal Education and the Law Society for educational purposes, although the capital value declined greatly over the years – See Report of the Committee on Legal Education, (The Omerod Report) 1971, p. 11.

[84] *Final Report of the Royal Commission on University Education in London*, 1913, Cd, 671, p. 338.

[85] According to BAKER, J., *An Introduction to English Legal History*. Second Edition. London, p. 149, "It is a sad reflection on the law faculties that most of the distinguished lawyers between 1850 and 1950 were either not university graduates at all or had read subjects other than law."

[86] Later in the century examinations were divided into two parts. The first, taken at any time, after admission, comprised Roman Law, Constitutional Law and Legal History; Criminal Law and Procedure, and Real Property and Conveyancing. Part Two, taken only after at least six terms had been kept, comprised papers in Common Law, Equity, Evidence, and Civil Procedure, and a general paper from all these subjects.

[87] ABEL, B.-S., STEVENS, R., *Lawyers and the Courts; a sociological study of the English Legal System*. London, 1967, p. 169.

[88] *69 Law Times*, 1881, p. 392. Clabon had been the elected Treasurer of the Legal Education Association.

Legal education for aspiring lawyers in England differed greatly from the extensive, broad and liberal instruction given to their counterparts in continental Europe, a point made in 1875 by an article in the Law Magazine and Review, a steadfast supporter of the campaign for reform waged by Lord Selborne and the Legal Education Association, which set out the curriculum and the teaching resources in the law faculty to students at the University of Strasbourg.[89]

14. What might have been if the General School of Law/ University of Law had been established?

Writing in the early 20th Century on the system of education which had grown up after the 1846 Select Committee Report Professor Sir Holdsworth considered it fortunate attempts to establish a general school of law had failed. To him the existing tripartite division: "had the advantages of resting upon the basis of the separate needs of the two branches of the profession and of the separate needs of those who wished for a general and more philosophical training in legal principles and theory.[90] Advocates of a general school of law would doubtless say this missed the point widely: the legal profession, the organisation, exposition and clarity of English law and British society generally would have been advantaged by most lawyers acquiring a general and philosophical foundation in law upon which to build later professional knowledge and inform practice.

This article concludes by asking it is hoped some perhaps not entirely idle questions about what might have happened if a general school of law had been established, to which, of course, there can only be speculation not answers:

Would exposure of many more solicitors to study of broader legal subjects including Roman Law, Jurisprudence, legal history and comparative law, and other subjects in a more methodical "scientific" way emphasising underlying principles, actually have affected the profession? It was argued that the quality of advice given to clients and instructions to counsel would increase by supporters; certainly the Select Committee of 1846 believed standards would have been raised.

What would have been the effect of teaching these subjects in greater depth to bar students on the bar and the judiciary drawn from it? Is it possible judges may have been more willing to think in broader concepts, identify and enunciate principles and draw on jurisprudence from beyond the common law world after hearing barristers formulate more expansive submissions to them or on their own initiative? Would English judges have been more prepared to consider academic opinions in their judgements?

Would there have been greater support in the long 19th Century amongst the judiciary and the legal profession for codification, with its emphasis on broader principle, of English Law and for legislation to clarify uncertainties in the law.[91]

Would the clarity of legislative drafting have improved as had been claimed by supporters of a General Law School?

Would education of articled clerks and bar students together in the preliminary stages of their legal education lessen the rigid divisions between solicitors and barristers and even have been used as an argument for fusion?

Would the English legal profession and English Law have become less insular from Civil Law and lawyers?

Would the establishment of a general school with a requirement for teachers have necessitated an expansion in numbers of legal academics in the country, especially if branches were founded outside London? Would a similar general school be established in Ireland?[92]

Would legal text books have increased in number to aid study of legal principles by students at the general school, which may have provided a sizeable market? Would the pool of potential writers have been enlarged by graduates from the school?

Would the development of university law faculties and their gradual growth of students during the late 19th Century universities have been slowed by creation of a General Law School/ University of Law?

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[89] The following courses are listed: Encyclopedia of Law, three lectures weekly; Institutes and History of Roman Law, four lectures, of two hours each; History of Roman Civil Procedure, two lectures; Pandects (also known as the Digest of Roman Law), except Law of Succession, five lectures of two hours; Law of Succession according to the Pandects, four lectures; Law of succession according to German Legislation, four lectures; Exercises on Texts of Roman Law, one lecture; Private Conferences (privatissima – translated into English as a lecture to a small number of students, roughly corresponding to a seminar or tutorial) on Roman Law, and Penal Law; Exercises on Roman Law, and German Private Law and Civil Procedure (privatissima); Penal Law, six lectures; Civil Procedure, six lectures; History of German Private and Public Law, five lectures; Public Law of the Empire, and of the separate States of Germany, five lectures; German Civil Law and French Law, seven lectures; Commercial and Maritime Law, six lectures; French Civil Law, five lectures; Penal Law, three lectures; Law of Nations, four lectures; Ecclesiastical Law, and Legislation on Marriage, five lectures; Politics, four lecture; Social movements of the day in England, France, and Germany, two lectures;Political Economy, five lectures; Practical Exercises on Civil Procedure, three lectures; Practical Exercises on Criminal Instruction, two lectures; Practical Exercises on the Pandects, one lecture of two hours; Legal aspects of Commerce and Industry, one lecture of two hours; and Statistics : In all twenty-seven different courses of lectures and seminars taught by fourteen professors, and representing a minimum of one hundred and ten hours instruction given each week during the University Session. The Law Teaching at a German University. In: *Law Mag. & Rev. Monthly J. Juris. & Int'l L. Both Branches Leg. Prof. Home & Abroad* 4th ser., 1875, p. 147.

[90] *History of English Law*, Vol. XV, p. 246.

[91] The idea of "codification", the word was introduced into English by Jeremy Bentham, is that legal principles should be laid down authoritatively in written form to remove doubts and uncertainties in law arising from cases or juristic writings. In its fullest form compilation of a code may entail rewriting the whole law. Its least manifestation involves editing existing forms sources of law by legislation. In the 19th Century the French *Code Napoleon* was adopted or imitated by many European states. More modestly much of the common law was codified for use in British India between 1830 and 1860. Its success there led to interest in England resulting in Digests in Evidence (1877), Criminal Law (1878), both drafted by Sir James Fitzjames Stephen; Partnership (1877), Professor Pollock, Bills of Exchange (1878), Judge Chalmers; and Law of Sale, Judge Chalmers (1893). The last three were enacted as the Bills of Exchange Act 1882; the Partnership Act 1890; and the Sale of Goods Act 1893. However further major codification, though debated and urged by some, did not take place. See BAKER, J., *An Introduction to English Legal History*. Fourth Edition. London, 2002, p. 217-220.

[92] In a radical initiative the Dublin Law Institute, financially supported by the benchers of King's Inn, was created in 1839 to provide legal education for both barristers and attorneys. Five professors were appointed. However after the benchers withdrew their backing the Institute ran into financial problems and closed in 1845. See KENNY, C., *Tristram Kennedy and the Revival of Irish Legal Training 1835–1885,* Dublin, 1996.

Naturalisations in the Independent State of Croatia

*Ivan Kosnica**

Abstract

The article addresses the issue of naturalisations as a way of acquisition of citizenship in the Independent State of Croatia. The research question we deal with in this paper relates to legal regulations and the practise of naturalisations. Since the topic is still not adequately researched, the article relies mainly on archival sources available in the Croatian National Archives and relevant legislation. The author analysed various aspects of naturalisations that were going on a central as well as on the local level.

Keywords: *citizenship; nationality; naturalisation; Independent State of Croatia.*

1. Introduction

The paper addresses the issue of naturalisations in the Independent State of Croatia. We define naturalisation as a mode of acquisition of national citizenship by which a foreign citizen or a person without citizenship acquires new national citizenship based on a decision of state authorities. The research relates to the Independent State of Croatia, the Ustasha state that existed during the Second World War. The period between formation of the state (10 April 1941) and its defeat in the beginning of May 1945 is analysed.[1]

The issue of naturalisations in the Independent State of Croatia has not yet been investigated. This notion leads us to research of archival sources. The sources are available in the Croatian National Archive in the fund of the Ministry of Internal Affairs of the Independent State of Croatia and to a lesser extent in the fund of the Ministry of Justice of the Independent State of Croatia. Particularly significant for the research are two records of the Ministry of Internal Affairs that contain names of naturalised persons.[2] The records made possible a further search of specific personal files in the Internal Affairs Ministry fund. Furthermore, we researched relevant legislative framework, specifically regulations about national citizenship, but to some extent the regulations about local citizenship as well. The latter was relevant for the acquisition of national citizenship. Finally, relevant literature is also researched.

The research question that we discuss in this paper relates to the regulation of naturalisations and the practise of naturalisations in the Independent State of Croatia. We are of opinion that research of this, still not researched topic might help in more complex understanding of the concept of citizenship and politics of citizenship in the Independent State of Croatia. Having in mind this, one can note that the research is to some extent complementary with done research about the concept of citizenship and race laws in the Independent State of Croatia as well as with the research about the concept of honorary Aryans.[3]

The paper begins with general instructions about the concept of citizenship in the Independent State of Croatia and about regulating the citizenship law. In the central part of the paper, we refer to naturalisations based on the decree of the Minister of Internal Affairs and naturalisations based on specific norms about local citizenship. The paper ends with the conclusion.

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1 For general information about formation and collapse of the Independent State of Croatia see: MATKOVIĆ, H., *Povijest Nezavisne Države Hrvatske*, Zagreb, 2002, pp. 25-27; 98.

2 HR-HDA-223 Ministarstvo unutarnjih poslova Nezavisne Države Hrvatske (further: HDA MUP), R.S. Opći spisi (signatura arhiva instituta za suvremenu povijest), the box 304, nr. 8611a, List of persons who had acquired citizenship of the Independent State of Croatia; HDA MUP, R.S. Opći spisi (signatura arhiva instituta za suvremenu povijest), the box. 304, nr. 10295, Citizenship of the Independent State of Croatia – naturalized persons 1941.-1945.

3 For the research about general concept of citizenship and race laws in the Independent State of Croatia see: BLAŽEVIĆ, R., ALIJAGIĆ, A., Antižidovstvo i rasno zakonodavstvo u fašističkoj Italiji, nacističkoj Njemačkoj i ustaškoj NDH. In: *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 31, nr. 2, 2010, pp. 902-911; BARTULIN, N., *The Racial Idea in the Independent State of Croatia*, Leiden – Boston, 2014, pp. 144-159; MIRKOVIĆ, Z.S., *Rasno zakonodavstvo u Nezavisnoj Državi Hrvatskoj*, pp. 41-69, in: BEGOVIĆ, B., MIRKOVIĆ, Z.S. (eds.), *Pravni poredak Nezavisne Države Hrvatske*, Beograd, 2018; ČEPULO, D., *Hrvatska pravna povijest u europskom kontekstu od srednjeg vijeka do suvremenog doba*, Zagreb, 2023, p. 284; For the research about the concept of honorary Aryans see: BARTULIN, N., *Honorary Aryans: National-Racial Identity and Protected Jews in the Independent State of Croatia*. New York, 2013, pp. 61-83.

2. The concept of citizenship in the Independent State of Croatia and (non)regulation of the citizenship law

Twenty days after formation of the Independent State of Croatia, on 30 April of 1941 the Poglavnik Ante Pavelić issued two regulations related to the concept of citizenship. These acts were the Legal provision on citizenship (*Zakonska odredba o državljanstvu*)[4] and the Legal provision on racial affiliation (*Zakonska odredba o rasnoj pripadnosti*).[5]

The first mentioned, the Legal provision on citizenship introduced two categories of citizens, citizens, and state members, like classification in the Nürnberg laws. It also defined a state member as a person who is under the protection of the Independent State of Croatia.[6] Furthermore, it states that a person acquires a state membership based on the legal provision on state membership.[7] This rule implied the necessity of enacting such legal provision in the future.

In relation to the concept of a citizen, the authorities defined a citizen as a 'state member of Aryan origin who, by his actions, showed that he had not been working against the liberation aspirations of the Croatian nation and who is willing to serve and be faithful to the Croatian nation and the Independent State of Croatia.'[8] The Legal provision on citizenship thus referred to the concept of Aryan origin, the concept that had been defined by the Legal provision on racial affiliation. The Legal provision on racial affiliation defined a person of Aryan origin as a person 'who originates from ancestors who are members of the European racial community or (a person) who originates from ancestors of that community outside Europe'.[9] Specifically, the Legal provision on racial affiliation introduced rules for definition of Jews and Roma as non-Aryans and thus excluded them from citizenry.[10]

The legal provisions on citizenship and racial affiliation clearly emphasise two groups of state members/citizens and put a strong accent on racial element for definition of citizenry. On the contrary, the authorities did not enact a legal provision about determination of citizenship/state membership, naturalisations, and loss of citizenship/state membership. Although the authorities planned to enact such provisions and in May 1941 formed the committee for preparing these draughts, this never happened.[11] Therefore, even during 1944 the draught that had to regulate matters of recognition of citizenship, its acquisition, and loss was still under debate in the Ministry of Justice.[12]

This situation had negative implications for the legal status and rights of many individuals, specifically those of non-Aryan origin. It happened that non-Aryans were unable to attain a citizenship certificate, even though their citizenship before the formation of the Independent State of Croatia was indisputable. As an example, we mention the case of Emil Leitner in 1941 interned in Prague who asked the authorities of the Independent State of Croatia for certificate of citizenship of the Independent State of Croatia which would make him possible getting a passport that was necessary for return home. For this purpose, he submitted a local citizenship certificate (*domovnica*) issued in 1935 that supports his argument that he is a local citizen and consequently a person who is a state member of the Independent State of Croatia. However, the authorities refused to issue him a national citizenship/membership certificate. The reasons for this were, as the authorities argued, formal. They specifically claimed that they cannot issue him such a certificate because an executive order for the implementation of the Legal provision of citizenship has not been enacted, nor the legal provision on state membership has been enacted.[13] Beyond these formalities, there was hiding an obvious different treatment between non-Aryans and Croats whose return home was heavily supported by the authorities.[14]

Nevertheless, although the issues of citizenship determination and naturalisations were not regulated by a specific legal provision, some norms still existed. These norms were issued mainly in the form of instructions. One of such norms was a rule on local citizenship as an important evidence of state membership. In some cases, this rule was combined with the Croatian nationality. This can be supported with the instruction that the Ministry of Internal Affairs issued to subordinate administrative districts on 16 May 1941 in the matters of issuing certificates to war prisoners. According to the instruction, municipalities must immediately issue local citizenship certificates to those enrolled in local citizen registers under the condition that these persons are of Croatian origin. Furthermore, similar official certificates should have been issued for people who are not enlisted in the registers of local citizens but were born in the municipality or lived continuously in the municipality. The authorities here also issued certificates under the condition that these persons are of Croatian nationality. Both certificates should have been issued only to Croats who were citizens of the Kingdom of Yugoslavia until 10 April 1941. As clearly stated in the order, these certificates proved that a person is a state mem-

[4] *Narodne novine*, 30. travnja 1941., br. 16.
[5] *Narodne novine*, 30. travnja 1941. br. 16.
[6] Cf. art. 1 of the Legal provision on citizenship.
[7] Cf. art. 1. par. 1. of the Legal provision on citizenship.
[8] Cf. art. 2. of the Legal provision on citizenship.
[9] Cf. art. 1. of the Legal provision on racial affiliation.
[10] Cf. art. 3. and 4. of the Legal provision on racial affiliation.
[11] The authorities planned to enact a legal provision on state membership and an order for the implementation and amendment of the legal provision on citizenship. Cf. The Decree on formation of the Committee which shall propose draughts on citizenship. HDA MUP, II-A 2596/44.
[12] "The Draft of the legal provision on recognition, acquisition and loss of citizenship of the Independent State of Croatia", in: HR-HDA-218, The Ministry of Judiciary and Religion of the Independent State of Croatia, the Department of Judiciary, the box 1.
[13] HDA MUP, II-A 44360/1941, the box 107.
[14] In this vein, the higher authorities of the Independent State of Croatia issued circulars that should speed up issuing citizenship certificates to Croats that were interned abroad during 1941. See: HDA MUP, the box 96, II-A 2409/41.

ber of the Independent State of Croatia. The order excluded non-Aryans by stating that these certificates will not be issued to them.[15] Furthermore, the authorities introduced practice of exceptional naturalisations by the decree of the Ministry of Interior, the issue we discus in the Section 3. Additionally, the lack of provisions about naturalisation was partially surpassed by accepting some specific rules about local naturalisation, the issue we debate in the Section 4.

The authorities prescribed citizenship of the Independent State of Croatia as a perquisite for enjoyment of rights. Notable example is the Legal provision on citizenship which specifically states that enjoyment of political rights is reserved for citizens only.[16] Insistence on citizenship emphasised the racial element in the legal order. As a result, not only foreigners but also non-Aryans were excluded.

3. Naturalisation based on the decree of the Minister of Internal Affairs

General features. The research taken in the Croatian National Archive indicates that during four years of existence of the Independent State of Croatia the authorities (n.b. Ministry of Internal Affairs) issued only 24 decrees about naturalization.[17] In other words, this means that there were only approx. 6 naturalizations per year, which indicates that the institute of such naturalisation was used rarely. In fact, out of 24 positively solved requests for naturalisation, only 20 were completed, since in these cases the applicants took a citizenship oath.[18] In four cases, although the authorities issued an act of naturalisation, the taking of the citizenship oath had not been documented. The rarity of usage of such naturalisation is evident if we consider the fact that the state numbered more than 6 million inhabitants.[19]

In the paper is already indicated that the concept of naturalisation and procedure for naturalisation were not regulated by one act. Instead, instructions on naturalisations were often issued on a case-by-case basis.

The sources indicate that the authorities of the Independent State of Croatia found out many applications for naturalisation that applicants submitted earlier, before 10 April of 1941.[20] However, in principle, the authorities refused to respond to these requests. In fact, previous processes of naturalisations were blocked. On the other hand, the authorities proclaimed that further requests will be solved only after enactment of the new provisions about citizenship.[21]

In such circumstances, naturalisations were only exceptionally given by the Ministry of Internal Affairs. Saved materials from the Ministry of Internal Affairs, specifically personal files, give us an elementary picture of how the process of naturalisation went. Specifically, the process began with a plea that the interested party submitted to the state administration on the local level, or directly to the Ministry of Internal Affairs or, in some cases, to the Poglavnik. Initiation of the process in front of the Minister of Internal Affairs or Poglavnik was the rule, since at the local level, due to nonregulation of the process of naturalisation, the process was in principle blocked. After higher authorities recommended naturalisation, the process of naturalisation included participation of lower authorities as well. In this process, the local police department issued a recommendation for naturalisation, and, in some cases, applicants submitted a recommendation of local Ustasha organisation.[22] After the local police department or the local administrative authorities prepared the naturalisation file, the file was submitted to the Ministry of Internal Affairs. The decree on naturalisation signed the Minister of Internal Affairs. After the Minister issued the decree, a person had to take an oath. Since the oath was not officially prescribed, it was defined on a case-by-case basis according to the model of the oath for civil servants and was similar in most cases. The oath was as follows: 'I, Armanini Petar, becoming a citizen of the Independent State of Croatia, swear to Almighty God that I will be faithful to the state of Croatia and the Poglavnik as representative of its sovereignty, that I will respect its constitutional provisions and laws and accurately perform all civic duties, and that I will always have in mind the interests of the Independent State of Croatia and the Croatian people and that I will selflessly promote these interests. So God helped me!'.[23] Another similar oath read: "I, Velimir Foskio, swear to God almighty and give my word of honour that I will be faithful to the Independent State of Croatia and the Poglavnik as a representative of its sovereignty, that I will respect and adhere to its constitutional provisions and laws, and that I will always have the achievements of the Independent State of Croatia and of the Croatian people before my eyes, which I will selflessly promote, and that I will fulfil all my civic duties accurately. So help me God!".[24] After the person

[15] HDA MUP, the box 96, II-A 2409/41.

[16] The Legal provision on citizenship stated that only citizens had political rights. Cf. 3. of the Legal provision on citizenship.

[17] HDA MUP, *op. cit.*, the box 304, nr. 8611a, List of persons who had acquired citizenship of the Independent State of Croatia; HDA MUP, *op. cit.*, the box. 304, nr. 10295, Citizenship of the Independent State of Croatia – naturalized persons 1941.-1945.

[18] *Ibid.*

[19] Data for the territories that became part of the Independent State of Croatia for the year 1931 mention 6,024 milion inhabitants. MATKOVIĆ, *op. cit.*, p. 53; Some other authors estimae population of the Independent State of Croatia at around 6,5 milion. Cf. BARTULIN, The Racial Idea, *op. cit.*, p. 145.

[20] HDA MUP, II-A 8392/41 (Josip Oberman), the box 98; HDA MUP, II-A 14966/41 (Toma Kosterhun), the box 100; HDA MUP, II-A 27222/1941 (Gabrijel Erdelji), the box 103; HDA MUP, II - A 27222/1941 (Karlo Vedral), the box 103; HDA MUP, II-A 27674/1941 (Luki (Lőki) Ruža), the box 103; For more cases see: HDA MUP, the boxes 100, 103, 106.

[21] HDA MUP, II-A, Opći spisi, 27674/1941, the box 103.

[22] Cf. HDA MUP, personal files, the file 16113 and the file 4330 (Šilhavi, Vjekoslav).

[23] HDA MUP, personal files, file 16219 (Armanini, Petar).

[24] HDA MUP, personal files, file 16649 (Foschio, Rudolf/Velimir).

gave his oath, he was recognised as a citizen of the Independent State of Croatia.

Previous citizenship, origin, and social position of the naturalised. The preserved personal files of naturalised persons give us information on the policy of naturalisations, meaning that we can reconstruct previous citizenship, the origin, and social position of the naturalised.

In general, one can say that most of the naturalised were Italian citizens and citizens of the Polish generalate.[25] Naturalised were also some persons who had local citizenship in the territories of the former Kingdom of Yugoslavia outside the Independent State of Croatia,[26] citizens of Czech Moravian Protectorate[27] and a Bulgarian citizen.[28]

In relation to origin, in 18 out of 20 cases naturalised were persons of Aryan origin. However, in two cases, the naturalised were two Jewish women. In one case from 1941/42, the naturalised was Maria Renne Rosenblat. Her naturalisation was supported by Milan Ivšić, a professor at the Zagreb University who was very close to the authorities of the Independent State of Croatia. Ivšić claimed that Maria Renne has been living with him for 13 years and that she helped him a lot in his scientific work.[29] In fact, the authorities recognised Maria Renne Rosenblatt as Honorary Aryan during the second half of 1941, in a situation while she was formally foreign citizen, specifically a citizen of the Polish governorate. Later, during March 1942 the Minister of Internal Affairs recognised Maria Renne Rosenblatt as a citizen of the Independent State of Croatia and recognised the change of her surname from Rosenblatt to Ružičić (which is Croatised version of her original surname). The second case of naturalisation of Jewish women was the case of naturalisation of Eleonora Feldmann. She was a young Jewish woman, who had local citizenship on the territory of the former Kingdom of Yugoslavia that did not become part of the Independent State of Croatia, and thus became a foreigner after formation of the Independent State of Croatia. Initially, she was recognised as an honorary Aryan by the authorities. She then, as a foreigner, asked for citizenship of the Independent State of Croatia based on rules that made possible easier access to citizenship for persons of Croatian origin who had local citizenship on the territory of the former Kingdom of Yugoslavia (the model of specific naturalisation that we debate further in the paper under the Section 4). However, the authorities refused to recognise her citizenship claiming that she is not Croatian. In a plea for citizenship, she claimed that as an honorary Arian is equal to Croats, which the authorities did not accept as a valid argument. In addition, she asked the Ministry of Internal Affairs for naturalisation, which finally happened during 1943. In her plea for naturalisation, she emphasised that she is involved in the Ustasha movement and that she works as an officer in the organisation of Ustasha youth in Zagreb.[30]

Related to the social position of the naturalised, one can generally say that naturalised persons belonged to higher or middle social strata. Often, they asked for citizenship because of entrance in the civil service, military service, or because they had connections in the higher branches of the authority. Moreover, the request for citizenship was often an attempt to obtain additional social recognition.

4. Naturalisation based on special regulations on local citizenship

In the paper, we already elaborated that the citizenship law, which would systematically regulate citizenship relations, had never been enacted. This lacuna was to some extent surpassed by special regulations that defined the possibilities of naturalisation by the acquisition of local citizenship.

Croats. The first such provision was the Legal provision on the recognition of local citizenship to Croats from the territory of the former Kingdom of Yugoslavia.[31] The legal provision regulates the cases of recognition (facilitated acquisition) of local citizenship in the Independent State of Croatia for Croats who were local citizens of one of the municipalities of the former Kingdom of Yugoslavia that did not become part of the Independent State of Croatia. The legal provision provided for an easier acquisition of citizenship for several categories of persons.

The first category includes 'Croats who, until April 10, 1941, changed their place of residence within the territory of the former Yugoslavia and thus lost their local citizenship in the municipality' that became a part of the Independent State of Croatia. According to the rule, 'their local citizenship is recognised in the municipality of the Independent State of Croatia, where they had it initially'.[32] If the interested party wanted to use this right, he should have sent a written request to the municipality of his previous local citizenship, and that municipality was obliged to recognise him as a local citizen.[33] This

[25] For Italian citizens see: HDA MUP, personal files, the file 16219 (Armanini, Petar); HDA MUP, personal files, the file 16660 (O. Ferenčić Dragutin/Karlo); HDA MUP, personal files, the file 16386 (Ghyczy, Tito); HDA MUP, personal files, the file 16394 (Soravia, Etor); HDA MUP, personal files, the file 16649 (Foschio, Rudolf). For citizens of the Polish Generalate see: HDA MUP, personal files, the file 16516 (Koziolkowski, Leon); HDA MUP, personal files, the file 16517 (Koziolkowski, Bohun); HDA MUP, personal files, the file 16518 (Koziolkowski Adam); HDA MUP, personal files, the file 16610 (Rosenblat, Marija Renee).

[26] In this way naturalized were only persons who were not Croats. See: HDA MUP, personal files, file 16669 (Dragojlov, Fedor); HDA MUP, personal files, file 16658 (Feldmann, Eleonora). Croats who had local citizenship on the territories of the Kingdom of Yugoslavia that did not become part of the Independent State of Croatia could had been naturalized under favourable terms we debate under Section 4 of this paper.

[27] HDA MUP, personal files, the file 16113 (Šilhavi, Vjekoslav); HDA MUP, personal files, file 16329 (Hameršmid, Albin).

[28] HDA MUP, personal files, file 16748 (Mažuranić Nestorov, Aleksandra).

[29] HDA MUP, personal files, file 16610 (Rosenblat, Marija Renee).

[30] HDA MUP, personal files, file 16658 (Feldmann, Eleonora).

[31] *Narodne novine*, 5. studenoga 1941. br. 170.

[32] Cf. art. 1 of the Legal provision on the recognition of local citizenship to Croats from the territory of the former Kingdom of Yugoslavia.

[33] Article 4, paragraph 2 stipulates that in such cases, municipalities are „obliged to issue a document on local citizenship within one month after receiving the application", *Ibid*.

kind of facilitated acquisition of citizenship provided by the law represented a kind of repatriation.

The second category included 'Croatian women who had local citizenship in one municipality of the Independent State of Croatia but lost that right by marriage before April 10, 1941.' Specifically, this woman 'acquired local citizenship through their husband in another municipality in the territory of the former Kingdom of Yugoslavia, outside the territory of Independent State of Croatia'.[34] These women were now recognised as local citizens of the municipality in which they had local citizenship before marriage if they became widows or were divorced.[35] If the interested woman wanted to use this right, she had to send a written request to the municipality of her previous local citizenship, and that municipality was obliged to recognise her as a local citizen.[36] This case, like the previous one, represented a form of repatriation.

The third category includes 'Croats who do not have a local citizenship in one of the municipalities of the Independent State of Croatia but moved from the territory of the former Kingdom of Yugoslavia and settled in the territory of the Independent State of Croatia'.[37] These Croats were recognised as local citizens 'in the municipality of the Independent State of Croatia, where they had it at birth, and if they were born outside the territory of the Independent State of Croatia, then in the municipality of residence'.[38] In this case, too, the interested party had to submit a written request to the competent municipality and that municipality was obliged to issue a document on local citizenship within one month.[39] The possibilities of acquiring citizenship under this provision were significantly wider than the two types of repatriation because in this case it was not really determined that the person had previously local citizenship in one of the municipalities of the Independent State of Croatia. The key was that the person was a Croat and that he moved 'from the territory of the former Yugoslavia to the Independent State of Croatia'.

The Legal provision on the recognition of the local citizenship to Croats from the territory of the former Kingdom of Yugoslavia also specifies who should be considered a Croat for the purposes of the legal provision. It states that Croats are, regardless of state membership, 'legitimate children of a Croat father, and illegitimate children of a Croatian mother, if they are of Aryan origin'.[40] Furthermore, a Croat is 'a widow who was Croat by birth, even if their deceased husband was of another nationality'.[41] As Croat had to be considered also 'Croatian widow (meaning that her husband was Croat) if she has living minor children of Aryan origin, and if she raises those children in the Croatian spirit'.[42]

This provision enables a very broad granting of local citizenship rights to Croats from the territory of the former Yugoslavia that did not become part of the Independent State of Croatia, under the assumption of Aryan origin. It also makes possible recognition of nationality to the widow of a Croat who was not a Croat by birth but under certain assumptions (underage children of Aryan origin and their upbringing in the Croatian spirit). Such an inclusive rule made it possible for Croats who on 10 April 1941 became foreign citizens to acquire citizenship of the Independent State of Croatia without special formalities by only local naturalisation. This also meant that Croats should ask for naturalisation by the Ministry of Internal Affairs only exceptionally. One of such cases was the case of Petar Armanini, an Italian citizen of Croatian ethnicity. He lived in Maribor (the Third Reich) and did not settle on the territory of the Independent State of Croatia. Therefore, he could not acquire citizenship of the Independent State of Croatia by local naturalisation. Instead, he was naturalised by the decree of the Minister of Internal Affairs.[43] Due to the article 5 of the Legal provision on the recognition of local citizenship to Croats from the territory of the former Kingdom of Yugoslavia, persons who were not Croats were excluded. That is why Eleonora Feldmann, although recognised as an honorary Aryan was refused with her request for local naturalisation.[44]

Slovenes. The second group of people who could acquire citizenship of the Independent State of Croatia based on acquisition of local citizenship were Slovenes. The issue regulated the Legal provision on acquisition of local citizenship of persons from the former Slovenia, enacted in November 1941.[45] This legal provision stipulates that a person from the former Slovenia who permanently settled in Croatia could acquire local citizenship in a municipality of residence. It was only necessary to submit a request for acquisition of local citizenship within six months.[46] The second article of the above-mentioned legal provision prescribed that citizenship in the municipality of permanent settlement is acquired *ex lege* by 'persons from the former Slovenia who had been moved to the territory of the

[34] Cf. art. 2, *Ibid.*
[35] Cf. art. 2, *Ibid.*
[36] Cf. art. 4. paragraph 2, *Ibid.*
[37] Cf. art. 3, *Ibid.*
[38] Cf. art. 3, *Ibid.*
[39] Cf. art. 4. paragraph 2, *Ibid.*
[40] Cf. art. 5, *Ibid.*
[41] Cf. art. 5, *Ibid.*
[42] Cf. art. 5, *Ibid.*
[43] Cf. HDA MUP, personal files, file 16219 (Armanini, Petar).
[44] However, she was later recognised as a citizen of the Independent State of Croatia *via* ministerial decree. HDA MUP, personal files, file 16658 (Feldmann, Eleonora).
[45] Narodne novine, 12. studenoga 1941. br. 176.
[46] Cf. art. 1 of the Legal provision on acquisition of local citizenship of persons from the former Slovenia.

Independent State of Croatia'. This rule affected reallocated Slovenes after April 10, 1941.

Czechs. Another group of people who could acquire citizenship of the Independent State of Croatia based on acquisition of local citizenship were Czechs. At first this situation was not regulated so many Czechs who submitted pleas for naturalisation before April 10 of 1941 were put on hold.[47] Later, the issue of naturalisation of Czechs was regulated by the Legal provision on the acquisition of local citizenship for members of the Protectorate of Bohemia and Moravia who were born on the territory of the Independent State of Croatia, enacted at the end of 1943.[48] This legal provision stipulates that 'members of the Protectorate of the Czech Republic and Moravia, born and permanently residing on the territory of the Independent State of Croatia, who did not have a local citizenship in one of the municipalities of the Independent State of Croatia until the date of promulgation of this legal provision, may acquire a local citizenship in the municipality, in which they reside on the day of promulgation of this legal provision'.[49] Persons who wanted to acquire citizenship on this basis had to request citizenship within six months from the promulgation of the legal provision, i.e., from December 4, 1943.[50] The aforementioned provision stipulates that a person acquires citizenship 'on the day of submission of the application to the municipality'.[51] This means that the authorities did not have the right to make a discretionary decision in the aforementioned cases. Furthermore, this legal provision stipulates that the petitioner's wife and children acquire citizenship regardless of their place of birth, assuming that they are members of the Protectorate of Bohemia and Moravia.[52] This provision basically reflected the principle of family unity. Finally, the legal provision in Article 3 makes it possible for the head of the family to claim citizenship under certain conditions even though he was not born on the territory of the Independent State of Croatia.[53] This provision also imposes an obligation on municipalities to 'immediately register the petitioner and family members in the register of natives' and to 'issue them a certificate of acquired local citizenship free of charge no later than one month after receiving the application'.[54]

This provision was supposed to solve the issue of acquiring citizenship of citizens of the Protectorate of Bohemia and Moravia who were born on the territory of the NDH. The provision thus enabled all those whose naturalisation was stopped by the foundation in 1941 to acquire new local and national citizenship. Until then, these persons could acquire citizenship only exceptionally by the decree of the Minister of Internal Affairs. According to this, as we could unquestionably determine, only two members of the Czech Bohemian protectorate acquired citizenship in this way. It was Albin Hameršmid, a Czech Bohemian citizen, born on Croatian soil, in Senj, who participated in the Velebit uprising in early 1930 s, an uprising organised by the Ustasha organisation.[55] The other case was of Vjekoslav Šilhavi, a student of the Faculty of Law in Zagreb, and a member of the Ustasha organisation before the Second World War.[56]

5. Conclusion

The research indicates that the matters of citizenship and naturalisations in the Independent State of Croatia were significantly underregulated. Except basic norms about citizens and state members and very detail rules about racial affiliation, a large part of citizenship law was not regulated or was regulated very fragmentally. This was the case with naturalisations as well, although, according to the sources, an initiative for regulation of such matters existed in the mid of 1941. In such circumstances when regulation did not exist, the issue of naturalisations was solved on a case-by-case basis and was result, as it seems, of good connections in the structures of government or/and in the structures of the Ustasha organisation. That is why only a small number of foreigners acquired citizenship of the Independent State of Croatia in this way. In these procedures, the racial element came to the fore, although two Jewish women (who were previously recognised as honorary Aryans) also managed to be naturalised in this way.

While naturalisations by the decree of the Minister of Internal Affairs were very exceptional, mass naturalisations were done based on special rules about local citizenship. These rules provided an easy and very wide inclusion of Croats form the territory of the former Kingdom of Yugoslavia. However, these rules were also excluding in case of non-Aryans since the legal definition of a Croat included racial element. It seems that only exceptionally recognising non-Aryans as Croats could have been possible in case of a widow of a Croat if she raised a minor in the Croatian spirit. Finally, it must be repeated that the rules on local citizenship made possible acquisition of local citizenship for Slovenes and for most Czechs who had been living on the territory for decades.

[47] See some cases in: HDA MUP, the boxes 100, 103, 106.
[48] Narodne novine, 4. prosinca 1943., br. 278.
[49] Cf. art. 1 of the Legal provision on the acquisition of local citizenship for members of the Protectorate of Bohemia and Moravia who were born on the territory of the Independent State of Croatia.
[50] Cf. art. 1, *Ibid.*
[51] Cf. art. 1, *Ibid.*
[52] Cf. art. 2, *Ibid.*
[53] See the art. 3, *Ibid.*
[54] Cf. art. 4, *Ibid.*
[55] HDA MUP, personal files, file 16329 (Hameršmid, Albin).
[56] HDA MUP, personal files, the file 16113 and the file 4330 (Šilhavi, Vjekoslav).

From *Bona Fides to Laba Ticība:* Historical Interpretation of the Good Faith Principle in Latvian Law

Aleksejs Jelisejevs *

Abstract

This paper focuses on a scientific analysis of the genesis and historical development of the good faith principle as a doctrinal interpretation of Latvian regulations. It is about the evolution of attitudes toward the principle of bona fides in modern legal science and case law, starting with its origins in archaic Roman law and its rediscovery by Justinian's Corpus Juris Civilis through its application in the Western medieval ius commune and its continental renaissance in the early twentieth century, considering its limited position in the Code of Civil Laws of the Baltic Provinces to its triumph in Latvian civil law. This comparative historical study shows that a clear definition of good faith can be found through a system-historical interpretation of the good faith rule. This should help to determine the nature of subjective rights and obligations under any legal rule governing specific legal relationships.

Keywords: *Bona fides; good faith; historical interpretation; Roman maxims; legal principles.*

1. Introduction

Often, overly strict positivism when applying legal rules and contractual conditions is a barrier to the effective protection of consumer rights. For example, this is evident when closing a bank account against the will of a payment service user (so-called de-banking). In order to mitigate this problem, previous works have proposed using the well-established Roman maxim of *bona fides* as a doctrinal interpretation of modern EU and Latvian legislation regulating the revocation of payment services by banks.[1] However, such an *interpretatio prudentium* is ineffective without a scientific analysis of the origin and historical development of the good faith principle to which this study is devoted.

Starting from the origin of this legal principle in archaic Roman law and its rediscovery in Justinian's *Corpus Juris Civilis*, through its application in the Western medieval *ius commune*, and its continental renaissance in the early twentieth century, this article focuses on the triumphant "*laba ticība*" approach of 1937 Latvian Civil Law. The author appreciates the role of good faith in restoring the supremacy of law in the Western legal tradition after the fall of the occupying communist regime and analyzes the evolution of attitudes toward this principle in Latvian modern legal science and case law.

The methodological basis of this research is based on formal logical and general scientific approaches (analysis and synthesis, abstraction and concretization, deduction, induction, comparison, and analogy). First, a particular historical and legal scientific research method was applied.

2. Advent of *Bona Fides*

There is no doubt that the concept of good faith, known as *bona fides*, originated in Roman law.[2] In the time of the old *ius civile*,[3] when subjective rights enforceable by law were defined only by the limited number of claims recognized by legislation – on the Twelve Tables or by the later *plebiscita*[4] – and were actionable exclusively by uttering the correct solemn *formulae* before the *praetor*,[5] what was later called the procedure of *legis action*,[6] the concept of *fides*[7] – literally, faith – was a moral and

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1 See, e.g., JELISEJEVS, A., Crucial Issues with Legal Protection of Consumers Human Rights When Banks Unilaterally Close Accounts. In: *Athens Journal of Law,* vol. 7, 2021, p. 617-634, and JELISEJEVS, A., De-Banking v Good Faith: Doctrinal Assessment of Bank's Interests when Terminating Payment Account Without Customer's Consent in the View of EU and Latvian Law. In: *Liverpool Law Review*, vol. 44, 2023, p. 183-204.

2 WHITTAKER, S. - ZIMMERMANN, R., Good Faith in European Contract Law: Surveying the Legal Landscape. In: BUSSANI, M. and MATTEI. U. (Ed.), *Good Faith in European Contract Law.* New York, 2000, p. 16.

3 BOVE, L., *La consuetudine in diritto romano*. vol. 1, Napoli, 1971.

4 KASER, M. - HACKL, K., *Das römische Zivilprozeßrecht*. 2nd ed., Munich, 1996, p. 35.

5 GUARINO, A., *Diritto private romano*. 7th ed., Napoli, 1984, p. 176.

6 PUGLIESE, G., *II processo civile romano*. vol 1, Roma, 1961, p. 11.

7 KUNKEL, W., Die fides als schöpferisches Element im römischen Schuldrecht. In: KOSCHAKER, P. (Ed.), *Festschrift Paul Koschaker*. Vol. 2, Weimar, 1939, p. 2.

sacral principle supported by religious sanctions.[8] In this context, *fides* served as an extra-legal basis for enforcing relationships that civil law did not permit but in which a man had given his word. It required that his word be kept and his conduct be in accordance with it.[9] In this way, *fides* generated an obligation not unlike that arising from strict civil law. From the point of view of the old *ius civile*, however, it was still not a legal principle of obligation but rather its precursor.

As the Republic progressed, the need to develop society and commerce exceeded the limits of the *legis actiones*.[10] On the one hand, some legal institutions, including *tutela* (guardianship), *fiducia* (trusts), the primitive *societas* (partnership), *mandate* (mandate), and *dos* (dowry),[11] rooted in *fides*, had already become established in the *ius civile* and were waiting to be sanctioned by civil actions to make them actionable.[12] That is, there had to be an admission of a remedy in a different sphere than the previously available action. On the other hand, both the old *ius civile*-based relationships and the new *fides*-sourced obligations required new dispute resolution mechanisms that could expand the *iudex*'s discretion in adjudication.

Probably during the third century B.C., one response to these challenges was the addition of a new type of procedure to *legis actiones* – the formulary system.[13] This no longer depended on the utterance of ritual phrases by the parties in the dispute. The *agere* of the plaintiff and the defendant was limited to a free statement of the facts and the submission of both to the procedural formula issued by the praetor, which established the litigation program and appointed a judge to decide the dispute.[14] This judge had to examine the facts described in the *formula* (*demonstratio*)[15] and render a judgment on the asserted claims and defenses (*intentio*). The *formula* also contained instructions for the judgment (*condemnatio*), should the plaintiff's allegations prove correct.[16] Since the *formulae* had to be publicly announced by the new *praetor*[17] in his yearly edict (*ius honorarium*), their arrangement provided extensive opportunities to expand the list of actionable claims.

Moreover, since the formula contained not only an enumeration of the agreed facts and an instruction for the judge's task but also a reference to the basis of the action, it could determine their common objective standard (*una norma obiettiva*), which could be "fides bona."[18] This way, the "*bonae fidei indicia"* were developed as the formulae, beginning with a *demonstratio.*[19]

It is not known when the edict began to contain actions based not on the old *civil oportere* but on *oportere ex fide bona*. The Italian jurist Mario Talamanca[20] and some other scholars[21] date the emergence of the *bonae fidei indicia* as far back as the third century B.C. because they associate it more closely with the development of the formulary procedure. In contrast, the German legal historian Franz Wieacker[22] estimates its emergence in the second half of the second century B.C. as a procedural reform to modernize the existing *ius civile* remedies. In contrast to both above, Luigi Lombardi[23] argues that the *bonae fidei indicia* emerged only "*ai tempi di M. Catone e Q, Mucio,"* that is, at the time of Cicero. In any case, Cicero's *De Officiis* contains a catalog, quoted directly from Quintus Mucius Scaevola Pontifex, of those contractual relationships that were subject to *bona fides*.[24] Therefore, we can confidently say that at the beginning of the first century B.C., *bona fides* were no longer considered ethical yardsticks of contractual liability and were incorporated into praetorian law (*ius honorarium*).[25]

The genesis and typology of *bonae fidei iudicium* reconciled[26] the two ways of applying fides when *bona fides* was initially invoked as a ground for obligation,[27] that is, when it formed its new source, where it was only the measure of the judge's discretion,[28] where it merely supplemented the old *civilian oportere*, thus providing the judge with a tool for assess-

[8] WIEACKER, F., Zum Ursprung der bonae fidei iudicia. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*. Vol. 80, 1963, p. 29-31.
[9] TURPIN, C., Bonae Fidei Iudicia. In: *The Cambridge Law Journal*, vol. 23, 1965, p. 262.
[10] Ibid., p. 263.
[11] KASER, M., *Das Altrömische Ius, Studien zur Rechtsvorstellung und Rechtsgeschichte der Römer*. Göttingen, 1949, p. 296-298.
[12] WIEACKER, Zum Ursprung, p. 29-31.
[13] WIEACKER, F., *Römische Rechtsgeschichte - Einleitung, Quellenkunde, Frühzeit und Republik.* Munich, 1989, p. 447.
[14] SELB, W., Zu den Anfängen des Formular Verfahrens. In: *Festschrift für Werner Flume zum*, vol. 70, 1978, p. 199.
[15] A *demonstratio* was contained only in actions for a claim, the amount of which was still uncertain at the time when the action was brought (actions for an *incertum*).
[16] SCHERMAIER, M. J., Bona Fides in Roman Contract Law. In: BUSSANI, M. - MATTEI, U. (ed.), *Good Faith in European Contract Law*. New York, 2000, p. 73.
[17] WIEACKER, Römische Rechtsgeschichte, p. 429.
[18] The example of the formula for *actio empti (actio depositi)* would have run as follows: "*Quod Aulus Agerius de Numerio Negidio hominem, quo de agitur, emit,-quod Anlus Agerius apud N-um N-um mensam argenteam, qua de agitur, deposuit-qua de re agitur, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, ejus, judex N-um N-ium Aulo Agerio condemna, si non paret, absolve."* (ZAIKOV, A., *Roman Private Law in a Systematic Presentation*. Moscow, 2012, p. 472).
[19] ARANGIO-RUIZ, V., Le formule con demonstratio e la loro origine. In: *Studi Cagliar*. Rariora, Rome, [1912], 1946, p. 25.
[20] TALAMANCA, M., Vendita (dir. rom.). In: *Enciclopedia del diritto*. vol. XLVI, Milano, 1993, p. 303.
[21] See e.g., KASER - HACKL, Das römische Zivilprozeßrecht, p. 153.
[22] WIEACKER, Zum Ursprung, p. 34.
[23] LOMBARDI, L., *Dalla fides alla bona fides*. Milan, 1961, p. 180.
[24] SCHMIDLIN, B., Der verfahrensrechtliche Sinn des ex fide bona im Formularprozeß. In: HARDER, M. (ed.), *De iustitia et iure. Festgabe für Ulrich von Lübtow*. Berlin, 1980, p. 365.
[25] SCHERMAIER, Bona Fides, p. 74.
[26] KASER, M., Oportere und ius civile. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*. vol. 83, 1966, p. 27.
[27] KUNKEL, Die fides als schöpferisches, p. 5.
[28] CARCATERRA, A., *Intorno ai bonae fidei iudicia*. Napoli, 1964, p. 36, 45.

ing the standard of performance required. While the modern lawyer considers this dilemma essential, from the perspective of classical Roman law, this is somewhat of a false dichotomy.[29]

In turn, the *ex fide bona* clause of the formula extended the judge's *officium* from fact-finding and applying the terms of the formula to those facts to an assessment of the case's legal merits.[30] He was free to examine the claim itself and to judge, in accordance with the principles of good faith, whether and to what extent the claim was substantiated. A significant part of the *praetor*'s duties were thus transferred to the judge. Of course, the judge was limited to the formula issued by the praetor, but the bona fides clause allowed him to shape its substantive content. Therefore, even if *bona fides* were the basis of liability, they had, per se, also governed the exercise of the judicial function to broaden the scope of the judge's discretion in thoroughly investigating the circumstances of the case.[31] However, for the ideal of fides to be legally relevant, it had to be set up as the standard for one of the claims protected by a procedural formula.[32] Since the praetor specified more precisely, the civil *oportere* was unlikely, given the novelty of the claims.[33] If the *formula* was nevertheless conceived *in ius* and described the plaintiff's obligation as *dare facere oportere*,[34] one might assume that the *praetor* regarded fides as a new source of duties separate from the actions of the older *ius civile*.[35]

Ultimately, the *bona fides* approach gave the Roman judge equitable discretion to decide the case according to what seemed fair and reasonable.[36] However, the application of this procedural *formula* did not lead to uncertainty and arbitrariness, which have become nightmares for modern legal positivists. This was due to a concrete and uniform understanding of what corresponded to both *fides* and *bona fides*. This insight was rooted in Roman social ethics, which recognized the comprehensive duties of fidelity and faithfulness and encompassed both citizens and peregrines.[37]

While *fides* were understood as remaining faithful to one's word,[38] *bona fides* were used to ascertain the content of contracts.[39] Faithfulness to one's word is a prerequisite for all legal transactions, and Cicero therefore describes it as "*fundamentum iustitiae.*"[40] *Per contra*, *bona fides* do not require performance itself, but by obliging the parties to act honestly, they influence the way performance occurs.[41] Another telling sign of the special substantive qualification of *bona fide* relationships was that condemnation for breach of trust involved *infamia*.[42] On the other hand, merely breaking one's word did not give rise to *infamia* but triggered a contractual action, which could be an action *stricti iuris*, as in the case of verbal contract *stipulatio*.[43]

While the manner in which *fides* were extended to *bona fides* is largely unclear,[44] its qualification as *bona fides* emphasizes the new substantive specificity of that standard of behavior. Cicero clarifies it as a specific duty of loyalty based on the older fiduciary relationships (*bene agere*)[45] of the Roman citizen who acted carefully and prudently and who respected the interests of his contractual partner, i.e., who acted as *bonus vir.*[46] In the early times, the *arbitrium boni viri* was seen as an independent verdict of an arbitrator that took into consideration the interests of both parties.[47] As Schmidlin notes, the latter point indicates that the *bonae fidei iudicia* were intended to provide a means of balancing the interests of both parties in adjudicating an enforceable claim.[48] The development of *bonae fidei iudicia* thus followed the pattern of the three central elements of the classical *bona fides:*[49] (1) the substantive determination of the old fiduciary relationships (*bene agere*), (2) the binding nature of even an informal promise, and (c) the officium of the judge, who had to weigh both parties' interests.[50] This reasoning helps us separate the evolved *bona fides* from the source bona fides to overcome the spell of overly strict positivism.

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29 TURPIN, Bonae fidei Iudicia, p. 266.
30 SCHERMAIER, Bona Fides, p. 76.
31 TURPIN, Bonae Fidei Iudicia, p. 266.
32 SCHMIDLIN, Der verfahrensrechtliche Sinn des ex fide bona, p. 369.
33 NOORDRAVEN, G., *De fiducia in het Romeinse recht*. Deventer, 1988, p. 349.
34 WATSON, A., *The Law of Obligations in the Later Roman Republic*. Oxford, 1965, p. 172.
35 SCHERMAIER, Bona Fides, p. 75.
36 ZIMMERMANN, R., *The Law of Obligations: Roman Foundation of the Civilian Tradition*. Oxford, 1996, p. 667.
37 SCHERMAIER, Bona Fides, p. 77.
38 CICERO, M. T., *De officiis*, 1, 23: «*credamus…, quia fiat, quod dictum est, appellatam fides*» (DYCK, A. R., *A Commentary on Cicero, De Officiis*. Michigan, 1996, p. 115).
39 SCHERMAIER, Bona Fides, p. 78.
40 CICERO, De officiis, 1, 23: "*Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas*» (DYCK, A Commentary on Cicero, p. 115).
41 SCHERMAIER, Bona Fides, p. 78.
42 KASER, M., *Das Römische Privatrecht*. 2nd ed., Munich, 1971, p. 274.
43 Verbal contracts were formal promises, often reliant on ritual phrases; the most essential form was the *stipulatio* (ZIMMERMANN, The Law of Obligations, p. 117).
44 NÖRR, D., *Die Fides im römischen Völkerrecht*. Heidelberg, 1991, p. 43.
45 CICERO, Topica, 42, (REINHARD, T., *Cicero's Topica. Edited with an Introduction, Translation, and Commentary*. Oxford, 2006, p. 150).
46 SCHMIDLIN, Der verfahrensrechtliche Sinn des ex fide bona, p. 362.
47 BROGGINI, G., *Iudex arbiterve: Prolegomena zum Officium des römischen Privatrichters*. Köln, 1957, p. 115.
48 SCHMIDLIN, Der verfahrensrechtliche Sinn des ex fide bona, p. 365.
49 SCHERMAIER, Bona Fides, p. 82-83.
50 MAGDELAIN, A., Aspects arbitraux de la justice civile archaďque ŕ Rome. In: MAGDELAIN, A. (ed.), *Jus imperium auctoritas. Études de droit romain*. Rome, 1990, p. 591-652.

An example from Cicero, who combined the jurisprudential and practical points of view like no other, illustrates this transformation of the obligation to remain faithful to one's word into a duty to consider the counterparty's interests. He asserts, "[A] man receives a sword as a deposit and is thus obliged to return it whenever the depositor so requires. The depositor requests its return at a time when he has obviously become insane."[51] Unlike modern civil lawyers, Cicero's dilemma is not whether the mentally ill person can make a valid declaration of intent but whether the contractual duty to return the deposited object is stronger than the duty to prevent an insane person from harming themselves or others. Fides (as in honesty) and veritas (veracity) require that a promise be kept.

However, Cicero does not hesitate to subordinate this duty to another that has a higher priority under the circumstances: to harm no one and to consider the community's interests. As the situation changes, so does the duty.[52] A promisor is released from his promise when his performance is no longer of use to the promise or when the loss the promisor suffers from the performance exceeds the advantage gained by the promise.[53] Here Cicero weighs the interests of the contracting parties against each other, just as the judge was required to do by in the context of *bonae fidei iudicia*.

The fundamental difference between *bonae fidei iudicia* and actions *stricti iuris* becomes clear by briefly comparing the wording of these two procedural formulas as follows:

actio stricti iuris

During the pre-trial hearing before the praetor (in *iure*), the defendant had to request that his defenses (*exceptiones*) be included in the *formula.*[54]

bonae fidei iudicia

The judge would consider any defenses the defendant might raise against the claim.[55]

For example, if a defendant had granted a plaintiff an additional period for payment (*pactum de non petendo*) but then initiated proceedings against him anyway,

the defendant should have ensured that the praetor inserted an *exceptio pacti* in the formula of the *actio certae creditae pecuniae*, so that the judge could dismiss a claim if it was shown that payment of the debt had indeed been deferred. If the defendant had failed to request an exception, the judge was bound by the wording of the *actio certae creditae pecuniae* and therefore could not take the defendant's defense into account during the trial (*apud iudicem*).[56]

the judge was required to consider all arrangements between the plaintiff and the defendant in assessing the defendant's duty to perform. Informal ancillary agreements (*pacta adiecta*), including the *pactum protimiseos,*[57] or a provision for calling off a sale,[58] were independently actionable with the *iudicium* of the main contract.

The same situation applied where additional obligations were undertaken under the contract, such as interest, which

had to be expressly stipulated in the praetor's formula in response to the pre-trial request.[59]

could be awarded by the judge automatically and without special authorization.[60] At the same time, *bona fides* also limited the amount of interest that the creditor could claim. For instance, it was *contra bonam fidem* if he demanded interest for the time before the debtor was *in mora*[61] (default).

Counterclaims arising out of the same legal relationship to be offset against the main award (*compensatio*)

were not permitted. The only option was for the defendant to bring a cross-action. Marcus Aurelius' rescript allowed the defendant, at least, to introduce his counterclaim into the proceedings by means of *an exceptio doli.*[62]

were permissible for any claims.[63]

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[51] CICERO, De Officiis, 3, 30 (DYCK, A Commentary on Cicero, p. 387-391).

[52] Cicero, De Officiis, 1, 10 (ibid., p. 32): "*Referri enim decet ad ea, quae posui principio, fundamenta iustitiae primum ut ne cui noceatur, deinde ut communi utilitati serviatur. Ea cum tempore commutantur, commutatur officium et non semper est idem*"; CICERO, De Officiis, 1, 7 (ibid., p. 24): "*Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas*"

[53] CICERO, De Officiis, 3, 32 (ibid., p. 394).

[54] KASER - HACKL, Das römische Zivilprozeßrecht, p. 260.

[55] SCHERMAIER, Bona Fides, p, 84.

[56] KASER - HACKL, Das römische Zivilprozeßrecht, p. 260, 320.

[57] WATSON, A., *The Digest of Justinian*. vol. 2, Pennsylvania, 1998, D. 18, 1, 75 and D. 19. 1, 21, 5.

[58] KASER, Das Römische Privatrecht, p. 561.

[59] SCHERMAIER, Bona Fides, p. 85.

[60] Digest of Justinian, D. 22, 1, 32, 2: "*In bonae fidei contractibus ex mora usurae debenture.*"

[61] Digest of Justinian, D. 16, 3, 24.

[62] JUSTINIAN, Institutiones, I. 4, 6, 30, (SANDARS, T. C., *The Institutes of Justinian with English Introduction, Translation, and Notes*. London, 1853, p. 548).

[63] GAIUS, Institutiones, 4, 61, (POSTE, E., *Gai Institutiones: or, Institutes of Roman law.* 4th ed., Oxford, 1904, p. 224); LIEBS, D., *Römisches Recht.* 6th ed., Berlin, 2004, p. 296.

This expansion of judicial discretion in assessing the merits of a case based on the *bona fide* clause under the auspices of a general value system[64] curbed excessive procedural formalism.[65] Eventually, the *bona fides* themselves could be reconciled with *iudicia stricti iuris* through the formula clause known as "*exceptio doli.*"[66] Cicero describes the standard of *bona fides* – the notion of *bene agree* – as the conceptual opposite of fraudulent behavior (*dolus*).[67] In turn, any act of *dolus* would usually result in a judgment against the guilty party, regardless of whether it was committed during the formation of the contract or by way of a cause of action.

Conversely, the judge would not allow a contractual action by the fraudulent party to succeed.[68] Thus, the *dolus* was not so much grounded in personal misconduct as in the inequity or injustice resulting from the action's success.[69] Therefore, the *exceptio doli* was an integral part of the *bonae fidei iudicia*,[70] and the judge always implicitly considered whether the plaintiff's claim or bringing the action was based on *dolus*,[71] that is, tested by *bona fides* tools. This serves as a good guideline for the modern judiciary system to stop pitting peremptory legal norms against the standard of good faith behavior.

From the end of the classical period, the decline and eventual abolition of the formulary procedure gradually led to an absorption of the concept of *bona fides* into the broader notion of *aequitas* (equity),[72] which, among other things, combined the two basic meanings of *fides*: keeping one's word and observing a certain standard of behavior.[73] Together with *humanitas* and *benignitas,*[74] *aequitas* proved to be more flexible and comprehensive than the concept of *bona fides*, confined as it was to the ideas of loyalty and fair dealing between contracting parties.[75] At the same time, it had given rise to such finely nuanced considerations and shaped such legal institutions that they became part and parcel of the civilian heritage on which modern legal systems are based. Liability for latent defects, rules on implied warranties of peaceable possession, rescission of contracts for a mistake, and *metus* inspired these and many other institutions of modern contract law to owe their appearance and development to conscientiousness, the *iudicia bonae fidei* of Roman law.[76] *Per se*, the *bona fides* were reborn as substantive principles, thus shedding their procedural shell.

3. Medieval Restoration and New Meanings

Throughout the Middle Ages and the early modern period, *aequitas* remained at the forefront of discussion as a counterweight to *ius strictum* (strict law)[77] but was generally equated with *bona fides*. The medieval jurists writing on Roman and canon law used the terms "good faith" or "equity" to describe three types of conduct expected of the contracting parties: (1) each party should keep its word; (2) neither party should take advantage of the other by misleading it or making too hard a bargain; and (3) each party should abide by the obligations that an honest person would recognize, even if they were not expressly undertaken.[78] However, instead of defining the essence and substance of the *bona fides* concept as a general guide for the legal regulation of contractual relationships, the jurists developed a rudimentary schema for classifying their Roman legal texts to describe individual situations in which good faith was required and how the parties should act in each case.[79] In the field of contract law, then, good faith and equity remained amorphous concepts, whereas canon lawyers would have been expected to make a clear statement of what Christian morality required.

These "phantom pains" of the Middle Ages are still evident today when modern jurists warn that one should not expect to find a clear rule of good faith[80] but should be content to list various situations where the courts found a breach of good faith (so-called "*Fallgruppen*," according to German lawyers).[81] Similarly, the American lawyer Robert Summers described good faith as

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64 In some late classical texts, *bona fides* is even linked to the moral category of the *boni mores*. The Digest of Justinian: D. 16, 3, 1, 7 and D. 22, 1, 5, (WATSON, The Digest of Justinian, p. 11, 117); MAYER-MALY, T., Contra bonos mores. In: Benöhr, H.-P. (ed.), *Iuris Professio, Festgabe für Max Kaser zum 80. Geburtstag*. Wien, 1986, p. 151, 158.

65 SCHERMAIER, Bona Fides, p. 84.

66 WHITTAKER - ZIMMERMANN, Good Faith in European Contract Law, p. 16.

67 CICERO, De Officiis (MILLER, W. (trans.), *Cicero. De officiis.* London, 1913, p. 3, 14); CICERO, De Officiis (ibid. p. 330).

68 SCHERMAIER, Bona Fides, p. 86.

69 MACCORMACK, G., Dolus in the Law of the Early Classical Period (Labeo-Celsus). In: *Studia et documenta historiae et iuris*. vol. 52, 1986, p. 263.

70 Julian states, „*Quia hoc iudicium fidei bonae est et continet in se doli mali exceptionem*" (The Digest of Justinian, D. 30, 84, 5 (WATSON, The Digest of Justinian, p. 24).

71 SCHERMAIER, Bona Fides, p. 87.

72 BECK, A., Zu den grundprinzipien der bona fides im römischen vertragsrecht. In: *Aequitas und bona fides. Festgabe zum 70. Geburtstag von August Simonius*, ed. Juristischen Fakultät der Universität Basel, Basel, 1955, p. 24.

73 WALDSTEIN, W., Entscheidungsgrundlagen der klassischen römischen Juristen. In: Hildegard TEMPORINI H. (ed.), *Band 15 Recht (Methoden, Schulen, Einzelne Juristen*). Berlin, 1976, p. 77.

74 BECK, Zu den grundprinzipien der bona fides, p. 29.

75 SCHERMAIER, Bona Fides, p. 89.

76 WHITTAKER - ZIMMERMANN, Good Faith in European Contract Law, p. 17.

77 SCHRÖDER, J., Aequitas und Rechtsquellenlehre in der frühen Neuzeit. In: *Quaderni Fiorentini*, vol. 26, 1997, p. 265.

78 GORDLEY, J., Good Faith in Contract Law in the Medieval Ius Commune. In: BUSSANI, M. and MATTEI, U. (ed.), Good Faith in European Contract Law. In: New York, 2000, p. 94.

79 Ibid.

80 ROTH, H., § 242. In: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. 5th ed., München, 2007.

81 HESSELINK, M., The Concept of Good Faith. In: *Towards a European Civil Code*. 4th ed., Alphen aan den Rijn, 2011, p. 623.

an "excluder," that is, "a concept that cannot be defined but excludes heterogeneous instances of bad faith."[82] Thus, although good faith has long been elevated to the status of the rule of law in many jurisdictions, modern lawyers continue to imitate their colleagues of the past, who explained what good faith is in each specific situation with systems or schemas that appear to be completely independent of a general notion of good faith.[83]

Although medieval jurists concluded that one must keep one's word in good faith, equity, and the *ius gentium*,[84] they could never convincingly reconcile this principle with the rules of Roman law.[85] Moreover, even canon law did not maintain that every agreement was enforceable[86] because, unlike civilians, the primary concern was not whether an agreement was actionable but whether the breach was a sin.[87]

Similarly, medieval lawyers developed a system of classifying Roman texts to explain good faith by the absence of *dolus* or deceit,[88] which was only weakly connected to the concept of *bona fides* as such.[89] *Dolus*, or "fraud," was classified as "causal" or "incidental"[90] with two different remedies. "Causal fraud," which induced a person to enter into a contract who otherwise would not have done so,[91] enabled its victim to avoid his contract altogether. The victim of "incidental fraud," which induced him to contract on less favorable terms,[92] could demand the price he would otherwise have received if he had been the victim of fraud in the ordinary sense, that is, if the other party had intentionally (*ex proposito*) deceived him.[93] According to medieval doctrine, if a person was not intentionally deceived but nevertheless, like the victim of incidental fraud *ex proposito*, had entered into a contract on unfavorable terms, he became the victim of fraud based on the transaction itself (*dolus ex re ipsa*), that is, "the transaction itself had deceit within it."[94]

Finally, the canonists reiterated the civilians' conclusion that in contracts of good faith, unlike those under strict law, the parties are bound by the unexpressed terms that good faith requires.[95] They said that the terms that must be read into an agreement in the absence of an express provision come from the "nature" of the contract.[96] From this, the jurists concluded that every type of contract has its natural terms and that a party must observe them in good faith, in equity, and according to the *ius gentium*.[97] However, they never explained the relationship between the "nature" or "substance" of a contract on the one hand and equity, good faith, and the *ius gentium* on the other.[98] Instead, they fitted the Roman texts into a different schema, where good faith meant doing what could be expected of an honest person who entered into a particular kind of transaction.[99]

Nevertheless, a way out of this deadlock was found at the end of the Middle Ages when Baldus de Ubaldis, the last great medieval jurist, developed a coherent conception of good faith through equity.[100] In doing so, he apparently drew on philosophical ideas borrowed from Aristotle and Thomas Aquinas.

Like the jurists who preceded him, Baldus identified good faith with equity[101] and conscience.[102] But he gave special attention to one critical principle of good faith: the requirement that no one be enriched at another's expense. This principle is similar to the principle of equality, which, according to Aristotle[103] and Thomas Aquinas,[104] is the foundation of commutative justice, defined as exchange. While distributive justice ensured each citizen a fair share of whatever wealth and honor society had to divide, commutative justice preserved each citizen's share.[105] Thus, according to Aristotle, each party in the exchange had to give something of equal value to what they

[82] SUMMERS, R., Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code. In: *Virginia Law Review*. vol. 54, 1968, p. 196.
[83] GORDLEY, Good Faith in Contract Law, p. 117.
[84] BEHRENDS, O., Treu und Glauben. Zu den christlichen Grundlagen der Willenstheorie im heutigen Vertragsrecht. In: VALLAURI, L. - DILCHER, G. (ed.), *Christentum, Säkularisation und modernes Recht*. vol. 2, Milano, 1981, p. 957.
[85] GORDLEY, Good Faith in Contract Law, p. 98.
[86] French legal historian Jules Roussier correctly noted that one cannot infer from their silence that they thought all agreements were enforceable (ROUSSIER, J., *Le fondement de l'obligation contractuelle dans le droit classique de l'église*. Paris, 1933, p. 179-181).
[87] ASTUTI, G., I principi fondamentali dei contratti nella storia del diritto Italiano. In: *Annali di storia del diritto*. vol. 1, 1957, p. 34-37.
[88] GORDLEY, Good Faith in Contract Law, p. 100.
[89] Ibid., p. 102.
[90] This schema had been developed early on by the Glossator. See e.g., ROGERIUS, Summa Codicis. In: GAUDENTIUS, A. (ed.), *Bibliotheca iuridica medii aevi: Scripta anecdota Glossatorum I.* Bologna, 1888; PORTIUS. A. [Azo of Bologna], *Summa Azonis*, Lyon, 1557, and others.
[91] For example, the seller of a horse might tell a lie to make the buyer think he would soon lose his own horse.
[92] For example, the seller might lie about the age of the horse to get a better price.
[93] GORDLEY, Good Faith in Contract Law, p. 101.
[94] Ibid.
[95] Ibid., p. 105.
[96] Ibid., p. 103.
[97] Ibid., p. 104.
[98] Ibid., p. 105.
[99] Ibid., p. 103.
[100] Ibid., p. 106.
[101] DE UBALDIS, B., *Decretalium Volumen Commentaria.* Torino, [1595] 1971), to X *(Liber Extra – Corpus Juris Canonici*), to 1, 29, 3; DE UBALDIS, B., *Corpus iuris civilis.* Luca Antonio Giunta, 1577, to D. 16, 3, 31.
[102] DE UBALDIS, Decretalium Volumen Commentaria, to X 1, 29, 3.
[103] ARISTOTLE, *Nicomachean Ethics*. translated by ROSS, W., Kitchener, 1999, p. 73-75.
[104] AQUINAS, T., *Summa Theologiae*. Augsburg, 2012, II-II. gv. 77.
[105] Aristotle, Nichomachean Ethics, p. 73-75.

received.[106] For Baldus, it was "the rule of rules in the life of conscience" that he called "natural" or "general" equity.[107]

To avoid confusion in explaining the word "equity," Baldus used two definitions, which he called "generic" and "specific" equity (*aequitas* in genre and *aequitas* in species).[108] He defined "generic equity" as the attainment of a just result, that is, a "correct judgment" taking into account "both substance and circumstances."[109] This is achieved through an exchange that excludes enrichment at the expense of others. In discussing the remedy, Baldus maintained that generic equity or equality in contracts must be considered in both their interpretation and justification.[110] In contrast, "specific equity" meant deviating from the law when circumstances required.[111] Since laws are framed in general terms, as Thomas Aquinas reflected, circumstances can always arise in which the lawmaker himself does not want the law to be followed. Equity means that the law should not be applied under such circumstances.[112]

At the same time, the perpetrator does not consistently profit at the victim's expense when he violates equity through breach of word and causal fraud.[113] Therefore, Baldus distinguished several kinds of good contractual faith of the judge for two purposes: first, to know whether contracts are binding or not, and second, to know what obligations the parties have and whether they have been fulfilled. For this second purpose, good faith has two meanings: the absence of *dolus* and the observance of what the parties are obliged to do according to generic equity and the order of the law. In cases of doubt, natural equity must be observed when it comes to matters not expressed in the law and the order of the law when it comes to matters expressed in the law.[114]

Thus, according to Baldus, generic (natural) equity was a kind of good faith distinct from fidelity to one's promises and the mere absence of *dolus*.[115] This allowed for the limitation of one's duty to keep one's word only in a situation with a contractual basis.[116] This basis could only be either "liberality" or the receipt of something in return for what one gave.[117]

As Aristotle said, liberality meant not only giving away wealth but giving it "to the right people, [in] the right amounts, and at the right time."[118] Indeed, Baldus presumed that giving wealth away was either an act of liberality or foolishness, which meant that the contract could be made out of "foolishness" rather than "liberality."[119] If, for example, an ignorant person waived the remedy of *laesio enormis,* the judge should assume that he did so "more from stupidity than from liberality."[120] Therefore, such a contractual word might not be honored on the grounds of equity.

It also follows that a contract is "principally ordered" to the "essential" or "substantial" terms of its "original root." The natural terms are "an extension of this root to the production of mere qualities," to which the contract is "consecutively ordered."[121] While the natural terms are "according to the nature of a contract," the accidental terms go "beyond its nature."[122] They are a "form [that] can be added or subtracted without a substantial change in the subject."[123] Since they correspond to the nature of the contract, the natural terms belong to it "tacitly."[124] The parties can modify them by express agreement, but this is possible only up to a certain point.[125] It is the source of the obligations that the parties must respect but to which they have not expressly agreed (so-called implied obligations).[126]

4. Landing to Latvia

To date, researchers have not directly addressed the issue of the genesis and development of good faith in the Latvian legal system prior to the civil law codification of the Baltic provinces in the second half of the nineteenth century (see below). However, general historical information invites us to draw some conclusions. Insofar as the canon law of the Catholic Church regulated the life of the Livonian clergy in the thirteenth to fifteenth centuries,[127] the relations between the Church, its servants, and the laity were likely influenced by the above-mentioned medieval doctrine of good faith, including its further develop-

[106] Ibid., p. 77-81.
[107] *„Regula regularum in via conscientie est, non locupletari cum aliena iactura*" (DE UBALDIS, Decretalium Volumen Commentaria, X 1, 2, 8 no.1).
[108] GORDLEY, Good Faith in Contract Law, p. 108.
[109] DE UBALDIS, Corpus iuris civilis, to D. 1, 1, 1 pr. no. 5.
[110] Ibid., to C. 4, 44, 2 no. 48.
[111] GORDLEY, Good Faith in Contract Law, p. 108.
[112] DE UBALDIS, Corpus iuris civilis, to D. 1, 1, 1 pr. no. 5.
[113] GORDLEY, Good Faith in Contract Law, p. 109.
[114] DE UBALDIS, Corpus iuris civilis, to C. 4, 10, 4, nos. 1-2; GORDLEY, Good Faith in Contract Law, p. 109.
[115] GORDLEY, Good Faith in Contract Law, p. 110.
[116] DE UBALDIS, Decretalium Volumen Commentaria, to X 1, 4, 11 no. 30.
[117] GORDLEY, Good Faith in Contract Law, p. 114.
[118] ARISTOTLE, Nichomachean Ethics, p. 53-57.
[119] GORDLEY, Good Faith in Contract Law, p. 113.
[120] DE UBALDIS, Decretalium Volumen Commentaria, to C. 4, 44, 2 no. 21.
[121] Ibid., to C. 4, 38, 13 no. 8.
[122] Ibid., to D. 18, 1, 72, 1 no. 4.
[123] Ibid., to C. 4, 38, 13 nos. 6-7.
[124] Ibid., to D. 18, 1, 72
[125] GORDLEY, Good Faith in Contract Law, p. 111.
[126] Ibid., p. 110.
[127] BLŪZMA, V., The Impact of Western Legal Culture on the Formation of Latvian Legal System Before Establishing of the Latvian Statehood (13th-early 20th century). In: FRENKEL, D. - VARGA, N. (ed.), Law and History, Athens, 2015, p. 12.

ment by Baldus under the philosophical ideas of Aristotle and Thomas Aquinas.

A somewhat more complicated discussion concerns the town law (Stadtrecht) of Livonian towns, which was formed in the thirteenth century due to the reception of the law of northern German cities.[128] It is known that Riga adopted Hamburg laws, but from the fourteenth century on, it had an independent law, which was later extended to other towns in the Latvian territory.[129] While the Stadtrecht of some German towns was familiar to Treu und Glauben [130] (literally, fidelity and faith used as a synonym for *bona fides* in the context of commercial relations),[131] we do not have precise data on how this principle was applied in Hamburg Stadtrecht in 1270 and 1497. Nor is there any direct reference to "Treu und Glauben" in Riga's Stadtrecht.[132] However, since *bona fides* and *aequitas* dominated relations between merchants and became a fundamental principle of the medieval and early modern *lex mercatoria*,[133] there is no reason to doubt that Hamburg's and Riga's merchants did not need the flexibility, convenience, and informality of this "prime mover and life-giving spirit of commerce" [134] (as *Casaregis* put it).

Conversely, there is no doubt about the honorable status of *bona fides* in Livonian chivalric law, which was influenced by the reception of Roman law during the fifteenth to the eighteenth centuries. Notably, the Livonian code of chivalry was called the "Systematic or Revised Livonian Knighthood Law," in which it was directly stated in the fifteenth century that Roman law must be applied when the rules of this code were not applicable.[135] Moreover, as the prominent researcher of Latvian legal history Valdis Blūzma rightly noted,[136] the prestige of Roman law had contributed to its being declared an imperial law, according to which all civil cases had to be appealed to the Imperial Chamber Court (Reichskammergericht). This court was established in the Holy Roman Empire in 1495. In its archives, nineteenth-century researchers found twenty-nine Livonian legal cases from 1530 to 1564, confirming that Roman law was used to govern legal relations on Livonian territory. Thus, Livonia's civil turnover could not escape the requirements of *bona fides* to be implemented with legal regulation in the sense described above.

The Livonian War (1558 – 1583) and the expansion of the Polish-Lithuanian Commonwealth somewhat weakened, but did not eliminate, the systematic invocation of good faith rules in the founding of states on modern Latvian territory. The legal source of both the 1611 Pilten Statutes and the 1617 Statutes of Courland was Roman Law,[137] which promoted *bona fides* in civil circulation; this principle no longer applies to all contractual relationships. The Statutes of Courland were limited to enumerating a few specific legal situations in which good faith was still paramount. In particular, *bona fides* were mentioned as a standard of conduct for the repayment of loans (§ 89) [138] and the use of another's property in lending (§ 92).[139] Perhaps the most important provision concerned the duties of the seller, who must disclose in good faith all defects in the item sold and may not conceal anything that the buyer would never try to buy if he knew it from the beginning (§ 100).[140]

The Swedish dominion of Livonia had excellent potential to restore the good faith of its former glory. Since the seventeenth century, Swedish-Finnish contract law[141] has been deeply influenced by the European *ius commune*.[142] Their legal system was imbued with the Roman principle of *bona fides*,[143] as they were considered *contractus bonae fidei* according to the old medieval codes.[144] After the strengthening of the Swedish administration in the Livonian province (now southern Estonia and the central region of Latvia) in the twenties of the seventeenth century, Swedish law was prescribed as a subsidiary source of law in Swedish Livonia.[145] However, as Finnish legal historian Heikki Pihlajamaki argues, "Swedish statutory law gained only limited influence in Livonia" [146] because of the discrepancy between the procedural rules of Swedish Livonia and the judicial practice of the local courts.

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[128] Ibid.

[129] Ibid.

[130] With respect to Augsburg, see e.g., OFENBRÜGGEN, E., *Das Alamannische Strafrecht im deutschen Mittelalter.* Schaffhausen, 1860, p. 329; regarding Nuremburg, see e.g., SCHULTHEIß, W., *Das Ortsrecht der Stadt der Reichparteitage Nürnberg*, 1939, https://www.nuernberg.de/internet/stadtrecht/, x.

[131] STRÄTZ, H., *Treu und Glauben*. Paderborn, 1974.

[132] NAPIERSKY, J., *Die Quellen des Rigischen stadtrechts bis zum jahr 1673*, Riga, 1876.

[133] MEYER, R., *Bona fides und lex mercatoria in der europäischen Rechtstradition: Diss. (Quellen und Forschungen zum Recht und seiner Geschichte).* Göttingen, 1994, p. 61.

[134] "*Bona fides est primum mobile ac spiritus vivificans commercii,*" and in the same vein, Baldus stated, "*Bonam fidem valde requiri in his, qui plurimum negotiantur*" (good faith is much required of those who trade most). Both citations were taken from Bona fides und lex mercatoria, p. 62.

[135] VON RAHDEN, O., *Историческія свѣдѣнія об основаніях и ходѣ мѣстнаго законодательства губерній остзейских*, St. Petersburg, 1845, p. 133.

[136] BLŪZMA, The Impact of Western Legal Culture, p. 13.

[137] Ibid., p. 16.

[138] *Statuta Curlandica, feu Jura et Leges in ufum Nobilitatis Curlandicae et Semigallicae, de Anno MDCXVII*, Mitau, 1804, p. 70-02.

[139] Ibid., p. 74.

[140] Ibid., p. 80.

[141] Finland and Sweden formed a union before 1809, so Swedish law prevailed in Finland.

[142] WHITTAKER - ZIMMERMANN, Good Faith in European Contract Law, p. 55.

[143] *Per contra*, a direct influence of Roman law and culture in Sweden on other issues was weak because historically, Romans were not interested in the expansion into the regions of northern Europe (BLŪZMA, The Impact of Western Legal Culture, p. 18).

[144] WHITTAKER - ZIMMERMANN, Good Faith in European Contract Law, p. 56.

[145] BLŪZMA, V., Unification vs. Local Autonomy: Evolution of Law in Baltic Provinces Under Rule of the Great Powers in 16th-19th Century. In: *Proceedings of the International Scientific Conference "Social Changes in the Global World*". vol. 1, 2020, p. 21.

[146] PIHLAJAMÄKI, H., *Conquest and the Law in Swedish Livonia (ca. 1630-1710): A Case of Legal Pluralism in Early Modern Europe*. Leiden, 2017, p. 263.

Moreover, both Livonia's nobility and its Landtag deputies tried to prevent the replacement of the local law by the Swedish one.[147] The last attempt to unify the law of the Livonian province with Swedish law was also unsuccessful. During the Great Northern War, Charles XII issued a unique document on June 12, 1707, stating that henceforth, only Swedish laws would apply in Livonia. However, this order could not be implemented because Russian troops had occupied almost all of Livonia's territory since 1705.[148] Thus, the European *ius commune* could not penetrate the Livonian legal system via Swedish law to broaden the scope of the application of good faith requirements for contractual relations in this territory.

The arrival of the Russian Empire did not initially change the rules of the game for good faith in Baltic civil intercourse, as Russian emperors Peter I and Catherine II declared in the general confirmations of the newly won provinces (Livonia, Estonia, and Courland governorates) that local laws in these provinces would continue to be unbreakable.[149] This meant that the *bona fides* from Justinian's *Corpus iuris civilis* would continue to be administered in the Latvian regions for many decades to come.[150] However, as surprising as it may sound, the stem of this legal principle as a general rule for contractual behavior was severed by the codification of the law of the Ostsee Provinces in 1864, which some attributed to the triumph of Roman law[151] and called its second reception.[152]

Although almost 63% of all the rules (2882 articles out of 4600) in the Code of Civil Laws of the Baltic Provinces (part III of the codification of the Baltic's local laws) were taken from Roman law,[153] neither in their content nor in their historical sources was the *bona fides* concept cited or mentioned as such. Therefore, the 1864 Code did not contain a general rule that the limits of subjective rights should be defined in good faith.[154] Only Article 3444 prohibited chicanery, that is, actions with the direct intention to harm. The rules of Roman law on *exceptio doli generalis* were cited as historical sources.[155]

Of course, such an approach should not be surprising, for, by the nineteenth century, Aristotelian notions of equality for the concept of objective good faith had fallen out of fashion.[156] Thus, the French Civil Code commentators defined contracts solely in terms of the parties' will. According to them, the judge should carefully guard against interfering with the parties' decisions in the name of equity. The will had become the source of all the parties' obligations, and there was no higher standard by which it could be criticized or supplemented.[157] Nineteenth-century German jurists agreed with their French counterparts. When, in 1900, they established the requirement of good faith in § 242 of the German Civil Code (the obligor must perform in good faith, taking into account customary practice), this seemed innocuous. They insisted that "good faith no longer meant there were obligations of substantive fairness which the parties must respect."[158] But the genie was already out of the bottle.

While Latvia remained under the yoke of the Russian Empire, its academic and legal circles were not isolated from European law-making processes. Apparently, this is why the Riga district court judge, Vladimirs Bukovskis, again invoked good faith in 1914 to explain the Code of Civil Laws of the Baltic Provinces. In his basic commentary collection on this codification of the Baltic region's local laws, references were made to good faith, among other things, to clarify the rules on torts of a borrower (Art. 3760)[159] and of a seller in the transfer of goods (Art. 3861).[160] It was a yardstick for the contractor's obligation to consider the customer's interests in the execution of the construction plan (Art. 4228)[161] and for the holder's title concerning bearer securities (Art. 3129).[162] The basis of contractual good faith consisted in declaring to the performer the non-existence of the obligation – otherwise, it is a deception (Art. 3689),[163] but *bona fides* accepted in commercial life were analyzed in the context of consent by silence (Art. 2941),[164] and so on (Arts. 3016, 3290, 3854, 4220).

After the proclamation of the independent Republic of Latvia on November 18, 1918, the Code of Civil Laws of the Baltic Provinces was retained on the grounds of legal continuity under the law "On Retaining in Effect the Former Laws of Russia in Latvia" adopted by the Pre-Parliament of the Republic of Latvia – People's Council on December 5, 1919.[165] Therefore,

[147] BLŪZMA, Unification vs. Local Autonomy, p. 21-22.
[148] Ibid., p. 23.
[149] BLŪZMA, The Impact of Western Legal Culture, p. 19.
[150] LUTS-SOOTAK, M., Civil Code of the Ostsee Provinces (1864/65) as a Monument of Roman Law. In: *Vestnik NSU*. vol. 8, 1995, p. 273.
[151] YLANDER, A., Die Rolle des römischen Rechts im Privatrecht der Ostseeprovinzen Liv-, Est- und Kurland. In: *Zeitschrift für vergleichende Rechtswissenschaft*. vol. 35, 1918, p. 441.
[152] JEGOROV, J., Recepcija prava v istorii Estonii (XIII-XIX vv.). In: *Studia iuridica*, vol. 2, 1989, p. 104.
[153] KALNIŅŠ, V., *Latvijas PSR valsts un tiesību vesture 1. Daļa*. Rīga, 1972, p. 304.
[154] KRONS, M., Civillikuma pirmais pants. (Laba ticība kā tiesiskas rīcības kritērijs). In: *Tieslietu ministrijas Vēstnesis*. vol. 2, Riga, 1937, p. 286.
[155] BUKOVSKIS, V., *Сводъ Гражданскихъ Узаконеній Губерній Прибалтійскихъ съ продолженіемъ 1912-1914 г.г. и съ разъясненіями*. vol. II., Riga, 1914, p. 1398.
[156] GORDLEY, Good Faith in Contract Law, p. 115.
[157] LAURENT, F., *Principes de droit civil*. vol. 7, Paris, 1872, § 178, 208; § 182, 212.
[158] GORDLEY, Good Faith in Contract Law, p. 116.
[159] BUKOVSKIS, Сводъ Гражданскихъ Узаконеній, p. 1607.
[160] Ibid., p. 1646.
[161] Ibid., p. 1845-1846.
[162] Ibid., p. 1220-1224.
[163] Ibid., p. 1580.
[164] Ibid., p. 1117.
[165] BLŪZMA, The Impact of Western Legal Culture, p. 22.

the Latvian Senate (Supreme Court) could resume the prohibition of chicanery only within the framework of the abovementioned Article 3444 but could not test disputed contractual relationships from the viewpoint of good faith. In its rulings, however, the Senate found that the narrow wording of Article 3444 proved insufficient. As a result, in addition to the harmful purpose, the Senate also cited a protected interest or the absence of a legitimate interest as a characteristic of chicanery. In one case, the Senate even acknowledged the liability under Article 3444; although the purpose of the chicanery was not established, it was recognized that the defendant, although acting within the limits of the law, had infringed on the plaintiff's interests.[166] Indeed, this was a precursor to the restitution of good faith as a general principle of law.

5. Triumph and Oblivion

While the Latvian Civil Law of 1937 was essentially a creative revision of the Code of Civil Laws of the Baltic Provinces, retaining the previous system of legal material but reducing the number of articles from 4600 to 2400 by excluding certain rules,[167] there was one systemic breakthrough designed to change civil circulation. It was our "bona fides," which had not been recognized by G.F. von Bunge[168] but which climbed the pedestal of the new codification and occupied a prominent place. Of course, the number of articles in the codification should not be a strict criterion for determining the hierarchical force of legal rules. Nevertheless, no one will prevent us from pointing out that the good faith principle became the first article of civil law to overtake its progenitor – Article 2 of the Swiss Civil Code (ZGB).[169] According to the well-known sworn advocate of the interwar period, Mīrons Krons, "the legislator had given this rule great importance by placing it at the forefront of the other norms of the new law."[170]

Instead, the content of the wording is significant since good faith (in Latvian: "*laba ticība*") has become a general requirement for both the exercise of any civil rights and the fulfillment of any civil duties ("rights shall be exercised and duties fulfilled in good faith"). As Bernhards Berents, former Latvian Minister of Justice, put it, this principle should govern the entire application of the law and provide a guideline for the interpretation of the law as "the limit of all legal exercise." "It is a general requirement concerning the content of legal relationships. The reference to good faith is from thoroughly objective content and contains a supreme norm of conduct and the application of the law."[171] It helps to reconcile the law with justice as "the ultimate goal of all law" and should be used to combat the unfair use of formal rights when those rights are exercised according to the letter of the law or legal transaction but are contrary to their true goals.[172]

At the same time, the boldness of the legislator's innovation so frightened the law enforcers in the early days of the new civil law that they not only tried to limit its scope but also to distort the very essence of the good faith principle. The chairman of the Senate's Civil Cassation Department, Osvalds Ozoliņš, gently suggested that Article 1 merely recommended that persons fulfill their duties and use their rights in good faith.[173] This presupposes no strict obligation to act in good faith in civil circulation. However, the wording of this article gave rise to such doubts because, unlike its original Swiss source ("In exercising his rights and in performing his duties, everyone has to act in good faith"), it did not refer literally to the person's obligation to conduct himself in good faith but described general norms of conduct. Krons described this rule as dangerous in terms of its application and warned others not to invoke it. He stated that it should not become a panacea for all ills but could only provide solutions to the most common conflicts of interest.[174] Thus, contrary to the original idea of civil law, the de facto proposal was to return to the above lists of Fallgruppen. Berents seemed to be at his most vegetarian when he argued only that Article 1 should not constitute an independent legal source and should not lead to an interpretation of *contra legem*.[175]

Undoubtedly, Latvian jurists at that time had a frightening idea of how the rules of good faith were being used as a positivistic hook by their German counterparts, which, of course, could explain their anxiety. When German inflation reached unimaginable proportions in November 1923 (one gold mark traded for 522 billion paper marks), the Reichsgericht ruled that the currency laws had to be set aside insofar as they could not be reconciled with the dictates of good faith. Referring to § 242 of the German Civil Code, the court refused to allow debtors to discharge obligations entered into before the First World War by paying the nominal value of the debts in paper marks. In addition, the court considered itself entitled to set a new conversion rate.[176] This gave rise to the thesis that the good faith provision could be "the source of the baneful plague gnawing in a most sinister manner at the inner core of our legal culture.[177] These misgivings were fully confirmed by events after 1933. "Unlimited interpretation" was key to the insidious perversion

[166] KRONS, Civillikuma pirmais pants, p. 287.
[167] BLŪZMA, The Impact of Western Legal Culture, p. 22.
[168] Dr. jur. Friedrich Georg von Bunge was a codifier of the Code of Civil Laws of the Baltic Provinces (Ibid., p. 20).
[169] KRONS, Civillikuma pirmais pants, p. 281.
[170] Ibid., p. 270.
[171] BERENT, B., Die Einleitung. In: *Lettlands Zivilgesetzbuch*. vol. 28, Riga, 1938, p. 38-39.
[172] KRONS, Civillikuma pirmais pants, p. 270.
[173] OZOLIŅŠ, O., Civiltiesību organizējošā un audzinošā nozīme. Senāta civilā kasācijas departamenta priekšsēdētāja senātora Osvalda Ozoliņa referāts. In: *Prezidenta Ulmaņa Civillikums. Rakstu Krājums*. Rīga, 1938, p. 51.
[174] KRONS, Civillikuma Pirmais Pants, p. 298.
[175] BERENT, Die Einleitung, p. 40.
[176] WHITTAKER - ZIMMERMANN, Good Faith in European Contract Law, p. 20-22.
[177] HENLE, R., *Treu und Glauben im Rechtsverkehr*. Berlin, 1912, p. 3.

of the legal system, to imbue it with the spirit of the new "national" (*volkisch*) legal ideology.[178] The Latvian legal system was not exposed to such risks. Nevertheless, the limited interpretation of its Civil Law Article 1 by the first commentators remains the bane of invoking the requirements of good faith.

At that time, subsequent tragic historical events did not allow this collision. On November 26, 1940, the Latvian legal system plunged into occupation by Soviet law. The communist regime rejected the principles of Roman private law as individualistic, cosmopolitan, and selfish. Socialist legal theory tied ancient principles to the "bourgeoisie" and its goal of oppressing the working class. In addition to the above principles, the concept of *aequitas,* or *ius naturale,* was also rejected and replaced by a "higher" form of justice: class justice.[179] The legal systems of occupied Latvia, influenced by communist legal theory, were therefore based on the principle of inequality before the law for several groups of people – enemies of communist ideology.

6. Renaissance and Growing Pains

After the fall of the communist regime, Latvia wanted to reestablish its legal order in the tradition of Western legal culture. A return to Roman legal principles was a prerequisite for the success of this effort.[180] Justice was the baseline, and good faith followed.[181] Unlike other Eastern European states, Latvia chose a more straightforward path to return to Western private legal values. The legal technique for doing so was to restore the 1937 Civil Law, including the first article, *ex altera parte.* Yet our neighbors took a different approach and created new civil law codifications after their independence was restored. The Civil Code of Lithuania of 2000 literally obliges the subjects of civil relations to act according to the principle of good faith (Art. 1.5(1)).[182]

In addition, the requirements of good faith are referred to a total of 103 times in relation to various aspects of civil regulation. While Article 138(1) of the General Part of the 2002 Civil Code Act contains the same wording on good faith as its Latvian sister, and Article 139 presumes it for all legal relations, Article 6(1) of the 2001 Estonian Law of Obligations Act directly requires that everyone act in good faith in their relations with each other. Moreover, the second part of this article prohibits the application of legal rules, usages, and contractual provisions if they are contrary to good faith.[183]

Indeed, the laconic brevity of the wording of the Latvian good faith rule did not allow it to start over of its own volition. It waited for a scientific doctrinal impulse that came from Kaspars Balodis, Dean of the Faculty of Law at the University of Latvia and later Latvian Constitutional Judge and Supreme Court Justice. In 2002, he wrote a paper, "*Labas ticības principa loma mūsdienu Latvijas civiltiesībās*" ("The Role of the Principle of Good Faith in Modern Latvian Civil Law"), published in the legal journal *Likums un Tiesības*.[184] Later, this research became part of his 2007 textbook *Levads civiltiesībās* (*Introduction to Civil Law*).[185] Although there have been several other studies and publications on the subject of good faith, Balodis' definition of this legal principle – " Everyone should use their subjective rights and fulfill their subjective duties by respecting the lawful interests of others"[186] – is the most cited reference in the modern practice of Latvian courts on this issue.[187] In addition, judges often refer to the above-mentioned jurists of the interwar period, particularly Krons, to justify their legal conclusions regarding the application of good faith requirements.

Latvian case law usually deals with issues of good faith when disputes arise over excessive penalties, the foreseeability of damages, excessive claims for damages in rental or lease agreements, or the termination of work performance contracts when the original calculation was too low,[188] as well as when it comes to abuse during insolvency proceedings and the protection of consumer rights. As of today (June 26, 2023), the database of Supreme Court rulings shows seventy-four cases subject to Civil Law Article 1, which is significantly higher than the average for other legal rules.[189] A cursory analysis of court practice shows that over the past two decades, judges have changed their approach to invoking the good faith principle from reasonably liberal to strictly positivist. For example, the Supreme Court's February 9, 2005 judgment in Case No. SKC-75 stated that the first Civil Law Article concerned all civil rights in order to limit the formal exploitation of these rights when they are used unjustly. Conversely, as early as December 16, 2020, in Case No. SKC-231/2020, the Supreme Court argued that this rule was not a general remedy and did not allow the judge to determine what constitutes "good faith" in each individual case.

7. Conclusions

Summarizing the above, it is fair to conclude that good faith in civil circulation moves along a historical sine curve. It both progresses by demanding total equity in legal relations and regresses by being completely rejected as a legally binding principle. Today, Latvian legal practice seems to be slipping into

[178] RÜTHERS, B., *Die unbegrenzte Auslegung; Zum Wandel der Privatrechtsordnung im Nationalsozialismus*, 9th ed., Dibenga, 2022, p. 64.
[179] IVANČÍK, J., Roman Principles: Foundations of the European Legal Culture and Their Position in the Changing World. In: *Vilnius University Open Series*. vol. 6, 2020, p. 60.
[180] STEIN, P., *Roman Law in European History*. Cambridge, 1999, p. 129.
[181] IVANČÍK, Roman Principles, p. 60.
[182] ASTROMSKIS, P., Contract and Tort Law. In: KERIKMAE, T. - others (ed.), *The Law of the Baltic States*. Tallinn, 2017, p. 486.
[183] POOLA, P., Law of Obligations. In: KERIKMAE, T. - others (ed.), *The Law of the Baltic States*. Tallinn, 2017, p. 116.
[184] BALODIS, K., Labas ticības principa loma mūsdienu Latvijas civiltiesībās. In: *Likums un Tiesības*. vol. 9, 2002, p. 279-286.
[185] BALODIS, K. *Ievads civiltiesībās*. Rīga, 2007, p. 140-150.
[186] Ibid., p. 141.
[187] For example, see the Latvian Supreme Court's judgments: SKC-5/2004 of January 14, 2004; SKC-292/2017 of December 11, 2017; SKC-1782/2018 of December 18, 2018; SKC-272/2019 of October 31, 2019; SKC-189/2020 of March 12, 2020; and others.
[188] TORGĀNS, K. - KĀRKLIŅŠ, J. - MANTROVS, V. - RASNAČS, L., *Contract Law in Latvia*. Alphen aan den Rijn, 2020, § 117.
[189] https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/tiesibu-aktu-raditajs

a strict positivism that turns good faith into a formal declaration with no practical meaning.

The laconic wording of Latvian Civil Law Article 1 feeds such efforts not to seek a clear rule of good faith but to be content only with enumerating various typical situations where it can be invoked. However, the present system-historical analysis shows that this is the wrong way to go. On the contrary, we must look for a clear definition of good faith, including researching its genesis and development in time and space.

According to the view of the legal technic, there should be a system-historical interpretation of the good faith rule – that is, Article 1 of Latvian Civil Law – to identify the target essence of subjective rights and duties under each legal rule governing specific legal relationships. A worthy alternative to *Fallgruppen* would allow for the creation of objective criteria without undermining legal certainty.

In the context of de-banking, this should mean that adequate consumer protection requires limiting the literal interpretation of legal and contractual rules authorizing banks to unilaterally withdraw from payment account contracts in favor of clarifying the true purpose and mission of their subjective right through the good faith principle to respect consumers' legitimate interests in retaining payment services. In other words, courts should definitively abandon the excessive focus on the *ius positivum* and prioritize aequitas. This could be effectively resolved by using *ius naturale* in the form of *bona fides*.

Development of Security Instruments of Maritime Loans on the Eastern Adriatic Coast, with Particular Reference to the Ordinance-Law on Property Rights on Ships and Maritime Liens from 1939

*Jelena Nikčević**

Abstract

This work provides a chronological overview of the development of pledge rights in the shipping industry, with particular reference to the area of the Mediterranean i.e. the eastern Adriatic coast. The work elaborates the means of security of maritime loans, from foenus nauticum to hypotheque. A special emphasis has been put on the solutions provided by the Ordinance-law on Property Rights on Ships and Maritime Liens from 1939. This Ordinance was the first to introduce the institute of ship hypotheque as a favourable means of long-term lending in the shipping industry and as one of the basic prerequisites for its unobstructed development. The legal solutions from the Ordinance create a significant basis for the further upgrade of regulations in the field of pledge rights on ships and are a kind of predecessor of contemporary legislation in this field on the territory of the eastern Adriatic coast.

Keywords: *Shipping industry; Security Instruments; Maritime Loan; Co-ownership of Ships; Ship Hypotheque; Ordinance-Law on Property Rights on Ships and Maritime Liens from 1939.*

1. Introduction

Securing the repayment of a loan that one person grants to another has been a legal issue ever since. Different legal systems treated this issue in a different way. Although law has always enabled a lender (creditor) to settle his/her claims against a borrower (debtor) by coercive means, the result was not always to the satisfaction of the creditor. Namely, in a situation where a borrower had no sufficient funds or other assets to repay the debt, the lender was unable to have the debt settled as well. In order to overcome such a situation, additional means i.e. instruments of security were sought from the earliest times, in order to provide a lender with legal security. These additional means appeared in the form of legal security which included an additional element - security increase.

The above issue has been particularly emphasised in maritime industry. Namely, the maritime shipping industry, as a branch of economy, has always used loans to a large extent for the purpose of ship-building. The development of the maritime shipping industry is not possible without lending. This equally applies to the past and present. It is deemed that almost 80% of funds invested in the shipping industry are derived from loans, while only 20% is reserved for own participation of investors – ship-owners. The importance of this issue becomes particularly increased in maritime industry due to the constant intertwining of long-term and short-term lending, legal nature of a ship as a specific movable asset which keeps changing the area of possible jurisdiction and constant incurring of costs during navigation – all of which increases the degree of uncertainty for persons granting maritime loans, in particular long-term maritime loans.

On the other hand, the existence of dual system of long-term security of loans in the maritime industry additionally complicates this issue. One system arose and developed in the continental Europe, primarily in the Mediterranean, and the other is the Anglo-Saxon system or, more precisely, the system of English and American law. These two systems have the same objective but they differ in terms of adopted solutions to the above.

2. Security Instruments of Maritime Loans – An Overview

The development of maritime navigation is directly linked with the need to build navigable, firm and, as much as possible, safe vessels, capable of mastering the rough sea and, as taught by the history of maritime affairs, capable of penetration into the sea space, new developments and accomplishment of more comprehensive development of merchant and civilisation ties. Building of sea-going ships has always been a complex and, above all, an expensive undertaking. Christopher Columbus would not have been able to make one of the most significant historic discoveries of all times if he had not obtained from the

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Spanish Court free-of-charge what would be nowadays considered as extremely moderate, three-ship fleet (Nińa, the Pinta, and the Santa Maria), and thus discovered America in 1492.[1]

Obtaining of funds for ship-building or ship purchase has always been a problem which required finding of necessary funds. In maritime industry, as well as in economy in general, loans play a very important role in this sense. In maritime industry, a loan is not only necessary for ship-building and equipping a ship, but also for regular operation i.e. for funding during navigation. In the past, when a ship-owner was a merchant at the same time, loans were also necessary for the purchase of goods. Loan was a lending instrument. Loan imposed a personal liability on a debtor (ship-owner) but also placed a special burden on a ship and cargo. Thus, the combination of personal and property law (hypotheque loan), through the development of capitalism, resulted in the development of a special type of credit transaction – maritime loan.[2]

3. Maritime Loan (Foenus Nauticum)

From the period preceding the modern capitalism and industrial revolution (in maritime industry, this period was characterised by the switch from wooden-hulled sailing ships to steam-powered iron ships) few data remained on the manner of providing funds for ship-building. However, the institute of maritime loan (foenus nauticum) was known but only as a means of financing of a certain maritime undertaking, not of ship-building or ship purchase.

Maritime loan - foenus nauticum originates from the distant past (it was mentioned in the Manu law in India).[3] It was also used by the ancient Greeks in the sixth century BC, and later on by the Romans and statutory laws of the medieval towns.[4]

The maritime law regulations from the Greek collection "*Nomos Rodion Nautikos*" Νομοσ Ρηοδιον ναυτιχοσ from the end of VI or beginning of VII century applied on the East-Adriatic coast in the Middle Ages and later on.[5] Consequently, the provisions on maritime loans referred to in this collection were relevant for this territory. This could be supported by the fact that the regulations on maritime loans were rare in the statutory law of certain coastal towns[6] since, at the time, the contracting of interest was disguised by other forms of obtaining loans, especially by different forms of association by investing capital.[7] Therefore, at the time, the norms of "*Nomos Rodion Nautikos*" most probably served as a model to be followed.

For centuries, ship-owners used the possibility of indebtedness in case of facing difficulties in terms of employment of ships, and used maritime loans.[8] A maritime loan meant that the lender lended the money to the ship-owner for one navigation of the ship, while the ship-owner, i.e. the borrower, was obliged to repay the borrowed money to the lender along with contractual fee (interest) in case of safe return. In the event that navigation did not end successfully, either due to force majeure or some other reason which could not be attributed to the fault of the borrower, the lender lost the lended amount.[9]

Therefore, by pledging a ship, ship-owners obtained a loan which enabled them to carry out the agreed voyage. However, the terms of loans were such that creditors i.e. lenders risked losing the lended money if the ship on the basis of which the loan was granted was wrecked. Maritime loan was used as an instrument of short-term lending but also served as a kind of primitive insurance.[10] A ship, although a movable property, was not pledged like the other movable property i.e. by being handed over to the lender (creditor). Instead, it still remained in the possession of the borrower (debtor). The concluded Contract, and subsequently the law, primarily ensured that the lender had the right to collect funds from the ship and ship property, with very high interest rate, if the maritime undertaking had ended successfully. However, if the maritime undertaking had not ended successfully, i.e. the ship and cargo wrecked, the loan was not repaid.

The turning point in the modernisation of a maritime loan, i.e. in its formulation as we know it nowadays with all relevant factors, was made by the French Commercial Code (*Code de commerce)* adopted in 1807, during Napoleon's reign. This Code stipulated the elements of loan business as well as its support-

[1] PASTOR, X., *The Ships of Christopher Columbus: Santa Maria, Nińa, Pinta*. London, 1992, p. 9.
[2] BRAJKOVIĆ, V., *Pomorsko pravo*. Zagreb, 1950, p. 117-118.
[3] HOOVER, C. B., The sea loan in Genoa in the twelfth century. In: *The Quarterly Journal of Economics*, vol. 40, Nr. 3, 1926, p. 495-529.
[4] SCHUG, A., *Der Versicherungsgedanke und seine historischen Grundlagen*. Gottingen, 2011, p. 198.
[5] BRAJKOVIĆ, P., *Plovidbeno pavo*. Kotor, 2002, p. 9.
[6] Particularly known Statutes of coastal towns which regulated the field of maritime affairs and which were the sources of maritime law of that time were the Statutes of the following towns: Dubrovnik 1272, Zadar 1305, Split 1240, Hvar 1331, Krk 1512, Rab 1330, Skradin XIII century, Trogir 1322, Kotor beginning of XIV century, Korcula 1214/1428, Pag 1433, Mljet 1310, Brac 1305, Senj 1388, Sibenik XV century, Lastovo XVI century, then Rijeka Statute from 1530, Statutes of Kopar 1380, Piran 1307, Umag 1528, Porec 1363, Pula XIV century and Rovinj 1531. BRAJKOVIĆ, V., Razvoj pomorskog prava na našoj obali. In: Pomorski zbornik povodom 20-godišnjice dana mornarice i pomorstva Jugoslavije, MCMLXII, Nr.1, 1962, p. 440. DOMAZETOVIĆ, F., O razvoju pomorskog prava na obali istočnog Jadrana, In: *Mjesečnik* vol. LII, Nr. 3, 1926, p. 97-102. MILOŠEVIĆ, A., Pomorsko pravo u statutima naših gradova i otoka, In: *Pomorstvo*, vol 2, Nr. 9, 1947, p. 33.
[7] BRAJKOVIĆ, V., *Pomorsko pravo*. Zagreb, 1950, p. 15.
[8] VLADETIĆ, S. - STANKOVIĆ, E., Fenus nauticum - praizvor osiguranja, In: *Evropska revija za pravo osiguranja*, vol. 13, Nr. 1. Beograd, 2014, p. 11-20.
[9] ŽIHA, N., *Fenus nauticum kao preteča prava osiguranja*. Zagreb, 2012.
[10] BRAJKOVIĆ, V., *Pomorsko pravo*. Zagreb, 1950, p. 119.

ing documents, making even possible its endorsed transfer until maturity.[11]

According to Article 311 of the *Code de commerce*, a maritime loan is a contract concluded by a ship-owner, shipper or shipmaster by pledging a ship, freight, cargo or a part of them for the purpose of carrying out a specific navigation or for a certain period, with the commitment to pay certain interest or special award for risks. A loan, interest and award were to be repaid following the safe return of the ship, or after the goods reach their destination, or after successful expiry of contractually agreed period. In other words, a loan would be repaid if no risk, because of which the Contract i.e. maritime loan was arranged, occurred. If the ship or cargo wrecked, the lender lost the lended money and award, or a part proportionate to the value of saved objects. The Maritime Loan Contract was a consensual contract i.e. it was legally valid only when a loan was granted.[12]

The development of the institute of a maritime loan through history was not only linked to the issue of finding funds. It was necessary to find the best legal solutions i.e. the most appropriate forms to ensure the maximum security for the lender, on one hand, and to ensure a normal commercial utilisation of a ship by a ship-owner, on the other, so that the ship-owner could repay the loan successfully.

At the beginning, such maritime loan ensured no property right of the creditor to a ship or cargo. This business was a typical example of an aleatory contract.[13] This is the reason why this type of loan was characterised by high interest rates (in feudalism, even 60%). The liability of the debtor i.e. borrower was personal, but it occurred only after a successful completion of navigation. In the course of time, this type of loan assumed the character of property law because, in addition to the pledge right on a ship, it was possible to establish a pledge right on cargo. In this way, the risk was connected with cargo i.e. objects. Therefore, if there was a loss of cargo i.e. objects, the right to recover the lended amount was lost as well. It was also possible to take a loan only for the purpose of equipping a ship or purchase of goods for a specific voyage, i.e. for a certain time period. Depending on the purpose of a loan, the object of pledge was a ship or cargo, or both - ship and cargo.

The French law stipulated that a loan could be arranged for a ship hull and keel, equipment and food supplies, cargo, specific articles, or parts of a ship or cargo, or all together. A maritime loan could not be used for salaries and bonuses to the fleet (Article 319 of the Code de commerce).

The use of maritime loan was extended to appurtenances and incidentals. However, it was not possible to obtain a loan for the purpose of some future freight or potential future gain because it this way it would become an aleatory business (event with uncertain result).

4. Short-Term Lending in Maritime Industry (Bottomory and Respodentia)

Gradually, as the modified conditions of economic-financial business created the grounds for maritime lending, two types of maritime loan became distinguished. The first type of maritime loan was a loan entered into by the ship-owner or shipper before a ship started its voyage (the so-called "pseudo maritime loan"). The second type of maritime loan was a loan entered into by the shipmaster during the voyage in case of necessity, in order to be able to continue the voyage (genuine maritime loan).

The first type of loan has meanwhile disappeared completely through modern formulation of a maritime loan and the development of insurance. The second type of loan is still possible, although it assumed a different definition and form as a result of modified circumstances. This type of maritime loan, both in historical terms and in contemporary legislation, has two forms. These are bottomry - *bottomory prret a la grosse* and a maritime loan obtained for objects carried on a ship and other ship supplies - *respodentia*. These could be arranged by a shipmaster in case of necessity, in order to be able to continue the voyage.[14]

Contemporary means of telecommunication nowadays enable a shipmaster to make easily a direct communication with a ship-owner or shipper who directly owns necessary funds. Despite this, it is assumed, especially when the undelay able needs require so, that a shipmaster may face a situation where he himself enters into an extraordinary loan in order to successfully complete the started voyage. Therefore, these two types of loan have still been regulated in certain international conventions and national legislation of many countries. Consequently, a maritime loan as a privileged claim has been retained in the *International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages* from 1926. This was the first Convention adopted in this field and was most widely accepted by the Mediterranean countries. It should be mentioned

[11] *Code de comerce* was adopted in 1807. Although it was subject to numerous amendments, it still applies in France nowadays. Its Book which relates to maritime law remained the source of maritime law on the Adriatic coast during the whole period of Austro-Hungarian rule. The second Book of the *Code de commerce* regulated the sea trade. In addition to the *Code de commerce*, here we would mention, although as an important source of maritime administrative law, a legislative act adopted on 25 April 1774 for the marine of the coastal region (at the time under Austrian rule) i.e. for Trst, Istra and Rijeka, known under the following name: *Editto Politico di navigazione mercantile austriaca – Political Edict from* 1774. *Code de comerce* and *Political Edict* were the main sources of maritime law on the eastern Adriatic coast, until the dissolution of the former Yugoslavia in 1941. These sources were also applied on the coast of Montenegro, where they were introduced by the provision of the Berlin Congress held in 1878. Under this provision, the same maritime law was to be applied applied in Dalmatia and Montenegro. Italian law applied in the newly-merged parts of Istra to Rijeka in the period from 1921 to 1947. DOMAZETOVIĆ, F., O razvoju pomorskog prava na obali istočnog Jadrana, In: *Mjesečnik* vol. LII, Nr. 3, 1926, p. 97-102. ŠKARICA, V., Razvitak pomorskog privatnog prava na jugoslovenskim obalama (osvrt na povijesnu studiju dr V. Brajkovića), In: *Jadranska Straža*, vol. 11, Nr. 7, 1933, p. 498-510.

[12] BRAJKOVIĆ, V., *Pomorsko pravo*. Zagreb, 1950, p. 119-120.

[13] MORGAN, J., Hipoteka na brodove. In: *Jugoslovenska njiva*, vol. 5, Nr. 1. 1921, p.

[14] TRENERRY, C.F., *The Origin and Early History of Insurance: Including the Contract of Bottomry*. New Jersey, 2009, p. 7-8; SANBORN, F.R., *Origins of the Early English Maritime and Commercial Law*. Oxon, 1989, p. 111-115.

that privileged claims in the maritime law refer to those claims which, by the force of law, have precedence in terms of collection over other claims.[15]

Professor Brajković indicates that *bottomory prret a la grosse* is a formal contract and specifies the procedure for conclusion of such a contract. This type of loan could be entered into by the shipmaster only outside the place of residence of the ship-owner i.e. the ship. In case a shipmaster is forced to enter into a loan, the shipmaster is obliged to consult the shipboard prior to entering into a loan and to receive the permit from the consular representative in a specific foreign country. Following the conclusion of the loan, the shipmaster has to notify the consular representative and the ship-owner about this fact.[16]

A maritime loan, i.e. *bottomory* and *respodentia,* entered into by a shipmaster encumbers a ship i.e. cargo it refers to. No crew member apart from the shipmaster is authorised to enter into a maritime loan. The loan may be granted for all objects exposed to the navigation risk.

5. Fiduciary Alienation of Ships

A maritime loan seized to fulfil the needs of ship-owners once the building of bigger and, as a result, more expensive ships started. The very character of a maritime loan, despite the fact that the claims of a creditor were secured by the hypotheque on a ship, did not enable this institute to become a favourable means of long-term lending for a ship-owner because the loan was exclusively granted for a specific voyage of a ship.

In addition to maritime loans of ship-owners, the legal instruments which could be taken into consideration while obtaining loans in the shipping industry included fiduciary alienation.[17]

Fiducia (*fiducia cum creditore)* is the earliest form of pledge right. It was known in the Roman law. Fiducia meant that the creditor retained the property right over a pledged object in order to secure the claim. The property was not transferred permanently but, instead, until the fulfilment of an obligation i.e. the occurrence of a certain condition. An object was normally ceded through a solemn ceremony – *mancipatio* or in open court - *in iure cessio,* with informal agreement that the object would be returned once a debt is repaid.[18] Such an obligation was based on the creditor's faith (*fides*), and that is where the term "fiducia" originates from. However, since there was no legal sanction which would affect the creditor in the event he/she did not return the pledged thing, a lawsuit was introduced as an instrument which was to protect the position of the debtor - *actio fiduciare*. The lawsuit could be filed only against an unconscientious creditor, but not against a person whose property was alienated. Due to the above, fiducia put the debtors in a fairly unfavourable position, which resulted in the decreased use of such a means of security and, eventually, its formal abolition by the Code of Justinian.[19]

In addition to fiducia, the Roman law recognised *pignus* as a form of pledge. However, pignus as an institute could not be used to increase the creditworthiness of ship-owners since, just like in case of fiducia, it was conditioned by the cessation of the pledged object to the creditor.[20] By ceding the pledged object to the creditor, the debtor (ship-owner) was deprived of the possibility to use the ceded object, to benefit from it, and to repay the debt in this way (Stanković; Orlić, 1990). In case of pignus, the debtor also ceded the pledged object to the creditor but with one essential difference – he/she retained the property right over the pledged object.

While in practice a maritime loan as a personal loan turned out to be too expensive for ship-owners, the fiduciary alienation of ships turned out to be impractical, although in the past, from the point of view of protection of a creditor's interests, it used to be the safest way to ensure the collection of the creditor's claims. This manner of securing of claims was abandoned primarily because the debtor was deprived of property and possession of an object, and thus was unable to continue economic activity through the utilisation of the ship. In fact, following the fiduciary alienation of a ship, the debtor could rent the same ship for the purpose of exploitation. However, the use of such legal concept was rare in practice because the performance of fiduciary alienation of a ship was disputable in many legal systems. Additionally, there were attempts to arrange a pledge without dispossessing the debtor, through a symbolic cessation of a pledged object, in the legal systems where such cessation was permitted (for example, in the Austrian law). However, the practice did not show the encouraging results in such cases either, given that further difficulties appeared in terms of registration of such rights in ship registers.[21]

6. Co-ownership of Ships as a Means of Collecting Fund

For easier collection of funds aimed at ship-building, a specific legal institute of co-ownership of ships became widely applied quite early. This institute is known as co-ownership of quirats *(quirat - share)*. This is a specific type of co-ownership in maritime law, which differs from co-ownership in civil law but could also not be categorised under any form of association in commercial law. Such name originates form the fact that the ideal share in the property of a ship is termed in law as "quirat".

This instrument was most widely used in the Mediterranean but its use was also extended beyond this region. In the Mediterranean countries, a ship was normally divided into

[15] JAKAŠA, B., *Udžbenik plovidbenog prava*, Zagreb, 1979. p. 106. GRABOVAC, I., *Hrvatsko pomorsko pravo i međunarodne konvencije*, Split, 1995, p. 53.
[16] BRAJKOVIĆ, V., *Pomorsko pravo*. Zagreb, 1950, p. 20.
[17] SUBOTIĆ, J.V. - STOJKOVIĆ, S., Hipoteka na rečnim brodovima u slovenskim državama, In: *Pravosuđe*, Beograd, 1933, p. 4.
[18] STANOJEVIĆ, O., *Rimsko pravo*. Beograd, 1999, p. 218.
[19] STOŠIĆ, S., *Obezbedjenje potraživanja zasnivanjem založnog prava na nepokretnosti*. Beograd, 2017, p. 32.
[20] RAŠOVIĆ, Z., *Založna prava na pokretnim stvarima*. Podgorica, 1992.
[21] RADOVIĆ, Z., *Hipoteka na brodu*. Beograd, 1986, p. 6-7.

24 quirats, in English law each ship was divided into 64 quirats, in the Scandinavian countries the number of quirats was 100, while every quirat could be divided into 1/2, 1/4 and 1/8 quirats. The parts of one quirat do not constitute a legally relevant division in terms of ship-ownership nor are they recorded in the register. A person may be co-owner of several quirats. The relation between co-owners (quirat-holders) is most frequently governed by a contract. If this is not a case, the norms which regulate this field in the coastal countries shall apply. Still, the basic principles of this co-ownership relation were more-less the same everywhere and could be defined as follows:

- every quirat-holder has pre-emption right over quirats. Namely, if any quirat-holder decides to sell his/her quirat, he/she is obliged to offer the quirat to the other quirat-holders first;
- no quirat-holder may put a hypotheque on his/her own quirat without the consent of the other quirat-holders;
- all quirats could be traded individually. The smallest part of co-ownership of a ship is one quirat and it could not be further legally fragmented. Still, one quirat could be co-owned by several persons, but all co-owners of one quirat must act as a single entity toward external entities.[22]

The creation of such associations certainly enabled the easier collection of funds necessary for building of increasingly expensive ships.

Prof. Brajković particularly emphasises the importance of co-ownership of quirats as an institute for collection of funds necessary to acquire ownership of sea-going ships. By carrying out the research in the Maritime Archives in Kotor, he reached the conclusion that the role of a shipmaster became separated from the role of a ship-owner during XVI century. An individual was no more able to own a ship by himself. An individual still retained the role of a shipmaster but the ownership of ship was shared with other people, who were no more sailors but capital owners. At the time, a ship quirat was defined as the ideal share in a ship and its equipment. Based on a document dated 1518, it could be concluded that the sale should be taken as *»cum omnibus corregijs et alijs quibuscumque rebus ad dictos quinque caratios navigij spectantibus et pertinentibus«*. A ship was divided into 24 quirats, which is obvious from a contract dated 20 March 1514, under which Jakov Gabrov and Bernard Drago possessed 8 quirats each, and Zuano Belli and Zoro Stevanov 4 quirats each.[23]

It is worth noting that, under the legal tradition, co-ownership of quirats applied in the Kingdom of Yugoslavia from 1939, when it was introduced by the *Ordinance-law on Property Rights on Ships and Maritime Liens*. It applied until the adoption of the Law on Maritime and Inland Navigation in 1977.[24]

7. Ship Hypotheque

Given that the development of capitalism and the appearance i.e. building of greater-in-size and more expensive steam-powered iron ships showed that all options of ship-owner lending known up to date were insufficient and impractical in term of providing sufficient funds for ship-building as well as inadequate from the point of view of securing of loans granted by creditors (primarily banks), the need arose to find a new solution which would enable an unobstructed and safe long-term lending in the maritime shipping industry.

A maritime loan and other security instruments increasingly became surpassed in the law of the Mediterranean countries and, generally, in the Continental law. There appeared a new instrument of securing a maritime loan – ship hypotheque. As commonly known, hypotheque, as a means of loan security, is a very old legal institute, known from as early as Middle Ages. Hypotheque was recognised by the ancient Greek law and the Code of Hammurabi, as well as the Law of Moses and Solomon. The Roman law also dealt with the issue of hypotheque as a means of loan security, so the magistrate law developed the concept of hypotheque for both movable and immovable property, but without registration right i.e. public impact in contemporary sense.[25]

Hypotheque as a means of security had significant advantages over pignus and fiducia, since in case of hypotheque the debtor retained both property right and possession of things. By pledging an object, the debtor was also able to use it and reap benefits towards repayment of debt. In case of pignus and fiducia, as stated above, a disadvantage was that a debtor was deprived of the possibility to use an object and reap benefits.

The objective of hypotheque i.e. pledge right is to guarantee to the creditor that a debtor fulfils his/her obligation, while a debtor may fulfil his/her obligation only if he/she is in possession of the objects in question and uses them for work. It is worth noting that the magistrate law enabled the creditor to file a lawsuit in order to settle the claim (*actio Serviana*). A creditor could file a lawsuit not only against a debtor but also against third persons who possessed a pledged object. The scope of the lawsuit was soon extended so as to include other cases where the pledge right was based on a simple agreement between parties. In such cases, it was termed *action Serviana utilis or action hypothecaria*, and such forms of pledge were termed as "hypotheque".[26]

As the civil law hypotheque obtained its present-day form by the establishment of land registers and the possibility of registration in those registers, the maritime hypotheque i.e. hypotheque on sea ships could be established from the moment of the development of the possibility of registration of hypotheque in certain public documents. This was achieved by

[22] BRAJKOVIĆ, P., Plovidbeno pavo. Kotor, Fakultet za pomorstvo, 2002, p. 27-28; BRAJKOVIĆ, V., *Pomorsko pravo*. Zagreb, 1950, p. 116-117.
[23] BRAJKOVIĆ, V., Suvlasništvo broda na karate u Kotoru u XVI stoljeću. In: *Godišnjak pomorskog muzeja u Kotoru*, Nr.1, 1952, p. 71-76.
[24] BRAJKOVIĆ, V. - TRIVA, S., *Zakon o pomorskoj i unutrašnjoj plovidbi: s napomenama i komentarskim bilješkama.* Zagreb, 1981.
[25] PALLUA, E., Hipoteka i privilegije na brodu, In: *Mjesecnik*, LXIII, Nr. 4, 5, 1937, p. 206.
[26] STANKOVIĆ, O. - ORLIĆ, M., *Stvarno pravo*. Beograd, 1990, p. 342-343.

the establishment ship registers. The laws on establishment and registration of hypotheque on ships were adopted as follows: in Portugal in 1833, in Germany in 1861, in France by the Law of 10 September 1874, in Italy in 1885, in Scandinavian countries in 1901, in Belgium in 1908 etc.[27]

The importance of maritime hypotheque particularly increased with the full development of capitalism, improvement and increase of the world commercial fleet, development of the world banking, appearance of banks specialised in granting loans to the maritime shipping industry, as well as the development of the ship-building industry. In order to increase confidence in this institute, hypotheque became the subject of international-law regulation very early. Namely, the mentioned *International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages* was adopted in 1926. In terms of hypotheque, the Convention stipulates only the basic rule that any type of pledge right (*hypotheques*, *mortgages*) on a ship will be recognised in all signatory states if this pledge right has been duly stipulated under the laws of the country to which a ship belongs and registered into a public register book (register) (Article 1 of the Convention). This implied the introduction of a collision norm for hypoteque, under which a law of the country to which a ship belongs has precedence over the laws of signatory states.

Similarly to the hypotheque in the Continental law, the institute of hypotheque appeared in the Anglo-Saxon law, being the instrument of common law in the Great Britain and United States, but in other states of the Anglo-Saxon legal area such as Canada, Australia or New Zealand. The basic issue here was also that the ship hypotheque existed as a legal instrument without registration.[28]

As early as from the Middle Ages, the institute of hypotheque was applied in England to secure lending in the shipping industry. However, it was not a registered hypotheque which would provide a sufficient legal safety. It was an institute which differed from hypotheque in terms of structure but served the same purpose. The registered hypotheque (so-called "legal hypotheque") was first introduced by the Merchant Shipping Act from 1854 and obtained its final form in 1894.[29] In USA, the problem was somewhat more complex given the existence of laws of specific American states and the Federal law. In 1920, the American Congress adopted the Ship Mortgage Act thus introducing the "maritime preferred ship hypotheque" into the American maritime law as a registered pledge right on a ship.[30]

Despite endeavours made, such adopted solutions did not manage to eliminate the differences between the Continental law hypotheque and Anglo-Saxon mortgage. The differences particularly remained in terms of the right to dispossession of a ship in favour of the creditor in order to settle the claims. However, the introduction of registration regime, both for mortgage and hypotheque, enabled the adoption of international legislation and mutual recognition of these legal institutes.

8. Ship Hypotheques on the Eastern Adriatic Coast Standardised by the Ordinance from 1939

In the Mediterranean coast, the institute of hypotheque on a ship was unknown for a long time because it was not recognised by the French Code de commerce. However, the circles of shipping industry kept raising the issue of hypotheque on ships but no legal solution was reached for quite a while, although there were some attempts to regulate the issue of pledging of ships for the purpose of obtaining long-term loans. According to professor Trajković, Dalmatian towns did not use maritime loans but, instead, some forms of hypotheque on ships under the influence of the French and Austro-Hungarian law.[31] The resolution of issue of hypotheque on ships became possible by the adoption of the Austrian Law on Merchant Fleet Flag in 1879. Since this Law was not precise in terms of hypotheque, a special Ordinance was adopted for the maritime area of Bakar in 1919, envisaging in the register book a blank field where pledge rights could be added and deleted.[32]

Following the establishment of the Kingdom of Yugoslavia, the regulations on property rights on sea-going ships were developed from 1923 to 1939. The basic purpose of adoption of such regulations was to enable the realistic lending in the maritime industry. The *Ordinance-law on Property Rights on Ships and Maritime Liens* was adopted in May 1939. The Ordinance entered into force on 11 June 1940 and dealt with the issue of maritime liens and ship hypotheque.

The issue of hypotheque on ships was legally regulated on the territory of the eastern Adriatic by the adoption of the above Ordinance from 1939.

8.1 Contents and characteristics of Ordinance from 1939

The Ordinance form 1939 regulated the basic property relations on ships, property and co-ownership. The co-ownership was regulated by stipulating the existence of co-ownership of quirats. The Ordinance particularly emphasised that any provision that applied to property on a ship as a whole also applied to its specific parts (quirats), unless otherwise stipulated.

The Ordinance was accompanied by three supporting Ordinances adopted in 1940:

1. Ordinance on Registration of Property Rights on Ships and on Related Procedure,
2. Ordinance on Organisation of Register Books, and
3. Ordinance on Enforcement and Security on Ships due to Financial Claims and on Temporary Orders with Regard to Ships. These three Ordinances were published on 11 April 1940 ("Official Gazette" of the pre-war Yugoslavia of 11 April 1940 No. 84-XXX). As provided for by Article 44 of

[27] RODIÈRE, R. – DU PONTAVICE, E., *Droit maritime*. Dalloz, vol. 11, 1982, p. 72-73.
[28] PALLUA, E., *Pomorsko uporedno pravo*, Rijeka, 1975, p. 83. NIKČEVIĆ, G. J., *Založna prava na brodu*, Kotor, 2007, p. 12.
[29] HILL, Ch., *Maritime Law*. London, 1997, p. 25-28.
[30] MARAIST, F. L., Admirality, In: *Louisiana Law Review*, 1984, Nr. 45, p. 179.
[31] TRAJKOVIĆ, M., *Pomorsko pravo*. Beograd, 2000, p. 43.
[32] MORGAN, J., Hipoteka na brodove. In: *Jugoslovenska njiva*, vol. 5, Nr. 1. 1921, p. 6.

the Ordinance from 1939, this Ordinance was to enter into force one month following the publication of supporting Ordinances i.e. 11 June 1940.

The starting point in the development of the Ordinance was the Convention from 1926. The objective of this Convention was to strengthen hypotheque on ships and international position of hypotheque creditors, as well as to improve conditions of international lending the field of ship-building and navigation (*Hlača, 2006, 849-869).* Even specific Articles of the Convention were taken over in their totality.

In addition to the Convention, the Ordinance relied on Italian law, particularly on the Italian draft Maritime Code (*Progetto di Codice Marittimo from 1931*). The provisions on cargo lien and mortgage with some amendments were taken over from the Italian draft law (for example, Artcle 3 of the Ordinance was taken over from Art. 66 of the draft, Art. 6 was taken over from Art. 440; Art. 7 from Art. 441; Art. 442 para. 2 and Art. 17 para. 2 from Art. 442 para. 1; then Art. 19-21 from Art. 455-457; Art. 25 and 26 from Art. 460; Art. 29 from Art. 465 and 466; Art. 30 from Art. 474; Art. 31 from Art. 305; Art. 32 from Art. 467; Art. 34 from Art. 455, 464, and Art. 36 from Art. 461. This is completely understandable, especially bearing in mind the fact that, out of all maritime countries, Italy is territorially closest to us. The French and German law were also taken into account, as well as laws of other foreign countries. The French Law on Ship hypoteque with novels of 10 July 1885 (Art. 1259-1272), as well as German Civil Code of 19 August 1896 and Commercial Law of 10 May 1897 (Art. 752 – 777). The rules taken over from foreign sources were harmonised with the principles of our private law, as well as with our legal concepts and needs.

As already mentioned, the Ordinance from 1939 was supposed to regulate the field of property rights, particularly the pledge rights on ships, and maritime liens i.e. priority rights on ships and cargo. Accordingly, the basic characteristics of the Ordinance were as follows: 1. Acceptance of the regime referred to in the Convention from 1926; 2. Regulation of cargo lien; 3. Regulation of co-ownership rights on ships by division into quirats; 4. Detailed listing of claims falling within the first-class lien; 5. Regulation of the so-called "positive procedure" aimed at revokal of liens; and 6. Introduction of the possibility to provide security through hypotheque on ships under construction.

The Ordinance did not contain a legal definition of the term "ship" as a subject of property law but, instead, took the definition of a ship for granted, as implied by maritime law. It started from the assumption that a ship is movable property, particularly emphasising that the acquisition, termination, transfer and limitation of property rights on ships are strictly conducted in compliance with a book registry regime. In this regard, the criterion of size was important for the Ordinance. The standard on the acquisition of property rights by means of registration applied only for ships exceeding 20 GRT (gross registered tonnage), while general regulations on movable property applied to ships below 20 GRT and other maritime waterborne crafts. The Ordinance observed the importance of acquisition and loss of property rights on ship appurtenances and therefore defined the appurtenances as objects permanently intended for use on ships (tools, equipment, boats etc.).

8.2 Solutions related to ship hypotheque according to the Ordinance from 1939

The issue of ship hypotheque has been regulated in the third part of the Ordinance. The Ordinance envisaged both contractual and judicial hypotheque. In the process of adoption of the Ordinance, one of the main issues in terms of pledge rights on a ship was whether a judicial hypotheque should be introduced in addition to the contractual hypotheque. However, despite numerous arguments, particularly in the French theory and judiciary practice, that judiciary hypotheque had no maritime law significance, the Ordinance accepted the opposite arguments. Namely, the Ordinance started form the view that judicial hypotheque also serves to improve maritime lending and that in certain cases it has precedence over ship immobilisation (seizure) which has to be resorted to in case of absence of such an instrument as hypotheque which would be established on a ship by a court order.

Hypotheque also applied to ship appurtenances which have been defined over-subtly in the Ordinance, while the general provision stipulates that, in case of doubt, the appurtenance shall mean all those objects registered in the ship inventory book.

The majority of quirat-holders could encumber the whole ship for the purpose of equipping the ship and for the needs of navigation, while the co-owners who paid their share could, for the same purpose, with the court permit, encumber the share of those quorate-holders who were in delay of payment. One co-owner could encumber his own share only in case the majority of quirat-holders gave their consent.

Similarly, a ship could be exposed to public auction in its totality in repayment of hypotheque on a ship quirat. The co-owners whose quirate was not encumbered could purchase the hypothequed share or participate in the public auction, in case they did not want to lose their ownership.

Hypotheque necessarily covered ship incidentals, which include indemnification claimed by the ship-owner for still unrepaired damage suffered by a ship as well as claims by a ship-owner in relation to a joint breakdown, if related to the unrepaired damage of a ship. It was assumed that hypotheque covered the insured sum of a ship, unless otherwise agreed by parties. This corresponded to the principle of property subrogation (pretium succedit in locum rei). The hypotheque creditor was imposed the obligation to report hypotheque to the insurer, obviously because the insurer could not be expected to continuously supervise what happened with hypotheque on the ship insured.[33] Ship hypotheque did not cover freight and amounts belonging to a ship-owner based on the rescue carried out at sea. Hypotheque in favour of the principal existed

[33] RADOVIĆ, Z., *Hipoteka na brodu*. Beograd, 1986, p.102-107.

also for three-year contractual and legal interest, the costs of hypotheque registration, as well as the costs of litigation and enforcement proceedings related to the enforcement of hypotheque.

If hypotheque, due to the ship damage but not due to the fall in its value in the market, does not provide the security that it used to provide at the moment of contracting, a creditor may require the settlement of claims before hypotheque becomes due, unless the debtor offers a new i.e. additional security.

Special provisions referred to hypotheque on ship quirats as well as to majority quirat-holders (ship hypotheque could be established solely by means of consent of the majority quirat-holders), and special proceedings aimed at enforcement of such hypotheques was stipulated (Art. 25 and 26 of the Ordinance from 1939).

The cessation of hypotheque followed the regulations of the civil law. The cessation occurred when a ship was deleted from the ship register, in case a ship was sold during the enforcement or bankruptcy proceedings (in which case the creditor would settle the claims according to the priority order following the sale) and, finally, by enforcement of positive procedure stipulated for maritime liens (Art. 33 of the Ordinance from 1939). The Ordinance envisaged the possibility of merging positive procedures (for example, positive procedure aimed at exemption of ship from liens and positive procedure aimed at exemption of ship from hypotheque could be enforced as a single procedure) (Art. 35 of the Ordinance from 1939.) All the above also refers to hypotheque on a ship under construction, provided that such a ship has been registered in the temporary ship register (Article 36 of the Ordinance).

9. Conclusion

The work provides an overview of the historical development of security instruments of maritime loans on the territory of the eastern Adriatic coast. The first part of the work describes the earliest means of security, analyses legal norms and legal relations arising from the use of specific security instruments. The second part of the work devotes special attention to the Ordinance-law on Property Rights on Ships and Maritime Liens from 1939 – the first legal act on property rights on ships on the territory of the Kingdom of Yugoslavia. The solutions related to the ship hypotheque contained in the Ordinance are in focus of this work.

The need to secure maritime loans arose from the earliest development of the human civilisation. Imposing an encumbrance on a debtor so that he/she would meet his/her liabilities through pledge, was more of a means of enforcement rather that security at the very beginning. It could be noted that the mechanisms of securing maritime loans have always been instruments which played a significant role in the development of shipping industry. The adequacy of means of security of maritime loans largely conditions the degree of legal security of a creditor. Therefore, all mechanisms of security which were used from the earliest times, from foenus nauticum, bottomory and respodentia, fiducia, co-ownership of quirats to hypotheque, were aimed at the improvement of the position of creditors i.e. to securing creditors. Therefore, stable means of security which would guarantee the creditor i.e. a person lending money the settlement of liabilities have always been sought.

Loan was the earliest form of a lending instrument. Loan imposed a personal liability on a ship-owner, who guaranteed that a claim would be settled, but also placed a special burden on a ship and cargo. Thus, the combination of personal and property law (hypotheque loan), through the development of capitalism, resulted in the development of a special type of credit transaction – maritime loan

Nevertheless, a maritime loan seized to fulfil the needs of ship-owners once the building of bigger and, as a result, more expensive ships started. The very character of a maritime loan, despite the fact that the claims of a creditor were secured by a pledge right on a ship, did not enable this institute to become a favourable means of long-term lending for a ship-owner because the loan was exclusively granted for a specific voyage of a ship.

The non-possessory forms of pledge, such as fiducia and pignus, were also not the adequate means of security which could be further affirmed, given that a debtor was deprived of property right and possession of an object, and thus was not able to proceed with his/her economic activity by exploitation of a ship. Consequently, all these means of security have been abandoned.

For easier collection of funds aimed at ship-building, a specific legal institute of co-ownership of ships became widely applied quite early, the so called "co-ownership of quirats". Co-ownership of quirats was a favourable instrument for easier collection of funds necessary for building of increasingly expensive ships. It was used in the Mediterranean countries, where a ship was normally divided into 24 quirats. On the eastern Adriatic coast or, more precisely, o the territory of the Kingdom of Yugoslavia, this legal instrument was standardised by the Ordinance-law on Property Rights on Ships and Maritime Liens from 1939. However, the co-ownership of quirats loses its importance and eventually becomes revoked by the adoption of the Law on Maritime and Inland Navigation in 1977. After the Second World War, the property relations on this territory, in society in general but also in maritime industry, were generally characterised by public ownership.

Since the former security instruments increasingly became surpassed in the law of the Mediterranean countries and, generally, in the Continental law, the need arose to find a new solution which would enable an unobstructed and safe long-term lending in the maritime shipping industry. There appeared a new instrument of securing a maritime loan – ship hypotheque. The objective of hypotheque i.e. pledge right is to guarantee to the creditor that a debtor fulfils his/her obligation, while a debtor may fulfil his/her obligation only if he/she is in possession of the objects in question and uses them for work. Hypotheque as a means of security had significant advantages over pignus and fiducia, since in case of hypotheque the debtor retained both property right and possession of things. By pledging an object, the debtor was also able to use it and reap benefits towards repayment of debt. In case of pignus and fiducia, as stated above, a disadvantage was that a debtor was deprived of the possibility to use an object and reap benefits.

The hypotheque on sea ships obtained its present-day form from the moment of the development of the possibility of its registration in certain public documents i.e. establishment of ship registers).

Although the issue of hypotheque on a ship was unresolved for a long time on the Mediterranean coast because it was not recognised by the French Code de commerce, the circles of shipping industry tried to solve the issue of pledging of ships for the purpose of obtaining long-term loans. This issue was standardised on the eastern Adriatic coast by the adoption of Ordinance-law on Property Rights on Ships and Maritime liens from 1939. This Ordinance was the first to introduce the ship hypotheque as a means of security on the territory of the Kingdom of Yugoslavia. The Ordinance creates a significant basis for the further upgrade of the existing solutions in the field of pledge rights on ships.

Gven all the above, we conclude that all means of security of maritime loans, and subsequently credits, influenced the development and shaping of the institute of hypotheque on a ship as one of prerequisites of unobstructed development of maritime affairs.

Die Armenfürsorge als Rechtsproblem in der Österreichischen Monarchie*

(Poor Relief as a Legal Issue in the Austrian Monarchy)

*Zdeňka Stoklásková***

Abstract

This study examines the origin of legal tools for the creation of systematic poor relief in the Austrian monarchy from the period of Joseph II. It is possible to find a certain kind of legal protection for Austrian state citizens in Joseph's Civil Code from 1786 and in the General Civil Code from 1811. The paper analyses the legal principles leading to the establishment of the home community principle for Austrian state citizens, which was essential for providing aid to the poor. Attention focuses on an interpretation of problematic legal terms such as „home settling" or „häusliche Niederlassung", the implementation of which was resolved in legal disputes between state authorities. The author discusses the decrees of the Supreme Court of Justice in Vienna from the last quarter of the 19th century which concerned disputes between municipalities relating to the reimbursement of the costs of poor relief.

Keywords: *Poverty; Poor relief; the Supreme Court of Justice; the General Civil Code; 19. Century; Habsburg empire; History of Law; Social History.*

Bis zum 18. Jahrhundert lag die Armenfürsorge ausschließlich in den Händen charitativer Wohltäter. Die spätbarocke Glorifizierung der Armut verschwand, die Gedanken der Aufklärung sahen in der Bevölkerung einen staatlichen Schatz, der bewahrt und vermehrt werden sollte. Nicht allein die Größe der Population, sondern auch deren gesundheitlicher, sozialer und beruflicher Zustand waren wichtig. Der Staat begann, seine „väterliche" Rolle zu übernehmen. So wurde im Jahre 1784 das Allgemeine Krankenhaus in Wien, 1786 in Brünn, 1787 in Olmütz und 1789 in Prag Allgemeine Krankenhäuser gegründet, in denen arme Kranke eine kostenlose Behandlung erhielten. Seit der Ausformung des modernen Staates galt die Fürsorge für Arme und Bedürftige als Obliegenheit des Staates. Dessen Anstrengungen, die Frage der Armut der eigenen Staatsbürger zu lösen, konnten jedoch erst dann beginnen, nachdem die Rechte und Pflichten der Bürger gegenüber dem Staat rechtlich fixiert worden waren.

1. Der Anspruch auf Armenfürsorge als Recht des Bürgers

„Jeder Unterthan erwartet von dem Landesfürsten Sicherheit und Schutz. Es ist also die Pflicht des Landesfürsten, die Rechte der Unterthanen deutlich zu bestimmen, und ihre Handlungen so zu leiten, wie es der allgemeine und besondere Wohlstand fordert." [1]

Der erste Artikel des Josephinischen Zivilkodex verdeutlicht eine neue Beziehung des Staates zu den eigenen Staatsbürgern, nämlich den Anspruch auf den Schutz seitens des Staates. Ob der erwähnte Artikel 1, der auf den *„allgemeinen und besonderen Wohlstand"* der Untertanen gerichtet sein sollte, auch den latenten Anspruch auf die Armenfürsorge inhaltlich rechtlich in sich birgt, bleibt mit Blick auf den Forschungsstand ein Desiderat. Die gesetzliche Entwicklung von einem Untertanen zu einem Menschen und Bürger lässt sich jedoch in zeitgenössischen Gesetzsammlungen und Kommentaren nachvollziehen. Der Begriff Mensch erscheint zum ersten Mal im Allgemeinen Bürgerlichen Gesetzbuch 1811, bis dahin wurden die Termini *Untertan*, *Inwohner* und *Individuum* benutzt, wobei diese eher mit der männlichen Person zu konnotieren sind, während bei dem Begriff *Mensch* wohl auch Frauen einbezogen sind. *„Jeder Mensch hat angeborne, schon durch die Vernunft einleuchtende Rechte, und ist daher als eine Person zu betrachten. Sclaverey oder Leibeigenschaft, und die Ausübung einer darauf sich beziehenden Macht wird in diesen Ländern nicht gestattet."* [2] Das ABGB 1811 geht von der naturrechtlichen Auffassung aus, in der der Mensch als sinnlich vernünfti-

* Der Beitrag entstand im Rahmen des Projekts der Forschungsagentur Grantová agentura ČR GA21-07473S „Der Schub und die Armenpflege in der österreichischen Monarchie 1780-1850: die Bemühungen um eine systematische Lösung der Armenfrage".

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[1] Allgemeines Bürgerliches Gesetzbuch 1786, Patent vom 1. November 1786, č. 220, § 1. Zweyte Fortsetzung der Gesetze und Verfassungen im Justizfache (weiter siehe: Justizgesetzsammlung). Wien, 1817, Nr. 591, S. 71-129, hier S. 72.

[2] Allgemeines Bürgerliches Gesetzbuch 1811, Patent vom 1. Juni, Nr. 946, § 16. Dritte Fortsetzung der Gesetze im Justizfache unter Seiner jetzt regierenden Majestät Kaiser Franz, Wien, 1816, S. 275an.

ges, freies Wesen verstanden wird.[3] Der Artikel 16 ist einer der wichtigsten im ABGB, anhand seiner Auffassung im Laufe der Zeit kann die rechtliche Beziehung des Menschen zum Staat demonstriert werden. Während der große Rechtskenner Josef Unger ihn einen *„für sich ganz müßigen, praktisch bedeutungslosen Paragraphen"* nannte,[4] wird er heute als eine zentrale Norm des österreichischen Rechts mit normativem Inhalt geschätzt, der subjektive Rechte schützt.[5] Die naturalistische Auffassung des subjektiven Rechts als Anerkennung der menschlichen Würde bildet die gedankliche Basis des Allgemeinen Bürgerlichen Gesetzbuches. Der Fokus auf das menschliche Individuum heißt hier: Du bist frei, du sollst selbst dein Wohl gestalten, und zwar im Rahmen des Gesetzes. Karel Eliáš spricht von der Noblesse der österreichischen zivilistischen Tradition, die sich des Menschen in eventueller Not erbarmt, ihn schützt und ihm hilft in der Ungleichheit zwischen Schwächeren und Stärkeren.[6]

2. Heimat und Armenfürsorge.

Bereits im 16. Jahrhundert erscheint der Gedanke, der Bettel sei besser zu bewältigen, wenn in irgendeiner Form zumindest eine minimale Armenhilfe bestünde, die logischerweise im Rahmen der Herrschaften zu verwalten wäre. Dieses Postulat wurde weiter in der ersten Hälfte des 18. Jahrhunderts verfolgt, ohne dass es jedoch zu einer gesetzlichen Regulierung gekommen wäre. In der zweiten Hälfte des 18. Jahrhunderts finden wir die Anfänge einer gesetzlichen Regulierung der Armenpflege, die freilich zu ihrer Zeit de facto lediglich auf den steigenden Bettel reagieren konnte, ohne wirkliche Hilfe anzubieten oder zu vermitteln.

Eine der ersten Maßnahmen verkörperte die „allerhöchste Entschließung", erlassen im Jahre 1754, die drei Kategorien von österreichischen Staatsbürgern unterschied, die ihren Geburtsort verlassen hatten und später in Armut fielen: *„1. Diejenigen Personen, welche sich in einem anderen Erblande ansässig gemachet, das Bürgerrecht ordentlich erworben oder als unbehauste Inwohner ihr Gewerbe oder Profession getrieben und so gestaltig bis zur erfolgten Müheseligkeit die gemeine Last mitzutragen geholfen haben, 2. Jene, welche entweder bei einer Gemeinde oder bei privaten an einem Orte durch 10 Jahre in Diensten gestanden sind, 3. solche, die zwar ebenfalls 10 Jahre in einem andern als ihrem Geburtslande entweder durch Dienstleistung oder auf eine andere Art ihr Brot erworben, jedoch durch diese Zeit nicht an einem, sondern mehreren Orten des Landes sich aufgehalten haben."*[7] Personen, die in ihrem Aufenthaltsort Besitz, das Bürger- oder Meisterrecht erworben hatten, also wohlhabende Menschen, die auf irgendeine Art ihren Besitz verloren hatten, sollten als Arme in ihrem Aufenthaltsort versorgt werden, da sie durch den Besitz, Bürger- oder Meisterrecht das Recht auf die Aufnahme in die Gemeinde erhielten. Bei der ersten Kategorie von Personen spielte die entscheidende Rolle der (verloren gegangene) Besitz. Die zweite Kategorie stellten *„die unbehausten auswärts geborenen Inwohner, welche zwar das Bürgerrecht nicht wirklich erlanget, iedoch mittels Bewilligung der Obrigkeit, des Magistrats oder der Gemeinde sich irgendwo durch 10 Jahre aufgehalten, und der Gemeinde durch ihre Handthierung, oder in anderen Wegen nützlich gewesen sind, wird billig zu sein befunden, daß ein solcher Innmann, wenn er sich wirklich 10 oder mehrere Jahre an einem Orte ohne Unterbruch aufgehalten hat und nach der Hand in eine gänzliche Müheseligkeit gerathen ist, ebenfalls daselbst in die Verpflegung zu nehmen."* Die dritte Kategorie von Personen, die keinen Besitz erworben und sich an keinem Ort mindestens zehn Jahre aufgehalten hatten, seien „bei aufbrechender Unvermögenheit in ihren Geburtsort abzuschieben".[8]

Die „allerhöchste Entschließung" enthält die Grundbausteine der späteren gesetzlichen Regulierung der Heimatzuständigkeit. Besitz, Bürger- oder Meisterrecht bildeten nachfolgend jene Faktoren, die das Recht auf die Aufnahme in den Heimatverband beinhalteten. Die zweite Kategorie von Personen, die sich legal über zehn Jahre in einer Gemeinde aufhielten, konnten unter bestimmten, später genau formulierten Bedingungen Anspruch auf die Aufnahme in den Heimatverband erheben. Die Frist von zehn Jahren wurde zu einer gesetzlichen Voraussetzung nicht allein für die Wartezeit auf die Heimatzuständigkeit, sondern auch für die Aufnahme in die österreichische Staatsbürgerschaft. Die dritte Kategorie, also besitzlose Personen, die sich keine zehn Jahre in einer Gemeinde aufhielten, wurde hingegen zu einer sozialen Last der Gemeinde des Geburtsortes. Der Geburtsort avancierte zum problematischen Punkt bei der Feststellung der Heimatzuständigkeit, wie die spätere Praxis zeigen sollte.

Der Geburtsort als das wichtigste Kriterium für die Festlegung des Rechtes auf die Heimatzuständigkeit und die damit verbundenen Armenfürsorge erfuhren auch in der ersten großen Norm, dem Konskriptionspatent des Jahres 1777, eine Definition. Die Veröffentlichung des Patents diente zwar nicht primär der Armenfürsorge, man zog es jedoch im Falle des Fehlens anderer Gesetze hierfür heran. Die Armenfürsorge ging dabei

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[3] ZEILLER VON, F., Commentar über das allgemeine Bürgerliche Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie. Bd. 1, Wien und Triest, 1811, S. 102.

[4] UNGER, J., System des österreichischen allgemeinen Privatrechts. Bd. 1, 3. Aufl., Leipzig, 1868, S. 71.

[5] KARNER, E., Ochrana osobnosti v Rakousku a v Evropě [Der Schutz der Persönlichkeit in Österreich und in Europa]. *Karlovarské právnické dny* 21/2013, S. 662 ff., hier 662. KARNER, E., Menschenrechte und Schutz der Persönlichkeit im Zivilrecht. *Österreichische Juristen-Zeitung* 106, 2013, Heft 20, S. 906-912, hier S. 906.

[6] ELIÁŠ, K., Noblesa civilistické tradice a postmoderní přístupy k občanskému právu [Die Noblesse der zivilen Tradition und die postmodernen Zugänge zum Bürgerrecht]. *Právní rozhledy* 8/2003, S. 413-417, hier S. 413.

[7] „Allerhöchste Entschließung wegen der abzuschickenden Vagabunden und Bettler" vom 16. November 1754. Sammlung aller k. k. Verordnungen und Gesetze vom Jahre 1740 bis 1780, die unter der Regierung der Regierung des Kaisers Joseph des II. theils noch ganz bestehen, theils zum Theile abgeändert sind, als eine Hilfs- und Ergänzungsbuch zu dem Handbuche aller unter der Regierung des Kaisers Josephs des II. für die k. k. Erbländer ergangenen Verordnungen und Gesetze in einer chronologischen Ordnung. 8. Bde. Wien, 1786, weiter siehe Joseph II. – Gesetze chronologisch, hier Bd. 2 (1786), Nr. 365, S. 403-405. Der Terminus *„unbehauste Inwohner"* könnte als österreichische Staatsbürger ohne ständigen Wohnort in der betreffenden Gemeinde interpretiert werden.

[8] Beide Zitate ebenda, S. 404.

vom Prinzip der Einheimischen aus, zumal die Herrschaft (Gemeinde) das versorgende Subjekt darstellte. Nicht zu dieser Gemeinde zählende Angehörige erhielten keine Versorgung, sondern wurden im Falle eines Ansuchens in der Regel aus der Gemeinde abgeschoben.

Die in Niederösterreich geborene Eva Maria Krause arbeitete als Seidenspulerin in einer Seidenfabrik in Wien, wo sie sich seit ihrem zwölften Lebensjahr aufhielt. Im Mai 1847 suchte sie bei der 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 für einen Anspruch nicht Wien, sondern Altenbuch (Staré Buky) in Böhmen zuständig war. Der Mann der Bittstellerin, ein Schlossergeselle aus Altenbuch, war im Jahr zuvor an Typhus verstorben und hinterließ seine 24jährige Frau mit drei Kindern im Alter vier, zwei und einem halben Jahr. Die Herrschaft Schottenstift entschied, Eva Maria Krause könne nicht nur keine Unterstützung erhalten, sondern müsse nach Altenbuch abgeschoben werden. Die Witwe legte gegen den Bescheid ein Gnadengesuch ein, da niemand sie in Altenbuch kenne und sie sich dort nur sehr schwer ernähren könne; außerdem befürchtete sie, ihr sechs Monate altes Baby werde den Schubtransport nicht überleben. Die Landesregierung ließ die Situation prüfen: der Verdienst der Frau als Seidenspulerin betrug 3 Fl. 30 Kr. wöchentlich, wobei sie aber 7 Fl. pro Monat Miete bezahlen musste. Selbst die Beamten äußerten die Meinung, dass die Frau in Altenbuch in ihrem sehr spezialisierten Beruf keine entsprechende Beschäftigung finden könne und zu schwerer Feldarbeit nicht die notwendige Kraft besäße. Die Gemeinde Altenbuch ihrerseits erkannte förmlich ihren Anspruch auf Heimatzuständigkeit an, teilte jedoch zugleich mit, dass sie Eva Maria Krause aufgrund unzureichender Mittel im Armenfond nicht unterstützen könne. Angesichts der kalten Jahreszeit durfte die Frau mit ihren Kindern, von denen das Jüngste in der Zwischenzeit bereits verstorben war, in Wien bleiben. Da sie weiterhin nicht weiter im Stande war, sich und ihre Kinder zu ernähren, wurde gegen sie eine Abschiebung verfügt. Das Grundproblem bestand in der ablehnenden Haltung großer Agglomerationen, zugezogenen Arbeitern die Heimatzuständigkeit zu verleihen. Der verstorbene Ehemann Eva Maria Krauses war zwar 17 Jahre als Schlosser in Wien tätig gewesen, doch hatte der Magistrat bei der Erteilung der entsprechenden Genehmigung zum Betreiben des Schlossergewerbes expressis verbis festgehalten, dass damit keineswegs die Heimatzuständigkeit erworben werden könne.[9]

Im Jahre 1777 erfolgte also die Veröffentlichung der ersten gesetzlichen Kriterien, die sich für die Armenversorgung als maßgeblich erweisen sollten: *„(…) Damit das Maaß der ersten Populationsgattung, nämlich aller zu einem Orte gehörigen Menschen, in Evidenz gebracht werden kann."*[10] Die erste gesetzliche Festlegung der einheimischen Personen war vage definiert, vor allem die zweite Kategorie von Personen, die nicht in ihrem Geburtsort lebten. *„Erstens: In die einheimische (Population) eines jeden Orts selbst wurden iene Menschen gerechnet, welche daselbst geboren sind, alle, die sich daselbst für beständig niedergelassen, und ansässig gemacht haben, mithin eigentlich zu der Bevölkerung dieses Ortes gehörig sind. Zweitens: theilet sich die Population in iene Gattung der Menschen, die zwar in dem konskribiert werdenden Lande geboren, und folgsam auch schon anderwärts zu der einheimischen Population eines Orts dieses Landes gezählet, und dort aufgezeichnet werden, sich aber nur in der Zeit der Konskription in diesem, oder ienem Orte befinden, und also nur in Ansehung dieses Orts fremde sind. Drittens: in ienen Theil der Menschen, die gar nicht zur Population des konskribiert werdenden Landes gehören, sondern sich nur aus besonderen Ursachen darinnen aufhalten, mithin lediglich als Ausländer zu betrachten kommen; doch untertheilet sich diese dritte Populationsgattung noch ferners in Ausländer, oder Fremde aus andern österreichischen Erbländern, und in derlei aus andern völlig fremden Staaten."*[11] Die in dieser Form vorgenommene Aufteilung der Bevölkerung macht deutlich, dass es bei der ersten gesetzlichen Regelung eher um die Trennung zwischen den in den konskribierten Ländern ansässigen und den übrigen Personen ging, ohne dass man jedoch zwischen Ausländern und Fremden aus nicht konskribierten Ländern des österreichischen Vielvölkerstaates unterschied. Diese Tendenz ist noch lange zu beobachten, wie die Polizeiakten in der mährischen Landeshauptstadt Brünn beweisen, die eine genaue Evidenz von Lohnarbeitern und Dienstpersonal zeigen, die eben nicht die Brünner Heimatzuständigkeit besaßen, ohne jedoch zwischen Ausländern, österreichischen Staatsbürgern aus anderen Kronländern und Inländern, die lediglich in den nahegelegenen Gemeinden lebten, zu unterscheiden.[12]

Für die lokalen Behörden, vor allem für die (Proto)-Gemeindeverwaltung[13], stellte sich dieser Tatbestand als äußerst diffizil dar, da sie in eine Situation gerieten, in der sich die Zuständigkeit für die entsprechende Person und damit ihre Armenfürsorge als sehr problematisch erwies. Der Staat zwang die Gemeinden und Herrschaften jedoch, die Armen zu versorgen. Doch wer ist jener Arme, der versorgt werden soll? Die nachfolgende gesetzliche Regelung hinsichtlich der Heimatzuständigkeit schloss jedenfalls nicht die Armenpflege ein, kam hier freilich zur Anwendung. „Das Konskriptions- und Rekrutierungspatent" erlangte zwar in erster Linie mit Blick auf die eventuell in Frage kommenden wehrpflichtigen Männer für die in der Zeit des Josephinismus errichtete stehende Armee Bedeutung,

[9] 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.

[10] Patent vom 18. September 1777. Joseph II. – Gesetze chronologisch, Bd. 8 (1787), Nr. 2086, S. 311ff. Hier zitiert aus der Reduplikation des Patents vom 5. Juli 1779.

[11] Ebenda, S. 331-332.

[12] Mehr dazu: STOKLÁSKOVÁ, Z., Die Arbeitsmigration in der Habsburgermonarchie im 19. Jahrhundert – Staat, Herrschaften, Gemeinden und das Sozialsystem, in: Österreich und Tschechien als Immigrationsländer – Transnationale Arbeitsmigration seit 1780 im historischen Vergleich, Wien, 2023, in Druck.

[13] Der Terminus (Proto)-Gemeindeverwaltung stammt lediglich von der Autorin, die damit eine Lücke in der Terminologie zu überbrücken versucht. Es handelt sich um die Gemeindeverwaltung, die aber noch nicht gewählt wurde, wie dies später nach der Provisorischen Gemeindeordnung im Jahr 1849 geschah.

wurde jedoch von den lokalen Behörden für die Armenfürsorge genutzt, zumal besagtes Patent eine gesetzliche Trennung von einheimischen und fremden Personen festlegte. Als Einheimische galten *„alle in dem Orte Gebornen." „Diese werden immer, sie seyen anwesend oder nicht, bey ihren noch lebenden Eltern classificirt, so lange sie sich nicht selbst für einen eigenen Aufnahms-Bogen qualificirt, oder anderwärts nationalisirt haben, oder auch in den Geistlichen- oder Soldaten-Stand übergetreten sind; (…)"* [14]

Die zweite Kategorie definierte die gesetzliche Regulierung für die Aufnahme einer anderen Heimatzuständigkeit durch die sog. *Nationalisierung*. Zu den Einheimischen sollten *„alle, welche sich in dem Orte nationalisirt haben"* gezählt werden. *„Die Nationalisierung geschieht entweder durch einen zehnjährigen Aufenthalt in den conskribirten Erbländern* [15] *oder durch häusliche Niederlassung, Ankauf von Grundstücken, Antretung des Bürger- oder Meisterrechtes, einer Bedienung, eines Amtes oder einer andern stabilen Versorgung."* [16] Die Nationalisierung im Sinne eines Erwerbs des politischen Domizils war also an Besitz, Amt oder eine andere Ernährungsquelle gebunden. Der Ausdruck *„eine andere stabile Versorgung"* lässt einen breiten Spielraum in der Interpretation zu, der von Gemeindebehörden benutzt werden konnte. *Die Nationalisierung* nach dem sog. *Dezennium* wurde bereits durch das Hofdekret vom 28. Dezember 1826 gesetzlich definiert. *„Sobald jemand durch einen Zeitraum von 10 Jahren von seiner Geburtsgemeinde entfernt ist und sich die ganze Zeit fortwährend in einem Orte aufgehalten hat, ist diese letztere Gemeinde nach den bestehenden allgemeinen Vorschriften zu dessen Versorgung verpflichtet."* Die faktische Realisierung des Dezenniums ist jedoch wesentlich älter, sie greift bereits bis in die Mitte des 18. Jahrhunderts zurück.[17]

Die Existenz oder Absenz der Eltern besaß für die Evidenz von Einheimischen große Wichtigkeit. Personen ohne Eltern wurden – unabhängig von ihrem Alter – als Fremde in der Gemeinde, in der sie sich aufhielten, klassifiziert. *„Die conscribirten Elternlosen, das ist, solche Elternlose, welche in was immer für einem concribirten Lande gebürtig sind, oder sich durch einen zehnjährigen Aufenthalt daselbst nationalisirt, jedoch nicht für einen eigenen Aufnahmsbogen qualificiert haben. Zu den Elternlosen werden auch jene Menschen gerechnet, deren Eltern man nicht weiß. Diese Menschen werden immer da, wo sie bei der Conscription angetroffen werden, in der Fremdentabelle, Formular B, classificiert und ihr Geburtsort samt der Herrschaft, zu der sie gehören, in der Qualifikation angezeiget."* [18] Alle übrigen Personen betrachtete man als Fremde. Keinerlei Bedeutung hingegen besaß bei der Interpretierung des Konskriptionspatents, auf dem das politische Domizil mit seinem vollendeten zehnjährigen ununterbrochenen Aufenthalt fußte, der Umstand, dass eine Person in den Konskriptionsverzeichnissen als Fremde(r) geführt wurde. Dem Wortlaut des Konskriptionspatents zufolge konnten Untertanen aus den sog. altkonskribierten Ländern erst dann in einer Gemeinde nationalisiert werden, nachdem sie von ihrer Herrschaft entlassen worden waren.

Die Wirksamkeit des Konskriptionspatents wurde erst durch die Veröffentlichung der Provisorischen Gemeindeordnung im Jahre 1849 aufgehoben. In der Praxis erwies sich dies als zumindest problematisch. Die „Provisorischen Vorschriften über das Heimatrecht", eine bloße Sammlung der gültigen Vorschriften, zusammengestellt von der Oberösterreichischen Landesbehörde im Jahre 1850, spiegeln die Realität. Die Vorschriften verfolgten das Ziel, Beamten am zweckmäßigsten Kriterien zu bieten, nach denen sich die Heimatzuständigkeit feststellen ließ. Allein diese Tat macht deutlich, dass es in der Gesetzgebung eine Vorschriftenlücke gab. Aus diesem Grunde schuf man eine Hierarchie, aufgrund derer die Heimatzuständigkeit ermittelt werden konnte, falls der Bittsteller sich nicht in der Lage zeigte, entsprechende Beweise vorzulegen. An erster Stelle standen jene Personen, die in der Gemeinde über Besitzrechte verfügten oder die Erlaubnis, ihr Gewerbe oder eine gewerbeähnliche Tätigkeit auszuüben; an zweiter Stelle folgten Staatsbeamte, Geistliche und öffentlich bestellte Lehrer, die ihr Domizil unmittelbar nach ihrem Amtsantritt erhielten. An dritter Stelle schlossen sich Personen an, die seit zehn Jahren freiwillig und ununterbrochen in der Gemeinde weilten, an vierter Stelle schließlich die nationalisierten österreichischen Staatsbürger, die im Heimatverband Aufnahme fanden. Für den Fall, dass sich nicht ermitteln ließ, ob sich eine Person in der Gemeinde seit zehn Jahren aufhielt, oder andere Beweise fehlten, sollte die entsprechende Person das politische Domizil in der Gemeinde der Eltern erhalten. Erst danach, wenn auch dieses nicht festgestellt werden konnte, galt die entsprechende Person als in der Gemeinde beheimatet, in der sie geboren wurde.

Der Geburtsort, der in der alleinigen – zu jener Zeit gültigen - gesetzlichen Norm als das wichtigste Kriterium für die Heimatzuständigkeit galt, geriet bei der praktischen Anwendung erst an die sechste Stelle. Die Praxis scheint bereits länger Anwendung gefunden zu haben, wie die vorsichtige Formulierung des Hofdekrets vom 22. April 1822 zeigt: *„Die bei einem zufälligen Besuche erfolgte Geburt eines Kindes kann eine Gemeinde nicht*

[14] Konskriptions- und Rekrutierungspatent vom 25. Oktober 1804. Sr. K. K. Majestät Franz des Zweyten Politische Gesetze und Verordnungen für die Oesterreichischen, Böhmischen und Galizischen Erbländer, weiter siehe Franz II. – Gesetze. Wien, 1806ff, Bd. 23 (1807), § 26, S. 29.

[15] Zu den konskribierten Erbländern wurden Oberösterreich, Niederösterreich, Innerösterreich, Böhmen, Mähren, Schlesien, Galizien und die Bukowina gerechnet, die dann weiter als „altkonskribierte Länder" erschienen. Für Tirol, Vorarlberg und Dalmatien bestanden eigene Vorschriften, die sich in bestimmten Bereichen wesentlich von jenen, in konskribierten Ländern geltenden Vorschriften unterschieden. In Galizien und der Bukowina wurde das Konskriptions- und Rekrutierungspatent zwar veröffentlicht, besaß jedoch kaum praktische Bedeutung. Die zum österreichischen Vielvölkerstaat gehörenden italienischen Gebiete kannten das Institut des österreichischen politischen Domizils nicht; der Terminus *cittadinanza* deckte auch die Staatsbürgerschaft ab. In den italienischen Gebieten gab es eine andere Form der Armenfürsorge, die im Untersuchungszeitraum nicht unmittelbar vom Staat oder vom Land abhing.

[16] Konskriptions- und Rekrutierungspatent vom 25. Oktober 1804. *Franz I. (II.) – Gesetze*, Bd. 23 (1807), § 26, S. 29.

[17] Die Allerhöchste Entschließung wegen der abzuschickenden Vagabunden und Bettler vom 16. November 1754. Joseph II. – Gesetze chronologisch, Bd. 2 (1786), Bd. 2 (1786), Nr. 365, S. 403-405. Bei entlassenen Soldaten, die vor dem Eintritt in die österreichische Armee als Ausländer, bzw. fremde Staatsbürger galten, oder bei Soldaten, die aus nichtkonskribierten Ländern stammten, zählte das Dezennium erst nach der Entlassung aus der Armee.

[18] Konskriptions- und Rekrutierungspatent vom 25. Oktober 1804. *Franz I. (II.) – Gesetze*, Bd. 23 (1807), § 26, S. 29-30.

verpflichten, in der Folge die Verpflegungskosten für dasselbe zu berichtigen, sondern es bleibt hiezu diejenige Gemeinde verpflichtet, wo das Domicilium der Eltern zur Zeit der Geburt des Kindes war.“[19] Die „bei einem zufälligen Besuch“ erfolgte Geburt kam besonders bei außerehelich geborenen Kindern vor, die in der Frage des politischen Domizils eine besondere Stellung einnahmen. Diese Kinder sollten das Heimatrecht ihrer Mutter bekommen, sofern dieses ermittelt werden konnte. Entscheidend war hierbei, ob sich die Mutter in einem Ort zehn Jahre ununterbrochen und freiwillig aufgehalten hatte; in diesem Fall sollte sie als ‚einheimisch‘ gelten. Im umgekehrten Fall galt für ihr Kind die Gemeinde der Geburt als verantwortlich, was freilich nicht für den Fall eintrat, dass sich das Kind selbst in einer Gemeinde zehn Jahre ununterbrochen aufhielt. Dann zeichnete für die Kosten für dessen Ernährung und Erziehung die Aufenthaltsgemeinde verantwortlich.

Es bestand also ein eindeutiger Unterschied zwischen ehelichen und unehelichen Kindern, die durch ihr „Dezennium“ selbständig das Heimatrecht erwerben konnten – ohne Rücksicht darauf, ob ihre Mutter in der betreffenden Gemeinde beheimatet war. Die außerehelich geborenen Kinder galten also im Unterschied zu ehelichen als selbständige Subjekte in der Frage des eigenen Erwerbs des politischen Domizils, was bei ehelichen Kindern ausgeschlossen war. Die Gesetze unterschieden zwischen außerehelich geborenen Kindern und Personen ohne Eltern, für die die gleichen Postulate galten, die jedoch stets als Ortsfremde angesehen wurden. Die Interpretation der Heimatzuständigkeit gemäß Konskriptionspatent ist nicht eindeutig, da man das Patent zwar für die Feststellung der Heimatzuständigkeit heranzog, ohne dass jedoch selbiges für diesen Zweck veröffentlicht worden wäre.

Der Geburtsort als Kriterium für die Heimatzuständigkeit erwies sich in der praktischen Anwendung als problematisch. Manche Gemeinden, insbesondere große Agglomerationen, wehrten sich gegen die Aufnahme in den Heimatverband von Personen, die zwar in der Gemeinde geboren waren, deren Eltern jedoch einer anderen Gemeinde angehört hatten, wie das Beispiel der Maria Amalia Kowarzik zeigt. In den überlieferten Archivakten begegnen wir Maria Amalia, als sie als vierzehnjährige Textilarbeiterin in der Plüschproduktion von ihrem ersten Arbeitsgeber, den Gebrüdern Schöller, entlassen wurde. Sie war zwischen dem 7. März und dem 16. September 1848 arbeitslos.[20] Es existiert keinerlei Hinweis darauf, dass Maria Amalia unter die Armenversorgung fiel, allerdings erhielt sie für die Zeit der Arbeitslosigkeit eine Verlängerung der Aufenthaltserlaubnis. Wenngleich Maria Amalia Kowarzik aus Brünn stammte, galt die mährische - im Gerichtsbezirk Eibenschütz (Ivančice) gelegene - Gemeinde Domaschow (Domašov) als zuständig, ebenso wie bei ihren Eltern, denen sie als unmündige Person folgen musste. Angesichts des Alters von Maria Amalia konnte letztere den Erwerb des Heimatrechts nicht selbständig beantragen, doch gelang es ihr im Jahre 1855 Aufnahme in den Brünner Heimatverband zu finden. Da sie zu der Zeit noch immer nicht volljährig war, dürfte dies durch eine andere Person geschehen sein: entweder durch ihre eigene Heirat oder durch eine neue Ehe ihrer Mutter.[21] Maria A. Kowarzik arbeitete weiter in Brünn, ohne wiederholt die Arbeitgeber zu wechseln: Nach ihrer Arbeitslosigkeit war sie seit dem 16. September 1848 in der Textilfirma Auspitz tätig, seit dem 30. November 1877 in der Textilfabrik Spitz.[22] Über ihr weiteres Schicksal ist nichts bekannt, in den Polizeiakten jedenfalls erscheint sie nicht mehr, da sie nicht als Einheimische notiert wurde.

In der Frage des politischen Domizils wurde die Gültigkeit des Konskriptionspatents erst durch die Provisorische Gemeindeordnung im Jahre 1849 aufgehoben, die die gesetzlichen Grundlagen des Heimatrechts in Österreich schuf.[23] In den katastral definierten Ortgemeinden unterschied man *Gemeindeglieder* und *Fremde*. Als Gemeindeglieder galten Gemeindebürger oder Gemeindeangehörige. Als Gemeindebürger definierte man Personen, die *„von einem in der Gemeinde gelegenem Haus- oder Grundbesitz, oder von einem, den ständigen Aufenthalt in der Gemeinde gesetzlich bedingenden, Gewerbe oder Erwerbe einen bestimmten Jahresbetrag an directen Steuern zahlen, oder von der Gemeinde als solche anerkannt worden sind.“ „Gemeindeangehörige sind jene, welche durch Geburt oder Aufnahme in den Gemeindeverband der Gemeinde zuständig sind.“*[24] Die Geburt begründete die Zuständigkeit zur Gemeinde der Eltern, bei unehelichen Kindern der Mutter; das Ableben eines oder beider Elternteile besaß dabei keine Auswirkungen auf die Heimatzuständigkeit. Die erst 1849 festgelegte Norm fand in der Praxis, wie das Beispiel von Maria Amalia Kowarzik zeigt, längst ihre Anwendung.

In unserem Zusammenhang besitzt die Erleichterung der Aufnahme in den Heimatverband für mittellose Personen große Bedeutung, die sich als Errungenschaft der revolutionären Ereignisse interpretieren lässt. Eine neue Möglichkeit verkörperte die klar definierte Aufnahme *„stillschweigend durch Duldung eines*

[19] HERZOG, F., Sammlung der Gesetze über das politische Domicil im Kaiserthume Österreich. Wien, 1837, S. 82.

[20] Die 1819 gegründete Fabrik der Gebrüder Schöller gehörte zu größten Textilunternehmen in Brünn. Im Jahre 1826 richtete man für die Arbeiter eine Krankenkasse ein. SMUTNÝ, B., Brněnští podnikatelé a jejich podniky 1764-1948: encyklopedie podnikatelů a jejich rodin [Brünner Unternehmer und deren Unternehmen 1764-1948: Die Enzyklopädie der Unternehmer und deren Familien]. Brno, 2012, S. 381.

[21] „Maria Kowarzik ist in Nr. 5 am Mühlgraben einheimisch und zuständig konskribiert. Konsk. Amt Brünn am 12. 9. 1855.“ MZA Brno, Policejní ředitelství B 26, Protokollbuch (1848), Nr. 569. Auf ihre eigene Heirat oder auf eine neue Ehe ihrer Mutter schließe ich aus der Bemerkung des Polizeibeamten, Maria Amalia würde bei ihrer Mutter leben, wobei in vorigen Anträgen die Eltern Erwähnung finden. Ihr Vater konnte also bereits verstorben gewesen sein. Maria Amalia und ihre Mutter änderten auch den Wohnort, was sich entweder auf die veränderten sozialen Verhältnisse oder auf eine neue Heirat zurückführen lassen könnte.

[22] Zur den bekannten Textilunternehmen der jüdischen Industriellen Auspitz und Spitz mehr bei: SMUTNÝ, B., *Brněnští podnikatelé a jejich podniky 1764-1948*, S. 24-26; 416-417.

[23] Der Begriff Heimatrecht taucht zum ersten Mal in der Provisorischen Gemeindeordnung auf; die Verwendung dieses Terminus davor ist jedoch üblich. Patent vom 17. März 1849. *Allgemeines Reichs-Gesetz- und Regierungsblatt für das Kaiserthum Oesterreich* (weiter RGBl.), Jg. 1849, Wien, 1850, Nr. 170, II. Ergänzungsband, S. 203ff.

[24] Patent vom 17. März 1849, § 8 und 11, RGBl., Nr. 170, S. 205.

ohne Heimatschein, oder mit einem bereits erloschenen Heimatscheine sich durch vier Jahre ununterbrochen in der Gemeinde aufhaltenden, die österreichische Staatsbürgerschaft besitzenden Fremden". Das bisherige Dezennium wurde damit abgeschafft, nunmehr genügten vier Jahre eines ununterbrochenen Aufenthaltes, der laut späterer Normen darüber hinaus freiwillig sein musste, womit im Gefängnis einsitzende Personen, Zwangsarbeiter und vor allem - wie später genauer formuliert wurde - Personen mit sog. zugewiesenem Heimatrecht ausgeschlossen wurden. Die (Zwangs) Aufnahme des Heimatrechts für Frauen nach der Heirat behielt man bei, eine (alte und zugleich) neue Möglichkeit erhielt *„durch den förmlichen Gemeindebeschluss"* eine Präzisierung.[25] Die Provisorische Gemeindeordnung verankerte das Recht zur Armenversorgung: *„Die Gemeindeangehörigen haben überdies das Recht: 1. Des ungestörten Aufenthaltes im Gebiete der Gemeinde; 2. Auf die Benützung des Gemeindegutes nach den bestehenden Einrichtungen; 3. Auf Versorgung nach Maße der nachgewiesenen Bedürftigkeit."*[26]

Die Provisorische Gemeindeordnung setzte die Veröffentlichung eigener Vorschriften für Städte mit Statuten voraus, was innerhalb kurzer Zeit auch geschah. Das Jahr 1850 machte freilich einen dicken Strich durch die bisherige Verflechtung von unklaren Auslegungen zum Thema des politischen Domizils: *„Gemeindeangehörige sind dermalen alle Personen, welche die Gemeindeangehörigkeit nach den bisher bestandenen Heimathgesetzen erworben haben."*[27] Die Bekanntgabe der Provisorischen Gemeindeordnung durch große Agglomerationen zeigt die Präzisierung von Fällen, bei denen die Aufnahme in den Heimatverband „drohte", nämlich in der Frage einer stillschweigenden Aufnahme, die für Personen, die von ihrer Hände Arbeit lebten und die latente Bezieher der Armutshilfe sein konnten, den einzigen Weg einer Änderung ihrer Heimatzuständigkeit darstellte. *„Die stillschweigende Aufnahme in den Gemeindeverband durch Duldung erfolgt nur dann, wenn der Fremde auch bei der in dem obigen Zeitraum fallenden zweiten Aufnahme der Conskriptionslisten in dieselben eingetragen war und keine Verwahrung der Gemeinde gegen dessen Aufnahme durch Anhaltung zur Erlangung eines neuen Heimatscheines, oder durch Ausweisung in seinen Heimatort Statt gefunden hat.*[28] Die Ausweisung oder der Schub in den Heimatort schlossen den Bewerber vom Anspruch auf die Heimatzuständigkeit aus.

In der Provisorischen Gemeindeordnung wurde zwischen der Aufnahme (faktisch: dem Anspruch auf Aufnahme) und dem Recht auf Heimatzuständigkeit unterschieden. *„Jeder österreichische Reichsbürger hat das Recht, die Aufnahme als Gemeindeangehöriger zu verlangen, wenn er 1. Die volle Befugnis hat, über seine Person und über sein Vermögen zu verfügen; 2. Wenigstens zehn Jahre unmittelbar vorher auf Grundlage eines giltigen, nicht erloschenen Heimatscheines ununterbrochen im Gemeindebezirke wohnhaft ist; sich sammt seiner Familie eines unbescholtenen Rufes erfreut und 4. Den Besitz eines, den Unterhalt seiner Familie sichernden Vermögens oder Nahrungszweiges nachweiset."*[29] Im Falle einer Verweigerung der Aufnahme entschied im Prozess des Rekurses der zuständige Kreispräsident. Beide Wege zur Erlangung des Heimatrechtes (per Gemeindebeschluss der Gemeinde oder Entscheid des Kreispräsidenten) waren mit einer Aufnahmegebühr verbunden.[30] Das Recht auf Aufnahme in den Heimatverband war also an Besitz oder eine stabile Versorgung gebunden.

Die Gemeinden suchten sich gegenüber eventuellen Kosten für die Armenfürsorge durch Streifendienste und Visitationen zu erwehren, wobei sie sich auf konkrete Vorschriften stützen konnten. In jedem Fall erfolgte die Anlage eines Protokolls („Konstitutum"), wobei man den Namen der entsprechenden Person, Staatsbürgerschaft, Zuständigkeit, Familienstand, Religion und eventuellen Bettel erfasste. Besondere Bedeutung besaßen eine eventuelle Übertretung des Gesetzes sowie ein unter Umständen in der Vergangenheit erfolgter Schub. Fremde Staatsbürger sollten über die Grenze abgeschoben, österreichische Staatsbürger in ihre Heimatgemeinden geschickt oder abgeschoben werden. Einheimische und erwerbsfähige Personen hingegen musste die Gemeinde versorgen. Den betreffenden Personen drohten Zwangsarbeit (Gemeindedienst) oder Zwangsarbeitsanstalt.[31]

Bemerkenswert an der Provisorischen Gemeindeordnung ist das Bestreben, Arme und Vaganten, bei denen sich eine Zuständigkeit nicht nachweisen ließ, nicht einfach davonzujagen, auszuweisen und abzuschieben, sondern sie entsprechend ihres Zustands sowie der finanziellen Möglichkeiten der Gemeinden zu versorgen. Erwerbsunfähige Personen, bei denen eine Zuständigkeit nicht ermittelbar war, fielen derjenigen Gemeinde zur Last, in der *„sie sich zuletzt aufgehalten hatten"*.[32] Alle Personen besaßen in ihrer Gemeinde einen Anspruch *„auf polizeilichen Schutz der Person und des in der Gemarkung liegenden Eigentums und auf die Benützung der Gemeinde-Anstalten nach Maß der bestehenden Einrichtungen"*. In unserem Zusammenhang ist besonders das Recht *„auf Versorgung nach Maßgabe der nachgewiesenen Bedürftigkeit"* hervorzuheben.[33] Damit wurden die Grundlagen der Struktur der sozialen Fürsorge im österreichischen Vielvölkerstaat geschaffen.[34]

3. Die problematische Auslegung des Terminus *häusliche Niederlassung*

„Unter *häuslicher Niederlassung* „kann weder begrifflich noch auch der Terminologie des § 26 Z. 1 lit. b lediglich die eigentüm-

[25] Patent vom 17. März 1849, § 12, RGBl., Nr. 170, S. 205.
[26] Patent vom 17. März 1849, § 22, RGBl., Nr. 170, S. 206.
[27] Angesichts des Themas wurde hier das Beispiel Brünn als einer Stadt mit Statuten herangezogen. Provisorische Gemeindeordnung für die Landeshauptstadt Brünn vom 18. Juli 1850, *Landesgesetz- und Regierungsblatt für das Kronland Mähren* (weiter LGBl.), Bd. 17 (1850), Nr. 126, § 8, S. 195.
[28] LGBl., Bd. 17 (1850), Nr. 126, § 10 b, S. 196.
[29] LGBl., Bd. 17 (1850), Nr. 126, § 11, S. 196
[30] Die Stadt Brünn verlangte die Aufnahmegebühr von zwei Gulden.
[31] STUBENREICH VON, M., *Handbuch der österreichischen Verwaltungs-Gesetzkunde.* 3. Verbesserte und vermehrte Auflage. Bd. 1, Wien, 1861, S. 425.
[32] Patent vom 17. März 1849, § 18, RGBl., Nr. 170, S. 206.
[33] Beide Zitate: Patent vom 17. März 1849, § 21 und § 22, Abs.3, RGBl., Nr. 170, S. 206.
[34] Das Heimatrecht erfuhr in der zweiten Hälfte des 19. Jahrhunderts einige Veränderungen, die hier aber nicht behandelt werden, da der verfolgte Zeitraum Mitte des 19. Jahrhundert endet.

liche Erwerbung von Realitäten verstanden werden. Vielmehr ist darunter zu versehen die auf ein bestimmtes oder erhofftes Einkommen aus dem Vermögen aus dem Erwerb oder aus einem sonstigen Bezuge gestützte Gründung eines Familienhaushaltes an diesem Ort mit der Absicht, daselbst den ständigen Aufenthalt zu nehmen."[35] Die Interpretation des Terminus „häusliche Niederlassung" führte später zu Beschwerden von Gemeinden, die sich weigerten, Personen in den Heimatverband aufzunehmen. Eine Erkenntnis des Verwaltungsgerichtshofes vom 15. Juli 1887 erläuterte die wichtige Interpretation der Anwendung des Erwerbs des Heimatrechts durch die „häusliche Niederlassung": Die für die *Nationalisierung* gemäß Conskriptionspatent formulierte Notwendigkeit der *häuslichen Niederlassung* ist durch die *„eigenthümliche Erwerbung der Realität, auf welcher die Niederlassung erfolgt, nicht bedingt".*[36]

Die Erkenntnis vom 15. Juli 1887 wurde aufgrund der Beschwerde der Gemeinde Napajedl (Napajedla) in Mähren vom 28. August 1886 gegen die Entscheidung der mährischen Statthalterei, die Zuständigkeit von Ignaz Oulehla betreffend, veröffentlicht. Der am 29. Juli 1814 in Wischitz (Vyžice) geborene Ignaz Oulehla, ehelicher Sohn des Grundbesitzers in Kwitkowitz (Kvítkovice), übersiedelte im Jahre 1843 oder 1844 mit seiner Familie nach Napajedl, wo ihm am 6. Mai 1844 ein Kind geboren wurde. Ignaz Oulehla hatte in Napajedl das Häuschen Nr.160a erworben und dieses, laut Vertrag vom 26. Februar 1848, an einen gewissen Josef Swoboda weiterverkauft. Der entsprechende Vertrag gelangte am 5. September 1848 vom Grundbuchamt zur Einverleibung. Ignaz Oulehla ging seinem Broterwerb in den Jahren 1849 bis 1866 in der Zuckerfabrik in St. Miklos (heute Fertöszentmiklós, Ungarn) nach, später arbeitete er in Untereigen (in Niederösterreich) als Spodium-Aufseher (Herstellung von tierischer Knochenasche zur weiteren industriellen Verarbeitung). Er starb am 5. April 1886 in der Städtischen Versorgungsanstalt Wien am Alserbach, ohne seit seinem Weggang aus Napajedl in einer Gemeinde ein selbständiges Heimatrecht erworben zu haben. *„Mit der angefochtenen Entscheidung der mährischen Statthalterei vom 26. August 1886 wurde Ignaz Oulehla in Napajedl als heimatberechtigt erklärt, weil er sich durch häusliche Niederlassung als Besitzer der am 26. Februar 1848 verkauften Realität dort im Sinne des § 26, Abs. 1b des Conskriptionspatents vom Jahre 1804 nationalisirt hatte, bis zu seiner im Jahre 1849 erfolgten Übersiedlung nach Ungarn zur einheimischen Bevölkerung zählte, seither aber in keiner anderen Gemeinde das Heimatrecht erlangt hat. Der V. G. Hof fand gegen diese Entscheidung in der Beschwerde vorgebrachten Einwendung, daß bloß der Verkauf des Häuschens C.-Nr. 160a in Napajedl seitens des Letzteren, insbesondere nicht dessen häusliche Niederlassung in Napajedl mit Zustimmung der Obrigkeit, nachgewiesen sei, und daß letztere Gemeinde denselben als ihren Angehörigen nicht anerkannten, gesetzlich nicht begründet. (…) Nachdem überdies die Beschwerde einen mehrjährigen Aufenthalt des Ignaz Oulehla in Napajedl vor dem Jahre 1849 nicht bestreite, so steht mit Rücksicht auf seinen Realitätenerwerb daselbst dessen Nationalisierung in Napajedl außer jedem Zweifel."*[37] Die Beschwerde der Gemeinde Napajedl wurde vom Verwaltungsgerichtshof abgewiesen.[38] Interesse verdient, dass die vorherige Heimatzuständigkeit von Ignaz Oulehla für nichtig erklärt wurde, zumal sie überhaupt keinerlei Erwähnung fand; für die Zeit vor dem Erwerb des Hauses hätte es sich um diejenige seiner Eltern gehandelt haben können.

Die Erkenntnis des Verwaltungsgerichtshofes vom 3. Dezember 1880 entschied eine problematische Auslegung über den Erwerb des Heimatrechts durch die *häusliche Niederlassung*. *„Das die Nationalisierung in einem Orte nach dem Conskriptionspatente vom Jahre 1804 begründende Moment der „häuslichen Niederlassung" ist nicht dadurch bedingt, daß die Realität, auf welcher die Niederlassung einer Person erfolgte, Eigenthum derselben sei."*[39] Den Anlass für die Erkenntnis lieferte die Beschwerde der Gemeinde Bennisch (Horní Benešov) gegen die Gemeinde Wiese (Loučky, beide Ortschaften in Österreichisch Schlesien) gegen die Entscheidung des Ministeriums des Innern vom 28. Juni 1880, betreffend das Heimatrecht der Albertine Wasserhauer. Die am 22. November 1836 geborene Albertine Wasserhauer war die Tochter des bereits verstorbenen Johann Wasserhauer, von 1827 bis zum 1. Oktober 1837 als Liechtensteinischer Revierförster bedienstet. Die Landesregierung führte dessen Heimatzuständigkeit in Wiese auf das sog. Decennium zurück. Das Ministerium des Innern stützte sich auf ebendiesen Paragrafen, insonderheit freilich auf den Umstand der häuslichen Niederlassung, zumal sich besagter Johann Wasserhauer von der Zeit seiner Pensionierung im Jahre 1837 bis zu seinem Tod am 19. September 1839 in Au-Haus Nr. 60 (Gemeinde Benisch), wo seine Gattin dieses Haus besaß, niederlassen hatte. Die Umsiedlung der unmündigen Albertine Wasserhauer mit ihrer nun verwitweten Mutter nach Freudenthal (Bruntál) und später nach Wien änderte selbstredend nichts an der Heimatzuständigkeit, allerdings bestritt die Gemeinde Bennisch die häusliche Niederlassung von Johann Wasserhauer in Bennisch, weil das Haus Nr. 60 nicht sein Eigentum war, sondern seiner Gattin gehörte, bei der er sich aufhielt.

Albertine Wasserhauer weilte seit den vierziger Jahren mit ihrer Mutter in Wien. Aufgrund ihres belegbaren Aufenthaltes bis zum 22. November 1860 hätte sie durch eine Duldung die

[35] GOLDEMUND, I. – RINGHOFER, K. – THEUER, K. (Hrsg.), *Das österreichische Staatsbürgerschaftsrecht, mit erläuternden Anmerkungen, einschlägigen Nebengesetzen und der Rechtsprechung der höchsten Gerichtshöfe* (Manzsche Ausgabe der österreichischen Gesetze, Bd. 19). Wien, 1969, S. 578.

[36] Erkenntnis vom 15. Juli 1887. BUDWINSKI VON, A. (Hrsg.): *Erkenntnisse des k. k. Verwaltungsgerichtshofes.* Jg. XI, 1887, Wien, 1887, Nr. 3646, S. 550.

[37] Erkenntnis vom 15. Juli 1887. BUDWINSKI VON, A. (Hrsg.): *Erkenntnisse des k. k. Verwaltungsgerichtshofes.* Jg. XI, 1887, Wien, 1887, Nr. 3647, S. 551-552.

[38] Den Grund der Beschwerde führt die Erkenntnis des Verwaltungsgerichtshofs nicht an, man kann jedoch annehmen, dass es sich um die Rückstellung der Kosten des Wiener städtischen Versorgungsanstalt handelte; diese These bestätigt auch die Datierung der Beschwerde der Gemeinde, die bald nach dem Tod des Ignaz Oulehla erfolgte.

[39] Erkenntnis vom 3. Dezember 1880. BUDWINSKI VON, A. (Hrsg.), *Erkenntnisse des k. k. Verwaltungsgerichtshofes.* Jg. IV, 1880, Wien, 1881, Nr. 939, S. 452-454.

stillschweigende Aufnahme in den Gemeindeverband erlangen können, sofern sie vor dem 27. April 1859 innerhalb von vier Jahren bei zwei Aufnahmen in die Konskriptionslisten einen Nachweis geführt sowie darüber hinaus keinen Heimatschein besessen hätte und gegen sie eine Ausweisung in den Heimatort vollzogen worden wäre.[40] Jedoch besaß ihre Mutter einen am 19. April 1856 von der Gemeinde Bennisch ausgestellten Heimatschein, der angesichts der Minderjährigkeit ihrer Tochter als Ausweis der Zugehörigkeit gelten musste. Der Aufenthalt von Mutter und Tochter in Freudenthal und Olmütz (Olomouc) zog keine rechtlichen Folgen nach sich, zumal er keine zehn Jahre dauerte.

Der Verwaltungsgerichtshof führte folgende Begründung an: *„Falls das Gesetz von der Anschauung ausgegangen wäre, daß derjenige, welcher sich im Orte häuslich niederläßt, nur unter der Bedingung sich nationalisiere, wenn die Liegenschaft, auf welcher er sich niederläßt, eigenthümlich erwirbt, wäre es überflüssig gewesen, das Moment der häuslichen Niederlassung als Nationalisierungstitel aufzunehmen, weil es in dem andern Titel, nämlich in dem des Ankaufes von Grundstücken inbegriffen wäre."*[41] Demgemäß wurde also entschieden, dass sich Johann Wasserhauer im Jahre 1837 in Bennisch häuslich niedergelassen hatte und nach damaligen Vorschriften mit der minderjährigen Tochter dort einheimisch geworden war. Seine Tochter Albertine fiel dementsprechend, sofern sie in der Zwischenzeit keine andere Heimatzuständigkeit erworben hatte, in den Zuständigkeitsbereich von Bennisch. Die Beschwerde der Gemeinde Bennisch wurde als gesetzwidrig erklärt, ebenso wies das Gericht eine Erstattung der Verfahrenskosten von der mitbelangten Gemeinde Wiese als unbegründet ab.[42] Beachtung verdient der Umstand, dass der Verwaltungsgerichtshof die Tatsache, dass die Gemeinde Bennisch die Heimatzuständigkeit der Ehefrau von Josef Wasserhauer nie in Zweifel gezogen hatte, unberücksichtigt ließ. Wasserbauers Ehefrau besaß in Bennisch ein Haus und war im Besitz eines gültigen von der Gemeinde Bennisch ausgestellten Heimatscheins. Den geltenden Gesetzen zufolge musste die Ehefrau die gleiche Heimatzuständigkeit besitzen wie ihr Ehemann – mit Ausnahme etwa von geschiedenen Frauen, Obdachlosen und anderen Personen, was hier keine Rolle spielt. Die verheiratete Frau war nach der Heirat verpflichtet, die Heimatzuständigkeit ihres Mannes anzunehmen, während das Heimatrecht der Ehefrau nicht auf den Mann überging.[43] Die Erkenntnis des Verwaltungsgerichtshofes war folglich auch so richtig, da die Ehefrau dasselbe Heimatrecht wie ihr Ehemann besitzen musste; ungeachtet der Tatsache, dass man das Heimatrecht der Ehefrau und damit der erwähnten Tochter Albertine nicht als Beweis heranzog.

4. Die Armenfürsorge als Rechtsproblem

4.1 Kosten für unheilbar kranke und nicht erwerbsfähige Personen

Die Erkenntnisse des Österreichischen Verwaltungsgerichtshofes verdeutlichen die problematische Interpretation des Heimatgesetzes in der Frage der Erstattung der entstandenen Kosten der Armenfürsorge. Seit seiner Gründung im Jahre 1875 entschied der Österreichische Verwaltungsgerichtshof über zahlreiche Beschwerden von Gemeinden, die eine Erstattung der Verpflegungskosten für auswärtige Arme von den Heimatgemeinden einforderten. Der Verwaltungsgerichtshof verkörperte die letzte Instanz auf dem üblichen Weg der sogenannten politischen (im heutigen Sinn staatlichen) Behörden von der Gemeinde zur Bezirkshauptmannschaft, dann zur Statthalterei oder zur Landesregierung (je nach Kronland) und zum Ministerium des Innern.

„Die Aufenthaltsgemeinde eines auswärtigen Armen ist für die Unterstützung und Verpflegung desselben den Ersatz nur desjenigen Aufwandes von der Heimatsgemeinde in Anspruch zu nehmen berechtiget, welcher bei Einhaltung eines vollständig gesetzmäßigen Vorganges, der Heimatgemeinde jedenfalls erwachen wäre."[44] Die in der böhmischen Stadt Wlaschim (Vlašim) heimatberechtigte Agnes Kadeřavek wurde im Wiener Krankenhaus „Rudolfstiftung" behandelt. Die Verwaltung des Krankenhauses forderte die Gemeinde Wlaschim auf, ihre als Arme klassifizierte Agnes Kadeřavek bis spätestens 3. Dezember 1874 zu übernehmen. So lautete auch das Ergebnis des am gleichen Tage ausgestellten ärztlichen Gutachtens, laut dem Agnes Kadeřavek als unheilbar krank galt, man sie jedoch zugleich als mittels Wagen oder Eisenbahn ohne Begleitung für transportabel hielt. Die Krankenanstalt handelte im Einklang mit den seit der Zeit des Josephinismus gültigen Vorschriften, dass keine unheilbar oder von einem chronischen Leiden betroffene Kranken im Krankenhaus bleiben durften, zumal die allgemeinen Krankenhäuser lediglich der Heilung von Kranken dienen sollten. Dieser Zustand ist auch heutzutage eines der schwierigsten Probleme im Bereich der öffentlichen Gesundheitspflege.

Der Wiener Magistrat ersuchte am 27. November 1874 die Bezirkshauptmannschaft Beneschau (Benešov), die Heimatgemeinde der Kranken, zu verständigen, dass Agnes Kadeřavek aus dem Krankenhaus „Rudolfstiftung" entlassen und in die Verpflegung der Kommune Wien übernommen worden sei und dass die Wiener Kommune *„den Ersatz der aufgelaufenen Verpflegungskosten 60 Kreuzer täglich begehren werde"*. Der Stadtrat in Wlaschim stellte sich taub; erst nach der durch die Bezirkshauptmannschaft Beneschau am 10. Februar 1875 an den Stadtrat

[40] PROCHAZKA, J. J. (Hrsg.), Die provisorische Gemeindeordnung für die Stadt Wien. Gemeinfachlich dargestellt und vom Standpunkte der inneren Freiheit der Gemeinde kritisch beleuchtet. Wien, 1850, § 8, Lit. b.

[41] BUDWINSKI VON, A. (Hrsg.), Erkenntnisse des k. k. Verwaltungsgerichtshofes. Jg. IV, 1880, Wien, 1881, Nr. 939, S. 453.

[42] Ebenda.

[43] Patent vom 17. März 1849, § 12, Lit. c. RGBl., Nr. 170, S. 205.

[44] Erkenntnis vom 24. November 1876. BUDWINSKI VON, A. (Hrsg.): *Erkenntnisse des k. k. Verwaltungsgerichtshofes.* Jg. I, 1876, Wien 1881, Nr. 6, S. 20-26.

Wlaschim überreichten Aufforderung des Wiener Magistrats, Agnes Kadeřavek und die entstandenen Verpflegungskosten zu übernehmen, ersuchte der Stadtrat von Wlaschim den Wiener Magistrat um Beförderung der kranken Frau in ihre Heimat. Am 7. April 1785 erteilte der Wiener Magistrat den Auftrag, Agnes Kadeřavek nach Beneschau zu transportieren. Die Versorgungsanstalt am Alserbach, wo die Arme untergebracht war, vollzog dies erst am 3. Mai 1875, da das am 8. April 1875 ausgestellte ärztliche Gutachten den Transport bei *„einer wärmeren Jahreszeit"* empfahl. Der Wiener Magistrat verlangte die Erstattung der Verpflegungs- und Transportkosten in Höhe von 101 Gulden 17 Kreuzer. Der Stadtrat von Wlaschim beglich jedoch lediglich die Transportkosten in Höhe von 9 Gulden 97 Kreuzer. Der Wiener Magistrat wandte sich daraufhin an die Bezirkshauptmannschaft Beneschau, die Stadtgemeinde Wlaschim zur Zahlung der übrigen Kosten von 91 Gulden 10 Kreuzer anzuhalten. Den Rekurs des Wlaschimer Stadtrates entschied die böhmische Statthalterei wie folgt: über den Einspruch der Gemeinde Wien wurde durch das Ministerium des Innern die Statthaltereientscheidung aufgehoben und die Entscheidung der Bezirkshauptmannschaft bestätigt.

Der Verwaltungsgerichtshof führte am 23. November 1876 eine öffentliche mündliche Verhandlung in Anwesenheit dreier Vertreter der Seiten (der Stadtgemeinde Wlaschim, der Stadtgemeinde Wien und des Ministeriums des Innern) durch. Der Verwaltungsgerichtshof entschied wie folgt: *„Die Entscheidung des k. k. Ministeriums des Innern dto. 2. Juni 1876, insoweit durch dieselbe der k. k. Reichshaupt- und Residenzstadt Wien der volle Ersatz der für die Verpflegung der Agnes Kadeřavek in der Zeit von 26. Februar bis April 1875 erwachsenen Kosten zuerkannt ist, wird als gesetzwidrig aufgehoben. Im Uebrigen wird die Beschwerde zurückgewiesen. Der Anspruch der k. k. Reichshaupt- und Residenzstadt Wien auf Ersatz der Kosten des Verfahrens wird abgewiesen."*[45]

Die auf den ersten Blick überraschende Erkenntnis des Verwaltungsgerichtshofes basiert auf den § 28 und 29 des Gesetzes vom 3. Dezember 1863, Nr. 105, dass nämlich die Aufenthaltsgemeinde im Falle *„augenblicklicher Bedürfnisse"* einem fremden Armen die Unterstützung nicht versagen dürfe, dass sie ferner *„in ihrem Gemeindegebiete erkrankte auswärtige Arme so lange zu verpflegen habe, bis sie ohne Nachteil für ihre und Anderer Gesundheit aus der Verpflegung entlassen werden können".* Beide Artikel räumen das Recht der Aufenthaltsgemeinde auf Erstattung durch die Heimatgemeinde ein, jedoch ist laut § 30 die Aufenthaltsgemeinde zur *„unverzüglichen Anzeige an die ihr bekannte Heimatsgemeinde" unter der Sanktion verpflichtet, „dass sie widrigens für allen aus der Verzögerung entstandenen Nachteil verantwortlich wird".*

Die Übernahme eines fremden armen Kranken in die Verpflegung der Aufenthaltsgemeinde oblag laut den § 26, 29 und 30 der Aufenthaltsgemeinde; die Entlassung aus der Armenfürsorge konnte nur dann geschehen, wenn sich die Person im Stande zeigte, sich den notwendigen Unterhalt mit eigenen Kräften zu sichern. Die Aufenthaltsgemeinde konnte jedoch durch die „rechtzeitige Entlassung (der Person) das Interesse der Heimatsgemeinde wahren". In allen anderen Fällen hatte die Aufenthaltsgemeinde die Verpflegung „so lange zu bestreiten, bis die von der Heimatsgemeinde getroffenen Verfügungen in Vollzug gesetzt werden können".

Agnes Kadeřavek war nach dem ärztlichen Zeugnis krank, ihr Status als arme Person wurde nie bestritten, sie galt als unheilbar krank und erwerbsunfähig, die Entlassung aus der Armenfürsorge der Gemeinde Wien kam nicht in Frage (§ 29). Die gesetzliche Verpflichtung der Stadtgemeinde Wien bestand in ihrem Fall in einer rechtzeitigen Verständigung der Heimatgemeinde. Die beschwerdeführende Stadtgemeinde Wien berief sich auf den Terminus *„unverzüglich"* (§ 30 Heimatgesetzes), den der Verwaltungsgerichtshof folgendermaßen interpretierte: *„Denn dem Ausdrucke „unverzüglich" im § 30 Heimatgesetzes kann doch nur der Sinn beigelegt werden, daß die Verständigung ohne unmotivierten Verzug, d. h. so schleunig zu geschehen hat, als dies bei ordnungsmäßigem Geschäftsgange erwartet werden kann".*

Die Heimatgemeinde Wlaschim begründete ihre Beschwerde mit der verspäteten Frist der Aufenthaltsgemeinde Wien, was der Verwaltungsgerichtshof bejahte, denn die Zuschrift, Agnes Kadeřavek per Eisenbahn oder Wohltatsfuhre in ihre Heimat zu überstellen, datiert am 26. Februar 1875, wurde als Amtshandlung erst am 7. April 1875 vollzogen. Die so eingetretene Verzögerung des Transports geschah gegen den Willen der kranken Frau. Die in § 30 des Heimatgesetzes ausgesprochene Verantwortlichkeit der Aufenthaltsgemeinde muss auf die Verzögerung ausgedehnt werden, zumal die Absicht der Gesetzbestimmung darauf hinausläuft, die Heimatgemeinde in ihrer Absicht zu unterstützen, die Art und Weise der Armenversorgung selbst zu bestimmen (§ 25 des Heimatgesetztes). Der Verwaltungsgerichtshof interpretierte die *„unzweifelhafte Absicht des Gesetzes"*, das bestreiten würde, wenn man die Aufenthaltsgemeinde von allen Verpflichtungen freisprechen und die volle Erstattungspflicht der Heimatgemeinde aufrechterhalten würde. Der Anspruch der Aufenthaltsgemeinde auf volle Erstattung im Sinne der §. 25, 26, 28, 29 und 30 sei lediglich *„bei Einhaltung eines vollständig gesetzmäßigen Vorganges"* berechtigt. Das war im Fall Agnes Kadeřavek nicht geschehen, da die Aufenthaltsgemeinde Wien die Aufforderung, die Frau an Heimatgemeinde abzuliefern, verspätet amtlich vollzogen hatte, wodurch der Gemeinde Wlaschim weitere Kosten entstanden. Der Verwaltungsgerichtshof stützte sich auf das Recht, bei einer begründeten Beschwerde die Entscheidung des Ministeriums des Innern, der Gemeinde Wien die volle Erstattung der Verpflegungskosten zuzuerkennen, als gesetzwidrig aufzuheben, was im Falle Agnes Kadeřavek auch geschah.[46] Der Anspruch der Stadt Wien auf Erstattung der Kosten des Verfahrens wurde abgewiesen.[47]

[45] Ebenda, S. 22.

[46] § 7, Gesetz vom 22. Oktober 1875 betreffend die Errichtung eines Verwaltungsgerichtshofes. *Reichsgesetzblatt für die im Reichsrathe vertretenen Königreiche und Länder,* Bd. XIII, 1876, Nr. 36.

[47] § 40, ebenda.

4.2 Die Kosten für Armenfürsorge als Problem zwischen Orts- und Katastralgemeinde

Ebenso wie bereits im 18. Jahrhundert bei der Entstehung der Armeninstitute, die man nicht selten als eine Obliegenheit der einzelnen Gemeinden interpretierte, wurde die organisierte Armenpflege als eine Pflicht der Gemeinden verstanden. Die Ortsgemeinde Barzdorf (Bernartice) beschwerte sich in eigenem Namen sowie jenem der Gemeinde Oberhermsdorf (Horní Heřmanice) am 26. Februar 1878 über die Entscheidung des Schlesischen Landesausschusses und der Katastralgemeinde Buchsdorf (Buková) – alle in Österreichisch Schlesien gelegen. Den Grund der Beschwerde bildeten der für die Schule betriebene Aufwand und die Kosten der Armenfürsorge der zum Gebiet der Ortsgemeinde Barzdorf zählenden Katastralgemeinde Buchsdorf. Die Gemeinden Barzdorf und Oberhermsdorf wollten für ihre Schulen und ihre Arme aufkommen und verlangten dies auch von der Gemeinde Buchsdorf. Ungeachtet der Tatsache, dass man den Bezirksschulrat in Freiwaldau (bis 1947 Frývaldov, heute Jeseník) zu Rate zog, nach dessen Auffassung es sich nicht um drei selbständige Gemeinden, sondern um eine aus drei Katastralgemeinden bestehende Schulgemeinde handelte, wurde über den Aufwand für Schulen und Armenfürsorge einheitlich entschieden. Die Steuern verteilten sich gleichmäßig auf alle Steuerträger im gesamten Gemeindegebiet. In der Frage der Armenfürsorge beriet sich der Verwaltungsgerichtshof auf der Grundlage der § 1 und 3 des Gesetzes vom 3. Dezember 1863,[48] demzufolge sich das Heimatrecht (und die von ihm abhängige Armenfürsorge) auf den ganzen Umfang des Gemeindegebietes erstrecke. Die Armenfürsorge oblag nach der schlesischen Gemeindeordnung der Ortsgemeinde (§ 27, 35 und 54). Der Verwaltungsgerichtshof wies nach der öffentlichen mündlichen Verhandlung die Beschwerde der Ortsgemeinde Barzdorf als unbegründet ab und verurteilte die Gemeinde Barzdorf zur Erstattung der Gerichtskosten in der Höhe von fünf Gulden an den schlesischen Landesauschuss.[49]

4.3 Die Kosten für Armenfürsorge als Problem zwischen den Ländern der Ungarischen Krone und den im Reichsrat vertretenen Königreichen und Ländern

Die Frage der Kostenerstattung für die Armenfürsorge in den beiden Reichshälften orientierte sich nach dem österreichisch-ungarischen Ausgleich am Prinzip der Reziprozität, die jedoch nach den Bestimmungen des Heimatgesetzes geprüft werden sollte. Einen komplizierten Fall stellte die Vergütung der Verpflegungskosten für einen Minderjährigen dar. Der achtjährige Johann Nowak, Sohn des in Klosterbruck (Louka, heute Stadtteil von Znaim) in Mähren geborenen Handlungsgehilfen Ottokar Nowak, verbrachte vier Jahre in der öffentlichen Pflege der Stadt Budapest.[50] Der am 16. Dezember 1871 geborene Knabe verlor bereits am 20. Juni 1872 seine Mutter, sein Vater Ottokar wurde im April 1874 festgenommen und arrestiert, über sein weiteres Schicksal ist mit Blick auf die Pflege des Kindes nichts weiter bekannt. Am 26. Januar 1877 nahm der Budapester Magistrat die Hilfe des ungarischen Ministers in Anspruch, der vermeintlichen Heimatgemeinde des Knaben, also Klosterbruck, die Verpflegungskosten vom 27. April 1874 bis zum 26. Januar 1877 (und weiter angelaufenen Kosten in der Höhe von 96 Gulden jährlich) zu ersetzen.

Nach einer Untersuchung der Bezirkshauptmannschaft Znaim erwies sich die Gemeinde Klosterbruck freilich nicht als Ottokar Nowaks Heimatgemeinde, da dessen Vater Johann Nowak, der zur Zeit der Verhandlung als pensionierter Bezirkshauptmann in Brünn lebte, in Mährisch-Ostrau (Moravská Ostrava) seinen Dienst verrichtet hatte, wo er laut der geltenden Vorschriften auch das Heimatrecht erhielt, das sich selbstredend auf seinen damals (vermutlich) unmündigen Sohn bezog. Nach Feststellung der Tatsache, dass Ottokar Nowak inzwischen kein anderes Heimatrecht erhalten hatte, erkannte die Gemeinde Mährisch-Ostrau seine Zuständigkeit an, weigerte sich jedoch, die Verpflegungskosten für seinen unmündigen Sohn Johann zu erstatten.

Die Reziprozität beider Reichshälften in der Frage der Erstattung der Verpflegungskosten für eine arme Person erwies sich als sehr problematisch, zumal im Königreich Ungarn theoretisch zwar ein Anspruch auf Armenfürsorge bestand, eine solche sich freilich angesichts fehlender Hausmatrikel als praktisch undurchführbar erwies. Hinzu kam noch der Umstand, dass das Allgemeine Bürgerliche Gesetzbuch im Königreich Ungarn nach 1861 außer Kraft gesetzt wurde. In umgekehrter Richtung traf dies mit Blick auf die Kostenerstattung seitens des Königreiches Ungarn für einen österreichischen Staatsbürger nicht zu, zumal in Zisleithanien seit 1849 eine Evidenz der Heimatberechtigten gesetzlich verankert war.

Die Beschwerde der Gemeinde Mährisch-Ostrau landete beim Verwaltungsgerichtshof, der alle Ebenen der unteren Verhandlung hatte prüfen lassen. Das Ministerium des Innern bestätigte am 21. März 1879 die Entscheidung der zuständigen Bezirkshauptmannschaft in Friedek (heute Frýdek-Místek), die Stadtgemeinde Mährisch-Ostrau *„zur Zahlung der für die Verpflegung des Johann Nowak in Budapest aufgelaufenen Verpflegskosten im Betrage von 264 Fl. zu verpflichten“*, und trug ihr ferner auf, *„den Genannten in die heimatliche Pflege zu übernehmen“*.[51] Damit wurde der Entscheidung der mährischen Statthalterei, die die vorherige Entscheidung der Friedeker Bezirkshauptmannschaft aufgehoben hatte, nicht Folge geleistet.

Der Verwaltungsgerichtshof unterschied im konkreten Fall drei Tatsachen: 1. Den der Gemeinde Mährisch-Ostrau erteilten Auftrag zur unverzüglichen Übernahme des Knaben Johann Nowak in die heimatliche Pflege; 2. Die der Gemeinde

[48] RGBl. Nr. 105, 1863.

[49] Erkenntnis vom 8. November 1878. BUDWINSKI VON, A. (Hrsg.), *Erkenntnisse des k. k. Verwaltungsgerichtshofes.* Jg. II, 1878, Wien 1881, Nr. 356, S. 513-515.

[50] Erkenntnis vom 12. Juli 1879. BUDWINSKI VON, A. (Hrsg.): *Erkenntnisse des k. k. Verwaltungsgerichtshofes.* Jg. III, 1879, Wien 1881, Nr. 539, S. 265-269.

[51] Ebenda.

Mährisch-Ostrau von der Stadt Budapest auferlegte Leistung der Verpflegungskosten vom 27. April 1874 bis 26. Januar 1877 in Höhe von 264 Gulden; 3. Die auferlegte Erstattung der noch entstehenden Kosten.

Im ersten Punkt wurde die Beschwerde zurückgewiesen; dies bedeutete konkret die unverzügliche Übernahme des Knaben durch seine Heimatgemeinde Mährisch-Ostrau, begründet durch § 23 des Heimatgesetzes 1863, und § 178 ABGB 1811. Der Ersatz der Verpflegungskosten in Höhe von 264 Gulden und die Erstattung der inzwischen angelaufenen Kosten wurden als gesetzwidrig aufgehoben. Laut § 28 des Heimatgesetzes durfte die Gemeinde *„einem auswärtigen Armen im Falle augenblicklicher Bedürfnisse die nötige Unterstützung nicht versagen“*, jedoch die Heimatzuständigkeit der Person *„durch sofort anzustellende Nachforschung ohne erhebliche Schwierigkeit ermitteln und (der Heimatgemeinde) unverzüglich Anzeige zu machen“* (§ 30). Die Stadt Budapest unternahm vom 27. April 1874 bis zum 17. März 1877 keinerlei Schritte, die Heimatzuständigkeit des Johann Nowak zu ermitteln. Durch die lange Verzögerung konnte die Stadt Mährisch-Ostrau von ihrem Recht, die Art und Weise der Armenversorgung zu bestimmen, nicht Gebrauch machen (§ 25). Die Erstattung der angelaufenen Kosten nach dem 27. Januar 1877 laut Entscheidung des Ministeriums des Innern wurde als gesetzwidrig zurückgewiesen.

Keinerlei Berücksichtigung fand hingegen das Schicksal des armen Kindes, das im Alter von sechs Monaten seine Mutter verlor, im Alter von drei Jahren aus der Pflege seines Vaters genommen wurde und mehr als drei Jahre in der Obhut des Budapester Magistrats verbracht hatte. Über die Art und Weise der Pflege erfahren wir nichts, so dass es sich sowohl um die institutionelle als auch um die Form der Pflege bei Pflegeltern gehandelt haben könnte. Nach Jahren der amtlichen Handlungen sollte der arme Knabe „in seine Heimat“ zurückkehren, in der er höchstwahrscheinlich nie gewesen war. Die Existenz eines lebenden – vermutlich bemittelten - Großvaters gestaltete die Lage des Kindes noch schwieriger (die Quellen sagen nichts darüber aus, ob der Großvater über die Geburt und die schwierige Lage seines Enkels informiert war).

5. Zusammenfassung

Die Armenfürsorge entstand in der Zeit der Aufklärung als Bestandteil des modernen Staates. Der erste Paragraf des Allgemeinen Bürgerlichen Gesetzbuches im Jahre 1811 deklarierte den Landesherrn als Beschützer seiner Untertanen. Der Staat suchte nach Kriterien für eine systematisierte Armenfürsorge: Wer sollte unterstützt werden? Wer ist der „wahre“ Arme? Wo und von welchen Subjekten wurde die Fürsorge durchgeführt? Im Laufe des 19. Jahrhunderts kam es zur Festlegung von Rechtsnormen, die in einigen Nachfolgestaaten der Habsburgermonarchie Anwendung fanden, wenn auch unter veränderten Umständen. Die Aufhebung des Heimatrechts in der Republik Österreich (1939) und in der Tschechoslowakischen Republik (1949) beendete die heimatbezogene Struktur der sozialen Fürsorge, die jedoch weiter realisiert und sogar ausgedehnt wurde. Die Noblesse der österreichischen zivilistischen Tradition lebt heute weiter im entwickelten System der Sozialhilfe in der Republik Österreich und in der Tschechoslowakischen Republik fort.

Jews and Anti-Jewish Rules in the Czech Codification of Church Law of 1349*

*Lenka Šmídová Malárová***

Abstract

The first codification of church law in the territory of the historically Czech lands, known as the provincial statutes of Ernst of Pardubice (Statuta provinicialia Arnesti), was issued in 1349, with validity for the entire Prague archdiocese. The Statute applied not only to the clerical and lay population, but also to Jews, for whom special rules and restrictions applied. The regulation of the legal and social life of the Jewish population is explicitly dealt with in three provisions (Articles 66-68), which mainly regulate the contact of Jews with Christians and their rights and obligations in public. Many of these prohibitions and regulations are based on papal decrees approved by the ecumenical councils, the text of which was reflected in the Decretals of Gregory IX and subsequently in the Mainz Statutes of Peter of Aspelt of 1310. The roots of these restrictions, however, in most cases go back to antiquity. This concerns, for example, the prohibition on hiring Christian nurses, midwives and servants; Jews were also not allowed to participate in public life, to build new synagogues or to improve existing ones. These measures were introduced by the Roman Emperor Theodosius II as part of the gradual process of Christianization of the Eastern Roman Empire. Although the legal provisions of the provincial statutes of Ernst of Pardubice imposed many restrictions on the Jews, this fact, on the other hand, was to some extent counterbalanced by protective provisions that prohibited laymen and Christian clergy from disturbing Jewish religious rites, destroying their graves, and arbitrarily punishing them without the existence of a relevant legal title.

Keywords: *Jews; ecclesiastical law; canon law; Middle Ages; ecumenical councils; Archbishop Ernst of Pardubice; Statuta provinicialia Arnesti; codification; Roman law; Czech lands; Prague.*

1. Home

When the bishopric of Prague was elevated to an archbishopric in 1344, there was an urgent need for a codification of church law that would reflect the current conditions in the newly established archdiocese.[1] This task was undertaken by the first Archbishop of Prague, Ernst of Pardubice.[2] At the November session of the Prague Provincial Assembly, held in 1349, he promulgated the *Statuta provinicialia Arnesti,* an exclusive codification of church law, unifying the legal regulations in the territory of the Prague, Olomouc and Litomyšl dioceses.[3]

This codification, in the spirit of the principle *lex posterior derogat legi priori,* replaced the provincial statutes of Mainz from 1310 and the existing synodal regulations valid in the territory of the Prague and Olomouc dioceses.[4] Ernst's provincial stat-

* The text is a written version of my lecture delivered at the event „Historical Jewish Law Moot Court – The Rabbinic Tribunal of Prague, 2022" organized by the law faculties of the University of Vienna, the Lomonossow Moscow State University, the Hebrew University of Jerusalem, the University of Tel Aviv and the Yeshiva University New York in cooperation with the Department of History of State and Law, Faculty of Law, Masaryk University in Brno. The article is partly based on my previously published paper ŠMÍDOVÁ MALÁROVÁ, L., Římské právo v provinciálních statutech Arnošta z Pardubic z roku 1349. In: *Mediaevalia Historica Bohemica*, vol. 24, Nr. 1, 2021, p. 7-35.

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1 The legal title for the establishment of the Prague archbishopric was the bull of Pope Clement VI *Ex supernae providentia maiestatis. For an* edition of the charter see KLICMAN, L. (Ed.), *Monumenta Vaticana res gestas Bohemicas illustrantia. Tomus I, Acta Clementis VI. Pontificis Romani, 1342-1352*. Pragae, 1903, No. 363, p. 209.

2 Ernst of Pardubice was probably born on March 1297. He came from a noble family, but already as a child visited church schools. As a young man he went to the Italy and become a student of law schools in Bologna and Padua. During his stay in Italy Ernst met Charles, later Czech king and Emperor of Holy Roman Empire. After returning to Bohemia he was ordained a priest and in 1344 he became archbishop of the newly founded archbishopric of Prague. HLEDÍKOVÁ, Z., Osobnost Arnošta z Pardubic. In: BOBKOVÁ, L., GŁADKIEWICZ, R., VOREL, P. (Edd.), *Osobnost – okruh – dědictví. Postać – środowisko – dziedzictwo*. Wrocław-Praha-Pardubice, 2005, p. 23-42. In a broader context, cf. the monograph by the same author, dedicated to the life and professional fate of Ernst of Pardubice: HLEDÍKOVÁ, Z., *Arnošt z Pardubic. Arcibiskup, zakladatel, rádce*. Praha, 2008.

3 See especially především KRAFL, P., *Synody a statuta olomoucké diecéze období středověku [Medieval synods and statutes of the Diocese of Olomouc]*. Praha, 2014. Cf. KRAFL, P., Wybrane aspekty życia synodalnego w dielcezjach: praskej, olomuniecka, wrocławskiej i litomyskiej do końca 15. wieku. Comparison. In: *Śląski Kwartalnik Historyczny Sobótka*, vol. 54, Nr. 4, 1999, p. 467-482.

4 Both dioceses were part of the Mainz ecclesiastical province (metropolis), which was governed by the so-called Mainz provincial statutes, until the elevation of the Prague bishopric to an archbishopric. The Mainz statutes of Archbishop Peter of Aspelt are only available in the now defunct edition SCHANNAT, J. F., HARTZHEIM, J. (Edd.), *Concilia Germaniae. IV*. Coloniae Augustae Agrippinensium, 1761.

utes contain a total of 86 articles aimed at regulating legal life within the newly established ecclesiastical province.[5] Although the statutes are a source of ecclesiastical law, the personal scope of the codification applied not only to the clergy but also to the lay population, including Jews, who formed a significant minority in late medieval society.[6] The legal regulation of the Jewish question is explicitly addressed in the provincial statutes of Ernst in three provisions entitled *De Iudeis* (arts. 66-68), which regulate the social status of Jews and their participation in public life. An analysis of these provisions and their ideological and legal sources will be discussed in the next chapter of this paper.[7]

2. Rights and duties of Jews according to the *Statuta provinicialia Arnesti* of 1349

The list of rights and especially the obligations that the statute granted to the Jewish population can be divided into three categories, according to their thematic focus. In this context, we can speak of legal norms of command and prohibition, concerning the regulation of the social intercourse of Jews with Christians and their participation in public life; and lastly, provisions providing Jews with protection against interference with their personal and religious rights. The provincial statutes prohibited Jews from hiring Christian nurses, midwives, or servants in general. The reason for this was that the Jews allegedly forced Christian nursemaids to nurse the children entrusted to their care on the third day after receiving the sacrament of the altar. The milk that these women had produced in the meantime had to be expressed and then poured out into latrines for fear of contamination with the blood and body of Christ (Art. 66).[8] In the event of a violation of this regulation, Ernst laid down rather severe penalties for both parties. Christians who, in spite of the above prohibition, allowed themselves to be hired for said services were to be excommunicated if proven guilty. Jews were for-

[5] The text of Ernst's provincial statutes is available in Rostislav Zelený's 1972 edition, see ZELENÝ, R. (Ed.), Councils and Synods of Prague and their Statutes (1343-1361). In: *Apollinaris*, vol. 45, 1972, p. 27-81 (special imprint). And further in the reedition by Jaroslav V. Polc and Zdeňka Hledíková, which will be used in this paper. POLC, J. V., HLEDÍKOVÁ, Z. (Edd.), *Pražské synody a koncily předhusitské doby*. Praha, 2002, p. 115-164. Despite its fundamental role in the legal development of medieval Bohemia, the codification of Ernst stands outside the interest of legal historians, who prefer research topics focused on the monuments of municipal and land law, or other areas of partial law. Thus, from the literature focusing on the legal-historical nature of Ernst's provincial statutes, only a few works can be mentioned that deal with this issue. First of all, there is the contribution of Pavel Krafl, which provides a basic description of the statute with an emphasis on its legal-theoretical aspects, see KRAFL, P., Arnoštova provinciální statuta z roku 1349 - významná česká právní památka. In: BOBKOVÁ, L., GŁADKIEWICZ, R., VOREL, P. (Edd.), *Osobnost - okruh - dědictví. Postać - środowisko - dziedzictwo*. Wrocław-Praha-Pardubice, 2005, p. 59-64. The content of the individual articles of the statute is briefly informed by an earlier work by Jan Kapistrán Vyskočil, which synthetically treats the life and work of Ernst of Pardubice in the context of historical events during his time in the Church, see VYSKOČIL, J. K., *Arnošt z Pardubic a jeho doba.* Praha, 1947, p. 289-304. Sexual delinquency in the regime of Ernst's Code has been dealt with in more detail by the author of this article, Lenka Šmídová Malárová, who has drawn attention to the facts of individual offences and their legal consequences in the light of church law. See ŠMÍDOVÁ MALÁROVÁ, L., Sexuální delikty v právní úpravě Arnoštových provinciálních statut z roku 1349. In: SCHELLE, K., TAUCHEN, J. (Edd.), *Sexuální trestné činy včera a dnes*. Ostrava-Brno, 2014, p. 102-108; ŠMÍDOVÁ MALÁROVÁ, L., Sexual offences in Arnest's provincial statutes from 1349. In: *Beiträge zur Rechtsgeschichte Österreichs*, vol. 9, Nr. 1, 2019, p. 173-179. The same author has subsequently addressed the question of possible Roman law influences in Ernst's codification, see ŠMÍDOVÁ MALÁROVÁ, L., Římské právo v provinciálních statutech Arnošta z Pardubic z roku 1349. In: *Mediaevalia Historica Bohemica*, vol. 24, 2021, Nr. 1, p. 7-35. At the same time, a study by Daniel Soukup was published, devoted to anti-Jewish regulations in legal monuments of church law of domestic (Czech) provenance, in which the author also took into account Ernst's provincial statutes. See SOUKUP, D., Anti-Jewish Rhetoric of Canon Law. Ecclesiastical Legislation and Jews in the14th-Century Bohemian Lands. In: *Judaica Bohemiae,* vol. 56, Nr. 1, 2021, p. 5-28. For further, mostly secondary literature see KRAFL, P., Czech codifications in the High Middle Ages. In: MAFFEI, P., VARANINI, G., M. (Edd.), *Honos alit artes. Studi per il settantesimo compleanno di Mario Ascheri. Il cammino delle idee dal medioevo all'antico regime. Diritto e cultura nell'esperienza europea*. Firenze, 2014, p. 237-244. Cf. also the annotated review of the same author's research, which assessed the state of editorial access to legal monuments of ecclesiastical law in the past fifteen years: KRAFL, P., Synody a synodální zákonodárství ve středovýchodní Evropě. Přehled bádání za posledních patnáct let. In: *Český časopis historický*, vol. 111, Nr. 1, 2013, p. 128-129. In broader sense Cf. KRAFL, P., Several Comments on Editions of Legal-Historical Sources Published in the Czech Republic after 1990. In: *Krakowskie Studia z Historii Państwa i Prawa*, vol. 7, no. 3, 2014, p. 507-516.

[6] On the question of the personal, material and territorial scope of Ernst's provincial statutes, we further refer to the above-quoted contribution of Pavel Krafl, see KRAFL, P., Arnoštova provinciální statuta z roku 1349 - významná česká právní památka. In: BOBKOVÁ, L., GŁADKIEWICZ, R., VOREL, P. (Edd.), *Osobnost - okruh - dědictví. Postać - środowisko - dziedzictwo*. Wrocław-Praha-Pardubice, 2005, p. 59-62. Cf. also KRAFL, P., *Synody a statuta olomoucké diecéze období středověku [Medieval synods and statutes of the Diocese of Olomouc]*. Praha, 2014, p. 101-102.

[7] In the literature, this issue has most recently been touched upon by SOUKUP, D., Anti-Jewish Rhetoric of Canon Law. Ecclesiastical Legislation and Jews in the14th-Century Bohemian Lands. In: *Judaica Bohemiae,* vol. 56, Nr. 1, 2021, p. 5-28. See also KARASOVÁ, H. Židé v době Karla IV. In: POLC, J. V. (Ed.), *Otec vlasti (1378-1978)*. Řím, 1978, p. 163-181. However, Ernst's statutes are not taken into account by Willehad Paul Eckert, who is the author of the article *Die Juden im Zeitalter Karls IV.* included in the jubilee volume published on the occasion of the 600th anniversary of the death of Charles IV. See ECKERT, W. P. Die Juden im Zeitalter Karls IV. In: SEIBT, F. (Ed.), *Kaiser Karl IV. Staatsmann und Mäzen.* Munich, 1978, pp. 123-130. Some information on our problem is provided by the introductory study to the edition *Prameny k dějinám Židů v Čechách a na Moravě ve středověku [Sources for the History of Jews in Bohemia and Moravia in the Middle Ages]*, which is the last volume of the series *Archiv český*. In comparison with the above-mentioned contributions, which thematically fall within the period when Ernst's provincial statutes came into force and which could therefore logically be expected to reflect the relevant legal regulation, the authors of the introductory study to the relevant edition, which is bounded by the year 1347, draw attention to the presence of (anti)Jewish provisions in the text of the Prague archdiocesan statutes from the mid-14th century, which is undoubtedly meant by Ernst's codification of 1349. Cf. BLECHOVÁ, L. et al. (Edd.), *Archiv český. Díl XLI. Prameny k dějinám Židů v Čechách a na Moravě ve středověku: (od počátků do roku 1347).* Praha, 2015, p. XVIII.

[8] Art. 66 of the Provincial Statutes of Ernst (hereafter APS): *„Accepimus autem quod Iudei christianas puerorum suorum nutrices, quod non tantum dicere sed etiam nephandum est cogitare, cum illas recipere Corpus et Sanguinem Iesu Christi contingit, per triduum antequam eos lactent, lac effundere faciunt in latrinam."* POLC, J. V., HLEDÍKOVÁ, Z. (Edd.), *Pražské synody a koncily předhusitské doby*. Praha, 2002, p. 151.

bidden to deal with Christians on that account.[9] The relevant provision was formulated by Ernst on the basis of the canonical law in force, in this case based on the Decretals of Gregory IX (X 5. 6. 13).[10] The prohibition against hiring Christian maids (servants) can, however, be found in older sources, which later became the inspiration for medieval anti-Jewish decrees. We are referring specifically to Roman law codifications, in this case in particular the code of Emperor Theodosius I, where an entire section (title) entitled *Ne christianum mancipium iudaeus habeat* (Cod. Th. 16. 9) is devoted to the relevant issue.[11]

Among the decrees approved at the Fourth Lateran Council was the obligation for Jews to wear clothing that would sufficiently distinguish them from Christians. The form of Jewish dress was not uniform in practice and varied according to the customs of the particular region. Men generally wore long cloaks and pointed hats decorated with a bell or pompom, while women hid their hair under a cap or veil. In addition to the special clothing, which was sufficiently visible from a distance to distinguish Jews from the Christian population at a glance, the application of special markings (signs) to the exterior was often required, either in the form of ribbons and badges placed on the outer clothing or through specific hair or beard arrangements.[12] The provincial statutes took a basically benevolent attitude towards this obligation, which was subsequently also enshrined in the Decretals of Gregory IX (cf. X 5. 6. 15), since they commanded Jews to wear only a head covering. For men this was a broad-brimmed hat; women were to wear a veil from which a lock of their hair would protrude. If Jews acted contrary to this provision and did not wear the prescribed headgear, they were in danger of being forbidden to communicate with Christians (Article 67).[13]

At Easter, especially on Good Friday, according to Article 68 of the Provincial Statutes, Jews were forbidden to be in public and thus disturb Christians during the festive season.[14] As for Jewish vocations, the statutes, following canon law and Roman law, did not allow Jews to hold public offices (art. 68, cf. X. 5. 6. 16).[15] By contrast, in accordance with the papal bull *Sicut Judaeis,* the statutes also set forth a number of basic, predominantly religious rights to which Jews were entitled and which Christians were obliged to respect.[16] According to this decree, which is also reflected in the provincial statutes of Ernst (art. 68), it was held that Jews were not to be forced to be baptized, were not to be punished without a proper sentence, and were forbidden to be disturbed in any way during their festivals. A strict prohibition also applied to destroying and damaging Jewish cemeteries. For reasons of commemoration it was not permitted to open graves for the purpose of exhuming buried bodies (X. 5. 6. 9).[17] Although the statutes

[9] Art. 66 APS: *„Inhibemus ergo districte ne de cetero nutrices seu obstetrices sive servientes habeant christianas, ne ipsos vel ipsas ex familiaritate nimia ad sue infidelitatis errorem pertrahant et ne filii libere filiis famulentur ancille, sed tantum servi a Domino reprobati, in cui mortem nequiter coniuraverunt se saltem per effectum operis recognoscant servos illorum quos Christi mors liberos et illos servos effecit. Si vero hac prohibitione nostra imo verius apostolica contempta, nutrices, obstetrices et aliam familiam non dimittant christianam, episcopi locorum sub excommunicationis pena inhibeant districte omnibus christianis ne cum Iudeis commercium aliquod exercere audeant."* POLC, J. V., HLEDÍKOVÁ, Z. (Edd.), *Pražské synody a koncily předhusitské doby*. Praha, 2002, p. 152.

[10] For this, cf. an excerpt from the article *De judaeis* in the Mainz statutes of Peter of Aspelt from 1310, which was in force in the territory of the Prague diocese, which was part of the Mainz ecclesiastical province, until the publication of the Code of Ernst: *„Licet etiam alias in sacris Canonibus prohibitum inveniatur expresse, ut Judei nec…servitiis mancipia teneant Christiana."* SCHANNAT, J. F., HARTZHEIM, J. (Edd.), *Concilia Germaniae. IV*. Coloniae Augustae Agrippinensium, 1761, p. 208.

[11] Cod. Th. 16.9: *„Ne christianum mancipium Iudaeus habeat."* Cod. Th. 16. 9. 1: *„Si quis Iudaeorum christianum mancipium vel cuiuslibet alterius sectae mercatus circumciderit, minime in servitute retineat circumcisum, sed libertatis privilegiis, qui hoc sustinuerit, potiatur etc."* The same clause was later reciprocated in the Codex of the Emperor Justinian, cf. Cod. 1.10: *„Ne christianum mancipium haereticus vel paganus vel Iudaeus habeat vel possideat vel circumcidat."* On the status of Jews in Roman law, see in detail SÁRY, P., Regulation of the Relations between Jews and Christians in Roman Law. In: *Journal on European History of Law*, vol. 12, Nr. 2, 2021, p. 181-186. From the younger period, cf. COHEN, M., *Under Crescent and Cross. The Jews in the Middle Ages*. Princenton, 2008, pp. 30-50. However, in connection with the analogy of the legislation in question with Roman law sources, it must be stressed that this is mainly an ideological inspiration, not a direct reception of these regulations. On the question of the origin of Roman law regulations adopted into legal monuments of domestic provenance, using the example of a handbook of medieval municipal law, cf. ŠMÍDOVÁ MALÁŘOVÁ, L., On the Origin of One Roman Law Rule in the Moravian Legal Manual from the Second Half of the 14th Century. In: *Journal on European History of Law*, vol. 13, Nr. 2, 2022, p. 64-69.

[12] PĚKNÝ, T., *Historie Židů v Čechách a na Moravě*. Praha, 1993, p. 20.

[13] Art. 67 APS: *„…statuimus, ut masculi Iudeorum in capitibus suis pilea lata, ut antiquitus solebat, et non caputia deferant; mulieres vero sub peplo sive alio velamine capitis orarium sive levaturam eminentem supra frontem ponant sic quod omni tempore per huiusmodi signa a christianis discernantur."* POLC, J. V., HLEDÍKOVÁ, Z. (Edd.), *Pražské synody a koncily předhusitské doby*. Praha, 2002, p. 152.

[14] Art. 68 APS: *„In die Parasceven, Dominice Passionis, Iudei in publicum non procedant et per totam ilam diem hostia [ostia] et fenestras suas clausas teneant ne in christianorum conspectu…"* POLC, J. V., HLEDÍKOVÁ, Z. (Edd.), *Pražské synody a koncily předhusitské doby*. Praha, 2002, p. 152-153.

[15] Art. 68 APS: *„Nulli eorum publico preficiantur officio; si quis autem hoc commiserit, excommunicationis sententia innodetur."* POLC, J. V., HLEDÍKOVÁ, Z. (Edd.), *Pražské synody a koncily předhusitské doby*. Praha, 2002, p. 153. Cf. Cod. Th. 16. 8. 24: *„…Sane Iudaeis liberalibus studiis institutis exercendae advocationis non intercludimus libertatem et uti eos curialium munerum honore permittimus, quem praerogativa natalium et splendore familiae sortiuntur. Quibus cum debeant ista sufficere, interdictam militiam pro nota non debent estimare."*

[16] RIST, R., *Popes and Jews, 1095-1291.* Oxford, 2016, p. 12-14.

[17] Art. 68 APS: *„Ad baptismum non cogantur inviti nec in personis vel rebus suis sine iudicio puniantur nec in suis festivitatibus perturbentur nec eorum cimiteria per exhumationem corporum vel alias violentur."* POLC, J. V., HLEDÍKOVÁ, Z. (Edd.), *Pražské synody a koncily předhusitské doby*. Praha, 2002, p. 153. Although it is clear that Ernst is based on canon law, the regulation concerning the prohibition of disturbing Jewish festivals and Sabbath services (the so-called Sabbaths) was also enshrined in Roman law sources. Cf. Cod. Th. 16. 8. 20: *„At cum vero Iudaeorum memorato populo sacratum diem sabbati vetus mos et consuetudo servaverit, id quoque inhibendum esse censemus, ne sub obtentu negotii publici vel privati memoratae observationis hominem adstringat ulla conventio, cum reliquum omne tempus satis publicis legibus sufficere videatur sitque saeculi moderatione dignissimum, ne delata privilegia violentur: quamvis retro principum generalibus constitutis satis de hac parte statutum esse videatur."*

provided for the prohibition of disturbing Jewish religious services, certain restrictions were placed on the premises where the services were held.[18] In fact, Jews were not allowed to build new synagogues; they were only allowed to reconstruct the original buildings.[19]

3. Conclusion and summary

Ernst's provincial statutes of 1349 provides a remarkable account of the legal regulation of the social coexistence of Jews with Christians, which was based on a series of prohibitions and restrictions that affected the quality of life of the Jewish minority. The fact that Ernst of Pardubice based his code on the existing regulations (collections) of canon law is fully reflected in its content. The individual provisions correspond to the papal decrees approved by the ecumenical councils, although their formal form is modified and adapted to the stylistic style of the author of the statute.

The Jewish question is the subject of three articles in Ernst's provincial statutes, which reflect the fundamental problems arising from the clash of two religious cultures. The fact that Jews were forbidden to hire Christian servants stems from two aspects. On the one hand, there is the fact that Jewish parents refused to allow their children to be fed with the milk of a nursing mother who had not long before received the body and blood of the Lord, and they forced these women to pour the mother's milk into vessels. Adding to the undignified nature of such behavior was the general opinion of the majority society that it was unacceptable for a Christian to serve a Jew. The religious and social restrictions that the Jewish population had to endure were counterbalanced by certain rights that gave Jews at least basic protection.

[18] Art. 68 APS: *„…quod in veteribus synagogis et suis observantiis tolerantur."* POLC, J. V., HLEDÍKOVÁ, Z. (Edd.), *Pražské synody a koncily předhusitské doby*. Praha, 2002, p. 153.

[19] Art. 68 APS: *„Synagogas novas construere nullatenus admittantur sed antiquas, si corruerint vel ruinam minantur reedificare poterunt, non autem ut eas exaltent aut ampliores aut precisiores faciant quam ante fuisse noscuntur."* POLC, J. V., HLEDÍKOVÁ, Z. (Edd.), *Pražské synody a koncily předhusitské doby*. Praha, 2002, p. 153.

In XII minuendi sumptus sunt lamentationisque funeris – sed ea non tam ad religionem spectant quam ad ius sepulcrorum: Restrictions on Funeral Luxury in Rome*

*János Erdődy***

Abstract

The legal attempts to curb funeral lavishness and extravagance come into two groups: the first includes the provisions of the Law of the XII Tables, the second the lex Cornelia sumptuaria (81 BC), and the leges Iuliae sumptuariae (46 BC, 18 AD) (Rotondi, Sauerwein). In this presentation, the focus is drawn to the provisions in the XII tables. In ancient law, funeral sumptuousness was mainly regulated by the Law of the XII Tables. Prior to the early Republic, some restrictive measures appeared in the so-called leges regiae. Spectacular, artistically designed, and expensive funeral ceremonies and processions were not far from the Roman thought. As a result, the provisions on Table X restricting these lavish ceremonies could be considered as direct precursors of leges sumptuariae (Sauerwein) since the immoderate spending constituted a substantial and profound social problem, even though this excess was available only to the upper class. The casuistic and detailed rules of the XII Tables suggest that the extravagance of funerals and burials could not be categorically severed from the worship of the gods. Therefore these rules are directly related to religio.

The sources include Cicero's texts in De legibus, Polybios' detailed account of Roman funeral rites, and Pliny the Elder's reports on funeral customs. These texts show that many rituals were associated with worshipping the gods and sacrificial rites. This circumstance underpins the religious origin and character of these rules. At this point, however, interesting questions arise from this observation. Why is the ius sepulcrorum linked with religio? Did the proper worship of the gods serve as a sufficient justification for more intensive obedience?

Keywords: *Funeral; luxury; restrictions; parsimonia; tenuitas; religio; superstitio; leges sumptuaria; the Law of the Twelve Tables; Polybius; Plutarch; Numa Pompilius; Romulus; Festus.*

1. Introduction

One of the first appearances of the restriction of luxury is seen in the scope of funerary customs. Legal attempts to curb funeral luxury are referred to in the literature as *leges sumptuariae*.[1] It is also worth mentioning the view in secondary literature which separates the categories of *leges sumptuariae* from *leges sumptuariae de funeribus*.[2] At the same time, it is not disputed by secondary authors that this ancient form of restriction of luxury also affects the sacred sphere.[3]

The rules that have survived restricting funerary luxury can be divided into two groups: the first includes the provisions of the law of XII B.C., and the second consists of the statutes of Sulla (*lex Cornelia sumptuaria*, 81 BC) and Caesar (*lex Iulia sumptuaria*, 46 BC) restricting luxury.[4]

1.1 Ius et religio

In examining the concepts of *ius* and *religio*, and their connection between these two, it would be inspiring to read, at least in an overview, the meaning of *ius* in Roman sources. For obvious reasons of size, not even a sketchy presentation could be attempted. In addition to a general introduction to the concept of *ius*, it would be equally valuable to analyse the concepts of *ius civile*, *ius gentium*, *ius naturale*, *ius praetorium*, *ius honorarium*,

* This paper is an altered and extended version of the presentation at the 75th session of the Société Internationale Fernand De Visscher pour l'Histoire des Droits de l'Antiquité (SIHDA) held at Université Saint-Louis, Brussels from September 13–16, 2022.

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1 Statements by authors are not unanimous. Some deem that funerary rules belong to the topic of *leges sumptuariae*. Cf. e.g. BOXMAN, A., *Dissertatio antiquario-juridica inauguralis de legibus Romanorum sumtuariis*. Leiden, 1816, p. 20–31; MOMMSEN, T., *Römische Geschichte*. Berlin, 1881, p. 431; BALTRUSCH, E., *Regimen morum. Die Reglementierung des Privatlebens der Senatoren und Ritter in der römischen Republik und frühen Kaiserzeit*. München, 1989, p. 44–50. Sauerwein believes these restrictions could be regarded as the direct precursor of *leges sumptuariae*. Cf. SAUERWEIN, I., *Die leges sumptuariae als römische Maßnahme gegen den Sittenverfall*. Hamburg, 1970, p. 8. Other authors generally fail to mention the restrictions on funerary luxury; see, for example, BONAMENTE, M., Leggi suntuarie e loro motivazioni. In: PAVAN (ed.), *Tra Grecia e Roma*. Roma, 1980, p. 67–91; SAVIO, E., Intorno alle leggi suntuarie Romane. In: *Aevum*, vol. 14, Fasc. 1, 1940, p. 174–194.

2 Cf. ENGELS, J., *Funerum sepulcrorumque magnficentia. Begräbnis- und Grabluxusgesetze in der griechisch-römischen Welt mit einigen Ausblicken auf Einschränkungen des funeralen und sepulkralen Luxus im Mittelalter und in der Neuzeit*. Stuttgart, 1998, p. 164.

3 Cf. BOXMAN, A., op. cit., p. 31; BALTRUSCH, E., op. cit., p. 44.

4 To the latter, see also ROTONDI, G., *Leges publicae populi Romani*. Milano, 1912447. Additionally, with more details, cf. SAUERWEIN, I., op. cit., p. 8.

as well as *ius privatum* and *ius publicum*. For the reasons given above, however, we must refrain from doing so.[5]

When the connection between *ius* and *religio* is analysed, the first term to consider is *religio*. Today, in modern languages, "religion", "die Religion", "religion", "religione", etc., continue to be used to mean a belief in and a worship of, or obedience to a supernatural power or powers considered to be divine or to have control of human destiny. In addition, religion also designates any formal or institutionalised expression of the previously described belief.[6] Even the etymology of the Latin term "religio" is complex, therefore, intricate. As regards the word elements, the prefix '*re-*' is undebated; however, the other word element already raises questions. The appropriate constituent could likewise be *legere* or *ligare*, respectively.[7] *Religio* denotes, on the one hand, a supernatural character and, on the other hand, a feeling or sensation connected with or relating to this supernatural. It also signifies the supernatural character, content or connection with a person, place, object or action and the associated.[8] In primary sources, the concepts of *religio* and *superstitio* appear as counterparts. In modern languages, the Latin term *superstitio* also survives, mainly in the sense of superstition, which refers to an irrational belief usually founded on ignorance or fear and characterised by obsessive reverence for omens, charms, etc.[9] In ancient Rome, the distinction between *religio* and *superstitio* was strictly related to the problem of established and unestablished religions. During the reign of Augustus, there was a general distrust towards Eastern religions. It should still be noted that the Jewish religion, which was clearly from the East, was accepted because of its antiquity.

Cicero was the first to separate the notions of *religio* and *superstitio* in his work "*De natura deorum*".

Cic. N. D. 2, (28,) 71–72

Quos deos et venerari et colere debemus, cultus autem deorum est optumus idemque castissimus atque sanctissimus plenissimusque pietatis*, ut eos semper pura integra incorrupta et mente et voce veneremur. Non enim philosophi solum verum etiam maiores nostri superstitionem a religione separaverunt. nam qui totos dies precabantur et immolabant, ut sibi sui liberi superstites essent, superstitiosi sunt appellati, quod nomen patuit postea latius; qui autem omnia quae ad cultum deorum pertinerent diligenter retractarent et tamquam relegerent, sunt dicti religiosi ex relegendo, [tamquam] elegantes ex eligendo, [tamquam] [ex] diligendo diligentes, ex intellegendo intellegentes; his enim in verbis omnibus inest vis legendi eadem quae in religioso. ita factum est in superstitioso et religioso*

[5] Secondary literature dealing with or being connected to the issue of *ius* could well fill libraries. The most important works to be mentioned are as follows: SOKOLOWSKI, P. V., *Die Philosophie im Privatrecht. Sachbegriff und Körper in der klassischen Jurisprudenz und der modernen Gesetzgebung*. Halle, 1902; APPLETON, C., *Nature et antiquité des Leges XII tabularum*. Roma, 1904; ROTONDI, G., op. cit. p. 4–13; SENN, F., De la distinction du ius naturale et du ius gentium. In: SENN (ed.), *De la justice et du droit*. Paris, 1927, p. 57–87; KOSCHEMBAHR-LYTOWSKI, J. D., Naturalis ratio en droit classique Romain. In: ALBERTARIO (ed.), *Studi in onore di Pietro Bonfante*. Milano, 1930, p. 467–498; MASCHI, C. A., *La concezione naturalistica del diritto e degli istituti giuridici romani*. Milano, 1937; KASER, M., *Das altrömische ius*. Göttingen, 1949; VOGGENSPERGER, R., *Der Begriff des ius naturale im römischen Recht*. Basel, 1952; KASER, M., Gaius und die Klassiker. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. LXX, 1953, p. 127–178; LÉVY, E., Natural Law in Roman Thought. In: KUNKEL (ed.), *Gesammelte Schriften I.* Köln - Graz, 1963, p. 3–20; SCHMIDLIN, B., *Die römischen Rechtsregeln. Versuch einer Typologie*. Köln – Wien, 1970, p. 24–29.; KASER, M., *Zur Methodologie der römischen Rechtsquellenforschung*. Wien Graz, 1972, p. 7–102; WIEACKER, F., Textkritik und Sachforschung. Positionen in der gegenwärtigen Romanistik. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. XCI, 1974, p. 1–40; WALDSTEIN, W., Entscheidungsgrundlagen der klassischen römischen Juristen. In: TEMPORINI – HAASE (ed.), *Aufstieg und Niedergang der römischen Welt*. Berlin – New York, 1976, p. 3–100; WIEACKER, F., Offene Wertungen bei den römischen Juristen. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. XCIV, 1977, p. 1–42; WALDSTEIN, W., Zu Ulpians Definition der Gerechtigkeit (D. 1, 1, 10 pr). In: JAKOBS – KNOBBE-KEUK – PICKER – WILHELM (ed.), *Festschrift für Werner Flume zum 70. Geburtstag*. Köln, 1978, p. 213–232; BRETONE, M., *Tecniche e ideologie dei giuristi romani*. Napoli, 1982, p. 138–142; COLISH, M. L., *The Stoic Tradition from Antiquity to the Early Middle Ages. Vol. I. Stoicism in Classical Latin Literature*. Leiden, 1985, p. 27–31, and 341–389; GALLO, F., Diritto e giustizia nel primo titolo del Digesto. In: *Studia et Documenta Historiae et Iuris*, vol. LIV, 1988, p. 1–36; GIARO, T., Über metodologische Werkmittel der Romanistik. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. CV, 1988, p. 180–262; PÓLAY, E., *A római jogászok gondolkodásmódja*. Budapest, 1988; WINKEL, L., Die stoische οἰκείωσις-Lehre und Ulpians Definition der Gerechtigkeit. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. 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Romanistische Abteilung*, vol. CVII, 2000, p. 1–29; PIZZORNI, R., *Il diritto naturale dalle origini a S. Tommaso d'Aquino*. Bologna, 2000, p. 136–154; WALDSTEIN, W., *Teoria generale del diritto. Dall'antichitŕ ad oggi*. 2001; WALDSTEIN, W., *Saggi sul diritto non scritto*. Padova, 2002, p. 7–88; HONORÉ, T., Ulpian, Natural Law and Stoic Influence. In: *Tijdschrift voor Rechtsgeschiedenis*, vol. LXXVIII, 2010, p. 199–208; ERDŐDY, J., The Topicality of a Papal Speech. Refernces of Classical ius naturale in the Speech of Benedict XVI. In: SZABÓ – ÚJVÁRI (ed.), *Universitas „unius rei". Tanulmányok a római jog és továbbélése köréből*. Debrecen, 2014123–132; ERDŐDY, J., Le rôle de ius naturale dans l'antiquité et dans la formation contemporaine. In: *Iustum Aequum Salutare*, vol. III, 2016, p. 101–111; ERDŐDY, J., Understanding the Concept of ius naturale in Ancient Roman Law. In: *Journal on European History of Law*, vol. 9, No. 1, 2018, p. 78–82. Specifically, with an example of the application of *ius civile* cf. e. g. ERDŐDY, J., Protected by Lex Laetoria: Two Papyri of Roman Egypt and Their Effect on Roman Law. In: *Journal on European History of Law*, vol. 13, 2022, p. 99–106.

[6] Cf. *Collins English Dictionary. Complete and Unabridged*. 12th edition, Harper Collins Publishers, 2014., s. v. "religion".

[7] Cf. ERNOUT, A. – MEILLET, A., *Dictionnaire étymologique de la langue latine. Histoire des mots*. 1951, s. v. "*religio*"; *Oxford Latin Dictionary*. Oxford, 1968. s. h. v. In primary sources see also Cic. N. D. 2, (28,) 72: "*[…] qui autem omnia quae ad cultum deorum pertinerent diligenter retractarent et tamquam relegerent, sunt dicti religiosi ex relegendo […]*"; Lact. Inst. Div. 4, 28, 2: "Hoc vincula pietatis obstricti Deo et religati sumus […]"

[8] Cf. Oxford Latin Dictionary, op. cit. s. v. '*religio*'.

[9] Cf. *Collins English Dictionary. Complete and Unabridged*. 12th edition, Harper Collins Publishers, 2014, s. v. "superstition".

alterum vitii nomen alterum laudis. Ac mihi videor satis et esse deos et quales essent ostendisse.

The extract from Cicero's text is centred around *veneratio*, the worship of gods. He mentions *veneratio* together with such attributes as the best (*optumus*), the purest (*castissimus*), the holiest (*sanctissimus*) and full of piety (*plenissimus pietatis*). The reverence of gods is always without stain, guiltless and uncorrupt (*semper pura integra incorrupta*) in terms of our inner attitude and its expression in the outer world. This inner attitude and external expression are described with the phrase *et mente et voce*. In connection with these characteristics of *religio*, Cicero remarks that *religio* has been dissociated from *superstitio* by philosophers and their ancestors (*maiores nostri*).

Directly linked with this comparison of the two terms, Cicero focuses on the adjective *superstitiosus*. For example, he refers to people who spend whole days in prayer and sacrifice so that their children might survive them. On the other hand, those who heedfully repeated and observed everything that formed a part of divine worship were *religiosi*. As Cicero puts it, this latter adjective stems from the verb *relego*, which means "regather". Consequently, he separates *superstitiosus* from *religiosus*: these two notions are regarded as *vitium* and *laus*, a fault and an excellence. Thus, *superstitio* is nothing more than excessive *religio*.

1.2 Funerary customs in Rome

Several primary sources are available concerning burial customs; still, there are only a few coherent, non-partial, non-fragmentary texts. Burials and funerals are typically mentioned in connection with other topics; therefore, each source represents a different approach to funerary customs. One example of a coherent account is that of Polybius in his work Ἱστορίαι.[10] This text gives a brief description of the burial rituals of people with high offices; a statement underpinned by the term used in the text itself, as ἐπιφανής refers to any notable person or someone distinguished by rank.[11] The body of the deceased was put on public display, and his adult son or another male relative would speak of his virtues (ἀρετή) and successes (ἐπιτετευγμέναι […] πράξεις) so that the whole crowd of mourners could feel sympathy and be deeply moved by the loss. In his house, an image of the deceased (εἰκών) was displayed on a small wooden shrine, which was essentially a mask (πρόσωπον), a representation which faithfully reflected the features of the deceased. On the death of any other family member, this mask was also taken to the funeral. There, it was placed on the person who most closely resembled the deceased in stature and build. The clothing of the impersonators was adapted to the rank of the personified: *senatores* wore a toga, *consules* and *praetores* a purple-crowned toga, and gold-embroidered togas for any triumphs in their lives. The impersonators arrived at the funeral in a chariot and sat in ivory chairs. The funeral orator, after recounting the merits of the deceased, also enumerated their great deeds, starting with the oldest (προγενέστατος).

A significant part of the funeral preparations is the washing and rubbing of the corpse with scented oil. Specially trained slaves (*pollinctores*) carried out this task, who were servants of the *libitinarii*.[12] Similarly, placing a coin under the tongue was also a customary practice in funeral preparations.

In the context of the funeral (*funus*), the topic of *pompa funebris* is worth examining, which analysis leads to the limitation of luxury. A coherent description of *pompa funebris* appears in Cicero's *De legibus*.[13] In his monumental work "Römische Geschichte",[14] Theodor Mommsen referred to the Law of the Twelve Tables as the oldest statute on luxury restrictions. He precisely followed the topics in the cited Cicero text as examples of restrictions on luxury. For example, the law forbade the anointing of the corpse by hired labourers. Another restriction was the prohibition of donating more than one pillow and more

[10] Polyb. Hist. 6, 53–54: "Ὅταν γὰρ μεταλλάξῃ τις παρ' αὐτοῖς τῶν ἐπιφανῶν ἀνδρῶν, συντελουμένης τῆς ἐκφορᾶς κομίζεται μετὰ τοῦ λοιποῦ κόσμου πρὸς τοὺς καλουμένους ἐμβόλους εἰς τὴν ἀγορὰν ποτὲ μὲν ἐστὼς ἐναργής, σπανίως δὲ κατακεκλιμένος. πέριξ δὲ παντὸς τοῦ δήμου στάντος, ἀναβὰς ἐπὶ τοὺς ἐμβόλους, ἂν μὲν υἱὸς ἐν ἡλικίᾳ καταλείπηται καὶ τύχῃ παρών, οὗτος, εἰ δὲ μή, τῶν ἄλλων εἴ τις ἀπὸ γένους ὑπάρχει, λέγει περὶ τοῦ τετελευτηκότος τὰς ἀρετὰς καὶ τὰς ἐπιτετευγμένας ἐν τῷ ζῆν πράξεις. δι' ὧν συμβαίνει τοὺς πολλοὺς ἀναμιμνησκομένους καὶ λαμβάνοντας ὑπὸ τὴν ὄψιν τὰ γεγονότα, μὴ μόνον τοὺς κεκοινωνηκότας τῶν ἔργων, ἀλλὰ καὶ τοὺς ἐκτός, ἐπὶ τοσοῦτον γίνεσθαι συμπαθεῖς ὥστε μὴ τῶν κηδευόντων ἴδιον, ἀλλὰ κοινὸν τοῦ δήμου φαίνεσθαι τὸ σύμπτωμα. μετὰ δὲ ταῦτα θάψαντες καὶ ποιήσαντες τὰ νομιζόμενα τιθέασι τὴν εἰκόνα τοῦ μεταλλάξαντος εἰς τὸν ἐπιφανέστατον τόπον τῆς οἰκίας, ξύλινα ναΐδια περιτιθέντες. ἡ δ' εἰκών ἐστι πρόσωπον εἰς ὁμοιότητα διαφερόντως ἐξειργασμένον καὶ κατὰ τὴν πλάσιν καὶ κατὰ τὴν ὑπογραφήν. ταύτας δὴ τὰς εἰκόνας ἔν τε ταῖς δημοτελέσι θυσίαις ἀνοίγοντες κοσμοῦσι φιλοτίμως, ἐπάν τε τῶν οἰκείων μεταλλάξῃ τις ἐπιφανής, ἄγουσιν εἰς τὴν ἐκφοράν, περιτιθέντες ὡς ὁμοιοτάτοις εἶναι δοκοῦσι κατά τε τὸ μέγεθος καὶ τὴν ἄλλην περικοπήν. οὗτοι δὲ προσαναλαμβάνουσιν ἐσθῆτας, ἐὰν μὲν ὕπατος ἢ στρατηγὸς ᾖ γεγονώς, περιπορφύρους, ἐὰν δὲ τιμητής, πορφυρᾶς, ἐὰν δὲ καὶ τεθριαμβευκὼς ᾖ τι τοιοῦτον κατειργασμένος, διαχρύσους. αὐτοὶ μὲν οὖν ἐφ' ἁρμάτων οὗτοι πορεύονται, ῥάβδοι δὲ καὶ πελέκεις καὶ τἆλλα τὰ ταῖς ἀρχαῖς εἰωθότα συμπαρακεῖσθαι προηγεῖται κατὰ τὴν ἀξίαν ἑκάστῳ τῆς γεγενημένης κατὰ τὸν βίον ἐν τῇ πολιτείᾳ προαγωγῆς ὅταν δ' ἐπὶ τοὺς ἐμβόλους ἔλθωσι, καθέζονται πάντες ἐξῆς ἐπὶ δίφρων ἐλεφαντίνων. οὗ κάλλιον οὐκ εὐμαρὲς ἰδεῖν θέαμα νέῳ φιλοδόξῳ καὶ φιλαγάθῳ· τὸ γὰρ τὰς τῶν ἐπ' ἀρετῇ δεδοξασμένων ἀνδρῶν εἰκόνας ἰδεῖν ὁμοῦ πάσας οἷον εἰ ζώσας καὶ πεπνυμένας τίν' οὐκ ἂν παραστήσαι; τί δ' ἂν κάλλιον θέαμα τούτου φανείη; πλὴν ὅ γε λέγων ὑπὲρ τοῦ θάπτεσθαι μέλλοντος, ἐπὰν διέλθῃ τὸν περὶ τούτου λόγον, ἄρχεται τῶν ἄλλων ἀπὸ τοῦ προγενεστάτου τῶν παρόντων, καὶ λέγει τὰς ἐπιτυχίας ἑκάστου καὶ τὰς πράξεις. […]".

[11] Correspondingly cf. MAU, A., Bestattung. In: WISSOWA (ed.), *Paulys Realencyclopädie der classischen Altertumswissenschaft*. Stuttgart, 1897, p. 353.

[12] With regard to *libitinarii* cf. specifically Plut. Numa 12, 1: οἱ δὲ Ποντίφικες καὶ τὰ περὶ τὰς ταφὰς πάτρια τοῖς χρήζουσιν ἀφηγοῦνται, Νομᾶ διδάξαντος μηδὲν ἡγεῖσθαι μίασμα τῶν τοιούτων, ἀλλὰ καὶ τοὺς ἐκεῖ θεοὺς σέβεσθαι τοῖς νενομισμένοις, ὡς τὰ κυριώτατα τῶν ἡμετέρων ὑποδεχομένους ἐξαιρέτως δὲ τὴν προσαγορευομένην Λιβίτιναν, ἐπίσκοπον τῶν περὶ τοὺς θνήσκοντας ὁσίων θεὸν οὖσαν, εἴτε Περσεφόνην εἴτε μᾶλλον, ὡς οἱ λογιώτατοι Ῥωμαίων ὑπολαμβάνουσιν, Ἀφροδίτην, οὐ κακῶς εἰς μιᾶς δύναμιν θεοῦ τὰ περὶ τὰς γενέσεις καὶ τὰς τελευτὰς ἀνάπτοντες. In this text Plutarch expressly refers to Libitina, the goddess of funerary rituals and sacrifices. This godly character could be identified with Proserpina or Venus. Similarly see also Liv. 41, 21: *Ne liberorum quidem funeribus Libitina sufficiebat*. Itt a *funeribus Libitina* kifejezés a még a szabad polgárok eltemetésére szolgáló eszközt jelenti, amelyből a szöveg szerint nem állt rendelkezésre elég, egy lázzal járó ragályos betegség miatt. A szekundér irodalomban ld. pl. William Smith: *A Dictionary of Greek and Roman Antiquities*. Boston, 1842. s. v. "Funus 2"; Petz Vilmos (ed.): *Ókori lexikon*. [Lexicon of the Ancient] Budapest, Franklin Társulat, 1902–1904, s. v. "Libitinarius". The connection between *libitinarii* and *pollinctores* is intriguingly described in a text by Ulpian; cf. Ulp. D. 14, 3, 5, 8 (28 ad ed.): *Idem ait, si libitinarius servum pollinctorem habuerit isque mortuum spoliaverit, dandam in eum quasi institoriam actionem, quamvis et furti et iniuriarum actio competeret*.

[13] Cf. Cic., de leg., 2, (23,) 59 – 2, (24,) 60.

[14] Cf. MOMMSEN, T., op. cit., p. 431.: "[…] gewissermaßen das älteste römische Luxusgesetz […]".

than three purple-covered blankets and wreaths of gold and flags. Neither was it allowed to use carved wood for funeral pyres or to burn incense and sprinkle incense and myrrh wine on them. For the funeral procession, not more than ten flutes could be present. The presence of mourners was also restricted, and funeral feasts were generally banned.

2. Restrictions on funerary luxury in the Law of the XII Tables

If the above-analysed account by Polybius is credible, the Romans of the Republic did not despise spectacular, artistically planned and expensive funeral ceremonies and processions.[15] This fact and the above-cited description of funeral customs lead us to comprehend the desire of a community living within a regulated framework to keep funeral rites and funeral luxury at bay. The Law of the Twelve Tables is the most important primary source regulating these matters in ancient law. From the period prior to this Act, some measures restricting luxury can be found in the Royal Laws.

In the Law of the Twelve Tables, the provisions of table 10 are generally considered the direct precursors of *leges sumptuariae*.[16] The casuistic and highly detailed regulations of this table lead to the conclusion that funeral and burial luxury was a severe and substantial social problem. Such luxury is tied to the veneration of the gods; therefore, it belongs to the scope of *religio*.[17] At the same time, however, it should not be overlooked that the rules of the law on this subject outline the same regulatory objective as *lex Cornelia sumptuaria* and *lex Iuliaa sumptuaria* (*Caesaris*): to curb the excesses of luxury available only to a narrow upper class.[18] In contemporary secondary literature, this view is based on Mommsen's approach.[19]

The provisions restricting luxuries before the Law of the Twelve Tables come from the reports known as the Royal Laws. Regarding *leges regiae*, it is worth recalling Max Kaser's view, who advised not to regard Royal Laws as normative texts. The accounts, mainly from the works by Dionysius of Halicarnassus and Plutarch, deal partly with the essential family and state institutions attributed to kings, who are otherwise largely mythical characters, and partly with the sacral regulations established by the priests.[20] One of the royal provisions attributed to Numa Pompilius is based on Pliny's account of funeral luxury.[21]

Plin. N. H. 14, (14), 88
Numae regis Postumia lex est: vino rogum ne respargito. Quod sanxisse illum propter inopiam rei nemo dubitet.

As this short text puts it, a certain *lex Postumia* from under the reign of Numa Pompilius forbade pouring wine on the funeral pyre. Prior to this, the text mentions that Romulus had offered milk (*lacte*) as a libation (*libatio*) in place of wine. It is also noted that it was he who instituted this sacred practice (*sacra ab eo instituta*) and that it became part of *mos* (*hodie custodiunt morem*).

In the Law of the Twelve Tables, funeral rites are regulated in Table 10, with the restrictions and prohibitions applicable to funeral luxuries.[22] The analysis focuses on texts considered to be original according to the edition by Bruns[23] (fragments 1, 2, 4, 5a, 7 and 8); the other fragments of Table 10 are discussed afterwards. Cicero's *De legibus* is of particular importance in the scope of textual reconstruction.

Lex XII tab. 10, 1
HOMINEM MORTUUM IN URBE NE SEPELITO NEVE URITO.

According to the first fragment of Table 10, corpses were not allowed to be buried or burned in the City. In speaking of this, Cicero compares *ius pontificium* with the law's wording. He concludes that the rules of the Twelve Tables are not related to *religio* but *ius sepulcrorum* instead. The prohibition of burning is explicit: it aims to avoid fire danger. However, where the text mentions the prohibition of burial, it refers to the burial of a corpse instead of the burial of ashes.[24]

Lex XII tab. 10, 2
HOC PLUS NE FACITO: ROGUM ASCEA NE POLITO.

This provision of the law forbids the decoration (*polire*) of the funeral pyre (*rogus*) with a hatchet.[25] (*ascia* or *ascea*).[26]

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[15] Correspondingly SAUERWEIN, I., op. cit., p. 9.
[16] Cf. Ibid. 8.
[17] Cf. BOXMAN, A., op. cit., p. 29–30; BALTRUSCH, E., op. cit., p. 44.
[18] Cf. SAUERWEIN, I., op. cit., p. 8.
[19] Mommsen linked the restrictions on funerary luxury and the practice of imposing a fine to maintain social order. Via this, Mommsen underpinned the idea of restrictions on funerary luxury being the first measures of curbing exrtravagant expenditure. He regarded such measures the appearance of „Polizeigesetze" in Roman society. Cf. "[…] die Bestimmungen der zwölf Tafeln, welche die Salbung der Leiche durch gedungene Leute, die Mitgabe von mehr als einem Pfühl und mehr als drei purpurbesetzten Decken sowie von Gold und flatternden Kränzen, die Verwendung von bearbeitetem Holz zum Scheiterhaufen, die Räucherungen und Besprengungen desselben mit Weihrauch und Myrrhenwein untersagten, die Zahl der Flötenbläser im Leichenzug auf höchstens zehn beschränkten und die Klageweiber und die Begräbnisgelage verboten – gewissermaßen das älteste römische Luxusgesetz […]". MOMMSEN, T., op. cit., p. 431.
[20] Cf. KASER, M., *Das römische Privatrecht*. München, 1971, p. 25; correspondingly SAUERWEIN, I., op. cit., p. 10.
[21] On this see also SAUERWEIN, I., op. cit., p. 11; BALTRUSCH, E., op. cit., p. 44.
[22] Cf. SAUERWEIN, I., op. cit., p. 13; BALTRUSCH, E., op. cit., p. 45; ENGELS, J., op. cit., p. 164.
[23] Carl Georg Bruns: *Fontes iuris Romani antiqui* I. Tübingen, 1909, p. 15–40.
[24] Cf. Cic., de leg. 2, (23,) 58: *Pauca sane Tite, et ut arbitror non ignota vobis. Sed ea non tam ad religionem spectant quam ad ius sepulcrorum. „Hominem mortuum" inquit lex in XII „in urbe ne sepelito neve urito". Credo vel propter ignis periculum. Quod autem addit „neve urito", indicat non qui uratur sepeliri, sed qui humetur*.
[25] On this see also Vitruv. 7, 2, 2: *Cum autem habita erit ratio macerationis et id curiosius opere praeparatum erit, sumatur ascia et, quemadmodum materia dolatur, sic calx in lacu macerata ascietur*. Similarly, Isid. 19, 19: *Ascia ab astulis dicta quas a ligno eximit; cuius diminutivum est asciola*.
[26] Cic., de leg., 2, (23,) 59: *Iam cetera in XII minuendi sumptus sunt lamentationisque funebris, translata de Solonis fere legibus. „Hoc plus" inquit „ne facito. Rogum ascea ne polito". Nostis quae sequuntur. Discebamus enim pueri XII ut carmen necessarium, quas iam nemo discit*.

Sauerwein presents several possible interpretations of this short provision. One is that the funerary pyre could only have been made of rough, unpolished wood. According to another interpretation, not any wood cut with an axe could be used to make the bonfire. According to the third, strictest interpretation, any wood or timber processed with an axe was unfit to be used to put up a bonfire.[27] According to the interpretation by Baltrusch, this provision referred to bar artistic carvings on the funeral pyre.[28] With all due honesty, Baltrusch's view seems more plausible. Suppose that the immediate purpose of the rules in Table 10 was to curb the excessive luxury of funeral ceremonies. Then this provision is only viable if there was a prior practice whereby mourners commissioned a specialist to decorate the wood used for the funeral pyre with carvings. The rule is all the more comprehensible if innovative and practical artisans offered their services to the mourners to take advantage of their state of mind. It may have occurred that mourners accepted such a service only because of the uncommon and moving circumstances. Otherwise, they would have seen these ornaments as an unnecessary extravagance.

Lex XII tab. 10, 4
MULIERES GENAS NE RADUNTO, NEVE LESSUM FUNERIS ERGO HABENTO.

According to the textual reconstruction by Bruns this fragment is known from Cicero's *De legibus*. Bruns reports its introductory sentence as fragment 3 of the law.[29]

Cic. de leg. 2, (23,) 59
Extenuato igitur sumptu tribus reciniis et tunicula purpurea et decem tibicinibus, tollit etiam lamentationem: "MULIERES GENAS NE RADUNTO NEVE LESSUM FUNERIS ERGO HABENTO".

The text before the sentence quoting the text of the Twelve Tables should be read in conjunction with fragment 4. The text reports certain restrictions, which all concerned customs deemed luxurious. Relying on Solon's laws as a model,[30] not more than three mourning veils (*ricinium* / *recinium*) were allowed to be put on, nor was it possible to exceed the number of three purple robes (*tunicula purpurea*) worn on such occasions.[31] The number of female flautists (*tibicinae*) in the funeral procession was limited to ten, and lamentation was totally or partly abolished. Fragment 4 of the Law follows these assertions. The provision prohibited women from lacerating their faces or tearing their cheeks (*genas radere*), and mourners were forbidden to cry loudly, bewailing the dead (*lessum habere*).[32] In our view, Cicero narrows the somewhat general meaning of the passage *tollit etiam lamentationem* by quoting the actual words of the Law of the Twelve Tables. In other words, Cicero claims that the law's wording contained the abolition of lamentation in addition to the other two specific rules. The abolition formulated this way seems to be a rather vague rule compared to the precise number of mourning veils, purple robes and flautists. Engels believes that the term *lamentationem tollere* refers to *nimia lamentatio*, which is excessive lamentation.[33] Two instances of this appear in the text of the Law: one is the wailing of the weeping women, and the other is the custom of lacerating their faces while lamenting. In Engels' opinion, the measure aimed to prevent social displeasure or even disgust caused by such excessive lamentation.[34]

Lex XII tab. 10, 5a
HOMINE MORTUO NE OSSA LEGITO, QUO POST FUNUS FACIAT.
Lex XII tab. 10, 7
QUI CORONAM PARIT IPSE PECUNIAVE EIUS <HONORIS> VIRTUTISVE ERGO ARDUUITUR EI […].
Lex XII tab. 10, 8
[…] NEVE AURUM ADDITO. AT CUI AURO DENTES IUNCTI ESCUNT. AST IM CUM ILLO SEPELIET URETVE, SE FRAUDE ESTO.

Fragments 5a, 7 and 8 of the twelve Tables are also reconstructed through Cicero's *De legibus*.[35] This longer Ciceronian text includes fragments 5b and 6a–b, 9–10 of Table 10.

In the text citing the fragments of the Twelve Tables, Cicero refers to several provisions of the law which were abolished

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[27] Cf. SAUERWEIN, I., op. cit., p. 14.
[28] Cf. BALTRUSCH, E., op. cit., p. 45. Correspondingly, MOMMSEN, T., op. cit., p. 431.
[29] A different text is handed down by Servius; cf. Serv. ad Aen. 12, 606: *Tamen sciendum, cautum lege duodecim tabularum, ne mulieres carperent faciem, his verbis „mulier faciem ne carpito".*
[30] See also the text from *De legibus* in connection with the previous fragment (Cic. de leg. 2, [23,] 59: "*[…] translata de Solonis fere legibus […]*".
[31] On this, see also BALTRUSCH, E., op. cit., p. 46.
[32] On this, see also SAUERWEIN, I., op. cit., p. 14–15; BALTRUSCH, E., op. cit., p. 45., and specifically, footnote no. 38. He deems the meaning of the term *lessus* in this context controversial, as the actual meaning of this word was unclear even in Cicero's time. There are several specific regulations on women in Roman law; with regard to one interesting cf. e. g. ERDŐDY, J., SC Claudianum: A Positive Feedback on Property or Defence of Family Bonds? In: *Journal on European History of Law*, vol. 11, 2020, p. 152–159.
[33] In detail, see also ENGELS, J., op. cit., p. 166.
[34] Cf. Ibid. idem.
[35] See also Cic., de leg., 2, (24,) 60–61: "*[60] Cetera item funebria quibus luctus augetur, XII sustulerunt. „Homini, inquit, mortuo ne ossa legito, quo post funus faciat". Excipit bellicam peregrinamque mortem. Haec praeterea sunt in legibus: de unctura quae servilis dicitur, unctura tollitur omnisque circumpotatio. Quae et recte tolluntur, neque tollerentur nisi fuissent. „Ne sumptuosa respersio, ne longae coronae, ne acerrae" praetereantur. Illa iam significatio est, laudis ornamenta ad mortuos pertinere, quod coronam virtute partam et ei qui peperisset et eius parenti sine fraude esse lex impositam iubet. Credoque, quod erat factitatum ut uni plura funera fierent lectique plures sternerentur, id quoque ne fieret lege sanctum est. Qua in lege quom esset „neve aurum addito", videtote quam humane excipiat altera lex, [praecipit altera lege]: „At cui auro dentes iuncti escunt, ast im cum illo sepeliet uretue, se fraude esto". Et simul illud videtote, aliud habitum esse sepelire et urere. [61] Duae sunt praeterea leges de sepulcris, quarum altera privatorum aedificiis, altera ipsis sepulcris cavet. Nam quod „rogum bustumue novum" vetat „propius sexaginta pedes adigi aedes alienas invito domino", incendium vereri videtur: item acerram vetat. Quod autem „forum", id est vestibulum sepulcri, „bustumue usu capi", vetat, tuetur ius sepulcrorum. Haec habemus in XII, sane secundum naturam quae norma legis est […]".*

because they had the effect of increasing grief and mourning (*luctus augetur*). The first of these provisions is the prohibition of collecting the bones of the dead for a later burial. This ban likely referred to the collection of the bones remaining among the ashes after cremation. In this case, the presumable purpose of collecting these bones was to arrange a second burial for the deceased, a fact indicated by the clause *"quo post funus faciat"* in the text. Funeral rites took several days, and the former but still living custom of *plures funera* and *plures lecti* required the disturbance of the remains, regardless of their actual physical state (e.g. half-burnt, not charred). It explains why this provision was necessary and hence the apparent disapproval that the prohibition embodied. The sole exception was the case of those who died in war (*bellicam mortem*) or abroad.[36] (*peregrinam mortem*).[37]

Fragment 7 deals with the issue of prizes awarded. Unlike today's medals, the prize symbol was a wreath in ancient times. The law then allowed such wreaths to be placed *sine fraude* on the catafalque of the deceased or his parents. From this fact, Cicero concludes that these prizes belonged to the dead and, therefore, it was worthy of being burnt and buried with them. Furthermore, Pliny, the Elder quotes the law, claiming that during the circus games (*in circum per ludos*), it was customary to participate personally (*ipsi descendere*), and it was also customary to send down servants and horses (*servos suos equosque*) to participate in the games.

Again, the prize wreaths won by the servants or horses could also be placed *sine fraude* on the deceased's funeral pyre in case of the master's death.[38] These provisions in the Law of the Twelve Tables quoted by Pliny directly result from this custom. When translating the text of the law, Zlinszky uses the term 'not illegal' instead of *sine fraude*.[39] Concerning the term *fraus*, it is interesting to describe somebody's behaviour as *in fraudem legis*.[40] Should the definition of *fraus legis* by Paul also be taken into account, the phrase *sine fraude* means if the above-described *corona* was placed on the pyre, it did not result in the violation or circumvention of the provision of the law. This rule is an exception to the limitation of the luxury of burial. It seems logical to follow Engels on this topic, who separates two cases. The first is the case of mere luxury, the purpose of which was simple ostentation. The second is the case where the deceased citizen's service to the public was presented. The fragment starting with '*qui coronam parit*' is doubtlessly an example of this latter.[41]

Fragment 8 of the law shows a similar structure: there is a general rule for gold not to be burnt with the deceased. The practical consequence was that the dead's jewellery, worn during their lifetime, was not to be buried with them. An exception to this rule is made in the following provision stipulating that the deceased's golden teeth were not to be removed; they could be burnt with the corpse. Ostensibly, the primary purpose of this provision was to discourage excess, the pretentious display of wealth.[42] However, there is another view to consider in this regard. The measure which curbed the burial of a considerable number of precious metals with the corpse prevented a grave robbery. The law makes an exception with the golden clasps used on the dentition. On closer examination, the amount of gold used for such clasps is negligible compared to the amount used for rings, earrings, bracelets, chains, and other jewellery. Therefore, the burial of such clasps presumably constituted less risk in a grave robbery.[43]

Lex XII tab. 10, 6a

Haec praeterea sunt in legibus: „[…] servilis […] unctura tollitur omnisque circumpotatio" […] „Ne sumptuosa respersio, ne longae coronae, ne acerrae".

Lex XII tab. 10, 6b[44]

Murrata potione usos antiquos indicio est, quod XII tab. cavetur, ne mortuo indatur.

Fragments 6a – b of the Twelve Tables deal with preparing the corpse for burial. Fragment a) covers the preparation carried out by *pollinctores*. This activity involved the application of oils and ointments by the slaves who washed the corpse.[45] In Engels' view, this restriction made it customary for family members to prepare the corpse for burial as an *officium*.[46] The overall limits of *sumptuosa repersio* may well stem from the prohibition of pouring precious liquids on the pyre, which is generally associated with Numa Pompilius.[47] The prohibition of burying *longae coronae* and *acerrae* is positively the means of curbing *pompa funebris*.[48] However, Baltrusch emphasises that the meaning and significance of the term *longae coronae* are still debated in secondary literature.[49]

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[36] Cf. SAUERWEIN, I., op. cit., p. 18; correspondingly BALTRUSCH, E., op. cit., p. 47. For a different interpretation, see also ENGELS, J., op. cit., p. 166., who believes that the term refers only to any foreign war.

[37] Cf. SAUERWEIN, I., op. cit., p. 18; ENGELS, J., op. cit., p. 166.

[38] Correspondingly see Plin. N. H. 21, (5,) 7: *Namque ad certamina in circum per ludos et ipsi descendebant et servos suos equosque mittebant. inde illa XII tabularum lex: qui coronam parit ipse pecuniave eius, virtutis suae ergo duitor ei. quam servi equive meruissent, pecunia partam lege dici nemo dubitavit. quis ergo honos? ut ipsi mortuo parentibusque eius, dum intus positus esset forisve ferretur, sine fraude esset inposita*.

[39] Cf. ZLINSZKY, J., op. cit., p. 70.

[40] Cf. Paul. D. 1, 3, 29 (1 ad leg. Cinc.): *Contra legem facit, qui id facit quod lex prohibet, in fraudem vero, qui salvis verbis legis sententiam eius circumvenit*.

[41] In detail see ENGELS, J., op. cit., p. 167. On this see also SAUERWEIN, I., op. cit., p. 17. In connection with the related archeologic evidence cf. BALTRUSCH, E., op. cit., p. 47., with literature.

[42] On this, see also ENGELS, J., op. cit., p. 167.

[43] Correspondingly see SAUERWEIN, I., op. cit., p. 17–18.

[44] Cf. Fest., F. 158

[45] Cf. SAUERWEIN, I., op. cit., p. 16; BALTRUSCH, E., op. cit., p. 46.

[46] In detail see ENGELS, J., op. cit., p. 166.

[47] See SAUERWEIN, I., op. cit., p. 17; ENGELS, J., op. cit., p. 167.

[48] Correspondingly see SAUERWEIN, I., op. cit., p. 17; ENGELS, J., op. cit., p. 167.

[49] Cf. BALTRUSCH, E., op. cit., p. 46., and specifically, footnote no. 50.

Likewise, the explanation by Festus in fragment b) can be taken as a reference to an earlier custom, as the prohibition to use drinks containing myrrh is undoubtedly linked to the preparation of the corpse.[50] The sole debated element is *circumpotatio*.[51] The ban presumably applied during the funeral procession or post-funeral reception.[52]

Lex XII tab. 10, 9.
[…] rogum bustumve novum vetat propius LX pedes adigi aedes alienas invito domino […]
Lex XII tab. 10, 10.
[…] forum bustumve usucapi vetat […]

In *De legibus*, Cicero also mentions two further regulations concerning burial. One of them protected private buildings; the other guarded the tombs themselves. The applicable rules can be found in fragments 9 and 10 of the table. Following these rules, a funeral pyre could be erected at least 60 feet[53] away from any building, should the proprietor of the building give permission. Regarding pyres, it is evident that the reason for this distance was to avoid fires. The rule written in fragment 10 prohibits the *usucapio* of the yard or vestibule of a tomb.[54]

3. The lex Cornelia sumptuaria and the lex Iulia sumptuaria (Caesaris)

As in the case of the Law of the Twelve Tables, two further acts were mentioned in the secondary literature that regulated excessive funeral luxury. These laws contained particular, almost casuistic provisions.[55]

In the case of *lex Cornelia*[56] (81 BC),[57] it is highly likely that the suffix *sumptuaria* initially failed to appear in the act's name; this was a retrospective addendum, the role of which was to underpin the original scope of the act.[58] Among the primary sources of *lex Cornelia sumptuaria,* specific texts by Gellius and Macrobius are to be mentioned. Two of Cicero's *Epistulae ad Atticum* also contribute to the topic. Plutarch's *Lives* is also a fundamental source, especially two excerpts on Sulla.[59] The Gellius text points out that the provisions of *lex Cornelia* pertain to table luxury: at most, 300 *sestercii* were allowed to be spent on a feast during *Calendae*, *Idus*, and *Nona* or during other festive occasions.[60]

Plutarch's report on funeral luxury is fascinating to be cited.
Plut. Sulla 35, 3.
καὶ τοῦτο μὲν ἀκριβῶς τὸ νόμιμον ὑπὸ δει σιδαιμονίας ἐτήρησε: τὸν δὲ τῆς ταφῆς ὁρίζοντα τήν δαπάνην νόμον αὐτὸς εἰσενηνοχὼς παρέβη, μηδενὸς ἀναλώματος φεισάμενος.

According to the text, when Sulla's wife Metalla was dying, the dictator divorced her while she was still alive. The reason for this was that she was seriously ill, and the priests would not let Sulla near her lest he contaminate himself or his house with the corpse. Sulla, therefore, dismissed his wife while she was still alive and took her to another house. In doing so, he followed precisely the ancient customs, the reason for which was δεισιδαιμονία. It could mean religious fear of the gods or even superstition.[61] Plutarch adds maliciously that in connection with funeral costs (δαπάνη), Sulla was not reluctant to evade his own acts (νόμον αὐτὸς εἰσενηνοχὼς παρέβη), and he spared nothing.[62]

The two letters by Cicero raise an exciting question. These letters mention a legal rule limiting the amount of money spent on monuments to the dead.

Cic. ad Att. 12, 35–36
„(35) Antequam a te proxime discessi, numquam mihi venit in mentem, quo plus insumptum in monimentum esset quam nescio quid, quod lege conceditur, tantundem populo dandum esse. Quod non magno opere moveret, nisi nescio quomodo, ἀλόγως fortasse nollem illud ullo nomine nisi fani appellari. Quod si volumus, vereor,

[50] Cf. Ibid. p. 45–46. Myrrh is a resin extracted from the sap of the Somali myrrhor (Commiphora myrrha), a plant with long-known anti-inflammatory, antiseptic and antibacterial effects.
[51] Cf. FORCELLINI, E. – FACCIOLATI, J., *Totius Latinitatis Lexicon*. Patavii, 1711, s. v. "circumpotatio": actus simul bibendi per circulum. Correspondingly *Thesaurus Linguae Latinae* s. h. v.
[52] See also SAUERWEIN, I., op. cit., p. 16. Correspondingly, ENGELS, J., op. cit., p. 166. He also connects the notion of *silicernium* to this question, and according to him, *circumpotatio* generally refers to the prohibition of any feast.
[53] Correspondingly ENGELS, J., op. cit., p. 167.
[54] Cf. Ibid. p. 167–168.
[55] SAUERWEIN, I., op. cit., p. 8.
[56] On *lex Cornelia sumptuaria* see mainly VOIGT, M., Über die lex Cornelia sumtuaria. In: *Berichte über die Verhandlungen der königlich sächsischen Gesellschaft der Wissenschaften zu Leipzig*, vol. Philologpisch–historische Classe, 42. Band, 1890.
[57] Cf. ROTONDI, G., op. cit.354; KURYŁOWICZ, M., Leges aleariae und leges sumptuariae im antiken Rom. In: *Acta Universitatis Szegediensis. Acta Juridica et Politica*, vol. XXXIII: 1–31, 1985, p. 277; BALTRUSCH, E., op. cit., p. 49. In connection with the actual date, see in detail SAUERWEIN, I., op. cit., p. 132., and especially footnote no. 2.
[58] Cf. SAVIO, E., op. cit., p. 186.
[59] See also, Gell. 2, 24, 11; Macr. 3, 17, 11; Plut. Sull. 35, 2–3; Cic. Ad Att. 12, 35–36. On this, see specifically VOIGT, M., op. cit., p. 245; ROTONDI, G., op. cit., p. 354–355; Cf. DAREMBERG, C. – SAGLIO, E., *Dictionnaire des Antiquités Grecques et Romaines*. Paris, 1904, s. v. "Lex Cornelia sumptuaria".
[60] Cf. Gell. l. c. In this context, examining the above-cited Macrobius text is also engaging. The author reports that Sulla's regulations did not aim to prohibit the ostentatious nature of the celebration but instead reduced the amount of money to be spent on the essential ingredients (Macr. 3, 17, 11: "*[…] non conviviorum magnificentia prohibita est nec gulae modus factus, verum minora pretia rebus inposita […]*"). On this see also DAREMBERG, C. – SAGLIO, E., op. cit., s. v. "Lex Cornelia sumptuaria"; BERGER, A., *Encyclopedic Dictionary of Roman Law*. Philadelphia, 1953, s. v. "Lex Cornelia sumptuaria"; SAVIO, E., op. cit., p. 187.
[61] Cf. LIDDELL, H. G. – SCOTT, R., *A Greek-English Lexicon.* Oxford, 1940, s. h. v.
[62] See also VOIGT, M., op. cit., p. 261; DAREMBERG, C. – SAGLIO, E., op. cit., s. v. "Lex Cornelia sumptuaria".

ne adsequi non possimus nisi mutato loco. Hoc quale sit, quaeso, considera. Nam, etsi minus urgeor meque ipse prope modum collegi, tamen indigeo tui consilii. Itaque te vehementer etiam atque etiam rogo, magis quam a me vis aut pateris te rogari, ut hanc cogitationem toto pectore amplectare.
(36) Fanum fieri volo, neque hoc mihi erui potest. Sepulcri similitudinem effugere non tam propter poenam legis studeo, quam ut maxime adsequar ἀποθεώσιν. *[…]"*

Cicero asks for advice in connection with a tomb. He writes that he would prefer it to be a shrine (*fanum*) rather than a *monumentum* or *sepulchrum*. Regarding *monumentum*, he mentions the provision which capped the maximum amount of money spent on a *monumentum*. Should the limit be exceeded, the proprietor was bound to pay an equal amount of money for the benefit of the public (*populo*).

Cicero declines to name the underlying law in these texts explicitly, leaving the question open for secondary literature whether *lex Cornelia sumptuaria* contained such a restriction.[63] Some authors contend to hand down sheer uncertainty to us: amongst other possible laws, *lex Iulia sumptuaria* of 46 BC[64] seems to be an appropriate potential; a law by Iulius Caesar aimed to put a general restraint on luxury.[65] However, a significant objection to this latter act is the lack of indication in primary sources[66] as to whether such provisions were present in the law.

4. Conclusions

Sources from the royal era[67] and the age of the Twelve Tables convey several reports on the actual restrictions of funeral luxury. The most prominent ones are Cicero's *De legibus*[68] on limitations of funeral luxury, Polybius' account[69] of burial rites, and Pliny, the Elder's reports[70] on funerary customs. These are well supplemented by Maurus Servius Honoratus grammaticus's remarks in his commentary on the Aeneid, in which he describes ancient Roman burial customs.[71] Likewise, clarifications and explanations ins Festus' *De verborum significatione* are also beneficial.

A fragment in Gellius' *Noctes Atticae* is also of general importance in the context of *leges sumptuariae*. Its significance resides in the fact that Gellius aims to underpin the legal restriction of luxury.

Gell. 2, 24, 1
Parsimonia apud veteres Romanos et victus atque cenarum tenuitas non domestica solum observatione ac disciplina, sed publica quoque animadversione legumque complurium sanctionibus custodita est.

The text focuses on two basic principles: one is frugality (*parsimonia*), and the other one is modesty (*tenuitas*). As Gellius puts it, the Romans observed these principles concerning meals (cena) and lifestyles (*victus*).[72] Observance was primarily secured by training at home (*domestica observatio ac disciplina*), but additionally, public penalties and the inviolable provisions of several laws also played an important role.

This text gives a general outline of the background to *leges sumptuariae*. These laws typically date from the last period of the Republic, when the demand for comfort and luxury exceeded a certain level, mainly due to the conquests. This phenomenon was coupled with increasing wealth, and these two factors together led to the enactment of laws restricting luxury (*leges sumptuariae*).[73]

Concerning the limitation of funeral luxury, these rules fail to fit into the traditional list of *leges sumptuariae*. On the one hand, they stem from the end of the republic's royal age or the first decades. In addition, these rules are themed differently from the classical restrictions on luxury. These classical *leges sumptuariae* are referred to as *leges cibariae* by Macrobius.[74] This latter term links the provisions with table luxury, whereas the phrase "*lex sumptuaria*" is used as a broader term to designate all rules aiming to curb excessive spending.[75]

Though we do not possess any reference to the reasons for the rules in the Law of the Twelve Tables, still a fragment by Pliny may be helpful in this regard. This text gives a parallel analysis of burial regulations in the time of Numa Pompilius and at the age of Pliny. Then the author juxtaposes them with the question of *religio*. For example, the Royal Laws provision

[63] Likewise VOIGT, M., op. cit., p. 261–262; SAUERWEIN, I., op. cit., p. 137.
[64] Cf. ROTONDI, G., op. cit., p. 42; SAUERWEIN, I., op. cit., p. 151.
[65] Cf. DAREMBERG, C. – SAGLIO, E., op. cit., s. h. v; ROTONDI, G., op. cit., p. 355. The fact supplementing uncertainty is comprehensibly classified by BALTRUSCH, E., op. cit., p. 49., who deems it more plausible to sustain the opinion that the rules cited in Cicero's letters were the provisions of *lex Cornelia sumptuaria*.
[66] Cf. Dion Cass. 43, 25, 2; Suet. Iul. 43; Cic. ad Att. 13, 7.
[67] Interestingly, among secondary authors, Boxman, Sauerwein and Baltrusch cover in-depth the regulation on funeral luxury prior to the Law of the Twelve Tables. In comparison, Engels' book on funerary customs confines the analysis of the republican and early imperial age. Cf. BOXMAN, A., op. cit., p. 20–24; SAUERWEIN, I., op. cit., p. 10–13; BALTRUSCH, E., op. cit., p. 44; ENGELS, J., op. cit., p. 155 sqq.
[68] Cf. Cic. de leg. 2, (23,) 58–59; 2, (24,) 60–61.
[69] Cf. Polyb. 6, 53–54.
[70] Cf. Plin. N. H. 21, (5,) 7, valamint Plin. N. H. 14, (14), 88.
[71] Cf. Serv. Ad Aen. 3, 67; 5, 64 és 78; 10, 519; 11, 143 and 185, as well as 205 and 287; 12, 606. See also SMITH, W., *A Dictionary of Greek and Roman Antiquities*. Boston, 1842, s. v. 'funus'; SAUERWEIN, I., op. cit., p. 9.
[72] On this, see also FINÁLY s.v. 'victus'.
[73] Cf. DERNBURG op. cit., p. 261; SAVIO op. cit., p. 174 and 194; BALTRUSCH op. cit., p. 40 – 41 and 43.
[74] Macrob. Sat. 3, 17, 13: *Sylla mortuo Lepidus consul legem tulit et ipse cibariam: Cato enim sumptuarias leges cibarias appellat*. See also BALTRUSCH op. cit. 41; ROSIVACH, V. J., The "Lex Fannia Sumptuaria of" 161 Bc. In: *The Classical Journal*, vol. CII, 2006, p. 1.
[75] In this respect, Baltrusch's classification is very suitable, as he mentions table luxury, funeral luxury, and excessive expenditure on constructions, clothing, jewellery, and games. Cf. BALTRUSCH, E., op. cit., p. 41.

forbidding the use of wine mixed with myrrh may not have sanctioned the pouring of ashes with wine. As we have seen, there is a view in the literature (Engels) that this rule was, in fact, intended to promote frugality.

Plin. N. H. 32, 20

Pisces marinos in usu fuisse protinus a condita Roma auctor est Cassius Hemina, cuius verba de ea re subiciam: Numa constituit ut pisces, qui squamosi non essent, ni pollucerent, parsimonia commentus, ut convivia publica et privata cenaeque ad pulvinaria facilius comparerentur, ni qui ad polluctum emerent pretio minus parcerent eaque praemercarentur.

The text commences with the report by Cassius Hemina, who informs us that sea fish had been used in Rome from the City's foundation. Based on this report by the historian who was the contemporary of Terentius and the Gracchi Brothers, Pliny recalls a statutory provision by Numa Pompilius, which ordered that fish without scales should not be served at the Festivals of the Gods. As the text puts it, the reason for this was frugality. Employing these rules in public and private events and sacrificial rites in favour of the gods might require more negligible expenses than formerly. The risk of forestalling the market by excessive spending when buying provisions was also evaded.

Festus links the verb *pollucere*[76] with sacrificial rites; therefore, the secondary literature tends to regard the provisions as of religious nature. In other words, this regulation was not designed to save money, even if the origin of the ban was subsequently explained by the fact that fish without scales were less common than their scaled counterparts and, thus, harder to obtain.[77] It might lead us to conclude that the less accessible an item was, the more expensive it was; therefore, the fewer people could afford it. Nevertheless, the taboo of eating scaleless fish was a literary *topos*, an excellent example of which can be found in the Mosaic laws.[78]

Thus, no obvious means-end link could be set up between the veneration of gods in Rome and the frugality of Roman citizens. It is also improbable to clarify which could have served as means and which as an end. Could such a link be established at all? It is also interesting to find out why rules develop a direct connection between a particular restriction and *religio* if the only driving force behind such limitations was frugality. On many occasions, the reference to the proper veneration of gods serves as a sufficient foundation for a higher degree of lawful behaviour; Table 8 in the Twelve Tables contains several good examples of this pattern.

In most cases, the legislator used sacral rules as a means of dispute resolution in cases of antagonistic social conflicts. The division of the community into rich and poor is an outcome in the community which lacks any particular interference: some people gain more incredible wealth; others achieve more modest financial success. Sacral rules could effectively balance the resulting vast economic and social differences.[79] These rules successfully safeguard the peace of the community, as well. Consequently, if the community is protected, the individual is safe, too.

These sacral rules pertain to the veneration of gods and therefore belong to the scope of *religio*. In a society where *superstitio* and *religio* were not easily separated, the difference between a superstitious and a religious lifestyle was anything but blatant. Not only funerary cults but burial rites belonged to the terrain of *religio*. In connection with these rites, the collective endeavour of the community to curb excessive expenditure is genuinely palpable. It was a collaborative effort even despite the attempt to link luxury with the veneration of gods.

[76] Cf. Fest. 253; 298.

[77] On this, see also e. g. BOXMAN, A., op. cit., p. 22–23., who speaks about '*superstitiosa prohibito*' to characterise the provision, though, in the conclusions of his work, he admits that the regulations had a religious character. Cf. IDEM op. cit. 30. See also ZLINSZKY, J., *Állam és jog az ősi Rómában.* [Law and State in Ancient Rome]. Budapest, 1997, p. 48–49.

[78] Cf. 3 Mos. 11, 9–10; 5 Mos. 14, 9–10. Correspondingly see also SAUERWEIN, I., op. cit.12; likewise mentioned by BOXMAN, A., op. cit., p. 23.

[79] On this see also ZLINSZKY, J., op. cit., p. 84–86., with literature, and 177.

Der Rechtsstatus und die Selbstverwaltung der Hauptstadt Budapest in der bürgerlichen Ära

(The Legal Status and the System of Self Government of Budapest During the Bourgeois Period)

*Gábor Schweitzer**

Abstract

The paper reviews the legal status and the system of self-government of Budapest in the Bourgeois Period. Budapest was created by the administrative merger of three cities - Pest, Buda and Óbuda – pursuant to Act XXXVI of 1872. In said period, the status and administration of the capital city were governed by separate laws. This was an expression of the special attention paid by the government and the legislature to the country's dynamically developing capital. During the existence of the Austro-Hungarian Monarchy between 1867 and 1918, liberal principles were the main determinants of the capital's legal status and administrative system. One of the typical institutions of this period was the general assembly, the guarantee of municipal autonomy: half of the membership was elected by the eligible population and half from among the ranks of the highest taxpayers. At the same time, Budapest's status as the capital of Hungary has led to a narrowing or even complete exclusion of the local government's room for maneuvers in certain areas. However, the centralizing administrative policy objectives of the national conservative government of the inter-war period resulted in the gradual crippling of self-governance.

Keywords: *Budapest; bourgeois period; self-government; municipal autonomy; general assembly; largest tax payers; centralization.*

Die folgende Studie soll zeigen, wie der Rechtsstatus und das System der Selbstverwaltung von Budapest, der Hauptstadt Ungarns, während der österreichisch-ungarischen Monarchie zwischen 1867 und 1918 und zwischen den beiden Weltkriegen geregelt waren.

1. Die Zeit der städtischen Vereinigung

Nach dem österreichisch-ungarischen Ausgleich von 1867 wurden in Ungarn mehrere Typen von Städten unterschieden, sowohl in Bezug auf das öffentliche Recht als auch in funktionaler Hinsicht.[1] Die Städte mit geregeltem Magistrat, die unter der Aufsicht des Komitates standen, sowie die Groß- und Kleingemeinden, wurden im Rahmen des Gemeindegesetzes geregelt.[2] So galten die Städte mit einem geregeltem Magistrat, die ganz unterschiedliche Gegebenheiten und Entwicklungsstufen aufwiesen, im öffentlich-rechtlichen Sinne nicht als Städte, sondern als Gemeinden. Gleichzeitig wurden die Städte mit Munizipalrecht, die zunächst größtenteils nicht mehr zu den ehemaligen freien königlichen Städten gehörten, durch den Gesetzesartikel Nr. XLII vom Jahr 1870 über die Komitats- und Stadtmunizipien und später durch den Gesetzesartikel Nr. XXI vom Jahr 1886 geregelt. Zur Zeit des Dualismus wurde also aus dem administrativ-politischen Gesichtspunkt zwischen den Komitaten und den Städten mit Munizipalrecht kein Unterschied gemacht. Der Rechtsstatus der Stadt Rijeka und ihres Bezirks wurde jedoch in Anbetracht ihrer besonderen Stellung als Küstenhafenstadt durch Sondergesetze geregelt.[3] Die Hauptstadt Budapest wurde schließlich in einem eigenen Gesetz geregelt, obwohl ursprünglich beabsichtigt war, die Bestimmungen über den Rechtsstatus, die Selbstverwaltung und die Verwaltung von Buda-Pest im Gesetz über die Munizipien festzulegen. Während der Debatte über den Gesetzentwurf über die Zuständigkeit der Hauptstadt schlug *Mór Wahrmann*, ein Vertreter der Regierungspartei aus der Hauptstadt, unter Hinweis auf die Tatsache, dass auch der Rechtsstatus von London, Paris und anderen Hauptstädten durch gesonderte Gesetze geregelt werde, vor, dass die

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1 Pölöskei, F., A városok jogállása a polgári korban. [Der Rechtsstatus der Städte in der bürgerlichen Ära.] In: Máthé, G. – Zlinszky, J. (Hrsg.), *Degré Alajos emlékkönyv* [Gedenkbuch von Alajos Degré]. Budapest, 1995, S. 221-231 und Beluszky, P. – Győri, R., „A város a láz, a nyugtalanság, a munka és fejlődés". Magyarország városhálózata a 20. század elején. [„Eine Stadt ist das Fieber, die Unruhe, die Arbeit und die Entwicklung". Ungarns städtisches Netz zu Beginn des 20. Jahrhunderts]. In: *Korall*, vol 13. Nr. 11–12, 2003, S. 199-238.

2 Zur Zeit des Dualismus wurde der Rechtsstatus der Gemeinden durch zwei Gesetze umfassend geregelt: Gesetzesartikel Nr. XVIII vom Jahr 1871 und Gesetzesartikel Nr. XXII vom Jahr 1886.

3 Ress, I., Fiume államjogi helyzetének ellentmondásai (1776-1918) [Kontroversen über den staatsrechtlichen Status von Rijeka (1776-1918)]. In: *Életünk*, vol. 47, Nr. 9, S. 43-51.

Verwaltungsorganisation von Buda und Pest durch ein gesondertes Gesetz geregelt werden sollte.[4] Der Änderungsantrag wurde von *Vilmos Tóth*, Staatsminister für Inneres, im Namen der Regierung und von der Mehrheit des Abgeordnetenhauses unterstützt. Dies war also der rechtspolitische Grund, warum die Bestimmungen über den Rechtsstatus und die Verwaltung der Hauptstadt Budapest nicht im Rahmen des Munizipalgesetzes, sondern in einem eigenen Gesetz geregelt wurden.

Ein eigenes Städtegesetz wurde jedoch weder damals noch später verabschiedet, obwohl die Städte mit Munizipalrecht und die Städte mit geregeltem Magistrat ab der Wende vom 19. zum 20. Jahrhundert sowohl einzeln als auch gemeinsam in mehreren Foren die Schaffung eines eigenen Städtegesetzes forderten, das sowohl aus Urbanisierungs- als auch aus nationaler Sicht als wichtig erachtet wurde.[5] Dies hatte zur Folge, dass sich der Begriff der Stadt im öffentlichen-rechtlichen und funktionalen Sinne in Ungarn nicht überschnitt, da Siedlungen mit städtischen Funktionen nicht den Rechtsstatus einer Stadt hatten, um die weitere Entwicklung zu fördern.[6]

2. Der Rechtsstatus und die Selbstverwaltung von Budapest gemäß Gesetzesartikel Nr. XXXVI vom Jahr 1872

Die Bestimmungen über die Vereinigung und die Verwaltung der Hauptstadt wurden im Gesetzesartikel Nr. XXXVI vom Jahr 1872 geregelt.[7] Das Hauptstadtgesetz vereinigte die freien königlichen Hauptstädte Buda und Pest sowie den Marktfleck Ó-Buda und die Margareteninsel unter dem Namen „Buda-Pest főváros" („Hauptstadt Buda-Pest") zu einem einzigen Munizipium. Die Vereinigung der Städte war ein Verwaltungsakt, während die Entstehung von Budapest als Hauptstadt auch eine verfassungsrechtliche Relevanz hatte. Das Gebiet der Hauptstadt wurde per Gesetz festgelegt, ebenso wie die Zusammenlegung der an das Gebiet der Hauptstadt angrenzenden Gemeinden mit der Hauptstadt auf der Ebene des Gesetzes erfolgen konnte.

Nachdem der Gesetzesartikel Nr. XXXVI vom Jahr 1872 die Hauptstadt zu einer selbständigen Munizipium erklärt hatte, erlaubten die Bestimmungen des Gesetzesartikels Nr. XLII vom Jahr 1870 über die Munizipien der Hauptstadt die Ausübung der Selbstverwaltung und die Vermittlung der staatlichen Verwaltung innerhalb der Grenzen des Gesetzes sowie die Erörterung von Angelegenheiten von öffentlichem Interesse und sogar von nationalen Angelegenheiten, wobei sie ihre Meinung nicht nur den anderen Munizipien, sondern auch der Regierung und dem Abgeordnetenhaus mitteilen konnte. Der Gesetzgeber hat damit den Umfang der munizipalen Autonomie der Hauptstadt festgelegt.

Die Hauptstadt traf aufgrund ihres Selbstverwaltungsrechts autonome Maßnahmen in ihren inneren Angelegenheiten, beschloss und erließ Regelungen, die sie durch ihre eigenen öffentlichen Behörden umsetzte. Außerdem wählte sie ihre Beamten und legte die Kosten der Selbstverwaltung und der öffentlichen Verwaltung fest, und nicht zuletzt stand sie in direktem Kontakt mit der Regierung.

Das hauptstädtische Munizipium legte den vereinbarten Haushalt dem Innenminister zur Genehmigung vor, der 40 Tage Zeit hatte, den Haushalt im Detail zu überprüfen. Der Innenminister konnte die Genehmigung des Haushalts verweigern und die Hauptstadt anweisen, einen neuen Haushaltsplan aufzustellen oder ihn anzupassen. Die Endabrechnung der Hauptstadt musste ebenso wie der Haushalt dem Innenminister zur Genehmigung vorgelegt werden, der ein ganzes Jahr Zeit hatte, die Befreiung zu erteilen.

In einem engen Rahmen legte das Hauptstadtgesetz auch die Befugnisse der Regierung in Bezug auf die Einnahmequellen Budapests fest, indem es der Hauptstadt erlaubte, eine kommunale Zusatzsteuer auf indirekte staatliche Steuern zu erheben, Gebühren, Marktgelder und Zölle in der Stadt zu erheben und neue, vom Staat nicht verwendete Steuern einzuführen. Die Ausübung dieses Rechts bedurfte jedoch der Genehmigung durch die Regierung.

In einigen Bereichen wurde das Prinzip der kommunalen Selbstverwaltung jedoch eingeschränkt oder ausgeschlossen: Der Spielraum der hauptstädtischen Selbstverwaltung wurde jedoch teilweise durch den nach dem Vorbild des Metropolitan Board of Works in London errichteten Hauptstädtischen Rat für Öffentliche Arbeiten eingeschränkt, aber durch die Einrichtung der Hauptstädtischen Polizei vollständig ausgeschlossen.

Der Hauptstädtische Rat für Öffentliche Arbeiten wurde durch den Gesetzesartikel Nr. X vom Jahr 1870 zur Koordinierung und Finanzierung von Stadtplanungsmaßnahmen eingerichtet.[8] Das Gesetz zielte darauf ab, den Lauf der Donau in der Hauptstadt zu regulieren, die Kosten für öffentliche Arbeiten für Verkehr und Transport in Buda-Pest zu decken und eine „zuständige Behörde" zu schaffen, die für die Durchführung der geplanten öffentlichen Arbeiten verantwortlich ist. Die Koordinierung wurde durch den Rat sichergestellt, dessen Präsident – und gegebenenfalls Vizepräsident – vom Ministerium ernannt wurde, während 6 der 18 ordentlichen Mitglieder von den Vertretern der Stadt Pest, 3 von den Vertretern der Stadt Buda und die restlichen 9 vom Ministerium gewählt wurden. Die Funktionen und Befugnisse des Rates – insbesondere seine Aufsichts- und Berufungsbefugnisse im Bereich der „Bau- und Architekturpoli-

[4] Az 1869-dik évi april 20-dikára hirdetett Országgyűlés Képviselőházának Naplója X. kötet. [Protokoll der Versammlung der Nationalversammlung, verkündet für den 20. April 1869. Band X.] Pest, 1870. S. 79.

[5] Breinich, G., A magyar városok szövetsége a dualizmuskori Magyarországon [Die Föderation der ungarischen Städte im Ungarn der Zeit des Dualismus]. In: Szvoboda Dománszky, G. (Hrsg.), *Tanulmányok Budapest Múltjából*, Band XXV. Budapest, 1996, S. 85-113.

[6] Beluszky, P. – Győri, R., Városi rang vice versa városi funkció. A városi rang és városi funkció alakulása az elmúlt másfél évszázadban. [Städtischer Status vice versa städtische Funktion. Die Entwicklung von Status und Funktion der Städte in den letzten eineinhalb Jahrhunderten]. In: *Történeti Földrajzi Közlemények*, vol. 6, Nr. 3-4, 2018, S.167-172.

[7] Zur Vereinigung und Autonomie der Hauptstadt, siehe Sipos, A., *Várospolitika és városigazgatás Budapesten 1890-1914* [Stadtpolitik und Stadtverwaltung in Budapest 1890-1914]. Budapest, [1996], S. 13-27.

[8] Déry, A., A Fővárosi Közmunkák Tanács. Egy független városrendező hatóság [Der Hauptstädtische Rat für Öffentliche Arbeiten (1870-1948). Eine unabhängige Stadtplanungsbehörde]. In: *Budapesti Negyed*, vol. 3, Nr. 3, 1995, S. 77-96.

zei" – haben in der Folgezeit zu erheblichen Reibungen zwischen dem Rat und der Autonomie der Hauptstadt geführt.

Die Ausgliederung der Arbeit der im Hauptstadtgebiet tätigen Polizei aus der Selbstverwaltung und ihre Eingliederung in das Innenministerium wurde vor allem mit dem Hauptstadtcharakter Budapests und der damit verbundenen politischen Bedeutung begründet. In Übereinstimmung mit diesem Konzept regelte das Hauptstadtgesetz den rechtlichen Status der auf dem Gebiet des Munizipiums tätigen Polizei. Die Ordnung von Budapest wurde von der über eine einheitliche Organisation verfügende Staatspolizei namens *„Hauptstadtpolizei"* überwacht, die von den eigenen Behörden des Staates – dem Innenministerium – geleitet wurde.[9] Solange das Gesetz über die Errichtung der Stadtpolizei nicht verabschiedet war – und das musste bis zur Verabschiedung des Gesetzesartikels Nr. XXI vom Jahr 1881 warten –, waren die Polizeikräfte von Budapest direkt dem Innenministerium unterstellt, d.h. völlig von der Autonomie der Hauptstadt ausgeschlossen. Das Hauptstadtgesetz hatte bereits im Zusammenhang mit der Tätigkeit der hauptstädtischen Polizei die Möglichkeit der Entstehung eines „Groß-Budapests" – d.h. mit der Angliederung der Siedlungen des Ballungsraums an die Hauptstadt – bereits berücksichtigt, indem es dem Innenminister die Zuständigkeit für die Ausarbeitung eines Gesetzentwurfs zur Ausweitung der polizeilichen Tätigkeit auf die an die Hauptstadt angrenzenden Gebiete übertragen hat. Die Ausweitung dieser polizeilichen Befugnisse – auf das Gebiet von Újpest und Rákospalota im Ballungsraum der Hauptstadt – wurde bereits 1889 vorgenommen.

Der Rechtsstatus des Oberbürgermeisters von Budapest spiegelt auch die besondere Aufmerksamkeit der Regierung gegenüber der Hauptstadt wider. Nach der durch Kompromisse entstandenen Regelung wurde der Oberbürgermeister, der die Exekutive vertrat und während seiner Amtszeit praktisch unabsetzbar war, von der Versammlung des Munizipalausschusses der Hauptstadt aus drei vom Kaiser ernannten Personen, die vom Innenminister gegengezeichnet wurden, für sechs Jahre gewählt. Ursprünglich hatte die Regierung die Idee, dass die Hauptstadt von einem von der Regierung ernannten Obergespan geleitet werde, ähnlich wie bei den Komitaten und Städten mit Munizipalrecht. Das Initiativrecht für die Ernennung des Oberbürgermeisters wurde jedoch letztlich der Exekutive übertragen, was durch die Wahl durch den Munizipalausschuss, dem Hüter der Autonomie der Hauptstadt, etwas ausgeglichen wurde.[10] Es gab einen weiteren Unterschied zwischen den Befugnissen des Bürgermeisters der Städte mit Munizipalrecht und des Bürgermeisters der Hauptstadt. Während der Exekutivapparat in den Städten mit Munizipalrecht vom Bürgermeister geleitet wurde, war das wichtigste Exekutivorgan der hauptstädtischen öffentlichen Verwaltung der Rat der Beamten, unter dem Vorsitz des Bürgermeisters der Hauptstadt.

Zur Zeit der Städtevereinigung zählte Budapest etwa 300 000 Einwohner und die Personalstärke des Verwaltungsausschusses seines Munizipiums wurde auf 400 festgelegt – eine Zahl, die bis 1920 unverändert blieb –, von der eine die Hälfte aus den Reihen der bei den Kommunalwahlen stimmberechtigten Bürger und die andere Hälfte aus den so genannten Virilistes selbst gewählt wurde, die die 1200 direktesten staatlichen Steuern zahlten. Die Versammlung des Verwaltungsausschusses des Munizipiums setzte sich aus etwa zwanzig führenden Beamten der Hauptstadt zusammen, die sowohl beratungs- als auch stimmberechtigt waren.

Der Gesetzgeber hat die Zahl der gewählten Mitglieder des Ausschusses des Munizipiums der Hauptstadt im Gegensatz zu den Ausschüssen des Munizipiums der Komitate bzw. der Städte begrenzt, da die Anzahl der Mitglieder der letzteren von der Bevölkerungszahl des Munizipiums abhing – die Ober- und Untergrenze der Personalstärke wurde festgesetzt. Die Ausbildung der Wahlkreise wurden durch das Hauptstadtgesetz in die Kompetenz der Autonomie verwiesen, mit der Einschränkung, dass die Zahl der Mitglieder des Ausschusses des Munizipiums, die in jedem Wahlkreis gewählt werden konnten, zwischen 20 und 30 liegen sollte. Der Gesetzgeber räumte der Autonomie somit einen doppelten Freiheitsgrad ein, da er nicht nur die Wahlkreiseinteilung, sondern auch die Anzahl der in jedem Wahlkreis wählbaren Ausschussmitglieder zur Verhandlung stellte.[11]

Nach dem Inkrafttreten des Gesetzesartikels Nr. XXXXVI vom Jahr 1872 wurden zwei Verwaltungsbezirke auf der Budaer Seite der Donau und 7 auf der Pester Seite der Donau geschaffen, zusätzlich zu Óbuda, das als eigenständiger Verwaltungsbezirk eingegliedert wurde.[12] Das heißt, die vereinigte Hauptstadt hatte 10 Verwaltungsbezirke. Die Verwaltungsbezirke der Hauptstadt wurden von einem Vorstand geleitet, der von der Versammlung der Hauptstadt gewählt wurde und von gewählten Beamten unterstützt wurde. Der Vorstand und die gewählten Beamten bildeten zusammen den Bezirksmagistrat. Die Vorschriften über den Bezirksmagistrat, der nicht über kommunale Befugnisse verfügte, wurden später durch die Bestimmungen des Gesetzesartikels Nr. XXXIII vom Jahr 1893 ersetzt. Auf der Grundlage all dessen kann man sagen, dass die Selbstverwaltung der Hauptstadt in der bürgerlichen Ära einstufig war, da die Selbstverwaltungsbefugnisse nur dem Rathaus und der Versammlung des Munizipalausschusses zustanden, während die Magistrate der Bezirke über keine Selbstverwaltungsbefugnisse verfügten.[13]

Durch die Vereinigung der Hauptstadt wurde das Städtenetz in Ungarn im öffentlich-rechtlichen Sinne trialistisch, wie István Kajtár treffend formulierte.[14] Neben den Städten mit geregeltem Magistrat, die dem Rahmen des Gemeindegesetzes ange-

[9] Zur Entstehung der Hauptstädtischen Polizei, siehe Kollár, N., A Budapesti Rendőr-főkapitányság története [Die Geschichte des Budapester Polizeipräsidiums]. Teil I. In: *Rendészeti Szemle*, vol. 31, Nr. 11, 1993, S. 37-45.

[10] Zur Tätigkeit der Bürgermeister und Oberbürgermeister der Hauptstadt, siehe: *A főváros élén. Budapest főpolgármesterei és polgármesterei 1873-1950* [An der Spitze der Hauptstadt. Die Oberbürgermeister und Bürgermeister von Budapest 1873-1950]. Feitl, I. (Hrsg.), Budapest, 2008.

[11] Zur Entwicklung des Wahlrechts in der Hauptstadt und zur Geschichte der Wahlen, siehe Feitl, I. – Ignácz, K. (Hrsg.), *Önkormányzati választások Budapesten 1867-2010.* [Kommunalwahlen in Budapest 1867-2010] Budapest, 2010.

[12] Wittenbarth, Gy., Budapest kerületi beosztása [Einteilung der Bezirke von Budapest]. In: *Városi Szemle*, vol. 17. Nr. 6, 1931, S. 941-945.

[13] Flaxmayer, J. – Medriczky, A., *A kerületi elöljáróságok szerepe Budapest székesfőváros közigazgatásában* [Die Rolle der Bezirksmagistrate in der Verwaltung von Budapest]. Budapest, 1934.

[14] Kajtár, I., *Magyar városi önkormányzatok (1848–1918)* [Ungarische Stadtverwaltungen (1848-1918)]. Budapest, 1992, S. 82.

passt waren, und den Städten mit Munizipalrecht, die durch das Munizipalrecht geregelt waren, wurde der Rechtsstatus der Hauptstadt Budapest als eine Stadt mit Munizipalrecht mit einem besonderen Rechtsstatus geregelt. Die tatsächlichen städtischen Funktionen und der städtische Rechtsstatus stimmten in dieser Periode nicht immer miteinander überein, da einige der Siedlungen mit städtischen Funktionen keinen flexibleren Spielraum bietenden Rechtsstatus einer Stadt mit Munizipalrecht hatten.[15] Ab dem zweiten Jahrzehnt der dualistischen Ära, nachdem der neue Status der Städte festgelegt worden war, umfasste das ungarische Städtenetz neben der Hauptstadt 25 Städte mit dem Recht der Gerichtsbarkeit und etwa 130 Städte mit geregeltem Magistrat. Zu Beginn des 20. Jahrhunderts lebten etwa 20 % der ungarischen Bevölkerung in der Hauptstadt oder in Städten.[16] Der besondere Rechtsstatus Budapests wurde durch ein anderes Rechtssystem gewährleistet als die Organisation und die Autonomie anderer Städte mit Munizipalrecht. Ein auffälliger Unterschied bestand in der Zusammensetzung des Munizipalausschusses, da das Hauptstadtgesetz den Virilismus durch Wahlen gegenüber dem „rohen" Virilismus bevorzugte. In den Gemeinderäten der Groß- und Kleingemeinden und Städte mit geregeltem Magistrat sowie im Ausschuss des Komitatsmunizipiums der „rohe" Virilismus vor, d. h. die Höchssteuerzahler (Virilistes) wurden automatisch Mitglieder der Selbstverwaltungskörperschaft. Die Stellung des die Hauptstadt leitenden Oberbürgermeisters, der während seiner Amtszeit praktisch unabsetzbar war, und die Stellung des Obergespans an der Spitze einer Stadt mit Munizipalrecht, der als lokaler Vertreter der Exekutive ernannt wurde, entsprachen ebenfalls nicht einander. Einer der Gründe dafür war, dass der Oberbürgermeister der Hauptstadt sein Mandat durch eine Wahl in Verbindung mit einem Kandidieren durch die Exekutive und nicht durch eine bloße Ernennung erhielt. Mit anderen Worten, seine Loyalität war teilweise geteilt zwischen der Exekutive, die das Ernennungsrecht ausübte, und der hauptstädtischen Autonomie, die mit dem Wahlrecht ausgestattet war. Zwar hätte die Loyalität des Oberbürgermeisters gegenüber der Exekutive – allein schon aufgrund seiner Ernennung zum Amt und der Befugnisse des Oberbürgermeisters – deutlicher ausgeprägt gewesen sein.

3. Die Einschränkung der kommunalen Autonomie der Hauptstadt zwischen den beiden Weltkriegen

In den Jahrzehnten zwischen den beiden Weltkriegen blieb das während des Dualismus zwischen 1867 und 1918 geschaffene Rechtssystem im rechtstechnischem Sinn bestehen, da die Rechtsstellung, die Organisation und die Funktionsweise der Hauptstadt, der Stadt mit Munizipalrecht und der Stadt mit geregeltem Magistrat weiterhin durch getrennte Gesetze geregelt waren.[17]

Die besondere Aufmerksamkeit der Regierung für Budapest war alles andere als schmeichelhaft, denn eine der Besonderheiten dieser Zeit, die Einschränkung der Befugnisse der territorial organisierten Verwaltungsautonomien bei gleichzeitiger Ausweitung der staatlichen Kontrolle und die zunehmende Zentralisierung, war im Fall der Hauptstadt besonders ausgeprägt. Die Bestimmungen, die die munizipale Autonomie einschränkten, waren zweierlei Art.

Ein Teil der Bestimmungen betraf die Vorschriften über die Zusammensetzung, die Wahl und die Befugnisse des Munizipalausschusses, und der andere Teil der Bestimmungen zielte auf die Geschäftsordnung, die Beratung und die das Rederecht beschränkenden Cloture-Regeln ab, die das Wirken der Vollversammlung des Munizipalausschusses einschränkten. Die Wortführer des christlich-nationalistischen Kurses, der sich um die Jahreswende 1919/1920 abzeichnete, machten letztlich die Stadtregierung der vergangenen liberalen Ära für den Zusammenbruch wegen des Weltkrieges und die darauffolgenden Revolutionen verantwortlich. Auf diese Weise wurde Budapest zu einer „sündigen Stadt" und gleichzeitig auch zu einem „Sündenbock.[18]

Die wichtigste Maßnahme der hauptstädtischen Novelle vom Jahr 1920, die zu Beginn des christlich-nationalistischen Kurses entstand, war die Abschaffung des Rechtsinstituts des Virilismus aus dem Munizipalauschuss der Hauptstadt[19], und die während der politischen Konsolidierung, unter der Regierung von István Bethlen als Ministerpräsident verabschiedete hauptstadtische Novelle vom Jahr 1924 hat die Zahl der mit anderen Rechtstiteln in den Munizipalausschuss ernannten Würdenträger auf Kosten des Anteils der gewählten Mitglieder des Munizipalausschusses deutlich erhöht, wodurch den Anteil der vermutlich regierungstreuen Mitglieder des Munizipalausschusses erhöht wurde.[20]

Für den christlich-nationalistischen Kurs, der sich in Ungarn nach der bürgerlich-demokratischen Revolution vom Jahr 1918 und dem Sturz der sozialistischen Räterepublik 1919 ab der Jahreswende 1919/1920 entfaltete, war nicht so sehr die Institution des Virilismus, die dem parlamentarischen Wahlrecht, als vielmehr die Person der Virilistes inakzeptabel, wie *Gábor Gyáni* deutlich hervorhob, denn die Beseitigung des Virilismus bedeutete *„den Ausschluss eines Teils des „reichen (jüdischen) Großbürgertums aus dem Munizipalausschuss"*.[21] Der politische Antisemitismus beeinflusste daher definitiv die Regierung und die Gesetzgebung zur Zeit der Schaffung der Hauptstadtgesetzes vom

[15] Beluszky, P. – Sikos, T. T., *Városi szerepkör, városi rang* [Städtische Rolle, städtischer Status]. Budapest, 2020, S. 58-69.

[16] Ebd. S. 67.

[17] Die Bezeichnung *eine Stadt mit geregeltem Magistrat* wurde durch den Gesetzesartikel Nr. XXX vom Jahr 1929 über die Organisation der öffentlichen Verwaltung in *Komitatsstadt kreisfreie Stadt* geändert.

[18] Schweitzer, G., Budapest, az ország vakbele. A magyar politikai közbeszéd történetéhez. [Budapest, der Blinddarm des Landes. Zur Geschichte des politischen Diskurses in Ungarn]. In: *Budapesti Könyvszemle*, vol. 16. Nr. 4, 2004, S. 328-335.

[19] Gemäß dem Gesetzesartikel Nr. IX vom Jahr 1920 konnten zusätzlich zu den 240 gewählten Mitgliedern des Munizipalausschusses 46 weitere Mitglieder auf der Grundlage zusätzlicher Titel Mitglieder des Munizipalausschusses werden.

[20] Gemäß dem Gesetzesartikel XXVI vom Jahr 1924 konnten neben den 250 gewählten Mitgliedern des Munizipalausschusses 63 weitere Mitglieder auf der Grundlage zusätzlicher Titel Mitglieder des Munizipalausschusses werden.

[21] Bácskai, V.– Gyáni, G. – Kubinyi, A., *Budapest története a kezdetektől 1945-ig* [Die Geschichte von Budapest von den Anfängen bis 1945]. Budapest, 2000, S. 216.

Jahr 1920.[22] Allerdings erinnerte die Institution des Virilismus die neue Machtelite auch an die Ideen einer vergangenen liberalen Ära. So war die Beseitigung des Virilismus nicht nur ein starker Ausdruck der Verleugnung der Vergangenheit, sondern auch des Widerstands gegen die liberale politische Tradition.

Im Gegensatz zur früheren Regelung sah der Gesetzesartikel Nr. IX vom Jahr 1920 bereits die Auflösung des Munizipalausschusses vor. Der Gesetzgeber hatte eine solche Möglichkeit des Einschreitens gegen eine Stadt mit Munizipalrecht oder Komitatsmunizipium bisher nicht vorgesehen.[23] Bis dahin konnte die Exekutive diese Befugnis gegen die Vertretungskörperschaft von Groß- und Kleingemeinden und Städten mit einem geregelten Magistrat nur ausüben, wenn die Vertretungskörperschaft ein Verhalten bekundete, die die Interessen des Staates oder das Wohl der Gemeinde gefährdete. Gemäß den Bestimmungen des Gesetzesartikels Nr. IX vom Jahr 1920 konnte der Munizipalausschuss der Hauptstadt vom Innenminister aufgelöst werden, wenn er sich eines Verhaltens schuldig macht, das die Staatsinteressen oder das Wohl der Hauptstadt gefährdet oder ein erfolgreiches Wirken der öffentlichen Verwaltung ausschließt. Die Rechtstitel für die Auflösung des Munizipalausschusses wurden durch den Gesetzesartikel Nr. XXXVI vom Jahr 1924 neu geregelt. Nach dieser Bestimmung konnte der Innenminister den Munizipalausschuss auflösen, wenn er gegen das Gesetz oder eine Rechtsverordnung verstößt, wenn er sich rechtswidrig weigert, die rechtmäßigen Maßnahmen der vorgesetzten Behörde auszuführen, oder wenn er dauerhaft arbeitsunfähig wird. Gegen den Erlass des Innenministers, mit dem der Munizipalausschuss aufgelöst werden konnte, konnte jedoch eine Beschwerde beim Verwaltungsgericht eingereicht werden.

Ferenc Harrer, ein prominenter Vertreter der zeitgenössischen Wissenschaft der öffentlichen Verwaltung und ehemaliger stellvertretender Bürgermeister von Budapest, ist nicht unbegründet in seiner Einschätzung, dass die beiden Novellen des Gesetzesartikels Nr. XXXXVI vom Jahr 1872, die nach dem Ersten Weltkrieg verabschiedet wurden – d.h. der Gesetzesartikel Nr. IX vom Jahr 1920 und der Gesetzesartikel Nr. XXXVI vom Jahr 1924 – „offenkundig politisch" waren und einzig und allein darauf abzielten, die Vorherrschaft der konservativen Elemente im nun politisch strukturierten Munizipalausschuss zu sichern.[24]

Nach dem neuen Gesetz der Hauptstadt, dem Gesetzesartikel Nr. XVIII vom Jahr 1930, wurde das Recht, den Munizipalausschuss aufzulösen, dem Amtsbereich des Ministeriums übertragen, das auf Vorschlag des Innenministers den Munizipalausschuss bei offener Missachtung des Gesetzes oder einer aufgrund des Gesetzes erlassenen Verordnung oder bei einem Verhalten, das die Interessen des Staates gefährdet, oder bei dauerhafter Arbeitsunfähigkeit oder bei einer Situation, die infolge der Tätigkeit des Munizipiums zu seiner kritischen wirtschaftlichen Lage führen kann, auflösen kann.

Mit dem Gesetz XVIII vom Jahr 1930 wurde die Zahl der Verwaltungsbezirke der Hauptstadt unter Berücksichtigung wahlgeographischer Aspekte von 10 auf 14 erhöht, weil dies – wie der Staatssekretär für Inneres Sándor Blaha bei der Debatte über den Gesetzentwurf im Ministerrat sagte – nach den Berechnungen für die nationalen Parteien vorteilhafter sei.[25] Mit anderen Worten: Die Entscheidung, die Zahl der Verwaltungsbezirke zu erhöhen, beruhte nicht auf verwaltungstechnischer Rationalität, sondern auf parteipolitischen Interessen. Mit dem neuen Hauptstadtgesetz wurde jedoch die Gesamtzahl der Mitglieder des Munizipalausschusses weiter reduziert, während der Anteil der nicht gewählten Mitglieder des Munizipalausschusses im Vergleich zu den gewählten Mitgliedern weiter erhöht wurde.[26] In der Tat war die Mehrheit der nicht durch eine Wahl gewordenen Mitglieder des Munizipalausschusses vermutlich eher regierungsloyal.

Zu den weiteren Merkmalen des neuen Hauptsadtgesetzes gehörte die Ausweitung der Aufsichts- und Kontrollbefugnisse, sei es auf den Innenminister, der die Oberaufsicht ausübte, auf andere Ministerien, die an der Kontrolle beteiligt werden sollten, insbesondere das Finanzministerium, oder auf die Befugnisse des Oberbürgermeisters. Der Gesetzgeber wollte auch die Funktionsweise der Vollversammlung des Munizipalausschusses durch spezifische Maßnahmen regeln. Nach Ansicht des bereits zitierten Ferenc Harrer haben die Zusammensetzung des Munizipalausschusses, die strengen Regeln der Geschäftsordnung und die Bestimmungen zur Einschränkung der Öffentlichkeit dazu geführt, dass ein beträchtlicher Teil der öffentlichen Meinung den Gesetzesartikel Nr. XVIII vom Jahr 1930 als *„Töter der Autonomie"* ansah.[27]

Gesetzesartikel Nr. XII vom Jahr 1934, mit dem der Gesetzesartikel Nr. XVIII vom Jahr 1930 während der Regierungszeit von Gyula Gömbös geändert wurde, schränkte die Autonomie der Selbstverwaltung der Hauptstadt weiter ein. Die Änderung des Hauptstadtgesetzes stand im Einklang mit der autoritären Regierungsvorstellungen des Ministerpräsidenten, die eine weitere Zentralisierung vorsah.[28] Die Bestimmungen des Gesetzesartikels Nr. XII vom Jahr 1934 ermöglichten zunächst die Ernennung des Oberbürgermeisters durch das Staatsoberhaupt auf Vorschlag des Innenministers, der jederzeit, ebenfalls auf Vor-

[22] Im selben Jahr trat der politische Antisemitismus in den Vordergrund, als der Gesetzgeber den Gesetzesartikel Nr. XXV vom Jahr 1920 verabschiedete, der die Zulassung von Juden an Universitäten und Hochschulen beschränkte.

[23] Die Auflösung der Munizipalausschüsse der Komitate bzw. der Städte mit Munizipalrecht wurde durch den Gesetzesartikel Nr. XXX vom Jahr 1929 ermöglicht.

[24] Harrer, F., Az új fővárosi törvény közigazgatási rendszere [Das Verwaltungssystem des neuen Hauptstadtgesetzes]. In: Mártonffy, K. (Hrsg.), *Fejezetek a közjog és a közigazgatási jog köréből Némethy Károly születésének 70. évfordulója (…) alkalmából* [Kapitel aus dem Bereich des öffentlichen Rechts und des Verwaltungsrechts anlässlich des 70. Geburtstages von Károly Némethy (…)], Budapest, 1932, S. 152.

[25] Magyar Nemzeti Levéltár Országos Levéltár, K. 27. A minisztertanács jegyzőkönyvei. 176. doboz. 1929. november 13. [Ungarisches Nationalarchiv Landesarchiv, Band 27. Protokolle des Ministerrats. Kiste Nr.176, 13. November 1929.]

[26] Gemäß Gesetzesartikel Nr. XVIII vom Jahr 1930 konnten zusätzlich zu den 150 gewählten Mitgliedern des Munizipalausschusses 90 weitere Mitglieder auf der Grundlage zusätzlicher Titel Mitglieder des Ausschusses werden.

[27] Harrer, *op. cit.* S. 152.

[28] Gergely, J., *Gömbös Gyula. Politikai pályakép* [Gyula Gömbös. Politische Laufbahn]. Budapest, 2001, S. 242-250 und S. 266-267.

schlag des Innenministers, abberufen werden konnte. Mit dieser Maßnahme beendete der Gesetzgeber die sechs Jahrzehnte alte Praxis, den Oberbürgermeister ausschließlich zum Vertreter der Exekutive zu machen und der Autonomie die ohnehin begrenzte Möglichkeit der Wahl des Oberbürgermeisters zu entziehen. Der Einfluss der Exekutive wurde dadurch verstärkt und die Autorität der Autonomie geschmälert, dass der Bürgermeister und die stellvertretenden Bürgermeister, die von dem Munizipalausschuss gewählt wurden, auf Vorschlag des Innenministers vom Staatsoberhaupt im Amt bestätigt wurden. Die Haushalts-, Budget- und Verwaltungsautonomie der Hauptstadt wurde durch die Bestimmung illusorisch, die den Innenminister ermächtigte, sozusagen gleichzeitig mit dem Inkrafttreten des Gesetzes einen Entwurf zu erlassen, zu dessen Umsetzung der Oberbürgermeister befugt war, um das Haushaltsgleichgewicht der Hauptstadt zu gewährleisten und die Zweckmäßigkeit und die Wirtschaftlichkeit der Verwaltung der Hauptstadt zu fördern.

Zu den Bestimmungen des Gesetzes, die die Autonomie der lokalen Selbstverwaltung weiter beeinträchtigten, gehörte die Tatsache, dass der Zeitpunkt des Inkrafttretens der Rechtsvorschriften über die neu geänderte Anzahl und Zusammensetzung des Munizipalausschusses durch eine Verordnung des Innenministers festgelegt werden konnten.[29] Da diese Verordnung vor Ablauf des Mandats des Munizipalausschusses erlassen werden konnte, hatte der Innenminister praktisch freie Hand, das Mandat des Munizipalausschusses vorzeitig zu beenden. Dem Innenministerium wurde daher die Möglichkeit gegeben, den Munizipalausschuss der Hauptstadt quasi aufzulösen. Später hat der Innenminister Miklós Kozma unter Berufung auf diese Befugnis den Artikel 2 des Gesetzesartikels Nr. XII vom Jahr 1934 durch die Verordnung Nr. 370/1935 des Innenministeriums in Kraft gesetzt, wodurch das Mandat des 1930 gewählten Munizipalausschusses vor Ablauf seines Mandats beendet wurde. Diese Ermächtigung rief sogar die Missbilligung von *István Egyed*, einem bekannten Professor für öffentliches Recht, hervor, der jedoch mit den Bemühungen der Regierung sympathisierte: Obwohl er nicht behauptete, dass der Innenminister den Munizipalausschuss durch die oben genannte Verordnung *„formell"* aufgelöst hätte, musste er zugeben, dass dies *„im Wesentlichen zweifellos"* geschehen sei. In der Tat hatte der Innenminister die formale gesetzliche Befugnis, die genannte Gesetzesstelle einzuführen; ob es angemessen war, ihm eine solche Befugnis zu erteilen, ist ein Thema für ein anderes.[30]

Der Grund für die staatliche Aufmerksamkeit, die der Hauptstadt zwischen den beiden Weltkriegen zuteilwurde, liegt in erster Linie in der einzigartigen Urbanisierungsleistung der Hauptstadt während des halben Jahrhunderts nach dem Ausgleich, in den liberalen administrativ-politischen Institutionen, die ihre Entwicklung förderten, und in dem sozialen Umfeld und den politischen Bedingungen in der Hauptstadt, die all dies widerspiegelten. Paradoxerweise wurden die Anti-Budapest-Maßnahmen der ersten Jahre nach dem Ersten Weltkrieg, die von christlich-nationalistischen – nationalkonservativen – Parolen widerhallten, durch die expansive städtische Entwicklung der Hauptstadt von fast fünfzig Jahren ausgelöst. Die veränderte öffentliche Wahrnehmung spiegelte sich auch in der Rede des Innenministers *Mihály Dömötör* während der Debatte über den Gesetzesartikel Nr. IX vom Jahr 1920 in der Nationalversammlung wider: *„Diese Stadt hat sich schwer gegen ihr Volk versündigt. Sie hat mit ihrer Undankbarkeit für die vielen guten Taten bezahlt, die die ungarische Nation ihr erwiesen hat. (…) Im vergangenen Jahr war diese Stadt der Ausgangspunkt der Destruktion."*[31] Der Verweis auf die Zeit der Revolutionen ist nicht stichhaltig, da die Revolutionen – insbesondere die bürgerlich-demokratische Revolution vom Jahr 1918 – durch den Zusammenbruch des Weltkriegs ausgelöst wurden, und nicht durch die politische, wirtschaftliche und soziale Entwicklung der Hauptstadt während der Zeit des Dualismus. Die vom Innenminister vorgegebene Richtlinie der Rechtspolitik prägte die hauptstädtischen Novellen der 1920er Jahre, in etwas undeutlicherer Form auch das in der letzten Phase der Bethlener Konsolidierung verabschiedete Hauptstadtgesetz vom Jahr 1930 und noch stärker die Bestimmungen der Novelle vom Jahr 1934.

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Der Rechtsstatus der Hauptstadt und das System der Selbstverwaltung von Budapest wurden vom Gesetzgeber in der bürgerlichen Ära in separaten Gesetzen geregelt. Dies spiegelt die besondere Aufmerksamkeit wider, die die Regierung und der Gesetzgeber der sich dynamisch entwickelnden Hauptstadt des Landes widmeten. Gleichzeitig bedeutete der Hauptstadtstatus Budapests, dass in bestimmten Bereichen – wie bei der Polizei und den Befugnissen des Hauptstädtischen Rates für Öffentliche Arbeiten – der Spielraum für kommunale Autonomie eingeschränkt oder sogar ganz ausgeschlossen wurde. Die Gesetzgebung der Zwischenkriegszeit zielte darauf ab, die zentralisierenden verwaltungspolitischen Ziele der Regierung gegenüber der politisch und ideologisch stigmatisierten Hauptstadt direkt durchzusetzen, was zu einer allmählichen Entleerung und der Unmöglichkeit der Selbstverwaltung führte. *Kálmán Molnár*, ein bedeutender Professor für öffentliches Recht in der ersten Hälfte des 20. Jahrhunderts, betrachtete das allmähliche Absterben der lokalen Selbstverwaltungen – aller Formen der Selbstverwaltung – als eines der größten Verbrechen der Zeit zwischen der beiden Weltkriege, da seiner Meinung nach dadurch das harte Rückgrat der Nation zerschlagen worden sei.[32] Auch Budapest, die Hauptstadt Ungarns, wurde Opfer dieser Bemühungen im administrativ-politischen Sinne.

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[29] Nach den Bestimmungen des Gesetzesartikels Nr. XII vom Jahr 1934 waren neben den 108 gewählten Mitgliedern des Munizipalausschusses 74 weitere Mitglieder berechtigt, dem Munizipalausschuss anzugehören.

[30] Egyed, I., *Budapest önkormányzata* [Die Stadtverwaltung von Budapest]. Budapest, 1936. S. 25-26.

[31] Az 1920. évi február hó 16-ára összehívott Nemzetgyűlés Naplója. III. kötet [Protokoll der am 16. Februar 1920 einberufenen Nationalversammlung Band III.]. Budapest, 1920, S. 100–101.

[32] Molnár, K., *Alkotmányfejlődésünk útjai.* MTA Könyvtára Kézirattára [Die Wege unserer Verfassungsentwicklung. Manuskriptarchiv der Bibliothek der Ungarischen Akademie der Wissenschaften], Ms. 10. 676.

The Constitutional Development of Transylvania

*Csaba Cservák**

Abstract

There is an interesting dichotomy between the Hungarian Historical Constitution and the former "province of Transylvania". On one hand, Transylvania was an inseparable part of the once-was Hungarian state. On the other hand, in the period of the "country torn into three parts", according to some approaches, Transylvania embodied and represented the independent Hungarian state.

During the reign of powerful princes, such as Gabriel Bethlen and George (György) Rákóczi I., Transylvanian power waxed, while the weak tenures of Sigismund Báthory, Gabriel Báthory and George (György) Rákóczi II. it waned, their unfoundedly great ambition brought to ruin the realm. In 1848, one of the principal demands of the Hungarian revolutionaries was the official, legal unification of Transylvania with the rest of Hungary, and it was was proclaimed through the April Laws of the same year

The existence of a separate ispán title for the Szeklers was a symbol of their autonomy, and its frequent conjoining to the voivode title was a source of importance and pride. John Zápolya died in 1540, and this Lesser Hungary, made up of a slightly enlarged Transylvania, was then governed by Dowager Queen Isabella and their son, John Sigismund Zápolya.

Keywords: *Historical Constitution; province of Transylvania; junior king; ispán; Voivode of Transylvania; governor; Austro-Hungarian Compromise.*

1. Preface

There is an interesting dichotomy between the Hungarian Historical Constitution and the former "province of Transylvania". On the one hand, Transylvania was an inseparable part of the once-was Hungarian state. On the other hand, in the period of the "country torn into three parts" (1526-1686), according to some approaches, Transylvania embodied and represented the independent Hungarian state. Thus, a Hungary without Transylvania can no longer be a successor to the old Hungary. Because of this bifold relationship, we need to have a closer look at the Historic Constitution.

Hungary had a specific constitution: the Historical Constitution based on the Holy Crown.[1] According to this, the Holy Crown serves as the material embodiment of the supreme power of the state and sovereignty. It is not only a symbolic carrier of those, but also provides the legit source from where the state's supremacy stems. This is a very early appearance of the concept of the legal entity in European legal culture.

Historic constitutions are also commonly referred to as unwritten constitutions, as opposed to written constitutions, which form the other major category. In the former group, the constitution is not a single document but a collection of norms that are partly customary, and there is a public agreement between the state and its people that elevates them to a constitutional level (in this respect it is similar to the historical constitution of Great Britain, or New Zealand, which became an independent British colony). In case of the written constitutions, there can almost always be found a fundamental document which was intended to be a constitution at the time of its creation.

The historical constitution contains moral and logical principles of popular reasoning which are the limits of future legislation. They cannot be changed, amended, and if they were to be changed, it would have to be explicitly declared that this or that guiding principle is now inapplicable.

The idea of the continuity of law is also intertwined with the Holy Crown. In other words, existing legislation can only be amended in accordance with the rules already in force.

The crown expresses abstract supreme power separate from the king's personal one, and therefore the monarch cannot privately own the country (This was a highly developed abstraction in the context of patrimonial-feudal medieval thinking!) The king does not exercise power alone, but together with the noblemen - so we can observe the germ of the principle of popular sovereignty in this context.

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[1] See BALOGH, E., Alkotmányunk történetisége, kitekintéssel az Alkotmánybíróság judikatúrájára. In: BALOGH, E. (ed.), *Számadás az Alaptörvényről*. Szeged, 2016, p. 541-543.

The historical constitution is not a sign of ossified conservatism, but it also contains the potential for change, but only allows for organic, continuous development that is in accordance with its own rules. The principles of the historical constitution, which can be traced back to the feudal era and even to the blood oath, thus corresponded to the idea of the state in the bourgeois era. The 'liberty of the one and equal noblemenship' declared in 1351 was an early manifestation of non-discrimination.

The reforms of April 1848 did not abolish this, but rather extended it.[2] The serfs and the bourgeoisie - the first group had been previously oppressed and and the latter one which had undergone anaemic development -, were brought into power. They did not take away the rights of the privileged, but gave privileges to virtually all citizens. But the core of the ancient constitution, its logical-ethical inner basis, remained unchanged. They did not even try to change it, but proudly referred to its timelessness and almost eternal characteristic.

For almost a millennium, Hungary's form of government was a kingdom headed by a king. However, unlike many medieval states, the power of the monarch was controlled from very early on by what is now called 'checks and balances', and the parliament played a significant role in law-making from very early on.[3] The king could only rule once he had been crowned and had accepted the constitutional conditions at the same time as the ceremony. Compared with other states of the time, the powers of the Hungarian Parliament were broader than those of the other states of the time.[4] The development of the legal status and administration of the various 'bordering provinces', however, took interesting turns very early on.

The Transylvanian princes, in their treaties with the Hungarian king, repeatedly acknowledged their obligation not to alienate parts of their possessions in order to protect the territory of the Holy Crown, and declared that Transylvania was an inalienable part of the Hungarian Crown.[5] The Treaty of Speyer, signed on 16 August 1570 by Maximilian and Janos Zsigmond, stated that "…nothing of the property that the sovereign prince holds of the crown of the country shall be alienated, although he and his successors shall be free to mortgage or pledge it to the benefit of others if necessary (retaining the clause prohibiting perpetual alienation.)" "Neither Transylvania, nor any other counties long since subordinate to it, nor their castles or fortifications be alienated from the crown of Hungary other than as it now possessed" - declares a similar agreement between Gábor Báthori and Matthias II.[6]

2. Historical antecedents

This article must necessarily begin with a historical assessment – naturally from a perspective of constitutional law –, since being aware of the historical context is essential for the understanding of the unique legal development of Transylvania. Historians are heavily divided on the Hungarian conquest of the area,[7] yet, the fact that Transylvania and the Szekler people were granted a special status within the medieval Hungarian state is not a subject of debate. There is a number of theses regarding the exact origin of the Hungarians, from Finno-Ugric to Turkic theories. Though widely diverging, all such theories recognise the unique place of the Szekler ethnic group within the Hungarian nation. It is worth noting that views about a two-stage conquest of the Carpathian Basin[8] are also gaining ground, whereby the Avars, who settled the region in the 700 s AD, would have been the ancestors of the Hungarians.[9]

Whatever the case, it is a certainty that the Carpathian Basin was inhabited before the 895 AD arrival of the Magyars. However, there is no evidence that a forced assimilation of other ethnic groups occurred thereafter. As a consequence, even Pál Engel – famous Hungarian historian and advocate of the Finno-Ugric theory – conceded that the Szekler people must have been ethnically related to the Magyars, but arrived in the Carpathian Basin at an earlier time.[10] As they specialised in defending the Eastern Carpathians, they were granted unique rights and privileges.[11] Interestingly, in the Árpád-era, the word *gyula* carried a meaning beyond a mere given name – borne by people such as Prince Gyula, an enemy of Saint Stephen –, serving as a noun, a title denoting the leader of the Transylvanian province.

Ever since the Árpád-dynasty, this province was typified by a unique administrative system. The first recorded Voivode of Transylvania – from 1003 AD – was Zoltán Erdőelvi,[12] whose surname is grammatically related to the Hungarian and Romanian words for Transylvania.

During the high- and late middle ages, the crown prince or junior king would often govern Transylvania.[13] For example,

[2] BÖLÖNY, J., *Történelmi alkotmányunk és az 1848-as fejlődés*. Budapest, 1941, p. 16.
[3] LAJOS, E., *Gondolatok a Történelmi Alkotmányról*. Budapest, 2021, p. 3
[4] ZETÉNYI, Zs., *A történeti alkotmány*. Budapest, 2009, p. 54.
[5] HORVÁTH, A., A Szentkorona Tan története. In: ARATÓ, B. (ed.), *Jogalkotási tükör 2010–2018.* Budapest, 2018, p. 45-70.
[6] SZILÁGYI, S. (ed), *Erdélyi Országgyűlési Emlékek. Hatodik Kötet. 1608-1614.* Budapest, 1880, p. 269.
[7] On the settlement of Transylvania: MÁLYUSZ, E., A magyarok. In: DEÉR, J., *Erdély*. Budapest, 1940, p. 51-56.
[8] More on this theory: LÁSZLÓ, Gy., *Múltunkról utódainknak*. Budapest, 1999, p. 685-752.
[9] ENGEL, P., *Beilleszkedés Európába a kezdetektől 1440-ig.* Budapest, 1990, p. 105-106.
[10] Similar views on Szekler origins: HÓMAN, B., A székelyek. In: DEÉR, J., *Erdély*. Budapest, 1940, p. 43-50.
[11] Reinforced in 1517 by István Werbőczy in *Tripartitum*: „The Scythians of Transylvania, whom we call *Székelys*, are descendants of Scythian nobility, having settled during the first arrival of the Scythians in Pannonia. In modern, vulgar speech, we also refer to them using the word 'Siculus'; these people live under completely different laws and customs and are the best of us at warfare. Their rules on inheritance, and their customs regarding the distribution of titles follow a tribal system passed down from ancient tradition."
[12] DIÓS, I. (ed.), *Magyar Katolikus Lexikon, II.* Budapest, 2013.
[13] The relationship between Hungarian and Transylvanian law, and the joint governance of the two countries, is somewhat similar to the constitutional development of England and Wales. (If only because the heir to the English throne is the Prince of Wales.) The intertwined Hungarian and Transylvanian law has already had a combined influence on other legal systems, as have English and Welsh law. See. WATSON, A., Changes in American Court Advocacy during the Long Nineteenth Century. In: *Journal on European History of Law*, Vol. 11, No. 1, 2020, p. 14-21.
Classical Influences, their Decline, Similarities and Comparisons with England and Wales

Béla IV was already made king during the lifetime of his father, Andrew II, and his son, Stephen V was, in turn, made *rex junior* and assigned Transylvania, whose governors bore the special title of voivode.

From an administrative standpoint, counties were led by an *ispán* each, a title effectively equivalent to a count. On account of the *ispán*s delegating power to subordinates, the vice-*ispán*s, they were eventually referred to by a new name, *főispán*, i.e. „supreme count" or „lord-lieutenant". Between them and the king stood the position of the *nádor*, the *palatinus* who served as the king's right-hand official and substitute in times of offensive war. The *nádor*'s jurisdiction did not, however, extend to Transylvania and Croatia, where the voivoide and the ban would substitute for the king, respectively. This meant that Transylvanian *ispáns* were appointed by the voivode, who also governed in the king's name in military, administrative and judicial matters.[14] „The voivode's office constituted a separate power in Transylvania, wedged between the king and the *ispán*s leading the counties."[15]

Beside the voivode, two further layers of Transylvanian governance must be made mention of. These were the institutions of Szekler and Saxon autonomy. Non-serf Szeklers were under the military and civil leadership of their *ispán*.[16] The Saxons, too, enjoyed some autonomy.[17] An *ispán* also headed the various regional administrative units of the Transylvanian Saxons. Later, these officials were renamed *király-bíró*, referencing their role as the local enforcers of the king's rule. When, during the administrative reforms[18] of Charles I, the various Saxon settlements were organised into a system of seats – a new provincial unit independent of the county system –, the Count of Szeben became head of the *universitas saxonum*, the collective organ of Transylvanian Saxon autonomy.[19]

From a judiciary and administrative perspective, the Count of Szeben was the main leader of the entirety of Transylvanian Saxondom, legally exempted from the jurisdiction of even the Voivode of Transylvania. The only kind of jurisdiction voivodes could exercise on the territory of the Saxon seats was military. The legal separation of the Szeklers manifested itself in a similar manner: forming a separate body from the other Hungarian ethnic groups, they too were headed by their own officials, one single count (*ispán*) at a time.[20] A difference here is that the Voivode of Transylvania was often the same person as the Ispán of the Szeklers, though the holders of these positions changed frequently.[21]

The existence of a separate *ispán* title for the Szeklers was a symbol of their autonomy, and its frequent conjoining to the voivode title was a source of importance and pride.

The Voivode of Transylvania held an extensive court, his powers usually greater than that of a typical regional governor at the time.[22] Voivodes were supported by a chancellery and an intricate system of administration, much like a lesser monarch.

From a perspective of modern, constitutional law, the situation was similar to the relationship between a prime minister on the one hand, and officials such as the chief justices of a supreme- or constitutional court on the other. The latter are not prime ministers, but very similar to them in rank and prestige. Likewise, the Voivode of Transylvania was an almost-monarch; there were even attempts to outright get on the king's legal level, such as László Kán's struggles for Transylvanian independence in the late medieval era of petty kings[23] during the reigns of Charles I and his rival claimants to the throne, Wenceslaus and Otto. Kán's legal strategy was to acquire and unite in his person all three prominent Transylvanian titles: the Ispán of the Szeklers, the Ispán of the Saxons, and the voivodeship itself, thereby boosting his legitimacy for actual rulership. In the end, Charles I defeated him and properly reintegrated the province.

It may seem controversial today, but in contemporary Europe, melding judiciary – or even legislative – functions to the executive was completely natural. It was a feature of feudalism all over the continent, which means Transylvania was in no way especially dictatorial for its time.

And yet, there were unique aspects of public law here in abundance. Many historians emphasise that Hungarian feudalism was different from the European mainstream of the time, more resembling the Norman and Aragonian systems between the 9th and 12th centuries. What this means is that Hungary developed a system of non-hereditary grants of land and titles (*honor-birtok*).[24] Other than control over land, these grants encompassed both the local management of taxation and jurisdiction over legal matters pertaining to the area. Typically, the Voivoide of Transylvania was thus rendered extraordinarily wealthy.

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[14] On the judicial privileges of Transylvanian voivodes: BÉLI, G., *Magyar jogtörténet. A tradicionális jog.* Budapest, 2014, p. 155-156.
[15] KRISTÓ, Gy., *Tanulmányok az Árpád-korról*, Budapest, 1983, p. 271.
[16] DEÉR, J., A szászok jogállása. In: DEÉR, J., *Erdély*. Budapest, 1940, p. 97-104.
[17] The German settlement of Transylvania began during the reign (1141-1161) of Géza II. The document of their specific privileges, called *Andreanum*, was issued in 1224, by Andrew II. The *Andreanum* – which was referred to by the Saxons themselves as *Goldener Freibrief*, Golden Letter of Privileges –, allocated the entire area between Szászváros and Barót to the Saxons, naming the king and the *Ispán* of Szeben their highest legal authorities. Furthermore, Saxon lands could not be transferred to the nobility of the kingdom's other ethnic groups, and they were free to elect their own clergy and judges. In exchange, they owed monetary taxation, hospitality if the king were to travel there, and the recruitment of a 500-strong military force. Further reading: MAKSAY, F., A szászság megtelepülése. In: MÁLYUSZ, E. (ed.), *Erdély és népei*. Budapest, 1941, p. 87-105.; HANZÓ, L., *Az erdélyi szász önkormányzat kialakulása*. Szeged, 1941.
[18] MEZEY, B. (Ed.), *Magyar alkotmánytörténet.* Budapest, 2003, p. 156.
[19] Further reading on Saxon autonomy: PUKÁNSZKY, B., Szászok. In: DEÉR, J., *Erdély*. Budapest, 1940, p. 57-60.
[20] HÓMAN, B., A székelyek. In: DEÉR, J., *Erdély*. Budapest, 1940, p. 43-50.
[21] KRISTÓ, Gy., *Tanulmányok az Árpád-korról*, Budapest, 1983, p. 210.
[22] MEZEY, B. (Ed.), *Magyar alkotmánytörténet.* Budapest, 2003, p. 178.
[23] Further reading on the Hungarian petty kings: FÜGEDI, E., *Ispánok, bárók, kiskirályok.* Budapest, 1986.
[24] ENGEL, P., Honor, vár, ispánság, tanulmányok az Anjou-királyság kormányzati rendszeréről. In: *Századok*, vol. 116, Nr. 5, 1982, p. 880-922.

Peculiarly, the Voivoide of Transylvania and the Ispán of the Szeklers were never actually Szeklers themselves; the appointees were Hungarians from the more westernly parts of the realm, or from Pannonia itself.

The monarch- or governor-like status of the voivodes was made manifest also in their ability to create vice-voivodes, who served as deputies and agents, one or two of whom were delegated to Central Hungary.

Another unusual feature of this title is that on occasion, it was held by a college of two or even three voivodes at the same time. An example is the period between 1441 and 1446, when John Hunyadi and Nicholas Újlaki co-governed the province. The latter would later prove a prominent political opponent of the former's son, Matthias Corvinus, an early absolutist ruler of Hungary.

Preceding the eventual independence of Transylvania was a period of resistance from the local nobility against the reign of Matthias Hunyadi. As a consequence, he revoked many of their lands and privileges in 1467. Furthermore, he reduced the monetary value of their lives; while the blood price – restitution money one had to pay for murder – of a noble from Western Hungary was set in 100 gold pieces, the same was only 66 pieces for Transylvanian nobility, creating a situation of *de facto* legal inferiority, despite the *de iure* state of noble equality.

Though so far, we have largely avoided getting into exact chronological details, it bears mentioning that the legal situation naturally differed century by century, and especially between Transylvania as part of a united Kingdom of Hungary and Transylvania as an independent principality during Ottoman times, which took on a markedly different course of legal development. Nevertheless, even during the former era, the seeds of Transylvanian statehood were planted.

Even contemporary legal terminology wasn't exact about „Hungary" and the „Hungarian state". By and large, the Hungarian state was defined as the counties of Pannonia proper, while Hungary as a whole also encompassed Slavonia, Croatia and Transylvania. István Werbőczy's *Tripartitum* also makes mention of a separate Transylvanian state,[25] which, while an integral part of the Kingdom of Hungary, still enjoyed a special status. In a way, the framework of the Principality of Transylvania was already found in medieval times, in the medieval kingdom.

Drastically different times were coming. The key figure of change was John Zápolya, who was Voivode of Transylvania from 1520 until the 1526 Battle of Mohács, where King Louis II died. As a consequence, both John Zápolya and Ferdinand I from the House of Habsburg were simultaneously crowned king. After the 1541 capture of Buda and the Ottoman occupation of a third of Hungary, the vassalised Transylvanian rump state emerged out of Zápolya's old holdings, now enlarged with the counties of Közép-Szolnok, Doboka, Zaránd and Kraszna.

3. Hungary divided into three parts

John Zápolya died in 1540, and this Lesser Hungary, made up of a slightly enlarged Transylvania, was then governed by Dowager Queen Isabella and their son, John Sigismund Zápolya, who still styled himself King of Hungary. In 1551, he entered into an agreement with Ferdinand that would see him surrender Transylvania in exchange for the Principality of Silesia. Internal strife prevented this agreement from realisation, keeping John Sigismund entrenched in Eastern Hungary.

It also bears notice that „from 1540 until 1848, Transylvania possessed its own *corpus iuris*, connected to the Hungarian *corpus iuris* solely through Werbőczy's *Tripartitum*,[26] which was codified into law in Transylvania".[27] Outside of this, the legal development of Transylvania took on a different path.[28]

The Torda National Assembly of 1556 was first to proclaim the right of the three Transylvanian estates to elect the prince of the realm. This is when John Sigismund was formally elected, staying in his office until his early death in 1571.

The Transylvanian estates themselves were organised in a fairly unique manner for their time. Instead of being differentiated by wealth or rank, they were based on ethnicity: the Saxon, Szekler and Hungarian nobility constituted one estate each. This too had its precedence in medieval Transylvanian public law, since the various, ethnically-organised seats had already held their own assemblies then.[29] Therefore, „Transylvania isn't solely the possession of the Hungarian nation, but rather, that of the Hungarian, Szekler and Saxon nations.[30] It would only start including the Romanian nation – which held no previous public legal status – in 1848."[31]

The official name of the assembly of these three estates was rendered as „States and Orders of the Three Nations of Transylvania and of the Joined Parts of Hungary" (*status et ordines trium nationum regni Transylvaniae Partiumque Hungariae eidem annexarum*),[32] which makes an important distinction in that the new Transylvanian state was now enlarged by other parts of Central-Eastern Hungary that fell outside the Austrian and Ottoman areas of control, treated separately on official documents.

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[25] See Tripartitum, Chapter 3, the author discusses the distinct customary laws of Slavonia and Transylvania, each treated as a different country. WERBŐCZY, I., *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae*. 1517.

[26] NAGY, P., A kártérítés kérdésének rövid vázlata Erdély XVI-XIX. századi jogtörténetében. In: *Glossa Iuridica*, vol. 2, Nr. 3-4, 2015, p. 79.

[27] SÁNDORFY, K., *Erdély reformkorszakának jogtörténete*. Budapest, 2000, p. 29.

[28] DOMOKOS, A., Büntetőszankciók a székely falvakban. In: MEZEY, B. and TEODÓRA, J. N. (ed.), *Jogi néprajz - jogi kultúrtörténet: Tanulmányok a jogtudományok, a néprajztudományok és a történettudományok köréből*. Budapest, 2009, p. 339-351.

[29] Further reading on Transylvanian public law: ECKHART, F., Erdély alkotmánya. In: DEÉR, J., *Erdély*. Budapest, 1940, p. 89-96.

[30] During the 16th and 17th centuries, Transylvanian legislation pertaining to religious freedoms and minority protection proved pioneering, even from a European perspective. Further reading: FARKAS, Gy. T., *A nemzetiségek alkotmányos jogállása Magyarországon, különös tekintettel a nemzetközi jog Hazánk szempontjából releváns jogforrásaira*. Budapest, 2014, p. 15-16.

[31] SÁNDORFY, K., *Erdély reformkorszakának jogtörténete*. Budapest, 2000, p. 29.

[32] SZILÁGYI, S. (ed.), *Erdélyi Országgyűlési Emlékek. (Monumenta Comitialia Regni Transylvaniae) I. 1540–1556.* Budapest, 1875, p. 189.

As we can see, the Principality of Transylvania turned into an elective monarchy.[33] The prince – *princeps absolutus* –, while possessing a wide array of rights in his exercise of rulership, was never allowed to designate his successor, either through primogeniture or seniority. The assemblies of Transylvania always reserved the right of electing the new prince exclusively to themselves. This was a fairly rare type of monarchy at the time,[34] which certainly merits our professional interest. Starting from 1556, the ruler of Transylvania was an absolute monarch, with very strong powers to his name, yet, one of the key traditional powers of a reigning prince – succession – was taken from his hands. In spite of this, many of them attempted to indirectly institute a dynasty, but none succeeded long-term.

Diets were held regularly: at least annually, but generally twice a year in peacetime and as many as five times during war, presiding over matters such as princely elections, princely inaugurations, the levying of taxes, military recruitment and international diplomacy. The Prince of Transylvania had great leeway in influencing the composition of these assemblies, being able to personally appoint a number of nobles, who came to be referred to as regalists. Further invitees to the Transylvanian Diet were the members of the consultative Princely Council, members of the High Court, the delegates of the estates and select towns, high-ranking church leaders and the most important officials of the government. While the prince himself did not attend the diets – though he usually travelled to the city in which they were held –, they were conducted by a president of his own choosing, and the first section of each diet was devoted to addressing the matters requested by the prince.[35]

While naturally lacking a written constitution, a document called *Approbatae Constitutiones* was issued in 1653, which not only collected and codified the various laws of Transylvania from the past one hundred and thirteen years, but also contained the constitutional groundwork of the state, defining the very essence of this union of three estates and calling on the constituent nations of Transylvania to unite in their opposition, should the rights and privileges of any one of them be infringed upon, effectively reaffirming the union. It is worth noting that even though the Romanians living in Transylvania at the time had no separate political representation of their own, they too were able to achieve higher offices as part of the Hungarian estate.[36]

Contrary to the will of the Habsburgs, the successor of John Sigismund, who died in 1571, was Stephen Báthory, further entrenching Transylvanian independence, and the whole legal situation of „belonging together, but still separate", *vis-ŕ-vis* the Kingdom of Hungary.

The nobility of Transylvania considered themselves the heirs and scions of the old, unified Hungarian realm and the legal tradition embodied by the Holy Crown of Saint Stephen, treating Transylvania as an integral part of the Kingdom of Hungary. In spite of that, they still vindicated sovereignty for themselves from the King of Hungary.[37] Several princes of Transylvania, such as Stephen Bocskai and Gabriel Bethlen wrote about their belief in the necessity of a separate Transylvanian state „as long as the King of Hungary is a German, who are a stronger nation than ours".[38] Likewise, Stepthen Báthory stressed the importance of secrecy during his diplomatic overtures to Maximilian of Austria, owing to the precarious situation of Transylvania and the very immediate and immense threat of Ottoman military invasion.[39] He was quoted as saying: "considering the fact that this province is located between the two most powerful rulers of the world […] we cannot retain it otherwise than to curry favour with both emperors…"[40]

Thus, we can see the duality of this situation being rooted in the Transylvanian state being an inherently Hungarian state, determined to continue the traditions and cultural development of Hungary while the *de iure* Hungarian kingdom remained under foreign, Habsburg occupation. This political constellation was favourable to the Ottoman Empire, which supported the status quo.

This is the primary reason for the unwillingness of the Turkish sultans to occupy Transylvania, a state of affairs that left its mark even on the cultural policies of the Transylvanian princes, whose ascension always happened with explicit Ottoman, and indirect Habsburg consent. While both great powers acknowledged the formal independence of the Transylvanian realm, such an independence would pertain to internal matters alone. Its foreign policy would greatly – though not entirely – depend on the Porte, with which it lingered in a state of loose vassalage.

This leads us to an enormously important constitutional concept: sovereignty. It is the cornerstone and fundament of independent statehood. Sovereignty and the sovereign's person represent an independent, united and indivisible central power, from which all other forms of political power derive within its geographical limits. A sovereign state needs its own territory, population and citizens.

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[33] See, for example: SZAKÁLY, F., *Virágkor és hanyatlás 1440-1711*. Budapest, 1990, p. 132-134.

[34] The fact that one of the constitutional cornerstones of a typical monarchy is the inheritance of the throne made the Principality of Transylvania an *ab ovo* unique case. Nevertheless, such atypical monarchies continue to exist worldwide: the King of Malaysia is elected to this day, and the Co-Princes of Andorra are elected by the French people on the one hand (as the President of France) and appointed by the Catholic Church on the other (as the Bishop of Urgell).

[35] OBORNI, T., State and Governance in the Principality of Transylvania. In: *Hungarian Studies*, vol. 27, Nr. 2, 2013, p. 319-320.

[36] Ih., p. 320-321.

[37] On the public affairs of independent Transylvania: LUKINICH, I., Erdély önálló állami élete. In: DEÉR, J., *Erdély*. Budapest, 1940, p. 81-88.

[38] Attributed to Bocskai, in 1606.

[39] OBORNI, T., State and Governance in the Principality of Transylvania. In: *Hungarian Studies*, vol. 27, Nr. 2, 2013, p. 316.

[40] BETHLEN, F., *Erdély története III. Báthory István trónra lépésétől Báthory Zsigmond uralkodásáig (1571–1594)* [*History of Transylvania, Vol. 3. From the Ascent of István Báthory to the Throne to the Rule of Zsigmond Báthory (1671–1594)*]. (Translated by András Bodor, with annotations by Tamás Kruppa), VI–VII., Budapest – Kolozsvár, 2004, p. 61.

Now, then, the question begs itself: to what extent was Transylvania a sovereign and independent state, from 1556 onward?

Its internal affairs absolutely were – this will merit later elaboration here –, but its external policies were necessarily influenced by, and had to be coordinated with the Turkish sultan. While the Prince of Transylvania was always elected by the nobility, the final act of the process was represented by the *ahidnâme*, an Ottoman charter that officially consented to the ascension of the new prince. The sultan would also send a number of regnal symbols, including a robe, a caftan and a scepter. All of this meant a state of dependency in foreign affairs; however, as long as the prince's actions weren't contrary to the sultan's interests, the Porte would not intervene.

According to László Tőkéczi, the Transylvanian state and people considered themselves a part of European civilisation. They maintained close relations with the Protestant nations of their time, such as the Swedish Empire and the Dutch Republic. This was not contrary to Ottoman interests, and therefore, such alliances were consistently allowed, particularly since they were usually aimed against the mutual Habsburg foe.

It is worth noting that the absolutism inherent to the Principality of Transylvania was amplified by the fact that the sultan backed individual princes, rather than national assemblies, reinforcing the office of the ruling monarch, rather than the whole state itself. Conducting his dealings through the prince, rather than the estates, inevitably strengthened the position of the former against the latter.

Therefore, Transylvania never developed as powerful a nobility as Royal Hungary. Seeing where it led the the old, united country, the princes took great care to make sure none of the Transylvanian noble families would grow too powerful; they certainly granted land and titles, but not as lavishly as the medieval rulers of Hungary. While there existed several influential magnate dynasties – the Báthorys, the Rákóczis, the Bethlens, etc. –, none of them managed to attain too much power and institute a hereditary system. Given the inherently great power of the princely title, the best course of action for any noble family was to make a bid straight for the top position and attain absolute power through a single, individual family member. The competition for the throne of the principality was thus rife with great struggle, and each outcome would go on to determine the fate of the state for decades to come.

During the reign of strong princes, such as Gabriel Bethlen (1613-1629)[41] and George I Rákóczi (1630-1648), Transylvanian power waxed, while the weak tenures of Sigismund Báthory, Gabriel Báthory and George II Rákóczi would see it wane, their unfoundedly great ambition bringing ruin to the realm.

In 1571, Stephen Báthory was named Voivode of Transylvania – a voivoide, rather than a prince, because as this point, there was still an intention to emphasise continuity with the old, medieval system, where Transylvanian leaders were but provincial governors of the whole Hungarian realm –, and in late 1575, he managed to beat Maximilian II, Holy Roman Emperor, to the Polish throne, a substantial feat from a Hungarian nobleman at the time. It was at this point, elevated in status and prestige, that voivodes began using the princely title.

Following Báthory's 1586 death, his successor attempted to create a princely dynasty. His younger brother, Andrew Báthory governed Transylvania in Stephen's name during the latter's kingship in Poland. Later, Andrew's son, Sigismund would be Voivoide, and from 1586, Prince of Transylvania. Yet, these terminologies would continue to be used interchangeably. Sigismund Báthory was a controversial figure, his ample ambitions coupled with a weak character; a rare pairing of character traits usually assigned to him by historians. Several times – in 1598, 1599 and 1601 –, he lost the throne and then regained it. Then followed a time of bloodshed, when Giorgio Basta ruled Transylvania, a governor for the House of Habsburg.

Finally, in 1605, Stephen Bocskai ended the troubles, becoming Prince of Transylvania and one of the greatest statesmen of Hungarian history.

After him came Sigismund Rákóczi's short tenure, and then, Gabriel Báthory became prince. One of his protégés, Gabriel Bethlen, recognising Báthory's weakness, overcame and succeeded him, following his dismissal. Bethlen, too, would go on to rank among the finest Hungarian leaders in history.

Stephen Bocskai and Gabriel Bethlen had a common strategic ambition: the permanent reunion of Transylvania with Hungary. Yet, they both believed the time was not yet right, and an independent Transylvania was important exactly to safeguard and externally reinforce the integrity of Hungarian statehood, the legal framework, the traditions and the legacy of Royal Hungary and its nobility. It was a period of tremendous importance in Hungarian history: this strategic goal, coupled with skillful politics and diplomacy, ensured that Transylvania would remain unoccupied by either the Habsburgs or the Ottomans for the duration of that century and a half when Hungary was a divided frontline of a great civilisational war. By finding a balance between the two great powers that battled it out for Hungary and the rest of the region, Transylvania managed to preserve not only its internal independence, but also the very core of Hungarian statehood.

Finally, when Hungary was liberated from the Turks, their empire began its slow decline. During this period, between 1661 and 1690, Michael Apafi was Prince of Transylvania. During his fall from power, he made an attempt to install his son, Michael II Apafi as prince; which is when the Austrians occupied Transylvania, at last.[42]

4. Transylvania as part of the Habsburg Empire

The 1691 *Diploma Leopoldium* of Leopold I, Holy Roman Emperor annexed Transylvania,[43] but did not legally re-attach it to Hungary. Despite this, contemporary historical maps would

[41] On the reign of Gabriel Bethlen and the organisation of the Transylvanian state during his time: TRÓCSÁNYI, Zs., Bethlen Gábor erdélyi állama. In: *Jogtudományi közlöny,* vol. 35, Nr. 10, 1980, p. 617-622.

[42] CSIZMADIA, A. (et al.), *Magyar állam- és jogtörténet*. Budapest, 1998, p. 143.

[43] Further reading on the TARJÁN, M. T., A Diploma Leopoldinum kiadása. In: *Rubicon online* (https://rubicon.hu/kalendarium/1691-december-4-a-diploma-leopoldinum-kiadasa)

once again start including Transylvania as part of the Kingdom of Hungary, itself a constituent realm of the Austrian Empire. The House of Habsburg, who at this point wielded the royal titles of Bohemia and Hungary, in addition to their own, Austrian offices and the emperorship of the Holy Roman Empire until 1806, added „Grand Prince of Transylvania" to their list of titles.[44] Thus, Transylvania was not properly returned to Hungary at this time.[45]

The new system kept the old noble framework of Transylvania intact, but replaced the office of the prince with a governorship that ruled the province as per the directions of the Holy Roman Emperor.[46]

Later on, a chancellery was created as an intermediary organ between the governor and the emperor. Oftentimes, this chancellery wasn't even based in Transylvania, but rather, directly in Vienna; an appropriate symbol of Transylvania's new relations with the Habsburg emperor. The new Transylvanian government was sequestered into various bureaus and offices dealing with different matters of governance. The nominal head of the executive was the Chancellery of Transylvania, whose first chancellor was Nicholas Bethlen, who was sworn into office in 1695. However, at this time, real power remained in the hands of the vice-chancellor, who was elected by the nobility, much like the princes before. This shifted to the chancellor only by 1742. The Court Chancellery of Transylvania did not have general jurisdiction; in individual cases, it had to compete with its Austrian counterpart, the *Österreichische Hofkanzlei*, as well as the *Neoacquistica Commissio*, which was a commission created to settle the questions of property arising from the banishment of the Ottomans from the territory of historical Hungary. Between 1765 and 1782, there was no chancellor in Transylvania, and eventually, Joseph II merged the institution with the Court Chancellery of Hungary.[47] Following his death, this merger was reversed.[48] The Court Chancellery of Transylvania was abolished during the 1867 Compromise.[49]

5. From Hungary to Romania

In 1848, one of the principal demands of the Hungarian revolutionaries was the official, legal union of Transylvania with the rest of Hungary, which was proclaimed through the April Laws of the same year.[50] This is when Transylvania legally returned to Hungary. Following the eventual defeat of the revolution in 1849, the government of Alexander von Bach divided Hungary into five districts, one of which roughly, but not accurately corresponded to Transylvania. It was once again administered by an appointed governor.[51]

The Austro-Hungarian Compromise of 1867 restored not only the old Hungarian county system,[52] but also the union of Transylvania with the rest of the country, fully integrating it into the Hungarian administrative system.[53] This would last until the 1920 Treaty of Trianon, which awarded most of Hungary, including the whole of Transylvania, to neighbouring and emerging nations. During the Second World War, as a consequence of the Second Vienna Award, the north of the province would return between 1940 and 1944, but Romania's switch to the eventually victorious Soviet side would ensure a return to the *status quo ante bellum* with regards to Transylvania, a state of affairs that persists to this day.

In light of this, the question must be asked: considering its unique history, would an independent Transylvanian republic have been a legitimate concept?[54] Such a development would also have been more acceptable for the Romanians than any sort of reclamation by Hungary, and for the other states in Europe, as well as NATO, the EU and other international organisations. Accusations of irredentism or Fascism would have been much harder to throw around.

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[44] This was made even more evident in Act VI of 1791 in Transylvania. ZÉTÉNYI, Zs., *A történeti alkotmány.* Budapest, 2009, p. 263-264.

[45] Interestingly, the independence of counties remained more pronounced in Transylvania than in Royal Hungary. The 1794 national assembly held in Transylvania further reinforced the freedoms and privileges of Transylvanian counties. Further reading: SÁNDORFY, K., *Erdély reformkorszakának jogtörténete*. Budapest, 2000, p. 63.

[46] The status of Fiume was similar to that of Transylvania. Within the Habsburg Empire, it belonged to Hungary several times and was annexed several times. See JUHÁSZ, I., *Fiume - Egy közép-európai város és kikötő a hatalmi érdekek metszéspontján*. Budapest, 2020, p. 512.

[47] The status of Transylvania under the Habsburgs was somewhat similar to that of Galicia, which was annexed from Poland to the Empire. In both cases, the legal system of the conquered province had some influence on the conquering country. GUZHVA, A., Codex Civilis pro Galicia Orientali 1797: Creation and General Characteristic. In: *Journal on European History of Law*, Vol. 12, No. 1, 2021, p. 83-89.

[48] Despite the administrative separation, spatial proximity has of course been maintained. In the 18th century, Hungary was hit by a late wave of the plague from the Ottoman Empire, via Transylvania, wiping out nearly half the population of Debrecen, which numbered around 20,000 at the time. See SIMICSKÓ, I., *Kihívások, veszélyek – kontra védelmi képességek*. Debrecen, 2021, p. 19.

[49] FAZEKAS, I., Az Erdélyi Udvari Kancellária. In: *Rubicon,* vol. 24, Nr. 2-3, 2013, p. 59-61.

[50] From the preamble of Act VII of 1848, On the Union of Hungary and Transylvania: „Spurred on by the pressing events of this day and age, we act on the necessity to unite the separated parts of the Hungarian crown, Transylvania and Hungary, and to facilitate the joint representation of the interests of these two brother nations at the National Assembly, thus declaring our willingness to successfully realise this union."

[51] After the crushing of the 1848/49 revolution, the Habsburgs imposed authoritarian rule in Hungary until historical circumstances forced the Compromise of 1867. This created a real union between Austria and Hungary. The latter implemented a specific state structure in which the member states were bound together by a common foreign and military policy and a common finance system to cover these, in addition to the person of the head of state (ruler). See ARATÓ, B., Az osztrák-magyar „álladalomról". In: LAJOS, E. (ed.), *Alkotmányosság a pandémia korszakában.* Debrecen, 2021, p. 99-104.

[52] On this topic, see: STIPTA, I., *Törekvések a vármegyék polgári átalakítására: Tervezetek, javaslatok, törvények.* Budapest, 1995, p. 196.

[53] Further reading: STIPTA, I., A székely székek vármegyékké alakítása 1876-ban. In: RAJNAI, Z. (et al.) (ed.), *Tanulmánykötet a 6. Báthory-Brassai nemzetközi konferencia előadásaiból*. Budapest, 2015, 419-428.

[54] The independent statehood of Transylvania was also proposed by Endre Bajcsy-Zsilinszky, whose idea was to organise this state after the Swiss example. Further reading: KISS, F. J., Bajcsy-Zsilinszky alkotmánytervezete. In: *Rubicon*, vol. 1, Nr. 4, 1990, p. 14-15.

Hungarian Scholar of Czechoslovak Law in the USA. The Life and Works of Miklós Ujlaki*

*Péter Nagy***

Abstract

The study aims to present the life and carrier of Miklós Ujlaki, who was one of the students of the well-known Hungarian law professor, Károly Szladits (1871–1956). At the beginning of his academic career, Ujlaki researched the bibliography of the Hungarian private law. He researched the development of the private law in the former Hungarian territories for several years, which came under the control of neighbouring countries because of the Treaty of Trianon. He published his conclusions in several books.

When the Communist dictatorship began to take hold, Ujlaki started a new life in New York. Miklós Ujlaki continued his research in the USA, mainly on legal bibliography and comparative law. In the first half of the 1950 s, his activities were based on academic research and teaching, and he became renowned in the fields of private international law and comparative law. He left academia in the mid-1950s and turned to practical work as a lawyer.

Keywords: *carrier; comparative law; private law; legal history; bibliography.*

Miklós Ujlaki was an important figure in the post-Trianon Hungarian and European private law scholarship. His research focuses on the private law of the successor states of the Austro-Hungarian Empire. The present paper seeks to examine the life and work of this scholar from his birth in Budapest in 1906 until his death in New York in January 1985.[1]

1. Profile

Miklós Ujlaki was born on 18 May 1906 in Budapest, his family was of Israelite religion. His father, József Ujlaki, was a lawyer in Budapest from 1901 until his death in 1937, and was himself the author of several academic works, mainly on financial law. He was a member of the Unified Lawyers' and Judges' Examination Committee, then for several sessions of the Bar Council of the Curia, and was Vice-President of the Financial Law Section of the Hungarian Bar Association. His mother was Margit Kiss.[2]

He completed his secondary school studies at the Kölcsey Ferenc Grammar School in Budapest, graduating in 1924 with "good" marks. In 1928 he graduated from the Faculty of Law and Political Science of the Royal Hungarian Pázmány Péter University of Budapest.[3] In October 1926, he joined Géza Magyary and Károly Szladits as a librarian and seminar assistant at the seminars on procedural and private law. He worked as a staff member of Géza Magyary until his death in 1928, where, in addition to his duties as librarian, he also carried out academic research. He continued his work at the private law seminar with Károly Szladits until 1942.[4]

The Minister of Religion and Public Education also granted Ujlaki a scholarship for the academic year 1929-1930 to enable the young researcher to continue his work on private law bibliography.[5]

In 1928 the Budapest Bar Association admitted him as a candidate lawyer, and his father, József Ujlaki, became his principal.[6]

* This work was supported by the Slovak Research and Development Agency under the Contract no. APVV-19-0419.

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1 States Social Security Death Index, database; FamilySearch [https://familysearch.org/ark:/61903/1:1:JKLF-L6P (2021. 09. 10.7)], Nicholas Ujlaki, Jan 1985; citing U.S. Social Security Administration, Death Master File.

2 Eötvös Loránd Tudományegyetem Archives, 7.c. Faculty of Law and Political Sciences. Records of the Dean's Office. (hereinafter ELTE Archives, 7.c.) 484/1944–1945. appendix no. 1, 1.

3 Sessions of Budapesti Királyi Magyar Pázmány Péter Tudományegyetem Faculty of Law and Political Sciences, 1928–1929 (ELTE 7.a.29.) April 24, 1929. Session no. 6, 239. Session minuts are available online: https://library.hungaricana.hu/hu/collection/egyetemi_jegyzokonyvek_elte_AJTK/ (2021. 09. 02.) (hereinafter: ELTE Archives, 7.a.29.) ELTE Archives 7. c. 484/1944–1945. appendix no. 1, 1. In the Hivatalos Közlöny (Official Gazette), only those who were awarded a majority in the History (I) exam and unanimously in the History (III) exam are listed. Comp. In: *Hivatalos Közlöny*, vol. 36, Nr. 25, 1928, p. 351.

4 ELTE Archives 7. c. 484/1944–1945. appendix no. 1, 2.

5 In: *Hivatalos Közlöny*, vol. 63, Nr. 14, 1929, p. 228.

6 In: *Budapesti Közlöny*, vol. 62, Nr. 252, 1928, p. 3.

Shortly afterwards, news of the meeting of the National Association of Lawyers' Candidates' Executive Committee announces the rise of the young lawyer's career and the unbroken interest in academia.[7]

At the National Congress of Candidate Lawyers held in Budapest on 19 and 20 May 1929, he gave a lecture on the reform of university legal education, the courses of further training for candidate lawyers, the system of examinations for lawyers and the inclusion of studies abroad in the period of legal practice.[8]

For the academic year 1930-1931 he was given another opportunity, when he won a scholarship to the Collegium Hungaricum in Berlin to continue his studies in legal history.[9] During this period, he worked mainly at the Osteuropa-Institut in Breslau, one of the most prestigious interdisciplinary research centres in the Weimar Republic dealing with Eastern European law and economics.[10] During part of his time there, he edited Hungarian legal opinions for the Institute, but mostly he studied the private law of Hungary's neighbouring states.[11]

For the academic year 1931/32, he was awarded another state scholarship to conduct comparative private law research at the Collegium Hungaricum in Vienna,[12] but this could not be realized, as the scholarships were withdrawn that year due to the general economic situation.[13] He finally won a domestic research fellowship for the academic year 1932-1933.[14] After the expiry of his research fellowship, on 13 March 1933, he was admitted to the Budapest Bar Association as a lawyer.[15] According to László Asztalos, in practice he excelled mainly as a tax lawyer.[16]

However, his work as a lawyer did not overshadow Ujlaki's academic interests and involvement in this field. The International Law Association held its 38th conference at the Hungarian Academy of Sciences between September 6-10, 1934,[17] and Ujlaki was one of the members.[18]

László Asztalos assessed Miklós Ujlaki's position in the Szladits school in such a way that while László Villányi (Fürst) was the intellectual deputy, Ujlaki was the organizer.[19]

It was to Ujlaki's merit that the volume prepared for the thirtieth anniversary of Károly Szladits' teaching career, which was published in 1937,[20] was written by law students and trainee lawyers. This work was accompanied by the volume published in 1941 for Szladits' 70th birthday,[21] which brought together the then and former members of the seminary and essentially embodied the whole school itself.[22]

On 8 February 1936, the Comparative Law Section of the Hungarian Lawyers' Association, headed by László Mendelényi, the president of the Pest province court, held its inaugural meeting. In his speech, Mendelényi emphasized that a real comparative jurisprudence can only be achieved if, in addition to the laws of individual states, the social development of individual laws and legal institutions is also subject to thorough examination. In this connection, he referred to the close link between comparative law and legal philosophy.[23] On the recommendation of the President, the Section elected Károly Szladits as Vice President, István Szászy and Miklós Ujlaki as Secretaries, and Károly Szladits jr., Károly Visky and Alajos Degré were elected as notaries.[24]

Paragraph 5 of the Hungarian Royal Ministry's decree No. 1.210. M. E. 1944 "On the abolition of Jews' civil service, public trusts and the practice of law" provided that lawyers of Jewish origin who had been employed by the Ministry before the entry into force of the decree (1944. 31 March 1944), i.e. a Jewish lawyer (??) who was registered before the entry into

[7] Az ügyvédjelöltek az ellenőrzési rendszer megváltoztatását kérik. (Candidate lawyers call for a change in the control system). In: *Budapesti Hírlap,* vol. 49, Nr. 23, 1929, p. 24.

[8] In: *Magyar Hirlap,* vol. 39, Nr. 106, 1929, p. 14.

[9] In: *Budapesti Közlöny,* vol. 64, Nr. 158, 1930, p. 1-2.

[10] See: HERGER, CS., Magyar magánjogászok tudományos írásai Németországban (1920–1944) [Academic Papers of Hungarian Private Law Scolars in Germany (1920–1944)]. In: *DÍKÉ*, vol. 5, Nr. 2, 2021, p. 111-131.

[11] ELTE Archives, 7.c. 484/1944–1945. appendix no. 1, p. 3.

[12] In: *Hivatalos Közlöny*, vol. 39, Nr. 15, 1931, p. 148.

[13] ELTE Archives, 7.c. 484/1944–1945. appendix no. 1, p. 4.

[14] ELTE Archives, 7.a.32. April 20, 1932. Session no. 5, p. 65.

[15] In: *Budapesti Közlöny*, vol. 67, Nr. 67, 1933, p. 2.

[16] ASZTALOS, L., Grosschmid tanítványok – Szladits iskola (Grosschmid students – Szladits school). In: KOVÁCS, K. (ed.), *A jogászképzés a magyar felsőoktatás rendszerében (Legal education in the Hungarian higher education system).* Budapest, 1984, p. 96.

[17] Nemzetközi Jogi Egyesület. – Az International Law Association budapesti konferenciája. (International Law Association. – Budapest conference of the International Law Association.) In: *Ügyvédi Közlöny,* vol. 4, Nr. 19, 1934, p. 75-76.

[18] *The International Law Association. Report of the Thirty-eighth conference held at Budapest in the Hungarian Academy of Science, September 6th to 10th, 1934. It held its 38th konferenciáját conference held in Budapest at the Hungarian Academy of Sciences between September 6–10., 1934.* London–Reading, 1935, p. 129.

[19] ASZTALOS, L., Grosschmid tanítványok – Szladits iskola (Grosschmid students – Szladits school). In: KOVÁCS, K. (ed.), *A jogászképzés a magyar felsőoktatás rendszerében (Legal education in the Hungarian higher education system).* Budapest, 1984, p. 86.

[20] *Ünnepi dolgozatok: Szladits Károly egyetemi tanár működésének harmincadik évfordulója alkalmából. (On the occasion of the thirtieth anniversary of Károly Szladits, professor at the University of Budapest.)* Budapest, 1937, p. 112.

[21] *Ünnepi dolgozatok: Dr. Szladits Károly egyetemi tanár 70. születésnapjára. (For the 70th birthday of professor Dr. Károly Szladits.)* Budapest, 1941, p. 376.

[22] ASZTALOS, L., Grosschmid tanítványok – Szladits iskola (Grosschmid students – Szladits school). In: KOVÁCS, K. (ed.), *A jogászképzés a magyar felsőoktatás rendszerében (Legal education in the Hungarian higher education system).* Budapest, 1984, p. 87-88.

[23] A Magyar Jogászegylet Összehasonlító Jogi Szakosztályának megalakulása (Formation of the Comparative Law Section of the Hungarian Bar Association). In: *Magyar Jogászegyleti értekezések és egyéb tanulmányok,* vol. 4, Nr. 1–2, 1936, p. 212-213.

[24] A Magyar Jogászegylet Összehasonlító Jogi Szakosztályának megalakulása (Formation of the Comparative Law Section of the Hungarian Bar Association). In: *Magyar Jogászegyleti értekezések és egyéb tanulmányok,* vol. 4, Nr. 1–2, 1936, p 213. See: In: *Budapesti Hirlap,* vol. 56, Nr. 35, 1936, p. 10; In: *Magyarság*, 1936. vol. 17, Nr. 35, 1936, p. 11.

force of the decree, shall be deleted from the register by the board of the bar association by 31 May 1944.[25]

A few weeks later, the Budapest Közlöny reported that the electoral board of the Budapest Bar Association, in its plenary session held on 14 April 1944, had, on the basis of Decree No. 1.210/1944 M. E., legally deleted Miklós Ujlaki from the list of lawyers kept by the Budapest Bar Association, along with several other lawyers, and appointed Zoltán Padányi as his office administrator.[26] Ujlaki himself mentioned this in his biography. In the period that followed, he served in compulsory labour service.[27]

On 11 May 1945, before the end of the Second World War, he applied for a private teaching qualification.[28] The Faculty of Law Faculty Council discussed the petition at its meeting on 1 August 1945. Ujlaki's academic work was reviewed by Bálint Kolosváry and Endre Nizsalovszky, both of whom gave positive comments on the applicant's academic work.[29] Nizsalovszky proposed that the applicant be allowed to give a test performance directly by waiving the oral examination. This was supported by Kolosváry and accepted by the Faculty Council.[30] The lecture took place on August 28, 1945, in the framework of the 8th extraordinary meeting of the faculty council, where, under the chairmanship of Dean Pál Szandtner, Gyula Moór, Ákos Navratil, Bálint Kolosváry, Ödön Kuncz, Ferenc Eckhart, László Gajzágó, Géza Marton, Endre Nizsalovszky, Jusztin Baranyay, Andor Sárffy and Erik Heller were present. The title of the habilitation trial lecture was New Approaches to Comparative Jurisprudence, which was unanimously accepted by those present, and they declared that they considered Ujlaki to be a qualified private lecturer, with the caveat that he could exercise the rights and duties of this position only after confirmation by the competent supervisory authority.[31] In the 7 November issue of the Magyar Közlöny it was announced that the Minister of Religion and Public Education had "approved the qualification of Ujlaki as a private university lecturer in the subject area of "Private Law of Neighbouring States" at the Faculty of Law and Political Sciences of Péter Pázmány University and confirmed him in this capacity."[32]

In February 1947, Endre Nizsalovszky and István Szászy[33] proposed to the faculty council that the faculty set up a committee to examine whether it would be justified to award Miklós Ujlaki the title of extraordinary professor.[34] The chairman of the jury was Ferenc Eckhart, the rapporteur was István Szászy and the secretary was Endre Nizsalovszky.[35] Szászy submitted a nearly 6-page proposal detailing Ujlaki's merits, which also adds new information to the emerging life story.

From the 1946-1947 academic year, Ujlaki announced separate subjects entitled Legal Relations of Romania and the Law of Yugoslavia. Among his academic plans were the publication of a new volume of the Bibliography of Private Law and a major study entitled The Principles of Comparative Jurisprudence and Legal Unification. In 1946 he was legal adviser to the Royal Swedish Embassy, a member of the National Arbitration Committee established by Act VII of 1940 on the Co-operative Tax, the Tantiem Tax and the Co-operative Property Tax, and a member of the Law Preparatory Committee and the Economic Committee of the Budapest Bar Association. He continued his activities in the Hungarian Lawyers' Association and in 1947 he became a permanent contributor to the journal Finance and Public Administration.[36]

At the meeting of 15 October 1947, István Szászy proposed that the faculty set up a comparative law institute. The faculty council supported the proposal, and Szászy himself was elected director, with Miklós Ujlaki being appointed deputy director.[37]

A year later, in April 1948, Endre Nizsalovszky and István Szászy presented another motion. The subject of the motion was to extend Ujlaki's private university teaching qualification in "Private Law of Neighbouring States" to the whole field of comparative private law. According to the statement of reasons, Miklós Ujlaki, who by that time had already been awarded the title of extraordinary professor, gave a lecture entitled 'New directions in comparative law' at the Hungarian Lawyers' Association on 27 May 1947, and his other works also showed that he had not only studied the substantive law of the neighbouring states of Hungary, but that several of his works had been on comparative private law.[38] The faculty passed the motion unanimously, Ujlaki's private university teaching qualification was changed to comparative private law, and it was submitted to the Minister of Religion and Education.[39]

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[25] Decree No. 1.210. M. E. 1944 of the Hungarian Royal Ministry on the abolition of the civil service and public offices of Jews and the practice of lawyers, 5. §.
[26] In: *Budapesti Közlöny,* 1944. vol. 78, Nr. 120, p. 6., 14.
[27] ELTE Archives, 7.c. 484/1944–1945. appendix no. 1, 2.
[28] ELTE Archives, 7.c. 484/1944–1945. Application, May 11, 1945.
[29] See: Opinions by Bálint Kolosváry and Endre Nizsalovszky. ELTE Archives, 7.c. 484/1944–1945.
[30] ELTE Archives, 7.a.44. August 1, 1945. p. 238-239.
[31] ELTE Archives, 7.a.44. August 28, 1945. p. 1-2.
[32] In: *Magyar Közlöny*, Nr. 169, 1945, p. 2.
[33] KAPRINAY, ZS., István Szászy (1899-1976) In: *FORUM: Acta Juridica et Politica*, vol. 10, Nr. 1, 2020, p. 705-717; VERESS, E., Megjegyzések Szászy Istvánról, a magyar polgári jog általános részéről és az összehasonlító jog szerepéről. (Comments on István Szászy, Hungarian civil law in general and the role of comparative law.) In: *Jogtudományi Közlöny*, vol. 76, Nr. 2, 2021, p. 49-55.
[34] ELTE Archives, 7.a.46. February 19, 1947. p. 30.
[35] ELTE Archives, 7.c. 941/1946–1947. Minutes, March 14, 1947.
[36] ELTE Archives, 7.c. 941/1946–1947. Committee opinion, p. 5.
[37] ELTE Archives, 7.a.47. October 15, 1947. p. 147–149; ELTE Archives, 7.c. 1691/1947–1948. Organisational Regulations of the Institute of Comparative Law at the Faculty of Law and Political Sciences of Péter Pázmány University.
[38] ELTE Archives, 7.c. 1516/1947–1948. Motion by Endre Nizsalovszky and István Szászy
[39] ELTE Archives, 7.a.47. April 21, 1948. p. 42-43.

Ujlaki was invited by the Swedish Institute for Cultural Relations "Svenska Instituteil" to lecture on Comparative Law and National and International Legal Unification at the Faculty of Law and Political Science, Stockholm University, in the autumn semester of the academic year 1948-1949, and to study recent developments in his narrow field of research. He asked the faculty to grant him a leave of absence as Deputy Director of the Institute for Comparative Law until the end of the year and to agree to a break in his lectureships and lectureships for the first half of the next academic year. The faculty supported the request.[40]

On 23 December 1948, the faculty council discussed another request by Ujlaki, in which the absent lecturer asked for an extension of his leave.[41] He also enclosed a letter of invitation from the Director of the Swedish Institute, which shows that his trip was a great success. He gave lectures and assisted in the establishment and operation of the Institute of Comparative Law at the University of Uppsala. Ujlaki quickly established good contacts with Swedish universities and with the most eminent scholars of Swedish jurisprudence, and the letter specifically mentions that Ujlaki established contacts with the Institut international pour l'unification du droit privée in Rome and the Institut für internationales Recht und internationale Beziehungen in Basel, where he undertook a short research trip, probably also for the benefit of the new Swedish Comparative Law Institute. During this period, in 1948, he published in Stockholm a short work entitled Chapters on the Unification of International Law.[42] *„In view, on the one hand, of your excellent academic achievements and, on the other hand, of the fact that the young "Institute of Comparative Law" in Uppsala cannot do without your activities for the time being, our Institute, decided to extend your invitation for the second half of the academic year 1948/49."* [43] His request was granted by the Faculty Council.[44]

On January 6, 1949 - unexpectedly compared to his officially announced plans - the news appeared in the Magyar Közlöny that Ujlaki had resigned from the practice of lawyer.[45] This was obviously an official severing of the domestic links, the presence implied in the gazette was merely a means of communication to the public.

In a letter dated 13 January 1949, the Minister of Religion and Public Education ordered the faculty to ask Ujlaki to return home, if he did not report to the faculty council within 30 days, he would be dismissed from his post.[46] Géza Marton, who was Dean at the time, informed the Minister on 26 January. In his letter he reminded that it was the Minister for Religious Affairs and Public Education who had declared Ujlaki's invitation and study visit to be of primary cultural policy interest.[47]

Ujlaki did not comply with the minister's request, but in a terse letter dated 2 April 1949 and addressed to Géza Marton, he resigned his position as deputy director, after he was unable to fulfil the mandate due to "circumstances beyond his control".[48]

The Szladits school was disbanded between 1945 and 1949. Several of its members died, many of its leading personalities - besides Miklós Ujlaki Károly Szladits Jr. - emigrated.[49] Ujlaki's name fell out of the Hungarian scientific public consciousness for many decades. László Asztalos gave the unofficial information that he left for the United States of America after his visiting professorship expired and taught at American universities.

2. Miklós Ujlaki in the United States of America

Miklós Ujlaki left Sweden on 20 December 1949 and arrived in New York on 31 December 1949 on board the ocean liner Oklahoma. He was no longer listed on the passenger list as a Hungarian citizen but as a stateless person, and his address was given as the Washington apartment of a person named Evan Hexner.[50] The host was probably the Hungarian-born lawyer Ervin Hexner, who became a citizen of Czechoslovakia after the Trianon decision,[51] then taught law and economics in the United States, and from the 1940s onwards held important positions in several international organisations. The fact that Ujlaki was almost immediately offered a research position, not in law but in economics, suggests that Hexner intervened. Between 1950 and 1951 he was involved in a research project at the New School. The New School for Social Research was a private university in New York, founded in 1919 to provide a home for progressive thinkers. As a result, it had previously provided opportunities for many immigrant scholars, including

[40] ELTE Archives, 7.a.47. June 23, 1948. p. 15-16.
[41] ELTE Archives, 7.c. 923/1948–1949. Minutes excerpt, January 5, 1949.
[42] UJLAKI, N: *Chapters on international unification of law*. Stockholm, 1948, p. 1-19.
[43] ELTE Archives, 7.c. 923/1948–1949. Gunnar Granberg's letter to Miklós Ujlaki, November 30, 1948. In appendix: Official translation from Swedish original.
[44] ELTE Archives, 7.c. 923/1948–1949. Minutes excerpt, January 5, 1949.
[45] In: *Magyar Közlöny*, Nr. 4, 1949, p. 2.
[46] ELTE Archives, 7.c. 1143/1948–1949. 210.708/1949.VI.1. sz. January 13, 1949.
[47] ELTE Archives, 7.c. 1143/1948–1949. Géza Marton's letter to Gyula Ortutay.
[48] SCHWEITZER, G., A „Pázmány"-tól az „Eötvös"-ig. Adalékok a budapesti jogi fakultás történetéhez [(1945-1950)] Additions to the history of the Budapest Law School (1945-1950) In: *Múltunk*, Nr. 4, 2011, p. 49.
[49] ASZTALOS, L., Grosschmid tanítványok – Szladits iskola (Grosschmid students – Szladits school). In: KOVÁCS, K. (ed.), *A jogászképzés a magyar felsőoktatás rendszerében (Legal education in the Hungarian higher education system).* Budapest, 1984. p. 88.
[50] New York Passenger and Crew Lists, 1909, 1925–1957. 7777 – vol. 16877–16879, Dec 28, 1949. image 1111 of 1331; citing NARA microfilm publication T715 (Washington, D.C.: National Archives and Records Administration, n.d.). [https://familysearch.org/ark:/61903/3:1:3QS7-994K-H9GP?cc=1923888&wc=MFKC-H29%3A1030202501 (2021. 10. 10.)] (hereinafter: New York Passenger and Crew Lists, 09. 12. 1951.)
[51] UJVÁRI, P. (ed.), *Zsidó lexikon. (Jewish Lexikon.)* Budapest, 1929, p. 368.

many Hungarian researchers and artists, and Rusztem Vámbéry taught there for many years.[52] Ujlaki was involved in research on international investment problems at the Institute of World Affairs,[53] where he compiled a bibliography of literature on the subject, which has not been published in print.[54]

Earlier this year, he published a paper entitled The need for bibliographic processing in law,[55] in which he stresses the importance of legal bibliography, mainly for law students. He refers to his work on the private law literature of seventy years, but he argues for the importance of legal bibliography by drawing on the American literature. He was also influenced by Professor Charles Hodgings' course on Legal Bibliography at New York Law School in the 1950-1951 academic year, and adopted his demarcation criteria.

At the beginning of September 1951, on his return from Zurich[56] he began his first semester at the New School of Social Research, his course being entitled Elements of International Law. At that time, several scholars of Hungarian origin were also teaching at the institution, such as Ervin Doroghi, who had previously researched and taught commercial law in Hungary,[57] and who taught comparative corporate law to American students.[58]

In 1951, Miklós Ujlaki's application for membership in the American Foreign Law Association was accepted,[59] of which he was a member - together with Károlly Szladits Jr. until his death.[60]

In the spring of 1952, as a continuation of his studies of the previous semester, he announced a new course entitled The Law of Nations: an Introduction to International Law.[61] The same year he married Elisabeth Pick.[62]

From the years 1952-1953, the names of the subjects taught by Miklós Ujlaki changed, and partly also their themes. In the autumn semester, he offered a course entitled International Law in the Nuclear Age,[63] while in the spring semester he offered a course entitled Contemporary Trends in International Law.[64]

His publication activity continued to be the Student Law Review of New York Law School, but his publications were significantly fewer than his previous publications in Hungary. In his study „The Failure of Mutual Recognition of Succession Rights Due to Inconsistent Foreign Laws"[65] he examined the twenty-five international treaties on succession law to which the United States of America was a signatory and which were in force at the time of the study. Sixteen of these were essentially the same.[66] He then analysed state-level differences and judicial practice in the United States between 1937 and 1951, with particular reference, for example, to changes in German law on Jews and the responses of the American courts to them.

His rise to prominence and his academic career is attested to by the fact that on 2 October 1953 he gave a lecture at the United Nations entitled Comparative law: hobby or necessity.[67]

From the autumn semester of 1953[68] a new name appeared among the New School's international law lecturers. Ujlaki had to share the teaching of international law with Barna Horváth. Barna Horváth previously taught, among others, sociology of law, English and „continental" legal theory and[69] comparative law.[70] Ujlaki continued his course International Law in the Nuclear Age in the autumn semester, but in the second semester he offered a course entitled International Events from a Legal Perspective, while Barna Horváth focused on the relationship between national and international law in his new course.[71]

In 1953, Ujlaki published a study on the tax aspects of foreign confiscations, co-authored with Joseph Dach.[72] Joseph Dach, or József Dach in Hungarian, obtained his law degree at the University of Budapest, after which he published a few

[52] *List of 173 refugee scholars and artists aided by the New School for Social Research, New York*. https://digital.archives.newschool.edu/index.php/Detail/objects/NS030207_000004 (2021. 10. 05.) p. 34.
[53] In: *New School Bulletin*, vol. 8, Nr. 27, 1951, p. 1.
[54] Bibliography of Economic Development, with Nicholas Ujlaki, 1950–1951. In: The New School Archives, Institute of World Affairs records (NS), Series III. Research projects, Aubrey, Henry G. circa 1940–1954. Box: 2, Folder: 38.
[55] UJLAKI, N., The Necessity of Subject Bibliographical Elaboration in the Field of Law. In: *New York Law School Student Law Review,* vol. 1, Nr. 1, 1951, p. 23-34.
[56] New York Passenger and Crew Lists, 09. 13. 1951.
[57] DOROGHI, E., *Törvénytervezet a részvénytársaságról*. (*Draft Act on Public Company)* Budapest, 1918, p. 1-48.
[58] https://digital.archives.newschool.edu/index.php/Detail/objects/NS020202_000021 (2021. 11. 10.)
[59] In: *American Forein Law Association Bulletin*, Nr. Spring, 1951, p. 23.
[60] In: *American Journal of Comparative Law*, Vol 32, Nr. 3, 1984, p. 607.
[61] In: *New School Bulletin*, vol. 9, Nr. 21, 1951, p. 2.
[62] https://www.nycmarriageindex.com/ (2021. 10. 15.)
[63] In: *New School Bulletin*, vol. 10, Nr. 1, 1952, p. 24.
[64] In: *New School Bulletin*, vol. 10, Nr. 19, 1952, p. 27.
[65] UJLAKI, N., Frustration of Reciprocal Inheritance Rights by Inconsistent Foreign Legislation. In: *New York Law School Student Law Review,* vol. 1, Nr. 3, 1952, p. 149-158.
[66] Austria, Bolivia, Colombia, El Salvador, Estonia, Finland, Germany, Great Britain, Guatemala, Honduras, Hungary, Latvia, Liberia, Norway, Poland, Spain, Sweden and Switzerland.
[67] In: *New School Bulletin*, vol. 10, Nr. 21, 1953, p. 1.
[68] In: *New School Bulletin*, vol. 11, Nr. 1, 1953, p. 30.
[69] In: *New School Bulletin*, vol. 8, Nr. 18, 1951, p. 116.
[70] In: *New School Bulletin*, vol. 8, Nr. 19, 1952, p. 25.
[71] In: *New School Bulletin*, vol. 11, Nr. 18, 1954, p. 27.
[72] DACH, J. – UJLAKI, N., Tax Aspects of Foreign Confiscations. In: *George Washington Law Review*, vol. 21, Nr. 4, 1953, p. 445-464.

short papers in Hungary. At the time the study was published, Dach was already a lecturer at George Washington University, a lawyer and the finance director of the Italian technical delegation.

In this study, the authors examine the tax consequences of foreign confiscations and expropriations, and the problems that arose, particularly with regard to the write-off of losses, starting from the solution in US law, which allowed losses to be offset by a tax deduction. The relevant provisions of federal tax law are analysed, with particular reference to the Internal Revenue Code. The paper also analyses a case with Hungarian relevance in the practice of the US courts.

It is noteworthy that Ujlaki's positions listed in the article include being a permanent advisor to the Institute of Comparative Law at the University of Uppsala.

In 1955, he published a paper in the New York Law Forum entitled Compensation for the Nationalization of American Property in Bulgaria, Hungary and Romania,[73] in which he discusses the United States International Claims Settlement Act of 1949 and analyses the construction and operation of the funds established to enforce the claims.

In the same year, he also published a short review in the American Journal of Comparative Law of Endre Doroghi's methodological monograph on marriage law. The author of the volume looked at the marriage dissolution reasons in European countries.[74] An important achievement of the work is that it not only looks at the characteristics of Western European countries, but also the marriage law of the Soviet Union and the Eastern Bloc countries.

Ujlaki travelled to Europe several times in the mid-1950s, visiting Zurich in 1955[75] and 1956[76] and Hamburg in 1957.[77] Both Switzerland and Germany were important stops on his earlier study trips.

In the autumn semester of the 1955-1956 academic year, Ujlaki's course International Law in the Nuclear Age was still listed among the courses advertised, but it was already written in pencil on the prospectus that it had been cancelled.[78] The same note is made for his second semester course.[79]

The New School's May 7, 1956, newsletter reports that Miklós Ujlaki is co-author of the „forthcoming" book The Legal Literature of the Scandinavian Countries in a Foreign Language, a joint project with the Institute of Comparative Law at the University of Uppsala.[80] However, it is highly unlikely that the book was published, for unknown reasons. Lester Bernhardt Orfield quotes the work in his 1953 volume The Development of Scandinavian Law (also indicating a later publication).[81] From this reference, however, we can learn more information, firstly that the exact title is The Law Literature of the Scandinavian States Edited in Foreign Languages, and secondly that the co-author was Ĺke Malmstrom, Professor of Private International Law at the University of Uppsala.

The last time Miklós Ujlaki offered a course at the New School of Social Research was in the autumn of 1956,[82] but it is unlikely that this course was started.

From the end of the 1950s onwards, Ujlaki's scientific activities were relegated to the background. His travels abroad cannot be verified, as his passenger lists are public only until 1957, and his publications did not appear after the mid-1950s.

Only fragments of information about the last decades of his life have been found. These suggest that in Miklós Ujlaki's work, theoretical research was gradually replaced by practical work. This is interesting because in the mid-1950s his academic career in the United States of America seemed to be getting momentum.

Ujlaki was admitted to the bar in 1956 at the Administrative Office of the Courts in Manhattan,[83] but was admitted to the bar only after the Supreme Court decision.[84] In a high-profile case involving the discovery of illegal gold in the bank vault of a deceased client of Hungarian descent, he said that he dealt mainly with international cases.[85]

Ujlaki's scholarly recognition and his European roots are attested to by his last known publication, a commemorative volume published in 1979 on the occasion of Adolf F. Schnitzer's 90th birthday. In this volume, published by the Faculty of Law of the University of Geneva, he expressed his thoughts on Schnitzer's book Diversity and the Unification of Law.[86]

Miklós Ujlaki died in New York on 10 January 1985, aged 79, after a long illness.[87]

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[73] UJLAKI, N., Compensation for the Nationalization of American-Owned Property in Bulgaria, Hungary and Rumania. *New York Law Forum*, vol. 1, Nr. 3, 1955, p. 265-284.
[74] UJLAKI, N., Grounds for Divorce in European Countries by E. Doroghi. In: *The American Journal of Comparative Law*, vol. 4, Nr. 3, 1955, p. 459-460.
[75] New York Passenger and Crew Lists, 02. 25. 1955.
[76] New York Passenger and Crew Lists, 08. 23. 1956.
[77] New York Passenger and Crew Lists, 02. 10. 1957.
[78] In: *New School Bulletin*, vol. 13, Nr. 1, 1955, p. 30.
[79] In: *New School Bulletin*, vol. 13, Nr. 18, 1955, p. 147.
[80] In: *New School Bulletin*, vol. 13, Nr. 36, 1956, p. 1.
[81] ORFIELD, L. B.: *The Growth of Scandinavian Law*. Philadelhia, 1953, p. 1-343.
[82] In: *New School Bulletin*, vol. 14, Nr. 1, 1956, p. 32-33.
[83] https://opengovny.com/attorney/1046176 (2021. 10. 01.)
[84] Court Admits 3 New Yorkers. In: *New York Times*, 1962. 11. 20. 27.
[85] In: *New York Times*, 1961. 02. 08.
[86] UJLAKI, N., International unification of law: reflections on Adolf F. Schnitzer's „De la diversité et l'unification du droit". In: *Liber Amicorum Adolf F. Schnitzer: offert à l'occasion de son 90e anniversaire le 30 juillet 1979 par la Faculté de droit de l'Université de Genčve*. Genve, 1979, p. 483-499.
[87] *New York Times,* 1985. 01. 22. 22.

3. Literary activity

The activity of the emerging Szladits school was based first and foremost on the processing of practice, the first comprehensive systematisation of which was carried out by Károly Szladits with the help of László Fürst. A similarly important task was to explore the literature of private law. This task was entrusted to Miklós Ujlaki. The third area was to assist in the publication of the results of young researchers, with partial results being published in volumes of studies and comprehensive results in monographs.[88] Miklós Ujlaki has published in all three categories, but his literary activity has had two main directions. The first, with which he gained national fame, was the compilation of a bibliography of private law, the second was research into the private law of neighbouring states, which in time developed into more general questions of legal comparison and unification. In addition to these two main areas of research, he also dealt with „general private law". In the following, I have compiled the results of his academic career in this order, with the proviso that it is hardly possible to include all the papers published abroad in their entirety, and that I will not deal here with the papers written during his emigration.

He first published on the basic methodological issues of bibliographic research and systematisation in March 1930 in Jogtudományi Közlöny.[89] In April of that year,[90] at the age of 24, as a publication of the seminar on private law by Károly Szladits, Ujlaki published a bibliography of the most important works on private law in Hungarian written between 1861 and 1930.[91]

The published reviews were positive, although they mainly emphasised Szladits' leadership and his relationship to the work published two years earlier, The Practice of Private Judicial Law[92].[93] This was followed five years later by a supplement compiling the private law literature of the period 1930–1934.[94]

In the field of comparative private law, he was the first to publish the results of his research at the Institute of Eastern European Studies in Breslau in his study „The Fate of Hungarian Law in the Areas annexed to Poland",[95] in which he examined the changes in private law in the counties of Árva and Szepes, which were partly annexed to the Polish Republic due to the territorial changes after the First World War, over a period of about twenty years. Almost at the same time, a German-language study of Hungarian marriage law surviving in Czechoslovak private law was published in the Zeitschrift für Ostrecht, which was later to become a chapter in a monograph.[96]

At the end of 1931, Ujlaki's most extensive monographic work was published under the title The Modification of Hungarian Private Law in Czechoslovakia.[97] In addition to the collection of the Osteuropa Institut, he also conducted research in Košice, Prague and Brno.[98]

In 1932 Ujlaki published his work The Fate of Hungarian Law in the Territories annexed to Austria and Poland,[99] while in 1934 his third monograph was published, which continues the history of the development of private law in the neighbouring countries.[100] The work takes stock of and analyses the changes that Hungarian private law in the Hungarian territories annexed to Romania has undergone in the narrow sense. The necessary research was covered by the scholarship he received for the academic year 1932-1933. He collected material in Bucharest, Cluj-Napoca and Oradea.[101] The last in a series of studies on the private law of the territories annexed to Yugoslavia was published in the same year.[102]

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[88] ASZTALOS, L., Grosschmid tanítványok – Szladits iskola (Grosschmid students – Szladits school). In: KOVÁCS, K. (ed.), *A jogászképzés a magyar felsőoktatás rendszerében (Legal education in the Hungarian higher education system).* Budapest, 1984. p. 83-84.

[89] UJLAKI, M., A bibliográfia műhelyéből. (From the Workshop of Bibliography.) In: *Jogtudományi Közlöny*, vol. 65, Nr. 5, 1930, p. 48-49.

[90] In: *Jogtudományi Közlöny,* vol. 65, Nr. 8, 1930, p. 77.

[91] UJLAKI, M., *Hetven év magánjogi irodalma; A magyar magánjog bibliográfiája, 1861–1930 (Private law literature of 70 years: bibliography of the hungarian private law, 1861-1930).* Budapest, 1930, p. 572.

[92] SZLADITS, K., *A magánjogi bírói gyakorlat: 1901–1927: a magyar felsőbíróságok elvi döntéseinek gyűjteménye. (The practice of private law 1901–1927: a collection of decisions of principle of the Hungarian high courts.)* Budapest, 1928, 732.

[93] MUNKÁCSI, E., Hetvenév magánjogi irodalma (Private law literature of 70 years). In: *Jogtudományi Közlöny*, vol. 65, Nr. 10, 1930, p. 98-99; Hetven év magánjogi irodalma (Private law literature of 70 years). In: *Kereskedelmi Jog*, 1930, vol. 27, Nr. 5, 1930, p. 118; VARANNAI, I., Hetven év magánjogi irodalma (Private law literature of 70 years). *Polgári Jog*, vol. 7, Nr. 1, 1931, p. 48-49.

[94] UJLAKI, M., *Öt év magánjogi irodalma: a magyar magánjogi bibliográfiája, 1930–1934 (Private law literature of 5 years: bibliography of the hungarian private law, 1930-1934).* Budapest, 1935. p. 210.

[95] UJLAKI, M., A magyar jog sorsa a Lengyelországhoz csatolt területeken. (The fate of Hungarian law in the territories annexed to Poland.) In: *Jogtudományi Közlöny*, vol. 66, Nr. 5, 1931, p. 45-47. Special issue: UJLAKI, M., *A magyar jog sorsa a Lengyelországhoz csatolt területeken*. Budapest, 1931, p. 11.

[96] UJLAKI, N., Das in der Cechoslovakei geltende ungarische Eherecht. In: *Zeitschrift für Ostrecht*, vol. 5, Nr. 4, 1931, p. 253-269; UJLAKI, N., *Das in der Cechoslovakei geltende ungarische Eherecht*. Berlin, 1931, p. 17.

[97] UJLAKI, M., *A magyar magánjog módosulása Csehszlovákiában (Changes in Hungarian private law in Czechoslovakia.)* Budapest, 1931, p. 258. VOJÁČEK, L. – SCHELLE, K. – TAUCHEN, J., *An Introduction to History of Czech Private Law*. Brno, 2011, p. 11.

[98] ELTE Archives, 7.c. 484/1944–1945. appendix no. 1, 3.

[99] UJLAKI, M., *A magyar jog sorsa az Ausztriához és Lengyelországhoz csatolt területeken (The fate of Hungarian law in the territories annexed to Austria and Poland).* Budapest, 1932, p. 126.

[100] UJLAKI, M., *A magyar magánjog módosulásai Romániában. (Changes in Hungarian private law in Romania)* Budapest, 1934, p. 194.

[101] ELTE Archives, 7.c. 484/1944–1945. appendix no. 1,4.

[102] UJLAKI, M., A magyar jog sorsa a Jugoszláviához csatolt területeken. (The fate of Hungarian law in the territories annexed to Yugoslavia.) In: *Jogtudományi Közlöny,* vol. 69, Nr. 25. 1934, p. 142-144. Special issue: UJLAKI, M., *A magyar jog sorsa a Jugoszláviához csatolt területeken.* Budapest, 1934, p. 10. Published in German in the journal of the Osteupa Institute in Breslau and as a special issue: UJLAKI, N., Das Schicksal des ungarischen Rechts auf den Jugoslavien angeschlossenen Gebieten. In: *Zeitschrift für Osteuropäisches Recht,* vol. 1, Nr. 2, 1934, p. 83-92; Special issue: UJLAKI, N.: *Das Schicksal des ungarischen Rechts auf den Jugoslavien angeschlossenen Gebieten*. Berlin. 1934, p. 83-92.

Ujlaki summarised and evaluated the career of Gusztáv Wenzel in the volume „In Memory of Law Professors",[103] with a special focus on the achievements in the field of comparative law and the strengthening of exemplary methodological ideas.

In 1936, he gave a lecture in Hungarian and German at the Law and Political Science Section of the Friends of the Franz Josef University on the unification of the successor states,[104] which was essentially a summary of his years of research on the legal development of the neighbouring countries.

In 1937 he published a paper presenting a critical perspective on the latest proposal of the Czechoslovak Civil Code,[105] which is a written version of a speech delivered at the meeting of the Comparative Law Section of the Hungarian Lawyers' Association on 20 May 1937.[106] He concludes that *„from a Hungarian point of view, the Czechoslovak proposal again reduces the strength of the argument, often heard in Hungary, that the legal regulation of Hungarian private law would disrupt the legal community with the breakaway territories. Unfortunately, the legal community has already been broken in so many respects as a result of the unification efforts of the countries that have gained territory from us that the aforementioned aspect cannot be used today as a reason for postponing the codification of Hungarian private law. Nor does the fact make it change that the Czechoslovak Civil Code may not enter into force for many years*."

In 1938, Károly Szladits published a study on the tasks of comparative jurisprudence in the pages of a commemorative book on the thirtieth anniversary of his teaching career, in which he explains his methodological views, which had crystallized by then. It records the development and essence of comparative law in Hungary, and also deals with the new tasks arising from the new situation after the World War. The essence of Ujlaki's method is that he *„restricts legal comparison to a narrow territorially delimited circle in which the scope of investigation is determined by the affinity of living conditions*." He saw the value of this methodological approach in the fact that, as life situations do not differ significantly, it is possible to obtain „highly empirical" data on the legal institutions and on the meaning and consequences of adopting a particular legal institution from another legal system, or on the results of moving from one legal system to another. The direct purpose of legal comparison was seen as the enrichment of living law, while the broader purpose was seen as the unification of law.[107]

Between 1939 and 1947, he did not publish any results on comparative law, one of the obvious reasons for this being that a European research trip, especially with the help of a state grant, was hardly possible during this period. His attention turned to Hungarian private law. In his last publication before his silence, he focused on the private law of the reannexed territories.[108] The last time he wrote on the private law of the neighbouring countries was in 1947, when he examined the surviving elements of Hungarian marriage law in Burgenland marriage law.[109] In the same year, he published his findings on the impact of the Paris Peace Treaty on Hungarian financial law.[110]

Posterity's scholarly evaluations of Ujlaki's comparative private law research show a different picture. In the mid-1980s, László Asztalos summarises his (pre-emigration) oeuvre as follows: *„Before the liberation from war, he had already published several publications which - in keeping with the nationalism of the time - dealt primarily with Hungarian law surviving in neighbouring states*."[111] In the field of comparative law Balázs Fekete sees Ujlaki as Gusztáv Wenzel's heir.[112]

In addition to his research in the field of bibliography and comparative private law, Miklós Ujlaki also did his share in the scientific systematization and analysis of practice, what he called the cultivation of „general private law"[113] Alongside Károly Szladits and László Fürst, he co-edited the third part of the work on Hungarian private law, „Hungarian private law in its present form: laws, decrees, case law", which deals with the

[103] UJLAKI, M., Gusztáv Wenzel. In: *Jogi Professzorok Emlékezete. (Memory of Law Professors.)* Budapest, 1935, p. 65-75. Special issue: UJLAKI, M.: *Gusztáv Wenzel 1812–1891*. Budapest, 1936, p. 13.

[104] UJLAKI, M., *Az utódállamok jogegységesítő törekvései és a magyar magánjog. (The unification efforts of the successor states and Hungarian private law.)* Szeged, 1936. p. 28. Published in German: UJLAKI, N., Die rechtsvereinheitlichenden Bestrebungen der Nachfolgestaaten und das ungarische Privatrecht. In: *Zeitschrift für Osteuropäisches Recht*, vol. 3, Nr. 9, 1936, p. 580.

[105] UJLAKI, M., A csehszlovák polgári törvénykönyv legújabb javaslata. (The latest proposal of the Czechoslovak Civil Code.) In: *Polgári Jog*, 1937, vol. 13, Nr. 6, 1937, p. 306-335. Special issue: UJLAKI, M., *A csehszlovák polgári törvénykönyv legújabb javaslata*. Budapest, 1937. 32. See also: Vojáček, L – Schelle, K. – Tauchen, J., *An Instroduction to History of Czech Private Law*. Brno, 2011, p. 33.

[106] In: *Jogállam*, vol. 36, Nr. 5–6, 1937, p. 253.

[107] UJLAKI, M., *Az összehasonlító jogtudomány feladatai. (The tasks of comparative law.)* In: Emlékkönyv Dr. Szladits Károly tanári működésének harmincadik évfordulójára. (Commemorative book for the thirtieth anniversary of Dr. Károly Szladits' teaching career.) Budapest, 1938, p. 580-581.

[108] UJLAKI, M, A magyar szent koronához visszatért területek magánjoga. (Private law of the territories returned to the Hungarian Holy Crown.) In.: *Emlékkönyv Kolosváry Bálint jogtanári működésének negyvenedik évfordulójára. (Commemorative book for the fortieth anniversary of Bálint Kolosvárys' teaching career.)* Budapest, 1939, p. 540-547. Special issue: UJLAKI, M., *A magyar szent koronához visszatért területek magánjoga*. Budapest, 1939, p. 10.

[109] UJLAKI, M., Magyar jogszabály töredékek a Burgenland házassági jogában. (Hungarian law fragments in the marriage law of Burgenland.) In: *Jogtudományi Közlöny,* Nr. 23-24, 1947, p. 355-357.

[110] UJLAKI, M., A párizsi magyar békeszerződés és a pénzügyi jog. The Peace Treaty of Paris and financial law. In: BECK, S. (szerk.) *A békeszerződés magán- és gazdaságjogi vonatkozásai. (Private and economic aspects of the peace treaty.)* Budapest, 1947, p. 102-110; UJLAKI, M.: A párizsi magyar békeszerződés pénzügyi jogi vonatkozásai. In: *Pénzügy és Közigazgatás*, vol. 1, Nr. 5, 1947, p. 280-283.

[111] ASZTALOS, L., Grosschmid tanítványok – Szladits iskola (Grosschmid students – Szladits school). In: KOVÁCS, K. (ed.), *A jogászképzés a magyar felsőoktatás rendszerében (Legal education in the Hungarian higher education system).* Budapest, 1984, p. 86.

[112] FEKETE, B., *A modern jogösszehasonlítás paradigmái. Kísérlet a jogösszehasonlítás történetének új értelmezésére. (Paradigms of modern comparative law. An attempt to reinterpret the history of legal comparison.)* Budapest, 2011, p. 175-176.

[113] ELTE Archives, 7.c. 484/1944–1945. appendix no. 1, 5.

law of obligations. The book was published in three volumes in 1934.[114] The aim of the collection was to bring together the relevant existing sources of law and practice. The compilation followed the scheme of the 1928 draft Private Law Code, with the relevant text of the draft code in the first part of each chapter, followed by „living law" in the second part (the laws, followed by government regulations and other sources of law, and finally the main decisions of the higher courts).[115] This three-volume work was published once more between 1942 and 1944, with a revised version.[116] One can also include Ujlaki's work on leases, which was published in Volume 4 of Hungarian Private Law, edited by Károly Szladits.[117] Here, he analyses the relevant case law on the firm ground of his earlier bibliographical work.

4. Summary

Miklós Ujlaki had a promising career path ahead of him, both in practice and theory. He was a student of outstanding talent of Károly Szladits and one of the school's leading figures. His career was temporarily interrupted by the Second World War, but from the second half of 1945 he continued his academic and teaching activities with unbroken vigour. When the Communist dictatorship began to take hold, Ujlaki, who was on a research trip to Sweden and in his mid-forties, did not return home, but started a new life in New York. It was during this period that the school named after Károly Szladits was finally dismantled.

Ujlaki gained national fame for his bibliographical work. For about twenty years he has been continuously researching the surviving and ever-changing legal systems in the Carpathian Basin after the Treaty of Trianon, with special emphasis on private law.

Miklós Ujlaki continued his research in Hungary, mainly on legal bibliography and comparative law. In the first half of the 1950s, his activities were based on academic research and teaching, and he became renowned in the fields of private international law and comparative law. He left academia in the mid-1950s and turned to practical work as a lawyer. The parallel cultivation of theory and practice was not new to Ujlaki, who had previously worked as a lawyer in Hungary in addition to his academic activities. The real reason for the switch is not known.

All in all, in the second phase of his life in the United States of America, his scientific activity decreased in intensity compared to the previous period, while his contacts with his European colleagues remained.

[114] SZLADITS, K. – FÜRST, L. – ÚJLAKI, M., *Magyar magánjog mai érvényében: törvények, rendeletek, joggyakorlat. (Hungarian private law as it stands today: laws, regulations, case law*) III. rész, Kötelmi jog (Law of obligations) Budapest, 1934, presented by: MUNKÁCSI, E., Károly Szladits László Fürst Miklós Ujlaki: Kötelmi jog. In: *Jogtudományi Közlöny*, vol. 69, Nr. 25, 1934, p. 144-145.

[115] SZLADITS, K. – FÜRST, L. – ÚJLAKI, M., *Magyar magánjog mai érvényében: törvények, rendeletek, joggyakorlat (Hungarian private law as it stands today: laws, regulations, case law)* III. rész, Kötelmi jog (Law of obligations) Budapest, 1934, p. 3-4.

[116] SZLADITS, K. – FÜRST, L. – ÚJLAKI, M., *Magyar magánjog mai érvényében: törvények, rendeletek, joggyakorlat (Hungarian private law as it stands today: laws, regulations, case law)* III. rész. Kötelmi jog (Law of obligations) Budapest, 1944, p. 414.

[117] UJLAKI, M., Bérlet. (Lease.) In.: SZLADITS, K. (ed. chief.), *Magyar Magánjog (Hungarian private law) IV. Kötelmi jog (Law of obligations), Különös rész (Special part).* Budapest, 1942, p. 451-545. As a special issue: UJLAKI, M., *Bérlet*. Budapest, 1941, p. 64.

Conflicts, Compromises and Professionalization. The Case of Hungarian Trainee Lawyers in the late 19th Century*

*Viktor Papp***

Abstract

This paper explores the question of how the relationship between trainee lawyers and lawyers has changed in the late 19th and early 20th centuries. The main question of this study is what arguments and what professional solutions the trainee lawyers have used to improve their position in relation to lawyers. The presentation of the problem will be based on articles published in the legal press.

The relationship between the two groups is important because, in addition to lawyers, trainee lawyers also have gained important functions through the lawyer's code of conduct introduced in 1874, which have further increased the already fierce competition in the labour market for lawyers. Another significant issue is the extent of conflictual discourse between lawyers and trainee lawyers. By the beginning of the 20th century, trainee lawyers had raised awareness of the inevitability of generational change within the profession by founding several professional associations. The study aims to illustrate, through concrete professional debates, the effectiveness with which trainee lawyers have been able to assert their professional and financial interests against lawyers. The final part of the paper deals with cases where lawyers and trainee lawyers have successfully allied themselves against government and state actors. The results of the research will show what professional mechanism and argumentation tools were in the hands of the legal professions, and when they were used during the process of advocacy. The results of the research will also fit well with the professionalization paradigm, as the research of the social history of lawyers helps to understand the transformation of the intellectual professions and of the middle class. The findings of the research, on the other hand, will be closely related to social closure theory, as the rivalry between lawyers and trainee lawyers sheds light on the mechanisms that influenced the practice of social closure in the 19th century.

Keywords: *lawyer; legal profession; professionalization; Budapest Bar; trainee lawyer; law clerk; concept of social closure; social history; the code of conduct for lawyers.*

The present study addresses the topic of Hungarian lawyers and trainee lawyers of the 19th century, and is therefore closely related to legal history. However, its approach and context of interpretation guide the reader towards other fields, namely social history and the history of the legal professions.

The history of lawyers has long been an area of research, and some aspects of the social history of Hungarian lawyers have attracted the interest of researchers several times.[1] I wish to emphasize here that in the following I will use the term "lawyer" to refer to those who have been members of one of the Hungarian bars since 1874. This is justified because not all lawyers were litigators, not all lawyers attended court as legal representatives. People who worked in the legal departments of various companies or who dealt exclusively with family law cases can be refferd to as lawyers, provided they were members of a bar. I therefore distinguish the profession indicated by the term not according to function, job title, or specialization, but according to membership in an association. This criterion clearly defines the number of lawyers who can be considered, thus avoiding methodological pitfalls.

The relationship between lawyers and trainee lawyers has not been the subject of much research, but also little is known, for example, about the social status of trainee lawyers, their working conditions, career prospects, and their aspirations for

* Supported by the ÚNKP-22-4 New National Excellence Program of the Ministry for Culture and Innovation from the source of the National Research, Development and Innovation Fund, and by the History of Professionalization Research Group (Eötvös Loránd University, Budapest) (FK 132451) from the source of the National Research, Development and Innovation Fund.

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[1] Some prominent publications from the international and Hungarian literature: ABEL, R. L., Between Market and State. The Legal Profession in Turmoil. In: *The Modern Law Review*, vol. 52, Nr. 3, 1989, p. 285-325; BURRAGE, M., Exceptional Professions in Extraordinary Times. A Comparison of Lawyers in Four Societies. In: MÜLLER, D., SIEGRIST, H. (Eds.), *Professionen, Eigentum und Staat. Europäische Entwicklungen im Vergleich, 19. und 20. Jahrhundert*. (Moderne Europäische Geschichte 8.) Göttingen, 2014, p. 41-73; HAWKINS, R. A., The Marketing of Legal Services in the United States, 1855-1912. A Case Study of Guggenheimer, Untermyer & Marshall of New York City and the Predecessor Partnerships. In: *The American Journal of Legal History*, vol. 53, Nr. 2, 2013, p. 239-264; HEINZ, J. P., LAUMANN, E. O., *Chicago Lawyers. The Social Structure of the Bar*. New York-Chicago, 1982; KOVÁCS, M. M., *Liberal Professions and Illiberal Politics. Hungary from the Habsburg to the Holocaust*. Washington-New York-Oxford, 1996; KORSÓSNÉ DELACASSE, K., *Az ügyvédi kamarák megszületése Magyarországon (The Emergence of the Bars in Hungary)*. Budapest-Pécs, 2012.

joining associations. The present study therefore addresses the question of what characterized the relationship between trainee lawyers and lawyers in the late 19th and early 20th centuries, and what changes took place in this relationship. The main question of the study is what arguments and professional solutions were used by trainee lawyers to improve their professional position. I draw on sources published in the legal press to illustrate the problem.

The relationship between the two groups is of particular importance as lawyers formed the dominant element of the Hungarian middle class, and due to their number and social influence, they played an important role in public life, in the life of the associations and even in the country's economy. In addition to lawyers, trainee lawyers also gained important functions with the modern code of conduct for lawyers adopted in 1874, which further increased the already fierce competition in the labour market for lawyers. Moreover, the processes of the 19th century have an impact on today's social conditions, and the identification of features specific of Hungary can facilitate comparative analyses.

1. The new setting brought about by the new code of conduct for lawyers

After the Austro-Hungarian Compromise, the modernization of the jurisdiction began. The government's main aim was to separate the judicial system from public administration. The parliament passed a law guaranteeing the independence of the courts and the financial and social recognition of judges.[2] The parliament also announced the introduction of a new code of conduct for lawyers to meet the challenges of the times.[3] The government also tried to take into account the lawyers' proposals when drafting the code of conduct, and consulted the Budapest Lawyers' Association, founded in 1865 and comprising the elite of the legal profession of the time, for its opinion.[4]

The modern code of conduct for lawyers was adopted by the parliament in 1874, and its introduction was closely linked to the trend of the judicial system reforms that was spreading across Europe at the time.[5] The most decisive part of the code of conduct was clearly the creation of autonomous bars. The modern code of conduct also brought innovations in other areas. For example, it is only from 1874 onwards that we can talk about trainee lawyers, since in the first half of the 19th century legal education in Hungary was still operating under a different framework. A bachelor degree was not required for legal education, and after one year of philosophical study, one could enrol in a two-year legal course. The real knowledge for lawyers at that time were the years spent as a law clerk, and those enrolled in legal practice were called *jurat*s. In the first half of the 19th century, moreover, law clerks were lawyers registered with the court, as there was no autonomous legal association yet.[6]

The code of conduct for lawyers provided the bar extensive powers over trainee lawyers. To be admitted as a trainee, one must have passed the necessary examinations, applied for admission to the local bar, and have practiced at a court, prosecutor's office or lawyer in the bar's area.[7] According to the law, the bar's board decided on the registration of trainee lawyers at the bar, but the board also monitored the trainees' conduct and the completion of their legal practice. By being forced to enter the bar, those who were in legal practice were also subject to the jurisdiction of the bar in disciplinary procedures. The commission of any disciplinary infraction could result in the extension of the practice period or even the termination of the trainee status.

It must be emphasized that the new legislation also provided certain advantages for trainee lawyers. For example, there was a certain division of labour between lawyers and their trainees, and thus a close interdependence evolved, as the trainee lawyer could act as a deputy to his principal, the lawyer, in negotiations before the courts. In addition, the principal lawyer had to bear the responsibility for any omissions in the negotiations.[8] This gave the trainees the opportunity to acquire genuine practical knowledge and to familiarize themselves with the operation of the courts.

2. The question of time and staff number of legal practice

There was no question among legal experts that in the new, modern legal framework, lawyers must acquire a very advanced theoretical background, and they argued strongly in favour of the requirement for a doctorate in law. Government officials argued that only by passing the doctoral examination would trainee lawyers acquire a thorough knowledge of administrative

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2 STIPTA, I., *A magyar bírósági rendszer története (History of the Hungarian Court System)*. Debrecen, 1998, p. 122-131; NAVRATIL, SZ., *A jogászi hivatásrendek története Magyarországon (1868/1869-1937) (History of the Legal Professions in Hungary)*. Budapest, 2014, p. 48-50.

3 An important element of the judicial and public administration reform was the establishment of the civil law notary profession, which had an independent bar system since 1875. The lawyers' profession had always supported the creation of the notary profession, and disputes had only arisen between them over the jurisdictional issues. ROKOLYA, G., *A közjegyzői intézmény fejlődése a polgári korban (The Development of the Notariat in the Civil Era)*. (Jogtörténeti értekezések 42.) Budapest, 2013, p. 30-39.

4 KUN, L., *A magyar ügyvédség története. Politikai s társadalmi tekintetben, a legrégibb időktől maig, párhuzamban a bírósági szervezet fejlődésével (History of the Hungarian Bar. From Political and Social Points of View, from the Earliest Times to the Present, parallel to the Development of the Judicial Organization)*. Budapest, 1895, p. 304.

5 KORSÓSNÉ DELACASSE, K., 2012, p. 176-177.

6 DEGRÉ, A., Ügyvédképzés Magyarországon a polgári korban (Lawyer Education in Hungary in the Civil Era). In: KOVÁCS, K. (Ed.), *A jogászképzés a magyar felsőoktatás rendszerében*. Budapest, 1984, p. 60; SZABÓ, B., A jogászság és a jogászképzés története (History of the Legal Professions and Legal Education). In: SZABÓ, B. (Ed.), *Bevezetés a jog- és államtudományokba*. Miskolc, 1995, p. 184-186.

7 Article 11, Act XXXIV of 1874 on the Code of Conduct for Lawyers, https://net.jogtar.hu/ezer-ev-torveny?docid=87400034.TV&searchUrl=/ezer-ev-torvenyei?pagenum%3D29

8 Article 15-16, Act XXXIV of 1874 on the Code of Conduct for Lawyers, https://net.jogtar.hu/ezer-ev-torveny?docid=87400034.TV&searchUrl=/ezer-ev-torvenyei?pagenum%3D29

and financial law.[9] Law academies not having the right to award doctorate in law gave university faculties of law a significant competitive advantage during the period.[10] The code of conduct finally introduced allowed the bar exam to be passed only after obtaining a doctorate in law, and the spectacular increase in the level of theoretical training obviously extended the period spent as a law clerk.

However, there was no agreement at all between legal experts and politicians involved in the debate on determining the length of the legal practice.[11] Since some lawyers wrote in the legal press that the number of lawyers had started to rise spectacularly from the mid-1860s, they tried to impose certain restrictions on new admissions to the legal profession.[12] Moreover, the increase of the length of the trainee period was a tool that could influence the career opportunities of those preparing to become lawyers for many years, even decades. According to contemporaries, for example, young law students from less affluent parents would have carefully considered committing themselves to the legal profession if they saw that it was a career that could only be entered after a doctorate in law and four to five years of legal practice.[13]

From this point of view, it is understandable why the Budapest Lawyers' Association wanted to see a five-year legal practice in the legislation, but the majority of the Association's members did not support this proposal. The opinion-shaping part of Hungarian lawyers was already aware that in the other half of the Monarchy the Austrian lawyers had introduced a seven-year practice from 1868. In 1871, on the proposal of the influential member of the Association, Vilmos Siegmund, the lawyers of Budapest took a stand in favour of a four-year legal practice and forwarded this draft to the Ministry. However, some lawyers did not see any justification for an excessively long trainee period. Even years later, the main subject of debate, whether there were many practicing lawyers in Hungary in the 1860s and 1870s, could not be agreed upon by the legal interest groups.[14]

The issue of the lenght of the legal practice for trainee lawyers remained a major professional debate and a source of conflict between trainee and practicing lawyers after 1874, too. However, not only those concerned were involved in the debate. According to the Crown Judge, Dezső Márkus, the three-year legal practice should definitely have been increased, but he justified this not on the grounds of a more thorough acquisition of practical knowledge, but on the grounds of limiting the number of lawyers.[15] At the turn of the century, as the professional debate on the reform of the code of conduct for lawyers intensified, influential lawyers were already expressing the view that the rise in the number of lawyers, and trainee lawyers called for radical legislative intervention.

The challenges of becoming a trainee lawyer were encoded *a priori* into this new legislative framework, and, of course, the parties involved were aware of this.[16] The status of trainee lawyer was only a temporary status, after a few years of legal practice trainees enjoyed the protective shield of a lifelong profession. This meant that only lawyers were able to improve the social status, financial situation, and working conditions of trainees. The relationship between the two parties, at least in the case of the trainee period's length, was, by contrast, fraught with unresolved problems, the interdependence being perceived by trainee lawyers as exploitation. In particular, the financial issues, the trainees' problems of making a living, exposed this kind of opposition.[17]

It follows from the above that the debate on the length of the trainee period was essentially part of a broader problem. It was not primarily a question of the time taken to acquire experience, but of the number of lawyers and trainee lawyers. Namely, contemporaries argued that the profession had become extremely overpopulated by the early 1900s, and that the presence of too many lawyers bloated the supply of lawyers.[18] Simply put, too many lawyers were working for too low remuneration.[19] The growth in the number of lawyers was, of course, fuelled by a dominant increase in the number of trainee lawyers. The professional debate surrounding the legal practice period was therefore a burning issue for all lawyers. Let us not forget that the mass of trainee lawyers essentially provided a cheap workforce with legal qualifications for law firms. Trainee lawyers, recognizing these challenges, have from the outset called for the status of trainee lawyer to be as close as possible in social standing to that of the actual practicing lawyer. They expected results to be achieved by joining forces and organizing bar associations.

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[9] ECKHART, F., *A jog- és államtudományi kar története 1667-1935 (History of the Faculty of Law and Political Science)*. Vol. 2. Budapest, 1936, p. 503.

[10] MEZEY, B., A jogakadémiák 1874. évi reformja (The Reform of the Law Academies in 1874). In: KOVÁCS, K. (Ed.), *A jogászképzés a magyar felsőoktatás rendszerében*. Budapest, 1984, p. 110-111.

[11] FISCHER, L., *Tanulmány az ügyvédek szervezéséről. Felolvasta a kolozsvári ügyvéd-egylet 1871. január 14-én tartott rendes gyűlésében (A Study on the Organization of Lawyers. Read at the Ordinary Meeting of the Cluj Bar Association Held on 14 January 1871)*. Pest-Kolozsvár, 1871, p. 45.

[12] TELLER, M., Az ügyvédi kar helyzete a múlt század közepén (The Status of the Lawyers' Profession in the Middle of the Last Century). In: *Jogi dolgozatok. A Jogtudományi Közlöny ötven éves fennállásának emlékére. 1865-1915.* Budapest, 1916, p. 731-734.

[13] KENEDI, G., A gyakorlat (The Practice). In: *Ügyvédek Lapja*, vol. 2, Nr. 44, 1885, p. 3.

[14] TELLER, M., 1916, p. 737-738.

[15] MÁRKUS, D., Ügyvédek és ügyvédjelöltek. Két közlemény (Lawyers and Trainee lawyers. Two Announcements). In: *Ügyvédek Lapja*, vol. 2, Nr. 46, 1885, p. 5-6, Nr. 47, 1885, p. 5-6.

[16] Ügyvédjelöltek (Trainee Lawyers). In: *Ügyvédek Lapja*, vol. 19, Nr. 50, 1902, p. 1-3.

[17] On the conflict over trainees' salaries, see: Az ügyvédjelöltek helyzetéről (On the Position of Trainee Lawyers). In: *Ügyvédek Lapja*, vol. 19, Nr. 43, 1902, p. 7-8; Az ügyvédjelölt fizetése (The Salary of Trainee Lawyer). In: *Ügyvédek Lapja*, vol. 21, Nr. 15, 1904, p. 7; Ügyvédjelöltek nyomora (The Misery of Trainee Lawyers). In: *Ügyvédek Lapja*, vol. 26, Nr. 15, 1909, p. 1-2.

[18] For a detailed discussion of the issue, see: KRÁLIK, L., *A magyar ügyvédség. Az ügyvédi kar (The Hungarian Lawyers. The Bar).* Vol. 1. Budapest, 1903, p. 261-279, 372-378.

[19] For the most recent discussion of this issue, see: MENKEL-MEADOW, C. J., Too many lawyers? Or should lawyers be doing other things? In: *International Journal of the Legal Profession*, vol. 19, Nr. 2-3, 2013, p. 147-173.

3. Failed efforts to set up bar associations and the role of recruitment agencies

The trainee lawyers' aspirations to set up bar associations were almost as early as the lawyers' attempts to organize themselves in this way. In 1871, self-educational associations had already been established in several counties, and in 1873, plans were made to set up the Budapest Association of Trainee Lawyers and Law Clerks.[20] However, the initial enthusiasm failed to achieve its goal, and according to press reports, the inaugural session did not even take place. Later on, in the second half of the 1870 s, the association showed some sign of life again, but it was still unable to carry out any constructive activity.[21]

While the trainee lawyers' social status and professional advancement has been increasingly challenged, there has been little progress in the area of professional self-organization over the decades. A new attempt was made in the early 1890 s, when judiciary and administrative law clerks located at the bottom of the judicial ladder joined trainee lawyers, too. The main aim of the association was twofold: to improve the remuneration of trainees and to 'reach out' to lawyers, although this was not backed up by concrete ideas.[22] However, what was formulated at the association's meeting was far from a unanimous success, as the planned strike by trainee lawyers sparked outrage in legal circles. In fact, if you like, the trainee lawyers' strike action was considered as a serious breach of the tacit agreement between the two parties, since it was the same lawyers against whom the walkout was planned, who were expected to provide higher salaries and better working conditions, and whom the trainee lawyers themselves joined in a few years later.[23]

The success of the organization of trainee lawyers depended mainly on their ability to re-establish a compromise with lawyers after the ill-planned strike and failed communication. Subsequent events suggest that trainee lawyers correctly assessed the developing situation at the time. They could not take up the fight with the lawyers, because, in addition to the low number of members in the associations, the division between the lawyer society in the capital and the provinces seemed to be an insurmountable problem.[24] Following symbolic acts of reconciliation, such as a visit to the Minister of Justice or the election of some prominent judges and lawyers for the honorary membership of the association,[25] a new era in the relationship between trainee lawyers and lawyers began.

This new era was marked not by a boom in association life, but by the organization of a new kind of service by trainee lawyers. From the 1890s onwards, trainee lawyers developed a service that had not previously been available to the lawyers' workforce, and which offered considerable assistance to those who ran law firms. This was the setting up of a recruitment agency for lawyers. The first reference to a recruitment agency dates back to 1891, and its operation was characterized by the fact that it was able to offer legal assistants and scriveners to lawyers by means of a register kept at the head office of the trainee lawyers and to assist trainee lawyers seeking a law firm. Mediation was a service offered free of charge by the association of trainee lawyers.[26]

After the turn of the century, the association also sought to help trainees by setting up an aid fund, a library, and organizing debates, but tangible results were only achieved by running the recruitment agency. This was mainly due to the lack of emphasis on mediation by the professional organizations of lawyers,[27] thus the mediation activities of trainee lawyers during the period filled a significant gap.[28]

During the age of dualism, trainee lawyers were ultimately unable to maintain a strong, nationally representative association with a widespread reach. On the one hand, the conditions for such a professional association were not in place, such as the problem of funding or the temporary nature of the trainee status, and on the other hand, effective self-organization of trainees would have seriously damaged the interests of lawyers with a high social prestige. One glaring example of this was the attempt to set up mandatory membership in the association of trainee lawyers.[29] In the 1910s, although trainee lawyers wished in vain to unite the associations in the capital and the provinces, the idea of a mandatory membership in the association was incompatible with the intentions of lawyers with an

[20] HERMANN, M., A szatmári ügyvédjelöltek önképző egyletének észrevételei (Observations of the Self-education Association of Trainee Lawyers in Szatmár County). In: *Magyar Themis*, vol. 2, Nr. 16, 1871, p. 182-183; DÁRDAI, S., A bíróságok reorganisatiója IV (Reorganization of the Courts). In: *Jogtudományi Közlöny*, vol. 9. Nr. 5, 1874, p. 35.

[21] A budapesti ügyvédjelöltek és joggyakornokok egyesületének közgyűlése (General Assembly of the Budapest Association of Trainee Lawyers and Law Clerks). In: *Jogtudományi Közlöny*, vol. 12, Nr. 4, 1877, p. 32.

[22] Ügyvédjelöltek és joggyakornokok köre (The Companion of Trainee Lawyers and Law Clerks). In: *Ügyvédek Lapja*, vol. 7, Nr. 23, 1890, p. 7.

[23] MURÁNYI, E., Ügyvédjelöltek és joggyakornokok egylete (The Association of Trainee Lawyers and Law Clerks). In: *Ügyvédek Lapja*, vol. 7, Nr. 24, 1890, p. 6-7.

[24] After the turn of the 19th century, a number of rural trainee lawyers' associations were formed, but even then, no professional association with national coverage could be established. Az ügyvédjelöltek mozgalma (The Movement of Trainee Lawyers). In: *Ügyvédek Lapja*, vol. 27, Nr. 34, 1910, p. 4.

[25] Az ügyvédjelöltek és joggyakornokok körének küldöttsége (Delegation of the Trainee Lawyers and Law Clerks). In: *A Jog*, vol. 10, Nr. 5, 1891, p. 39; Az ügyvédjelöltek és joggyakornokok köre (The Companion of Trainee Lawyers and Law Clerks). In: *A Jog*, vol. 11, Nr. 40, 1892, p. 304.

[26] Az Ügyvédsegédek Országos Egyesülete (The National Association of Legal Assistants). In: *Ügyvédek Lapja*, vol. 16, Nr. 45, 1899, p. 8; Az ügyvédsegédek országos egyesületétől vesszük a következő értesítést (We received the following notification from the National Association of Legal Assistants). In: *Ügyvédek Lapja*, vol. 19, Nr. 31, 1902, p. 4, Ügyvédjelöltek országos egyesülete (National Association of Trainee Lawyers). In: *Ügyvédek Lapja*, vol. 21, Nr. 42, 1904, p. 7.

[27] For example, only 10 years after the trainee lawyers' movement, the Lawyers Association of Budapest systematized the list of jobseeker trainee lawyers. See: Az ügyvédjelölti és segédi állások (Trainee Lawyer and Legal Assistant Positions). In: *Ügyvédek Lapja*, vol. 21, Nr. 48, 1904, p. 8.

[28] For the initial difficulties of the employment agency, see: Az Ügyvédjelöltek és Joggyakorlók Országos Egyesülete (The National Association of Trainne Lawyers and Legal Assistants). In: *A Jog*, vol. 22, Nr. 2, 1903, p. 16.

[29] Az ügyvédjelöltek mozgalma (The Movement of Trainee Lawyers). In: *Ügyvédek Lapja*, vol. 27, Nr. 34, 1910, p. 4.

autonomous bar.[30] Namely, as I mentioned in the introduction, trainee lawyers were required to be members of the relevant bar, and any other form of mandatory membership could have only been prescribed by law. However, despite the fact that trainee lawyers automatically became members of the bar during the legal practice, they were excluded from a number of benefits and entitlements, since they were not considered full members of the bar. Overall, therefore, the status of trainee lawyers could only have been substantially improved if lawyers had engaged the trainee lawyers's organization and had urged the reform of the law clerk status.

4. The key to success? Fighting for Sundays off

As already mentioned, trainee lawyers voiced their grievances against lawyers on a number of issues, with most of their suggestions urging improvements in working conditions at law firms. In addition to salaries, other cardinal issues were the need for a satisfactory solution to the notice periods and clarification of the obligations of principals and office staff.[31] Moreover, in the 1890s there was even a special movement to achieve Sundays off.

Lawyers, and even more so trainee lawyers, similarly to the employees of the industrial sector, demanded one day off a week. The first comment from lawyers was made in 1886 on the pages of *Ügyvédek Lapja* [Lawyers' Journal].[32] The idea of Sundays off for law firms received more support after the legislation of 1891.[33] During the period of dualism, Hungarian lawyers were constantly following the changes within the Austrian legal profession, and were also informed that the Austrian judicial government had addressed a question to the Bar of Lower Austria in 1896 concerning Sundays off. Although the Bar of Lower Austria initially opposed the closure of the offices, from the end of 1896, largely under pressure from legal assistants and trainee lawyers working in the offices, the Bar of Lower Austria passed a resolution in favour of closing the Vienna law firms on Sundays.[34]

Clearly, the nature of the work carried out at law firms was quite different from industrial or commercial units often reffered to in the legal press. After all, there was no such thing as a day off in the administration of justice in this era, and, as lawyers put it, "criminals and rioters did not rest on Sundays". Summonses and interrogations required the presence of lawyers, and even if the courts were not open on the last day of the week, it would not have been possible to declare a general Sunday off for law firms, since many people only had time to visit a lawyer's offices on that day.[35]

A spectacular progress was finally achieved in 1908, although not by a long-awaited government decision. The extraordinary general assembly of the Budapest Bar Association passed a proposal in that year, which stated in a bar association resolution that in the future all offices operating within the bar association's territory would be expected to allow their staff not to work on Sundays.[36] Lawyers could therefore continue to receive clients on the Lord's Day, but the unlimited Sunday work of trainee lawyers, scriveners, and typists – at least in Budapest – came to an end.

The issue of Sundays off is a good example of how trainee lawyers have been able to tackle a problem successfully. Despite the conflict we had seen in the past, their action was successful because their efforts were aimed at solving a well-defined problem limited to the capital. The only way they could assert their interests against lawyers was to win over other actors to their original idea. Law firms were not only staffed by trainee lawyers, but also by scriveners, typists, and legal assistant, and representing their interests to the bar was a decisive step. Although trainees also committed serious mistakes in communicating the problem, their ideas did not conflict with the general interests of lawyers, and were not related to other professional problems that needed to be solved.

5. Photo identification against "fake trainee lawyers"

Finally, I would like to draw attention to one last question. The aspect described below is, however, quite different from the ones above, since trainee lawyers and lawyers took a firm common position on this issue, in opposition to state actors and bar leadership.

Under the code of conduct for lawyers, a trainee lawyer could, with the authorization of his principal, act as a deputy in the courts.[37] This, however, led to numerous abuses during the period, as the identity and eligibility of trainee lawyers was rarely verified in the courts. The abuses were not without consequences.[38] Some judges have appealed to the Budapest Bar

[30] MÁRKUS, D., Kötelező ügyvédjelölti szervezet (Mandatory Organization of Trainee Lawyers). In: *Ügyvédek Lapja*, vol. 26, Nr. 31, 1909, p. 1-2; POPPER, T., Kötelező ügyvédjelölti – szabad ügyvédi szervezet (Mandatory Trainee Lawyer Organization – Free Association of Lawyers). In: *Ügyvédek Lapja*, vol. 26, Nr. 36, 1909, p. 2-3.

[31] ÖDÖNFY, M., Az ügyvédjelöltek helyzete (The Status of Trainee Lawyers). In: *A Jog*, vol. 11, Nr. 17, 1892, p. 147; Az ügyvédjelölt felmondási ideje (Period of Notice for Trainee Lawyer). In: *A Jog*, vol. 15, Nr. 34, 1896, p. 239.

[32] M., I., Vasárnapi munkaszünet az ügyvédi irodákban (Sunday off at Law Firms). In: *Ügyvédek Lapja*, vol. 3, Nr. 28, 1886, p. 7.

[33] BÓDY, ZS., A munkaviszony a kereskedelemben és iparban a századforduló Magyarországán a joggyakorlat tükrében (The Employment Relationship in Commerce and Industry in Turn-of-the-Century in Hungary in the Light of Legal Practice). In: SASFI, CS. (Ed.), *Régi témák, mai kérdések a mentalitástörténetben*. Esztergom, 2000, p. 219-220; PREPUK, A., Egy szociális törvény a rendeletalkotás útvesztőiben: a vasárnapi munkaszünet bevezetése Magyarországon (A Social Act in the Maze of Regulation: the Introduction of Sunday off in Hungary). In: *Történelmi Szemle*, vol. 53, Nr. 2, 2011, p. 183-214.

[34] Vasárnapi munkaszünet az ügyvédi irodákban (Sunday off at Law Firms). In: *Ügyvédek Lapja*, vol. 13, Nr. 25, 1896, p. 7; Vasárnapi munkaszünet az ügyvédi irodákban (Sunday off at Law Firms). In: *Ügyvédek Lapja*, vol. 13, Nr. 46, 1896, p. 7.

[35] Bíróságok vasárnapi munkaszünete (Courts off on Sundays). In: *Ügyvédek Lapja,* vol. 17, Nr. 10, 1900, p. 2.

[36] Vasárnapi munkaszünet (Sunday Working Holiday). In: *Ügyvédek Lapja*, vol. 25, Nr. 21, 1908, p. 8.

[37] See: HAVLIK, J., Az ügyvédjelölt képviseleti jogköre (Rights of Representation of Trainee Lawyer). In: *Ügyvédek Lapja*, vol. 24, Nr. 49, 1907, p. 4-5; SOMLÓ, GY., Az ügyvédjelölt képviseleti jogköre (Rights of Representation of Trainee Lawyer). In: *Ügyvédek Lapja*, vol. 24, Nr. 50, 1907, p. 6.

[38] Lukács Emilnek ügyvédjelöltek útmutatójához (Emil Lukács' Guide for Trainee Lawyers). In: *A Jog*, vol. 25, Nr. 36, 1906, p. 254-255.

Association, requesting them to ask trainee lawyers to bring their identity cards to the courtroom in all cases. This shows the prevalence of "fake trainee lawyers" and hedge writers who acted before the courts without an actual authorization, and often with insufficient legal knowledge. Not only the trainee lawyers, but also the lawyers and the civil law notaries themselves, spoke out against these hedge writers.[39] The bar advocated stricter controls for trainee lawyers, and a few years later, a new provision was introduced for trainee lawyers in the capital. Under this, from 1 January 1901, the Budapest Bar issued photo identity cards.[40]

The new procedure has seriously damaged the trainee lawyers' professional self-esteem. In their view, it has created an additional barrier between trainees and practicing lawyers, who were not required by the courts to hold any photo certificate. On the other hand, they argued that the measure would not achieve the bar's objective of discouraging fake trainee lawyers, as many courts did still not ask for presentig a photo identification.[41]

It would have been in the common interest of lawyers and trainee lawyers to reduce the number of hedge writers, but the initiative of the Budapest Bar Association described above has nevertheless provoked surprising reactions from the bar's members. Trainee lawyers complained of divide and an increase in administrative burdens, while lawyers were opposed to any reform that would put obstacles in the way of their flexible approach to courtroom appearances. This included the fact that principals who employed trainee lawyers often failed to comply with their legal obligations even in relation to their employees. For example, it was regularly the case that lawyers did not report to the bar in time on the conduct and professional development of their trainee lawyers.[42]

6. Outlook on the context: professionalization and the concept of social closure

The presentation showed which professional tools and argumentation were at the disposal of trainee lawyers, and which tools were worth using when advocating. The discussion revealed that, initially, the scope of trainee lawyers was extremely limited, and that both the working environment and the social and financial standing of trainee lawyers were in the hands of lawyers. There were also many obstacles to the self-organization of trainee lawyers, just as there had been no progress on remuneration over the decades. However, a few specific examples have highlighted the need for an accurate understanding of the situation of trainee lawyers and the interdependent relationship between practicing lawyers and trainees. Overall, it was found that the relationship between lawyers and trainee lawyers in the era of dualism was characterized by ambivalence, and was influenced by both alternating forms of conflict and compromise.

However, the relationship between the two parties should also be seen in a broader context. The results of this research fit well into the paradigm of professionalization,[43] as the history of lawyers helps us to understand the transformation of liberal professions as well as that of the middle classes. The complex issue described above is essentially related to a new approach to the thesis of professionalization, the Neo-Weberianism or interactional (conflict theory) approach, which emerged in the 1970s and has been interpreted only in a much more moderate way in Hungary. According to this view, professions do not simply respond to market conditions, but also manage and shape them, and when they do so successfully, they are called professions. In the spirit of this line of thought, Randall Collins wrote that professions can be defined as status groups, since they have a high social prestige due to the control over economic factors.[44] Far from operating in the spirit of the free market, professions actually use tools to influence the number of people wishing to enter a certain profession.[45]

The interpretative framework of Collins and other neo-Weberian authors, however, would only remain valid in an idealized market environment. It has been known since Akerlof's theory that the free market would morally disintegrate under asymmetric information.[46] Professions can prevail in evolutionary terms because they offer a compromise to the problem. This

[39] ROKOLYA, G., Lawyers, Civil Law Notaries vs. Municipal Scriveners. A Particularity of Hungarian Legal History: the Private Activities of Scriveners. In: *Journal on European History of Law*, vol. 9, Nr. 2, 2018, p. 140-147.

[40] Az ügyvédjelöltek kamarai igazolványa (Bar Pass for Trainee Lawyers). In: *A Jog*, vol. 13, Nr. 50, 1894, p. 367; Uj ügyvédjelölti igazolványok (New Bar Pass for Trainee Lawyers). In: *A Jog*, vol. 19, Nr. 45, 1900, p. 328; Az ügyvédjelölti igazolványok tárgyában (On the Bar Pass for Trainee Lawyers). In: *Ügyvédek Lapja*, vol. 17, Nr. 49, 1900, p. 11.

[41] HUBAY, M., Az ügyvédjelöltekről (On Trainee Lawyers). In: *Ügyvédek Lapja*, vol. 17, Nr. 47, 1900, p. 5-6.

[42] Az ügyvédjelöltekről szóló évi jelentések (Annual Reports on Trainee Lawyers). In: *A Jog*, vol. 12, Nr. 2, 1893, p. 15; Az ügyvédjelöltek magaviseletéről (On the Conduct of Trainee Lawyers). In: *A Jog*, vol. 13, Nr. 6, 1894, p. 47.

[43] The paradigm of professionalization was born within the Anglo-Saxon social science discipline in the 1930 s and 1940 s. Professionalization means the pursuit of an activity becoming a profession, i.e. it undergoes a quality change. At the same time, it can also refer to the increasing sophistication of working life, as well as to the self-organization of the professions. The innovative approaches of the 1970 s and 1980 s made it clear that the process was not one-way but could be reversed, what is known as deprofessionalization. WILENSKY, H. L., The Professionalization of Everyone? In: *The American Journal of Sociology*, vol. 70, Nr. 2, 1964, p. 137-158; BURRAGE, M., Introduction: the Professions in Sociology and History. In: BURRAGE, M., TORSTENDAHL, R. (Eds.), *Professions in Theory and History. Rethinking the Study of the Professions*. London-Newbury Park-New Delhi, 1990, p. 1-23; KELLER, M., *Experten und Beamte: Die Professionalisierung der Lehrer höherer Schulen in der zweiten Hälfte des 19. Jahrhunderts - Ungarn und Preußen im Vergleich*. (Studien zur Sozialund Wirtschaftsgeschichte Ostmitteleuropas, 24.) Wiesbaden, 2015, p. 20-24.

[44] COLLINS, R., Market closure and the conflict theory of professions. In: BURRAGE, M., TORSTENDAHL, R. (Eds.), *Professions in Theory and History. Rethinking the Study of the Professions*. London-Newbury Park-New Delhi, 1990, p. 24-43.

[45] EVETTS, J., Professions in Turbulent Times: Changes, Challenges and Opportunities. In: *Sociologia. Problemas e Práticas*, vol. 23, Nr. 88, 2018, p. 48-49.

[46] AKERLOF, G. A., The Market for 'Lemons': Quality Uncertainty and the Market Mechanism. In: *Quarterly Journal of Economics*, vol. 84, Nr. 3, 1970, p. 488-500.

compromise is dedicated to eliminate market uncertainty by introducing licensing practices. In the case of lawyers, such practices include, for example, the doctorate in law or the bar exam or bar membership.

From the point of view of the paradigm of professionalization, trainee lawyers were a kind of semi-profession, as they lacked autonomy just as their attempts at self-organization often failed.[47] Without their work, however, the prestigious legal profession could not function effectively, and one glaring example of this is the practice of substitution in courtrooms. The underregulation of substitutions also hindered transparent judicial proceedings, but making the system more transparent was not in the interest of all lawyers. From the outset, the aspirations of trainee lawyers working at law firms were to reduce the existing social and professional gap between lawyers and trainee lawyers. The relationship between Hungarian lawyers and trainee lawyers can therefore also be understood as a projection of certain market effects within the legal profession.

The relationship between Hungarian lawyers and trainee lawyers can serve as a case study for understanding professionalization processes in continental Europe and Central Europe. According to Hannes Siegrist, there are basically four models to describe professionalization in Central Europe in the 19th century.[48] By the end of the 19th century, a modern code of conduct for lawyers was also introduced in the German Empire, guaranteeing the German lawyers' professional autonomy under the liberal professionalization (*liberale Professionalismus*). The new legal framework essentially guaranteed free access to the legal profession.[49]

Similar processes were taking place in Hungary during this period.[50] The code of conduct for lawyers introduced by the legislature ensured the rights of lawyers and determined their obligations, but did not regulate the relationship between lawyers and trainee lawyers at all. Under the liberal paradigm of professionalization, the state, by guaranteeing the autonomy of the legal profession by law, no longer wished to take a position or exercise control over other professional matters. Trainee lawyers could not expect any reforms from the all-time government, since for the decision-makers the issue of trainee lawyers was closely linked to the lawyer profession and, in a broader sense, to the systemic problems of the Hungarian legal profession and the judicial sphere. This also explains why one of the spectacular successes of the trainee lawyers, the introduction of Sundays off in the case of Budapest law firms, was not a concession by the government but by the bar in contoll.

On the other hand, the results of the research are closely related to social closure theory, as the rivalry between lawyers and trainee lawyers sheds light on the mechanisms that influenced the practice of social closure in the 19th century. The foundations of the social closure paradigm are derived from Max Weber, but it only really became a coherent social theory in the 1970s.[51] A comprehensive interpretation of the works of Frank Parkin, Raymond Murphy and Randall Collins is of course not possible here,[52] so it is only worth noting that, according to the theory, the purpose of social classes and groups is always to exclude outsiders: to close them off to some extent from the social and economic advantages and opportunities in question. The key question in social closure theory is how social classes have organized themselves around particular interests, and how they have closed off resources from other social groups. Nevertheless, theorists of closure theory have narrowed the Weberian concept by focusing their work only on how resources should be monopolized by particular groups.[53]

The social closure practice of lawyers and trainee lawyers is multi-layered.[54] The prestige of the legal profession and the law, some argue, is based primarily on the fact that the language of jurisprudence has become detached from everyday language, which has created an epistemological divide among language users. The specific legal language has constantly reinforced the social and symbolic distance of lawyers, judges, prosecutors and further legal professionals from other social classes.[55] I could not deal with legal language issues in the present study, which would obviously require a different methodology and analysis of other sources.[56] Rather, in the case of the neo-Weberian ap-

[47] RÜSCHEMEYER, D., The Legal Profession in Comparative Perspective. In: *Sociological Inquiry*, vol. 47, Nr. 3-4, 1977, p. 116-118. For a new conceptual approach, see: NISHIMURA, T., Reconsidering the Concept of Modern Professionals. In: *The Kyoto Economic Review*, vol. 82, Nr. 1-2, 2013, p. 2-18.

[48] SIEGRIST, H., *Advokat, Bürger und Staat. Sozialgeschichte der Rechtsanwälte in Deutschland, Italien und der Schweiz (18-20. Jh.)* Vol. 1. (Ius Commune, Studien zur Europäischen Rechtsgeschichte 80.) Frankfurt am Main, 1996, p. 41-68, 134-135, 152-169.

[49] Ibidem, p. 406-411.

[50] KORSÓSNÉ DELACASSE, K., 2012, p. 48-90; KOVÁCS, M. M., 1996, p. 8-30.

[51] HARRITS, G. S., Professional Closure Beyond State Authorization. In: *Professions and Professionalism,* vol. 4, Nr. 1, 2014, p. 1-17; AGEVALL, O., Social Closure: on Metaphors, Professions and a Boa Constrictor. In: LILJEGREN, A., SAKS, M. (Eds.), *Professions and Metaphores. Understanding Professions in Society*. London-New York, 2017, p. 63-76.

[52] PARKIN, F., Strategies of Social Closure in Class Formation. In: PARKIN, F., *The Social Analysis of Class Structure*. London, 1974, p. 1-18; MURPHY, R., The Struggle for Scholarly Recognition. The Development of the Closure Problematic in Sociology. In: *Theory and Society*, vol. 12, Nr. 5, 1983, 631-658; MURPHY, R., The Structure of Closure: A Critique and Development of the Theories of Weber, Collins, and Parkin. In: *The British Journal of Sociology*, vol. 35, Nr. 4, 1984, 547-567; COLLINS, R., 1990.

[53] MACKERT, J., Social Life as Collective Struggle: Closure Theory and the Problem of Solidarity. In: *Sozialpolitik.ch*, vol. 1, 2021, p. 1-19. https://www.sozialpolitik.ch/fileadmin/user_upload/2021-1-5-mackert.pdf

[54] Family background and social origin have an important influence on the structure of the legal professions, even in societies with a well-developed education system. See: HANSEN, M. N., Closure in an Open Profession. The Impact of Social Origin on the Educational and Occupational Succes of Graduates of Law in Norway. In: *Work, Employment & Society*, vol. 15, Nr. 3, 2001, 489-510.

[55] HARRITS, G. S., 2014, p. 5-6. See also: LILJEGREN, A., Key Metaphors in the Sociology of Professions: Occupations as Hierarchies and Landscapes. In: LILJEGREN, A., SAKS, M. (Eds.), *Professions and Metaphores. Understanding Professions in Society*. London-New York, 2017, p. 20-21.

[56] Novak was concerned with the creation of Slovenian legal language: NOVAK, M., Vloga slovenskih odvetnikov in razvoj položaja slovenskega jezika kot pravnega jezika od 1848 do 1918. In: *ACTA HISTRIAE*, vol. 29, Nr. 1, 2021, p. 79-90.

proach, the relationship between the state and social classes and groups needs to be highlighted. As we have seen, in Hungary the legal framework of the legal profession was established by the state, and this legal framework ensured the high social status of lawyers.[57] The self-discipline conferred on bars was a means of exercising control not only over practicing lawyers but also over trainee lawyers. This authority was of course not limited to disciplinary procedures, but also extended to the day-to-day work of trainee lawyers (photo identification and certificates requested by their principals). Looking at the many actions and ideas of trainee lawyers, it is now clear that when they sought to approach lawyers, that is full members of the bar, they were seeking to bridge the gaps created by social closure by various means.[58] The ambivalent relationship between Hungarian lawyers and trainee lawyers can therefore also be described as a specific form of social closure, when distinctions are made within a given social group or profession.[59] The hardly successful actions of trainee lawyers to form associations and the ineffective efforts to improve salaries and working conditions also point to the fact that on certain issues lawyers did not allow the trainee lawyers to formulate a coherent strategy to access the resources.[60]

The juxtaposition of the paradigms of professionalization and social closure, and sometimes the matching up of the two theories,[61] as well as the comparison of hypotheses with empirical research, may yet yield new research results on a number of questions related to the history of the emergence and functioning of different professions.[62]

[57] MACDONALD, K. M., Social Closure and Occupational Registration. In: *Sociology*, vol. 19, Nr. 4, 1985, p. 543-544.

[58] SAKS, M., A Review of Theories of Professions, Organizations and Society: The Case for Neo-Weberianism, Neo-institutionalism and Eclecticism. In: *Journal of Professions and Organization*, vol. 3, Nr. 2, 2016, p. 179.

[59] SIDA, L., The Legal Profession as a Social Process: A Theory on Lawyers and Globalization. In: *Law & Social Inquiry*, vol. 38, Nr. 3, 2013, p. 671-672; LILJEGREN, A., 2017, p. 13-15. This kind of social closure has also been observed in other legal professions, see an example from central Europe: ROGOWSKI, R., German Corporate Lawyers: Social Closure in Autopoietic Perspective. In: DEZALAY, Y., SUGARMAN, M. (Eds.), *Professional Competition and Professional Power: Lawyers, Accountants and the Social Construction of Markets*. London-New York, 2005, p. 82-97.

[60] MACKERT, J., 2021, p. 10-11.

[61] SAKS, M., Defining a Profession: The Role of Knowledge and Expertise. In: *Professions and Professionalism*, vol. 2, Nr. 1, 2012, p. 4-5; HARRITS, G. S., 2014, p. 4-5.

[62] SAKS, M., 2016, p. 178-181.

A Hungarian Jurist's Views on 19th-Century English Juries

Tamás Antal *

Abstract

The author presents a brief amendment to the history of British common law by publishing the opinion of a talented Hungarian lawyer on English juries according to his 1870 viewpoint. The new liberal Government sent a young ministry councilor to London to examine the criminal procedure law of that time. After returning home he became one of the flag-bearers of juries in the Austro-Hungarian Monarchy and also made a remarkable influence on the codification process that led to the first Hungarian Code of Criminal Procedure decades later. He armed the constitutional system of the United Kingdom in the second half of the 19th century and the way its legal institutions operated became basic standards for his reform plans as a Minister of Justice in the 1890 s. His name was Desider Szilágyi.

Keywords: *Hungary; England; Jury; Criminal procedure; 19th century; Old Bailey.*

1. The jury in Hungary

The first third of the 19th century was an important stage in the history of the English jury, although not in the year 1832, which brought many liberal constitutional reforms, but somewhat earlier, when in 1825 the Parliament adopted the first law (act) renewing the organizational framework of this legal institution.[1] This was still in force one hundred and forty years later, in 1965, at the time of the report of the committee headed by Lord Morris.[2] Since in the Hungarian reform era travelers, who visited Western European countries to gain experience, encountered its effects upon arriving England, and because of this law was closest in time to the first proposal of the Hungarian Criminal Procedure Code (1843)[3] and the Press Act of 1848,[4] and as a result, to Minister of Justice Ferenc Deák's[5]

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1 6 Geo. IV, cap. 50: An Act for consolidating and amending the Laws relative to Jurors and Juries; with commentary: KENNEDY, J., *Treatise on the Law and Practice of Juries: as Amended by Statute 6 Geo. IV c. 50, including the coroner's inquest,* & *c*. London, 1826.

2 *Report of the Departmental Committee on Jury Service*, Presented to the Parliament by the Secretary of State for the Home Department by Command of Her Majesty (Cmnd. 2627), London, 1965.

3 In 1843 the debate on the Criminal Procedure Code was started at the House of Commons of the feudal Hungarian Parliament *(Országgyűlés)*, during which the debate on the introduction of a jury system irrespective of the feudal (legal) differences was first adjourned, then despite the adjournment the planned juries were nevertheless voted for by the representatives on 27th January 1844. However, the House of Lords rejected the entire bill because of its liberal and anti-feudal institutions. In parallel with this, a Code of Penal Law was submitted, but its fate was similar. DIÓSZEGI SZABÓ, P., '„Nem bírok kiszámított ékesszólással…" – Az 1843–44. évi esküdtszéki vita és Madách Imre beszéde az esküdtszékek mellett' ['„I do not have a strict eloquence" – The Debate on Juries in 1843–44 and Emericus Madách's Speech in Favour of Juries']. In: Máté, Zs., Varga, E. (Editors), *XXIV. Madách Szimpózium* [XXIV. Madách Symposium], Szeged–Balassagyarmat, 2017, p. 27–86. About the feudal Parliament (Diets) see: HÖRCHER, F., LORMAN, T. (Editors), *A History of the Hungarian Constitution: Law, Government and Political Culture in Central Europe*, London–New York, 2020, p. 35–43. About the codifications of 1843–44 see: Balogh, E., *Die ungarisches Strafrechtskodifikation im 19. Jahrhundert* = Rechtsgeschichte und Rechtsgeschehen 12, Berlin, 2010, S. 12–18, S. 39–46.

4 The Press Act of 1848 regulated the guarantees of the liberal press in Hungary at the first time. It consisted of legal norms on the administrative and financial requirements of distributing printed journals and books and it also listed the crimes could be committed in printed materials. The main goal of the statute was establishing the freedom of the press with no political censorship. Later the illegal offences (crimes) mentioned were codified in the Hungarian Criminal Code (1878) but the other parts of the Act were kept in effect until 1914. Varga, N. (Translator and editor), *The Acts of 1848 in Hungary* = Fundamenta Fontium Juris 2, Szeged, 2012, p. 60–61.

5 Ferenc Deák (1803–1876) was an excellent lawyer and a significant Hungarian politician in the 19th century. He led the first codification of the Hungarian criminal law and criminal procedure in 1843. He was the first Minister of Justice in the history of the Hungarian governments (1848) and the very first decree on the jury trial was issued by him in the months of the revolution of 1848, too. Later he was one of the originators and the main leader of the negotiations between Austria and Hungary for the Compromise in 1867 as well as the leader of the liberal party between 1867 and 1875 (Deák-party). STIPTA, I., 'Die Ansichten von Franz Deák über Recht, Wahrheit und Macht'. In: *Jogtörténeti Szemle*, Vol. 19 (Sonderheft), 2021, S. 70–75.

first decree on press jury (29 April, 1848),[6] the study of the *Juries Act of 1825 was not indifferent for the contemporary Hungarian literature either.*

For instance, based on his French and English impressions, Bertalan Szemere[7] wrote the following about the *values of the European lay administration of justice in his travel notes in 1837:* „we see almost 90 million people resting peacefully in the enormous shadow of this popular institution, on the other hand, it is striking that it exists and flourishes in the countries which, having the most advanced constitutions, can be said to be free most of all."[8]

The jury aroused the interest of liberal politicians and the legal profession in Hungary already during the reform era.[9] In the course of the bourgeois revolution,[10] Acts of 1848 constituted trial by jury only in cases of *press offences*, the procedural rules of which were ultimately regulated by a decree of the minister of justice, not on the level of a statute. They must have considered the virtues of the English law of 1792 (Libel Act), which extended the powers of the jury to protect the freedom of the press as it confirmed that the judge could not say what was and what was not a libel as a judgement of law.[11] Nevertheless, its actual application in Hungary was thwarted by the war of independence (1848–49).

In the period of Habsburg neo-absolutism – between 1849 and 1867 – juries did not operate in the Realm at all.

The first Hungarian government after the so-called Austro-Hungarian Compromise (1867)[12] considered the matter of juries to be essential in the distant future, mainly in press regulation,[13] but at the same time its real practice was mostly obscured. As regards lay judgment, the available literature examined mainly the contemporary versions developed in the member states of the German Confederation *(Deutscher Bund, Norddeutscher Bund)*,[14] and actually, according to through their communication,– at least with respect to the jury – the French and the Italian legal solutions were rather viewed.[15] Since the example of England could not be ignored from the point of view of studying parliamentarism, either, Minister of Justice Bold-

[6] BOTH, Ö., 'Küzdelem az esküdtbíráskodás bevezetéséért Magyarországon a reformkorban és az 1848. április 29-i esküdtszéki rendelet' ['The Struggle for Jury Jurisdiction in Hungary in the Reform Period and the Decree of 29th April, 1848']. In: Self-same: *Reform és forradalom. Egybegyűjtött írások Magyarország alkotmány- és jogtörténetéből, 1790–1849* [Reform and Revolution: Collected Papers on the Constitution and Legal History of Hungary, 1790–1849], Editor: Ruszoly, J., Szeged, 2009, p. 83–131.

[7] Bertalan Szemere (1812–1869) was a politician, a lawyer and a writer. He travelled through Western Europe in the 1830 s and examined the constitutional institutions of modern states. He was the Home Secretary of the first Hungarian Government in 1848 and the Prime Minister of the Government in 1849 after accepting the Declaration of Independence (14th April 1849) against the Austrian Empire. Because of these activities he was sentenced to death while he was in exile, and could only return home in 1865 after the general amnesty granted by King Franz Joseph.

[8] SZEMERE, B., *Utazás külföldön* [Travelling Abroad], Pest, 1845, Volume 1, p. 162–164.

[9] ANTAL, T., 'The Codification of the Jury Procedure in Hungary'. In: *The Journal of Legal History*, Vol. 30, No. 3, December 2009, p. 279–297, specially: p. 280–284.

[10] The great revolutionary period in Europe (the so-called "Spring of Nations") caused a bourgeois revolution in Hungary in March 1848, too, in October it turned to a war of independence against the Habsburg Dynasty and Empire and ended in failure on 13th of August 1849. Many heroes were executed or sent to prison. See: HÖRCHER–LORMAN 2020 (n. 3), p. 100–107.

[11] HELMHOLZ, R.H., 'Civil Trials and the Limits of Responsible Speech'. In: Helmholz, R.H. and Green, T.A., *Juries, Libel, and Justice: the Role of English Juries in Seventeenth- and Eighteenth-Century Trials for Libel and Slander*, Los Angeles, California, 1984, p. 1–36; GREEN, T.A., *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800*, London–Chicago, 1985, p. 318–355; HOSTETTLER, J., *Thomas Erskine and the Trial by Jury*, Chichester, 1996, p. 83–85, p. 94–96, p. 143–144. In Hungarian: BARSI, J., 'A sajtó- és nyilatkozási szabadság története Angliában, 1760–1860' ['The History of Free Press and Statements in England, 1760–1860'] Part 1. In: *Budapesti Szemle*, No. 4, 1865, p. 579–602, especially: p. 588–591.

[12] The Compromise of Austria and Hungary established an extraordinary connection between the two monarchies in 1867, which is technically described as a real union of states ("Austro-Hungarian Monarchy"). It meant that both Austria and Hungary were sovereign states but they had three common relations: foreign affairs, defense in the case of a war and the finances connected with the preceding areas. This cooperation functioned well but it came to a sudden end after World War I (October–November 1918). See in English: HÖRCHER–LORMAN 2020 (n. 3), p. 283–301; MÁTHÉ, G. (Editor), *The Hungarian State 1000–2000: Thousand Years in Europe*, Budapest, 2000, p. 217–248 (chapters by MÁTHÉ, G. and PÖLÖSKEI, F.); in German: GOTTAS, F., *Ungarn im Zeitalter des Hochliberalismus: Studien zur Tisza-Ära (1875–1890)*, Wien, 1976.

[13] ANTAL 2009 (n. 9), p. 284–285; MÁTHÉ, G., *A magyar burzsoá igazságszolgáltatási szervezet kialakulása, 1867–1875* [Formation of the System of the Hungarian Bourgeois Jurisdiction, 1867–1875], Budapest, 1982, p. 76–82; RÉVÉSZ, T., 'Pressevergehen im ungarischen Recht der dualistischen Zeit'. In: Máthé, G., Mezey, B. (Hrsg.), *Die Elemente der ungarischen Verfassungsentwicklung: Studien zum Millennium*, Budapest, 2000, S. 63–70. On the autonomic territory of Croatia (a land of the Hungarian Realm until 1918): ČEPULO, D., 'The Press and Jury Trial Legislation of the Croatian Diet 1875–1907: Liberalism, Fear of Democracy and Croatian Autonomy'. In: *Parliaments, Estates and Representation*, Vol. 22, No. 1, 2002, p. 169–192.

[14] LANDAU, P., 'Schwurgerichte und Schöffengerichte in Deutschland im 19. Jahrhundert bis 1870'. In: Padoa Schioppa, A. (Editor), *The Trial Jury in England, France, Germany, 1700–1900,* Berlin, 1987, p. 241–304; RÉSŐ ENSEL, S., *Az esküdtszék Magyarországon* [The Jury in Hungary], Pest, 1867 (despite the title, this book gave a perspective mainly on Germany); FAYER, L., 'Refom-mozgalmak az esküdtszéki intézmény terén' ['Reform Movements on Juries']. In: *Magyar Themis*, No. 5, 1871, No. 5, 1872, No. 9, 1872, p. 37 (1871), p. 38–39 (1872), p. 72–73 (1872); RUSZOLY, J., *Európai jog- és alkotmánytörténelem* [The Legal and Constitutional History of Europe] = Opera Iurisprudentiae 1, Szeged, 2011, p. 505–507.

[15] DONOVAN, J.M., *Juries and the Transformation of Criminal Justice in France in the Nineteenth and Twentieth Centuries*, Chapell Hill, NC, 2010, p. 87–110; DONOVAN, J.M., 'Not a Right but a Public Function: The Debate in the French National Assembly over the 1872 Law on Jury Formation'. In: *French History*, Vol. 21, No. 4, 2007, p. 395–410; PASSARELLA, C., 'From Scandalous Verdicts to "Suicidal Sentences": The Reform of the Courts of Assize under the Fascist Regime'. In: *Studia Iuridica* LXXX (Wydawnictwa Uniwersytetu Warszawskiego) Warsawa, 2019, p. 251–264, specially: p. 251–253, p. 262–263; PASSARELLA, C., 'From Scotland to Italy and Back: Enrico Ferri, the Verdict of Not Proven and its Consequences on the Accused'. In: *Forum Historiae Iuris*, 16 November, 2020 [an e-document: https://forhistiur.net/2020-11-passarella/#5 (see sections 42–45)].

izsár Horvát[16] decided to send a government official to Great Britain. He chose Desider Szilágyi, a thirty-year-old energetic young jurist and later a great reformer, who resembled English statesman Henry Brougham in terms of mentality.[17]

During the organization of the Ministry of Justice, in 1867, Horvát appointed Szilágyi as presidential secretary, and then, due to his talent, he soon started to rise through the ranks and became a councilor of the ministry. During his legislative preparatory work, his genius, high level of competence and leadership qualities immediately became apparent.[18] In any case, as he was a man with knowledge of the language, wide reading and difficult-to-handle personality, Horvát dispatched him to England in 1870, where he spent half a year conducting, among other things, the *a posteriori* examination of criminal substantive (material) and procedural law. It was then that he discovered the essence of trial by jury, and upon returning home, he became one of its most committed advocates in Hungary. This revelation accompanied him throughout his life. As a result, twenty years later, then already as the *Minister of Justice* – unlike his predecessors – he insisted on extending the powers of the jury and including it in the codification of the ordinary criminal procedure passionately. It is not an exaggeration to say that the integration of the trial before the jury into the Code of Criminal Procedure (1896) could not have been realized without him, as it had been rejected by his more conservative predecessors during the drafting of earlier bills, and based on their previous experience, practicing jurists of Hungarian – mainly judges and public prosecutors – were also distrustful of lay judgment.[19]

Szilágyi is commonly criticized for writing relatively few legal works during his career rich in achievements.[20] However, one of his most important publications fits right here because upon returning from „Albion" he made a summary report on the experience of his travel, some excerpts of which were published in three installments in the journal *Themis*,[21] and the ministry's journal, *Jogtudományi Szemle* [Scientific Law Review], also published studies that were presumably written by him.[22] Since the archives of the Ministry of Justice were later destroyed, his views at that time can only be reconstructed from these sources.

According to the 1848 regulation juries should have been organized in every county tribunal, but after the Compromise of 1867 juries were activated only in some tribunals with special authority. The county tribunals were on the second level in the hierarchy of royal courts after the national judicature reforms between 1868 and 1871 (district courts, county tribunals, courts of appeal, Curia). This way the tribunals with jury performed the jurisdiction in a regional system.

2. Desider Szilágyi on the activities of the English jury

„I must confess that I was rather pessimistic regarding the institution of the jury. I was not enthusiastic about this institution" – Szilágyi was characterized by this negative starting point based on his prior knowledge acquired from his readings.[23] In the first phase of his career, he held a good professional judge in much higher esteem than a good juror, although his absolute respect for judges and prosecutors was characteristic of his views

[16] Boldizsár Horvát (1822–1898). In 1848 he became a Member of Parliament. After the war of independence, he could continue practicing law from 1850. In 1861 he was a member of the so-called National Judicial Conference and was elected again a Member of Parliament. In 1865 he was re-elected to be a representative in Parliament, then, in connection with the process of the compromise negotiations the King appointed him as Minister of Justice in 1867. He undertook the most difficult task: to carry out the first judicial organizational and procedural reforms separating public administration and the power of jurisdiction. Despite their success, the conservative aristocracy exerted significant political pressure on him, which made him leave his office in 1871, however, he remained a liberal politician until the end of his life. He was elected honorary member of the Hungarian Academy of Sciences in 1868.

[17] FORD, T.H., *Henry Brougham and His World: A Biography*, Chichester, 1995.

[18] Dezső [in English and German texts: Desider] Szilágyi (1890–1901) was born in Nagyvárad (now Oradea in Romania) in a Calvinist family. He completed his studies in Pest and Vienna, then in 1865 he opened a law office in the Hungarian capital, where he also became a journalist for political dailies. He first met that he first met Ferenc Deák and Boldizsár Horvát there, so in 1867 he could join Horvát's Ministry of Justice as presidential secretary, and in 1869 he was already councilor of the ministry. In 1870 he made a study visit to England, where he acquainted himself with criminal substantive law and procedural law and became the standard-bearer for the institution of the jury in Hungary. In 1871 Szilágyi was moved to the new codification committee subordinated to the Prime Minister's Office, but this body ceased to exist in 1874. This was when he was appointed to be a full professor of politics (constitutional law and administrative law) as well as criminal law at the University of Budapest. He first became a Member of Parliament representing the pro-government party in 1871. In 1875 he was a fellow of the new Liberal Party *(Szabadelvű Párt)*, but in 1878 he joined the opposition, of which he became a leading figure, while from 1886 he was a non-party politician. He returned to the Liberal Party in 1889 and was appointed Minister of Justice in PM Count Kálmán Tisza's Government. He resigned from ministry in 1895. He was soon elected as a chairman of the House of Representatives in Parliament and he held this position until 1898, when he left his party again and returned there only after the departure of the PM. In 1897 he was elected honorary member of the Academy of Sciences. See in German: *Österreichisches Biographisches Lexikon*, *1815–1950*, Bd. 14, Wien, 2013, S. 155–156; BALLA, A., 'Ungarische Bildergalerie: Desider Szilágyi'. In: *Pester Lloyd*, Morgenblatt, 13 September, 1942, S. 11–12.

[19] Antal, T., 'Das Strafverfahrensrecht (1867–1944)'. In: Máthé, G. (Hrsg.), *Die Entwicklung der Verfassung und des Rechts in Ungarn*, Budapest, 2017, S. 565–595, specially: S. 569–580.

[20] As perhaps the most significant jurist politician of the era of dualism, he made long-lasting accomplishments in almost every field, from the issues of judicial organization through the codification of procedural law to the reforms of church law. See: STIPTA, I., 'Szilágyi Dezső és az igazságügyi modernizáció' ['Desider Szilágyi and the Modernization of Jurisdiction']. In: Csibi, N., Domaniczky, E. et al. (Editors), *Deák és utódai. Magyar igazságügyi miniszterek 1848/49-ben és a dualizmus korában* [Deák and His Successors: Hungarian Ministers of Justice in 1848/49 and in the Dual Monarchy], Pécs, 2004, p. 137–152.

[21] SZILÁGYI, D., 'Szilágyi Dezső igazságügyminiszteri osztálytanácsos hivatalos jelentéséből, az angol büntető eljárást illetőleg' ['From the Official Report of Ministerial Councillor Desider Szilágyi on the English Criminal Procedure']. In: *Themis*, No. 10, 11 and 14, 1870, p. 122, p. 134–137, p. 193–194. Also published in: ANTAL, T., *Szilágyi Dezső és műve* [Desider Szilágyi and His Achievements], Szeged, 2016, p. 87–98.

[22] *Jogtudományi Szemle*, No. 2 and 4, 1870, p. 54–61, p. 145–156.

[23] SZILÁGYI 1870 (n. 21), p. 135.

on the members of the Hungarian legal profession later on as well. During his secondment, the source of his impressions of the jury was primarily the Old Bailey in London.

First, he examined the jurors' attitude to their function in the trial; how much they feel the weight of their responsibility when making the verdict:

> I found that normally they are seriously aware of their duty. That they pay close attention to the evidence, and the verdict is normally based on the evidence and not on some general vague impression, that in many cases their sense of duty overcomes natural pity and sympathy, that clear reasoning discussing the merits of the case has the greatest impact on them. Overall, the result is that generally they give a correct verdict, which the public and even the lawyers acquiesce in.[24]

He found the average juror in London to be objective, exact-minded, and not someone who dispenses some kind of mercy. He believed that this was not only his feeling, but English practicing lawyers themselves were also satisfied with this legal institution and did not contrast jurors and professional judges as sharply as they did in Hungary. On the other hand, he observed that, the English society felt that jury service itself was a burden, and the better-off, especially the *special jury*, tried to get out of it:

> In London, there is real confusion, especially regarding the special jury register. The same person is often summoned to three tribunals on the same day. therefore, they might skip all of them. Currently qualification is also regarded as either low or uncertain. In recent years, a parliamentary selection committee has been commissioned to draft a bill on the qualification and the summoning of the jury. The bill is ready, but it has not been discussed yet.[25]

In the last sentence, he was most probably referring to the *Juries Act* of 1870,[26] which changed the qualifications and exemptions for special juries, proceeding mainly in commercial cases.[27]

He made an interesting observation when he reported that in most cases the litigants did not exercise their right of *recusation* (challenging), that is, the right known in French as *voir dire*. It was common only in the case of crimes of a political nature. This can be regarded as a really important observation since the right to refuse is considered to be one of the most substantial features of the jury from early times, now-a-days particularly in the legal practice of the United States of America.[28]

Szilágyi experienced that in the second half of the 19th century, English jurors fulfilled their duties in a disciplined manner, even if, according to the law, the court had to pass a serious sentence, since they found the accused guilty. In contrast to the Hungarian regulations, the procedural law there allowed lay people to ask the judge for professional advice in case they are unable to make a decision, and then they followed said advice to the letter. The possibility of *recommending pardon* also differed from the practice of other European juries. While Hungarian jurors could not make such a recommendation, the English jury could even submit a reasoned opinion on this issue as a supplement to the verdict:

> The verdict is always guilty or not guilty. The jury often makes a statement other than the verdict in a strict sense. They often recommend pardon for the accused. At other times, they give certain motivation as to why they say not guilty. »The jury does not see that this or that fact is proven without reasonable doubt, and gives the benefit of the doubt to the accused, and therefore the defendant is not guilty.« Also, the judge always instructs them to do the latter if they have serious doubts. Besides the recommendation for pardon, they say on what grounds they do so. If they do not say it, the judge will ask. It is up to the judge to consider this recommendation. Normally, if it is well-grounded, it will mitigate the verdict. […] The continental jury would have resolved the dilemma differently. They would not have recommended pardon, they would have given pardon themselves [by an unlawful acquittal]. This is the difference between the two juries.[29]

The role of the English professional judges in the lawsuit in the courtroom differed from the Hungarian practice in several aspects. This was a necessary consequence of trial by jury, and in fact it dated back to the Middle Ages *(Nisi prius; writ of Venire facias)*.[30] Szilágyi wrote the following about this:

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[24] Ibid., p. 136.

[25] Ibid., p. 136.

[26] 33 & 34 Vict., cap. 77 (An Act to amend the Laws relating to the qualifications, summoning, attendance, and remuneration of Special and Common Juries).

[27] KENNEDY 1826 (n. 1), p. 80–89; OLDHAM, J.C., 'The Origins of the Special Jury'. In: *The University of Chicago Law Review*, Vol. 50, No. 1, 1983, p. 137–221; OLDHAM, J., *Trial by Jury: The Seventh Amendment and Anglo–American Special Juries*, New York–London, 2006, p. 127–173.

[28] SIR DEVLIN, P., *Trial by Jury*, London, 1956, p. 28–37; CORNISH, W.R., *The Jury*, London, 1968, 1971, p. 47–52; POWELL, L., 'Peremptory Challenges Cannot Be Used to Create a Racially Stacked Jury'. In: Winters, R. (Editor), *The Right to a Trial by Jury*, New York, 2005, p. 81–88; BROWN, R.B., '„A Delusion, a Mockery, and a Snare": Array Challenges and Jury Selection in England and Ireland, 1800–1850'. In: *Canadian Journal of History*, Vol. 39, No. 1, April 2004, p. 2–26; HOSTETTLER, J., *The Criminal Jury Old and New: Jury Power from the Early Times to the Present Day*, Winchester, 2004, p. 26–27; HOWLING, N., 'Controlling Jury Composition in Nineteenth-Century Ireland'. In: *The Journal of Legal History*, Vol. 30, No. 3, December 2009, p. 227–261, specially: p. 244–252; BADÓ, A., *Ártatlanok vagy bűnösök? Az Egyesült Államok esküdtszékeinek vitatott döntései* [Innocent or Guilty? Problematic Verdicts of the Juries of the United States], Szeged, 2016, p. 248–250, p. 259–276; BADÓ, A., *Az igazságszolgáltató hatalom függetlensége és a tisztességes eljárás* [The Independence of the Judicial Power and the Fair Trial], Szeged, 2013, p. 119–139; See also: BADÓ A., *Some Aspects of Impartiality in the Hungarian Judicial System*, Timisoara, 2017, p. 17–58.

[29] SZILÁGYI 1870 (n. 21), p. 136.

[30] KENNEDY 1826 (n. 1), p. 173–174; SIR VINOGRADOFF, P., *Historical Jurisprudence: Introduction*, Oxford, 1923, p. 7–8; BAKER, J.H., *An Introduction to English Legal History*, Oxford, [4]2007 (reprint: 2011), p. 18–22; MILSOM, S.F.C., *Historical Foundations of the Common Law*, Oxford, [2]1981 (reprint: 2009), p. 31 and 49. About the medieval relation of the jurymen and the judges see for inst.: SEIPP, D.J., 'Jurors, Evidences and the Tempest of 1499'. In: Cairns, J.W., McLeod, G. (Editors), *„The Dearest Birth Right of the People of England": The Jury in the History of the Common Law*, Oxford, 2002, p. 75–92; ANTAL, T., 'The Legal Status of Judges in the German *"Spiegels"* and in the Medieval English Common Law'. In: Balogh, E. (Hrsg.), *Schwabenspiegel-Forschung im Donaugebiet* = Ius Saxonico-Maideburgense in Oriente 4, Berlin, 2015, S. 73–83.

> Factors move quite freely. There are two points, however, to which both of the two lawyers and especially the judge over them pay special attention. He will not allow anything to be brought before the jurors that is excluded by law, or that does not belong to the matter. In several cases, he does not allow certain questions to be put to the witnesses. At other times, he asks the lawyer what he wants to prove with the witness. And depending on the answer, he will allow questioning or not. It happens that he interrupts the questioning because, the fact in question has been proved, so to speak. Judges exercise this right of theirs very often, and I have never heard the slightest disagreement between them and the lawyers. The other point is that the judges assiduously take care to ensure not only that only the evidence allowed by law is presented to the jurors, but also that the evidence revealed during the trial is not presented to the jury by the lawyers intentionally or by mistake in any other way, and that no misconceptions about the question of law are presented to them. […] All this contributes enormously to the fact that the debate takes place on a jointly recognized and established basis, and that the jurors are fully and completely aware of the real state of the antecedents on which their verdict is based.[31]

Szilágyi also noted the activities of the judge presiding over the trial, aimed at summarizing the facts after the presentation of evidence. Although this also existed in Hungary, its uniform practice had not yet developed after the Compromise of 1867,[32] and its content was much debated later on as well: whether the judge can *de facto communicate* his own legal standpoint or not (*de jure* both the press jury decrees and the Code of Criminal Procedure prohibited judges from expressing their opinion). In England, however, the influence of the royal judge was greatly increased by the so-called reassumption, or summary, of the evidence procedure.

> However, we should not imagine it as a mere repetition of the accusation and defense presented at the trial. Judges say this or that statement is not authentic countless times. This testimony cannot be relied on, so they go over the evidence presented by the prosecution and the defense critically, and truthfully says what deserves consideration and what does not. I have heard them say countless times that the basis of the defense has no probability whatsoever. In the Millar case,[33] the judge stated that the main basis of the defense, according to which the stranger who had asked for the keys of the murdered victim and Millar were two different individuals, was completely improbable, and the jurors should pay no heed to it. […] If any question of law arises, the judge gives definite instructions to the jurors and specifies the exact conditions under which they must give this or that kind of verdict. Frequently, he even tells them which verdict the evidence alludes to. All this is done in a calm, dignified and almost dry manner. And no one is amazed at it. It was impossible to observe the trust and respect that the jurors showed towards the judge without satisfaction. Especially if he belongs to the three common-law high courts.[34] When the judge begins the charge, there is general movement in the jury box. Everyone turns to the judge and listens intently to what he says. And yet – usually – he speaks without any means of external influence; seated, addressing the jurors in a slow voice. And they closely follow what he instructs them to do.[35]

At the same time, it also became clear to the Hungarian jurist that despite all this, the judge presiding over the trial was in a position subordinate to the jurors: he was bound by their verdict. For intance, in one case, in which an English jury could not reach an agreement, the judge clearly explained his professional standpoint to the jurors returning to the courtroom, adding that he had to accept whatever they decided. In the end, the jury fulfilled its duty and passed a verdict of guilty according to the facts.

> This case clearly shows what the judge can do when he notices that the jurors are hesitating while performing their duty. He has no other direct power here. If the jury had declared that [the accused] was innocent or only guilty of manslaughter, it would have given a clearly false verdict. But the judge could not have done anything against it. The judge has the power to prevent the wrongful conviction from taking effect. But he has no power against an unjust acquittal, once it has taken place. […] let me note that it is decided at such a critical point: does the jury have a sense of duty? I am afraid that few continental juries would pass such a test.[36]

With regard to the role of lawyers, Szilágyi was of the opinion that participation in criminal cases was generally less esteemed than in civil ones. For the most part, only young lawyers or older ones with little success in civil law undertook legal

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[31] SZILÁGYI 1870 (n. 21), p. 137.

[32] Interesting comment: The Irish constitutional literature and also the newspapers discussed the compromise between Austria and Hungary of 1867, and called for a similar agreement between Ireland and Great Britain, especially Arthur Griffith in his "The Resurrection of Hungary" which provided a detailed narrative from the Hungarian constitutional development. See: SZENTGÁLI-TÓTH, B., '„The Hungary of the West": The Interdependence of the Irish and the Hungarian Constitutional Development during the Last Decades of the Long XIX. Century'. In: *Díké*, No. 2, 2020, p. 124–139. [https://journals.lib.pte.hu/index.php/dike/issue/view/364/65]

[33] The aforementioned Probably the "Millar-case" was probablya double murder in Chelsea in May 1870. The accused was called Walter Millar, and according to the brief fact he had murdered a clergyman and his housekeeper in an atrocious way. In the willful murder Mrs. Anne Goss and Mr. E. Huelin were killed. Millar was tried at the Old Bailey in July, convicted on circumstantial evidence and sentenced to death. The sentence was carried out on the 1st August, 1870 in Newgate Prison. See for source of data [loaded on 20 October, 2022]: http://www.britishexecutions.co.uk/execution-content.php?key=1095&termRef=Walter%20Millar

[34] Before the Judicature Acts of the 1870 s: Court of Queen's Bench, Court of Common Pleas and Court of Exchequer. CARTER, A.T., *A History of the English Courts*, London, 1944, p. 49–59, p. 109–114; see also: BAKER 2007 (n. 30), p. 50–51.

[35] SZILÁGYI 1870 (n. 21), p. 137.

[36] Ibid., p. 193.

defense in the Old Bailey,[37] and also those who were entrusted with prosecution by the Crown tried cases there. In rural jury courts, the prestige of the two types of cases showed no such sharp difference, but cases of private law were preferable and more profitable there as well. Even then, the litigation activities of English lawyers differed from those of their Hungarian counterparts:

> Nevertheless, it must be admitted that the English legal profession takes part in criminal justice honorably, and is quite free from many of the anomalies that are almost inseparable from criminal practice on the continent. The lawyer's main duty is to question the witnesses and to cross-examine them. This is so important that the currently most famous English criminal lawyer of our time owes his reputation and his income of 130,000-150,000 pounds not so much to his oratory, even less to his knowledge, but to his questioning skills. However, we must mention a dark side of the English practice. The main aim of the English lawyer is to confuse the opponent's witnesses and to make them contradict themselves. And thus they tend to treat them roughly, question them, and make them ridiculous. […] according to my general observation so far, the merit of the case is considerably greater than the oration. No jokes, nice words or witty reasoning whatsoever will convince the jury that black is white. Although – as I hear – this is not always the case; there are many rumors circulating about [county] assizes, and especially about quarter sessions, where there are few jurist judges and mostly young lawyers practice: nevertheless, I do not think that I will be mistaken if I say that oratory is not dangerous for the English jury." [38]

The English trial by jury had a great and positive effect on the young Szilágyi. Even though there was no immediate turnaround in his views,

> but – as he put it – it is a clear, indisputable fact for me that the jury, at least in England, is a major factor in an honest and fair criminal administration of justice. I heard some forty cases decided by the jury. Apart from the difference of opinion that often arises between reasoning people, without any of them being definitely unfounded, I found the jury's verdict to be thorough and in most cases agreeing with my view.[39]

This is how he drew the conclusion in his report, the published version of which is incomplete, yet it powerfully proves his perceptive expertise and heated interest for posterity as well.

A quarter of a century later, in the ministerial reasoning for the proposal on the Code of Criminal Procedure (1896),[40] the heuristic impressions obtained in 1870 became conviction. There is no doubt that the scholarly comparative discussions that can be read in the general part of the reasoning for the code of procedure are not the thoughts of Sándor Erdély,[41] who was the Minister of Justice in office at the time, or Jenő Balogh, who drafted the normative text,[42] but the thoughts of Desider Szilágyi, who supervised the codification.[43] He considered the English jury as a standard, even though he obviously knew that it could only be applied *mutatis mutandis* in Hungary. European and Hungarian scholars markedly debated the powers of jurors: the separability or inseparability of questions of fact and law (*ad quaestionem juris respondent judices, ad quaestionem facti respondent juratores*).[44] Szilágyi followed and recommended the British model which he knew well:

> In England and in Scotland, the indictment was and is drafted in such a way that it can become a verdict with minor formal modifications; the decision made by the jurors covers the entire content of the indictment, and the affirmative decision (guilty) is nothing more than the simple acceptance of the indictment, its raise to the force of a verdict, which usually requires nothing more than changing the wording from the form of an allegation to the form of a statement. Therefore, the jury is responsible for all the questions except for the one that is closely related to the sentence to

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[37] MAY, A.N., *The Bar and the Old Bailey, 1750–1850*, Chapel Hill, 2014; KINGSTON, C., *Dramatic Days at the Old Bailey*, London, 1929 (reprint: 2018); JOSEPH, W., *Unlawful Killings: Life, Love and Murder: Trials at the Old Bailey*, London, 2022; RUMBELOW, D., *The Triple Tree: Newgate, Tyburn and Old Bailey*, London, 1982; HITCHCOCK, T., SHOEMAKER, R., *Tales from the Hanging Court*, London, 2008; GRANT, T., *Court Number One: The Old Bailey Trials that Defined Modern Britain*, London, 2019.

[38] SZILÁGYI 1870 (n. 21), p. 193.

[39] Ibid., p. 135.

[40] ANTAL 2009 (n. 9), p. 289–294; ANTAL 2017 (n. 19), p. 570–576; MÁTHÉ 2000 (n. 12), p. 340–342.

[41] Sándor Erdély (1839–1922). Desider Szilágyi appointed him as undersecretary of state in his ministry in 1892, finally in 1895 he himself became Minister of Justice after Szilágyi until 1899. In the course of his judicial career, he judged private law cases. During his ministerial term, he completed the codifications of procedural law commenced by his predecessor by adopting the Code of Criminal Procedure and its supplementary acts (1896–97), and related to this by reorganizing the trial by jury, and by establishing the Hungarian Royal Court of Administration, which had a country-wide jurisdiction (1896). It was also him who initiated the establishment of a ministerial standing committee for drafting the Hungarian Civil Code for the first time.

[42] Jenő Balogh (1864–1953). He was invited by Szilágyi to take part in the legislative preparatory work in the Ministry of Justice in 1891, where he was one of the main figures in the successful codification of the Code of Criminal Procedure and its supplementary acts (1896–97). Thereafter, in 1897 he was appointed to be an appeal court judge, and from 1900 he taught criminal law at the University of Budapest. In 1910 he became a Member of Parliament and was also appointed undersecretary of state in the Ministry of Education. He served as Minister of Justice in the government from 1913 to 1917. He was elected to be a full member of the Hungarian Academy of Sciences in 1912. After World War I, he retired from politics and served as general secretary of the Academy between 1920 and 1935, and as its vice-president between 1940 and 1943.

[43] *Az 1892. február hó 18-ára hirdetett országgyűlés nyomtatványai. Képviselőház. Irományok* [Documents of the Hungarian Parliament settled on 18th February 1892, House of Representatives, Papers], Vol. XXVII, Nr. 870, (1895) p. 62.

[44] See a contemporary literature to this problem: THAYER, J.B., '„Law and Fact" in Jury Trials'. In: *Harvard Law Review*, Vol. 4, No. 4, 1890, p. 147–175.

be imposed. It is clear that, on the one hand, the English jury has always been a judicial institution, and on the other, that Lord [Edward] Coke's proposition, »de facto judicant juratores, de jure judices«, never meant in English law that the activity of the jurors was excluded from questions of law. […] The English jury's special verdict of exceptional nature, which, similarly to the famous libel act of 1792, is excluded by the New York code of procedure of 1881 only in press cases, testifies that it is not impossible to separate questions of fact and law. However, the external act itself has no legal significance. But as soon as such an act is applied to criminal law, it gains name and importance; therefore, as soon as such an act becomes relevant under criminal law, it will be a punishable offence: a question of fact immediately becomes a question of guilt and, consequently, takes on a legal character.[45]

Later, the practice of the Hungarian trial byjury provided many thought-provoking lessons regarding the extended competence of jurors and the „art of questioning" in several types of violent cases. Unfortunately, negative ones as well, but Szilágyi did not live to experience them as he passed away in 1901.[46] He had the confident belief throughout his career:

> The example of England fully convinced me that the jury system can result in good criminal justice. And I cannot believe – at least in principle – that any country has won a privilege from heaven for this institution. In any case, the main obstacle is that legislation can create only the external conditions. The soul is instilled in it by another factor, the people themselves, the nation. The only thing legislation can do is: by learning from a successful example, to do everything in its power to ensure the result.[47]

3. Some conclusions

Desider Szilágyi visited England just when changes were being induced in their trial by jury-system.[48] In the middle of the 19th century, the archaic past and the future assuming modernization met in the British administration of justice. Szilágyi was in the fortunate position of being able to acquaint himself with both the medieval and the early modern roots of the jury, as well as the errors revealed through the ongoing reforms, the theoretical and practical criticisms, and he could see the new legislative aims. The only thing he did not see was that: while the jury was one of the new institutions of the *liberal state ideal* all over the European continent, including Hungary, and other continents,[49] meanwhile in England many of its old types belonged among the clumsy and conservative legal institutions to be surpassed or at least modernized.

In any case, the judicial reforms Szilágyi initiated later –as a minister – were based on deep professional convictions,[50] some of which – especially the respect for the European perspective and liberal institutions – can be traced back to his young years, including his first travel to England. *The Times* published the following tribute after his death:

> In M. Szilágyi England has lost a true friend and a sincere and enlightened admirer of her institutions and of the British national character. He had lived for a short time in England, and throughout his whole carrier he followed English affairs with keen interest. His sympathy was warmly returned by many Englishmen who had the privilege of his acquaintance. […] It may be truly said of him he was an apostle of British constitutionalism and liberal institutions in Hungary, where he did yeoman's service in enlightening the public mind on the true principles of progressive government.[51]

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[45] Documents of the Hungarian Parliament (n. 43), Vol. XXVII, Nr. 870, (1895) p. 57–58.

[46] *The Standard* wrote about him: "The Great Parliamentarian. Hungary has lost, by the death yesterday evening of Desider von Szilágyi, former Minister of Justice and President of the Hungarian Lower House, its most prominent Parliamentarian, its most gifted orator, and its most eminent champion of liberal ideas. The deceased was a man of rare knowledge and of unusual conscientiousness and character – in short, one of Hungary's best Statesmen, or perhaps, the best it has possessed in recent years. […] The deceased enjoyed, indeed, an immense popularity, not only among his equals, but also among the masses, who looked up to him as the guardian of the people's liberties." *The Standard*, 1 August, 1901.

[47] SZILÁGYI 1870 (n. 21), p. 136.

[48] HOSTETTLER 2004 (n. 28), p. 118–121; GETZLER, J., 'The Fate of Civil Jury in the Late Victorian England: Malicious Prosecution as a Test Case'. In: Cairns, J.W., McLeod, G. (Editors), *„The Dearest Birth Right of the People of England": The Jury in the History of the Common Law*, Oxford, 2002, p. 217–237; HANLY, C., 'The Decline of Civil Jury Trial in Nineteenth-Century England'. In: *Journal of Legal History*, Vol. 26, No. 3, November 2005, p. 253–278; QUINAULT, R., 'Victorian Juries'. In: *History Today*, Vol. 59, No. 5, May 2009, p. 47–53; HANDLER, P., 'Judges and the criminal law in England, 1808–61'. In: Brand, P., Getzler J. (Editors), *Judges and Judging in the History of the Common Law and Civil Law*, Cambridge, 2012, p. 138–156, specially: p. 151–155; POLDEN, P., *A History of the County Court, 1846–1971*, Cambridge, 2003, p. 27–39, p. 46–47.

[49] VOGLER, R., 'The International Development of the Jury: The Role of the British Empire'. In: *International Review of Penal Law*, Vol. 72, No. 1, 2001, p. 525–550.

[50] ANTAL, T., 'Reforms of the Judicial System in the Era of Dezső Szilágyi'. In: Szabó, I. (Editor), *Ius et legitimatio*, Szeged, 2008, p. 9–16.

[51] *The Times*, 1 August, 1901.

Western Europe Immigration Laws on Diversity in International Arbitration. A Historical Perspective on Africa and the Influence of English Law

*Thembi Pearl Madalane**

Abstract

International arbitration resolves cross border disputes which involve parties with different nationalities, cultures and backgrounds. As such, the diversity of the arbitral tribunal is important in the legitimacy of the arbitral process. Due to the confidentiality cornerstone of arbitration, there is no public data but statistics of appointed arbitrators by nationality, in the leading arbitration institutions. But the general accusation is no secret that international arbitration is a male, stale and pale field. This has also increasingly been criticized due to the lack of African representation. The discourse has circulated around bias and poor perception that is argued, isolated from European immigration laws. However, in backdrop of international disputes involving African parties and populist views opposed to African immigration in Europe, foreign arbitrators are still required to first obtain employment visas. So it is not irrational to expect a spill over in African lawyers' compliance with applicable immigration requirements as a possible inhibition to participation in Western Europe seated hearings. Even Britain, with a leading international arbitral centre in London is supposedly the most positive in Europe on the benefits of immigration. But it has been called out by British MPs for its UK visa system that damages Africa relations and also anecdotally reported as denting London's international arbitration reputation, due to foreign lawyers' inability to obtain a visa to participate in hearings. Once a seemingly far-fetched thought, some emerging jurisdictions have introduced visa-free entry for participants in international arbitration to market as attractive dispute resolution centres. So, with increasing options that also facilitate diversity, the immigration laws may also be Western Europe's Achilles heel in continuing to maintain its position as the sought-after international centre for dispute resolution service.

Keywords: *Immigration Laws; International arbitration; Employment visa; European Union; Britain; Africa; Nationality; Diversity.*

1. Introduction

With Increased international trade and the expansion of transnational corporations, there has been an increase in the migration of skilled workers across borders.[1] Governments have also played a role in this through incentives to attract highly skilled workers in some parts of the world or through implementing deterrents to hinder migration such as visa and work permits restrictions.[2] But also with increased trade, international arbitration has become more important in resolving disputes, which have accompanied this increase in economic activity.[3] However, participants in global trade are diverse and multicultural which is unfortunately not mirrored in international arbitration as an international dispute resolution mechanism.[4] Instead, international arbitration has faced criticism of being *male, stale and pale* and so threatening its legitimacy.[5] Ethnic diversity in international arbitration has increasingly received attention as the process of determination of facts and application of the facts to the law (and the interpretation thereof) is a deeply cultural exercise.[6] So ethnic diversity will improve the outcome of the arbitral process and give confidence. Understandably, international arbitration has received some resentment such as in Africa with a view that African disputes were

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1 LOWELL, A. B., FINDLAY, A., Migration of Highly Skilled Persons from Developing Countries: Impact and Policy Responses, *International Labour*, December 2001.

2 *Ibid.*

3 SCHINAZI, M., The Three Ages of International Commercial Arbitration and the Development of the ICC Arbitration System, *ICC Dispute Resolution Bulletin*, Extract 2020 Issue 2 < https://library.iccwbo.org/dr-bulletins> accessed 17 November 2020.

4 *See*: MAMOUNAS, J., Does "Male, Pale, and Stale" Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change, *Kluwer Arbitration Blog*, 10 April 2014 < http://arbitrationblog.kluwerarbitration.com/2014/04/10/icca-2014-does-male-pale-and-stale-threaten-the-legitimacy-of-international-arbitration-perhaps-but-theres-no-clear-path-to-change/ > accessed 17 November 2020.

5 *Ibid.* Only 10% of arbitrators are female, the ICC reported that approximately 50% of its appointments came from the United States, the United Kingdom, Switzerland, France, or Germany alone. And in most cases, an international arbitrator is senior in age and experience. *See*: MAMOUNAS, J, *supra* note 4.

6 *See*: HOWARD, M., Impacts of cultural differences on international arbitration based on the example of Iran, *Robert Gordon University*, [online] PhD thesis (2018). Available at: https://openair.rgu.ac.uk. *Also see*: KIDANE, W., The Culture of International Arbitration, *Oxford University* (Press 2017).

not being resolved by Africans, but by non-African arbitrators in Europe who are biased against African nations.[7]

Generally, there are no specific immigration requirements applicable to arbitrators other than general visa and work permit rules. So foreign representatives and arbitrators are required to go through the onerous process of applying for a work permit. Such restrictions obviously affect disputing parties' freedom to select the most appropriate arbitrator or representative to adjudicate or represent them in that particular dispute.[8] Leading arbitral institutions are in Western Europe which in any case also among countries highly ranked according to destinations accessible without a prior visa.[9] It should therefore not be a surprise that international arbitration has been dominated by Western European arbitrators whose passports provide them with the opportunity to travel to more countries without a visa.[10] But domination is more specifically, by arbitrators from Britain; a country[11] that was not only a great global power in the 19th century, even when it had not joined the European Communities(later the European Union),[12] but also a major provider of legal services through arbitration.[13]

As a step further from the European Economic Community (EEC) that broke down trade barriers between countries in Europe, the EU was created by the Treaty of Rome of 1957 by six Western European countries to promote peace in the aftermath of WWII.[14] Although the development of arbitration for international commercial disputes did not generally extend to the rest of the world, it had a steady development and recognised as a means of dispute settlement in international commercial matters in Europe.[15] But for many years, it seemed to be viewed that EU law and the law of international arbitration were two very distinct areas of law that did not intersect until the emergence of conflict on a series of matters on which the international arbitral regime and the European Union part ways.[16] Now, the impact of EU law on the law of international arbitration can be felt over the course of all stages of international arbitration from pre-arbitration.[17] And although EU law has not only impacted international arbitrations seated in EU Member States but also influenced arbitrations seated around the world,[18] there's not much talk on the contribution of EU immigration laws on diversity international arbitration. It was only in 1969 that Britain[19] was accepted into the EU after it was already formed[20] and it is accepted that a significant proportion of U.K. employment law is derived from the EU. However, ultimately the idea of modern immigration laws as we know them have Western European origins with a strong British influence. So it is logical to refer to the influence of British immigration laws which the EU succeeded. Even with the recent withdrawal of the UK from the EU, it is understandable that no wholesale changes on UK's immigration policy are expected[21] if one has to really consider the origins and evolution of modern immigration laws across the world.[22] And so in making reference to Western Europe which created the EU, this paper explains how Britain plays a major role in modern immigration laws and the limitation on diversity in international arbitration. This is a disadvantage as

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[7] *See:* ONYEMA, E., The Transformation of Arbitration in Africa: The Role of Arbitral Institutions, *Kluwer Law International* B.V., 17 Sep 2016. *See also:* YUSUF, A.Y., From Reluctance to Acquiescence: The Evolving Attitude of African States Towards Judicial and Arbitral Settlement of Disputes, *Leiden Journal of International Law* 28 (3), 605-621, (2015). *Also see:* YUSUF, A.Y., Vice-President, International Court of Justice., The Contribution of Arbitration to the Rule if Law- The Experience of African Countries, *ICCA Keynote Speech – Mauritius*, (9 May 2016). Available at: http://www.arbitration-icca.org/.

[8] The consideration of international arbitration in connection with immigration laws is one that requires a consideration of public international law in connection with private international law. It has been written that in citizenship law, the elements of public and private law are intertwined. Varga notes that the biggest debate concerning public law is in connection to the consequences of citizenship under private law. The principle that citizenship could not have an effect on the legal status of an individual under private law is compromised. *See:* VARGA, N., The public law and the private law nature of citizenship, *European Legal Studies and Research*, 2009.

[9] *See*: The Henley Passport Index, Global Ranking 2020 < https://www.henleypassportindex.com/passport >.

[10] British arbitrators generally make up the majority. *See*: KIRBY,C.R., facts and figures: ICC, LCIA, SIAC, *Thompson Reuters*, 5 October 2018 < http://arbitrationblog.practicallaw.com/2017-facts-and-figures-icc-lcia-siac/>.

[11] *Ibid*, KIRBY, C. R.

[12] UK Parliament, Into Europe < https://www.parliament.uk/about/living-heritage/transformingsociety/tradeindustry/importexport/overview/europe/ > accessed 17 November 2020.

[13] *See:* SCHINAZI,M., *supra* note 3.

[14] Its six founding members: Belgium, France, Italy, Luxembourg, the Netherlands and West Germany. *See:* European Union, The EU in brief < https://europa.eu/european-union/about-eu/eu-in-brief_en > accessed 17 November 2020.

[15] United Nations Conference on Trade and Development, Dispute Settlement International Commercial Arbitration, (United Nations 2005).

[16] FERRARI, F.(Ed.), The Impact of EU Law on International Commercial Arbitration, *Center for Transnational Litigation, Arbitration and Commercial Law* (2017).

[17] *Ibid*.

[18] *Ibid*.

[19] The United Kingdom of Great Britain and Northern Ireland, commonly known as the United Kingdom (UK or U.K.) or Britain. *See*: The National Archives, The Countries of the UK < https://webarchive.nationalarchives.gov.uk/20160108051201/http://www.ons.gov.uk/ons/guide-method/geography/beginner-s-guide/administrative/the-countries-of-the-uk/index.html > accessed 17 November 2020.

[20] The UK joined the European Economic Community (as it then was) on 1 January 1973, alongside Denmark and Ireland. *See*: UK Parliament, The EEC and the Single European Act < https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-europe/overview/britain-and-eec-to-single-european-act/ > accessed 17 November 2020.

[21] European Commission, Questions and Answers on the United Kingdom's withdrawal from the European Union on 31 January 2020, (EC, 24 January 2020)< https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_104> accessed 17 November 2020.

[22] HM Government, The UK's future skills-based immigration system CM9722 (December 2018), < https://www.gov.uk/government/publications/the-uks-future-skills-based-immigration-system > accessed 17 November 2020.

international powers are shifting and previously disadvantaged States such as those in Africa and Asia are increasingly asserting their rights to be included in defining the international legal and therefore economic order.[23]

2. The Evolution of Immigration Laws (in the context of international arbitration)

2.1 The founding of countries: migration restriction through slavery and the need for dispute resolution

Although the imposition of travel documents and immigration laws to manage migration flows into, through and from a State's territory may seem like a modern concept, humans have shown themselves willing to fight and die to seize or defend territory throughout history.[24] Usually in loosely organised nomadic tribes as opposed to settled civilisation, travelling across different regions for resources was to provide for themselves and not for trade. So bloody wars waged against neighbours were used to gain access to land and resources. But the advantage of an alternative dispute resolution mechanism becomes more apparent in the context of separate countries as a result of the development of human civilization. Unlike with nomadic lifestyle, when humans began to settle in and develop one area, wars pose the risk of a bigger loss to the investment made in developing the territory.[25] And so it seems logical to expect the first civilisations, with more to lose, to not only be more protective of their territories but to have first initiated alternative dispute resolution mechanisms than waging war and the destruction it entails. Indeed even Before Christ,[26] protection measures of a territory and its people existed throughout history.[27] Travel documents which we now know as passports, have existed in many forms; from royal seals, face masks in Africa and Greek and Roman tattoos[28] to control migrations before the paper documents that we use today. But the discussion of which civilization ‚started first' is one that remains debated.[29] Egyptian civilization of North Africa is believed by some to be the earliest founded country in the world.[30] But even when there is a general consensus that Greece where Europe's first advanced civilizations sprouted, follows Egypt, many consider the Greeks as founders of modern western civilization[31] and so of world history.[32] Likewise, the study of arbitration properly began with the ancient Greeks which is arguably reported to have made a success of arbitration[33] despite the origins of arbitration as a dispute resolution mechanism being lost in obscurity.[34] Because prehistoric migration was nomadically driven by climate and other environmental factors that impacted resources such as food required for survival, the development of civilisation decreased the possibilities for migration the need for violence as separate States had been organized.[35] Proportionally violent wars declined as populations became increasingly large and organized.[36]

This is not to say that migrations ended entirely because later countries such as England may have been so as a result of its geographical isolation. Although, countries such as Australia are also isolated but came into being as a result of emigration that displaced a previous nation.[37] In fact, slavery that began to be operated in the first civilisations as free labour contributed to the restriction on the free movement of persons.[38] But then

[23] For instance, *See*: SHAFFER, G.,GAO, H., A New Chinese Economic Order?, *Journal of International Economic Law*, Volume 23, Issue 3, September 2020, Pages 607–635, https://doi.org/10.1093/jiel/jgaa013.

[24] JOHNSON, D. P., TOFT, M. D., Grounds for War-The Evolution of Territorial Confict, *International Security*, Vol. 38, No. 3 (Winter 2013/14), pp. 7–38, doi:10.1162/ISEC_a_00149. This concept also filtered into modern criteria of obtaining citizenship. Obtaining citizenship of a land came with the liability of military service. Varga also gives a brief discussion on the link of this liability in Hungary. *See:* VARGA, N., The Framing of the First Hungarian Citizenship Law (Act 50 of 1879) and the Acquisition of Citizenship, *Journal of the International Association for Hungarian Studies*, Volume 18, Number 2, 2004.

[25] *See*: ECKHARDT, W. Civilizations, Empires, and Wars, *Journal of Peace Research*, vol. 27, no. 1, 1990, pp. 9–24. JSTOR, <www.jstor.org/stable/423772 > Accessed 30 Nov. 2020.

[26] Hebrew Bible, Nehemiah 2:7–9, dating from approximately 450 BC: "If it pleases the king, may I have letters to the governors of Trans-Euphrates, so that they will provide me safe-conduct until I arrive in Judah?"

[27] *See*: ECKHARDT, W., *supra* note 25.

[28] Face Masks worn by same tribe were identified, allowed to travel and trade *See*: SCHILDKROUT, E., Inscribing the Body, *Annual Review of Anthropology*, vol. 33, 2004, pp. 319–344. JSTOR, <www.jstor.org/stable/25064856>. Accessed 30 Nov. 2020.

[29] Egyptian civilization can trace its roots back to around 6000 BCE, when various groups of hunter-gatherers settled in the Nile River Valley, Egypt's first dynasty is dated c.3100 BCE. Although, earliest leather shoe (6500 BCE.) and wine making facility in Armenia, there are claims that the Armenian civilization predates Egypt *See*: Oldest org, 10 Oldest Countries in the World (Updated 2021) at < https://www.oldest.org/geography/countries/ > accessed 17 November 2020.

[30] *Ibid.*

[31] *See:* The History Teacher, The Development of Western Civilization- Simplified, *Society for History Education*, Vol. 1, No. 2 (Jan., 1968), pp. 49-51.

[32] PARKINSON, J. S. (Ed.), The Impact of Western Civilization on World History, *Cognella Academic Publishing*, 2019.

[33] There are only two instances known where it was reported that the states did not abide by the tribunal's award. *See*: WOLAVER, E. S., The Historical Background of Commercial Arbitratio, *University of Pennsylvania Law Review and American Law Register*, Vol. 83, Issue 2, pp. 132-146 (1934). < https://scholarship.law.upenn.edu/penn_law_review/vol83/iss2/2> accessed 17 November 2020.

[34] *Ibid*.

[35] *See Ibid.* By the middle of the seventh century B.C.

[36] *Also see:* AVIS, W. R., Current trends in violent conflict, Knowledge, evidence and learning for development, 2019. < https://www.gov.uk/search/all?keywords=Current+trends+in+violent+conflict&order=relevance > accessed 17 November 2020.

[37] *See*: Migration Heritage Centre, Australia's migration history <http://www.migrationheritage.nsw.gov.au/belongings-home/about-belongings/australias-migration-history/index.html > accessed 17 November 2020.

[38] ROSE, C. ARSENAULT,N., Africa Enslaved A Curriculum Unit on Comparative Slave Systems for Grades 9-12, University of Texas at Austin liberal arts at: https://liberalarts.utexas.edu/hemispheres/_files/pdf/slavery/Africa_Enslaved.pdf.

war politics and later colonialism began to fuel migrations once again.[39] The important point is that the reasons for migration changed, largely dependent on the slave trade based on ‚nationality' which is closely related to ethnicity.[40] What opened opportunity for forced migration of humans in the form of slave trade which is said to have started during the 15th century transatlantic trade, is after the middle of the seventh century B. C when States began to emerge from their isolation and come into economic relations through 'international' trade.[41] This transatlantic trade also created the conditions for the subsequent colonisation of Africa by the European powers and the unequal relationship that still exists between Africa and the world's powerful countries today.[42] In this way, Africans did not migrate as workers but were dehumanized as commodities in trade.[43] So any dispute that resulted in trade could not possibly have required the cooperation of 'the commodity' to resolve the conflict but of its owners, Western Europe.[44] While arbitration probably precedes all the former legal systems, it has still not developed any code of substantive principles, and is so mostly a matter of free decision.[45] So each case is decided according to the ethical or economic norms of the particular participants which were Western European.[46] With the involuntary emigration of African and the similarity of Western European parties, there was no need to consider diversity. No Western European country was yet sufficiently strong to defy its neighbours, consequently, arbitration seemed possibly balanced and was called into play.[47]

Historical scholarship relating to international arbitration appears often to be limited to a specific period.[48] What is common is that scholarship both identifies the roles of the Greeks but also provides evidence from Mediaeval Europe that identifies the main influences from France and Britain.[49] The first evidence dates from the early fourteenth century on recovery of the Holy Land where French lawyer, Pierre Dubois, believed that peace between the sovereign princes in Europe was possible only by the creation of a sort of permanent board of arbitration.[50] The French may have had a major influence in modern international arbitration[51] but Great Britain has been a major provider during the long nineteenth century and beyond.[52] As it has also been a major influence in immigration laws. The German model has also had an effect on the legal development of several other countries.[53] However, it is excluded from the discussion of this paper as the context of international arbitration is not greatly linked with developments in Germany. This paper seeks to discuss weakness of Western Europe immigration laws in continuing to maintain its position as the sought-after inter-

[39] 'Colonialism not only stimulated more than 60 million Europeans to migrate overseas, it also brought millions of Asians, Africans and Amerindians to Europe.' *See: EMMER, P. C, LUCASSEN,L.,* Migration from the Colonies to Western Europe since 1800, in: European History Online (EGO), *Leibniz Institute of European History (IEG)*, Mainz 2012-11-13. URL: http://www.ieg-ego.eu/emmerp-lucassenl-2012-en.

[40] LAW, R., Ethnicity and the Slave Trade: "Lucumi" and "Nago" as Ethnonyms in West Africa, *History in Africa*, 24, 205-219 (1997). doi:10.2307/3172026.

[41] FRASER, H. S., Sketch of the History of International Arbitration, *Cornell Law Review* Volume 11179 (1926) Available at: http://scholarship.law.cornell.edu/clr/vol11/iss2/3.

[42] *See*: ADI,H., Africa and the Transatlantic Slave Trade, (BBC, 5 October 2012) < http://www.bbc.co.uk/history/british/abolition/africa_article_01.shtml > accessed 17 November 2020.

[43] MCDONALD BECKLES, H., Slave Voyages: The Transatlantic Trade in Enslaved Africans, *United Nations Educational, Scientific and Cultural Organization*, 2002 < https://unesdoc.unesco.org/ark:/48223/pf0000128631>. *Also see:* MUHAMMAD, P. M., The Trans-Atlantic Slave Trade: European Corporations, the Papacy and the Issue of Reparations. *Willamette Journal of International Law and Dispute Resolution*, Vol. 26, Nos. 1-2, 2019.

[44] *Ibid*. The slave trade's legal basis given by the Spanish crown *asientos de negros* contracts are widely known. What is less known is the dispute settlement mechanism that pertained to the slave trade *Also see:* MARTINEAU, A., A Forgotten Chapter in the History of International Commercial Arbitration: The Slave Trade's Dispute Settlement System, *Leiden Journal of International Law*, 31(2), 219-241 (2018). doi:10.1017/S0922156518000158

[45] WOLAVER, E. S., *supra* note 33.

[46] *Ibid*.

[47] FRASER, H. S., *supra* note 41.

[48] Specifically international commercial arbitration. *See*: SCHINAZI, M., *supra* note 3.

[49] FRASER, H.S., *supra* note 41. These influences from France and Britain did not go unchallenged. After WWII, there were conflicting views with other countries of Western Europe such as Germany. There were tensions between France and West Germany which already been dedicated to the preference for freedom of movement. *See:* EMMANUEL COMTE, The History of the European Migration Regime: Germany's Strategic Hegemony, *London & New York: Routledge*, 2018. France and Britain may be identified as the main influencers but Germany has also been influential. For example, in Hungary, the ministerial justification of the law mentions the German regulations of 1870. *See:* VARGA, N., Short History of the First Hungarian Citizenship Act, *Novi Sad Faculty of Law (Serbia)*, Collected Papers XLIII (2009). Varga introduces the French, the
English and the German models as the three basic models of citizenship in Europe. *See:* VARGA, N., European Citizenship or Citizenship in Europe, *Acta Universitatis Szegediensis: acta juridica et politica*, 2014. The tension with Britain, concerning freedom of movement, remains prevalent in the present day. *See eg.:* Reuters Staff, Central Europeans reject British EU demand to limit free movement, (Reuters, 17 December 2015) <https://www.reuters.com/article/uk-britain-eu-visegrad-idUKKBN0U029520151217 > accessed 13 February 2023.

[50] About I3O6, when Pierre Dubois, a royal advocate of Normandy, wrote a pamphlet in which was developed an elaborate outline plan for the recovery of the Holy Land - "On the Recovery of the Holy Land". *See*: FRASER, H. S., *supra* note 41.

[51] And French theorist, Émeric Crucé (early seventeenth century in 1623), who echoed Dutch philosopher, Desiderius Erasmus who advocated for arbitration and world peace. Erasmus pleaded with nations to lay down their weapons and establish a permanent assembly of ambassadors representing all the nations of the known world from China to Poland, England, and the West Indies. *See*: FRASER, H. S, *supra* note 41. *Also see*: Britannica, Pierre Dubois: Additional Information < https://www.britannica.com/biography/Pierre-Dubois >
Available at: http://scholarship.law.cornell.edu/clr/vol11/iss2/3.

[52] SCHINAZI, M., *supra* note 3.

[53] VARGA, N., European Citizenship or Citizenship in Europe, *supra* note 49.

national centre for dispute resolution service. Germany is not a country generally cited as a preferred place for arbitration.[54]

2.2 Travel documents and Immigration controls on nationality & ethnicity- Pre WW

Most focus is on the Mediaeval origins of the concept of a travel document, traced back to the reign of Henry V of England with the Safe Conducts Act 1414 for , punishing Breakers of Truces and Safe Conducts'.[55] Both English and foreign travellers could be issued with a sovereign's letter of recommendation from the King, known as a 'Safe Conduct' that served as an identity document intended to help ‚subjects' prove who they were in foreign lands.[56] Perhaps more similar to today's Vatican city which issues passports but without immigration controls.[57] Following the first public sale of African slaves in 1444 restricting the free movement of Africans, these foreign travellers would later highly unlikely be non-African because of slavery. Besides, the term ‚passport' to ‚pass through a port'[58] may have afterwards begun to be used in issuing travel documents granted by King Louis XIV of France, but it was more a visa than just a passport in the sense that we understand it today because it served to permit travellers to remain in a country for a specified period.[59] During the reign of Louis, even though the country borders of medieval Europe were largely symbolic,[60] almost every country in Europe had set up a system to issue passports and visas (Obviously more relevant to non-Africans who were enslaved and therefore not for involuntary migration).[61] And so with slavery still in place, there was no concern of ethnic immigration because all efforts to maintain Western European power had underhand oppressed diversity.[62] Although ethnic oppression not initially the goal, it was an opportunity that became apparent in the slavery of Africans who were ethnically different.[63] The emphasis of this ethnic difference assisted in oppression by giving reason of difference to justify the difference in power and oppression.[64] Of course not everyone was oblivious to the immorality so British abolitionists actively opposed the transatlantic trade in African people since the 1770s, ordering the gradual abolition of slavery in all British colonies which lead to anti-slavery laws.[65] And what is coined the 'Age of Aspirations' and the exploration of arbitration, England, which had become the dominant world economic power during the Industrial Revolution, became a major provider of legal services through arbitration during the long nineteenth century and beyond.[66] Most likely out of economic interest of cotton imports from the United States, British Government had violated its le-

[54] *See*: Queen Mary University of London, School of International Arbitration, White & Case LLP, 2021 Arbitration Survey: Adapting arbitration to a changing world, (Queen University of London, White & Case LLP, 2021).

[55] Great Britain; Tomlins, Thomas Edlyne, Sir; Raithby, John, The statutes at large, of England and of Great Britain : from Magna Carta to the union of the kingdoms of Great Britain and Ireland, London : Printed by G. Eyre and A. Strahan, 1811 < https://archive.org/details/statutesatlarge01raitgoog/page/n360/mode/2up> accessed 17 November 2020. *Also see*: NEVILLE, C., The Law of Treason in the English Border Counties in the Later Middle Ages, *Law and History Review*, 9(1), 1-30 (1991). doi:10.2307/743658

[56] *Ibid*. NEVILLE, C., This was for safety reasons for the traveller so they would not be injured or robbed as ‚unknown' foreigners. *Also see*: CASCIANI, D., Analysis: The first ID cards, (BBC, 25 September 2008) < http://news.bbc.co.uk/2/hi/uk_news/politics/7634744.stm > accessed 17 November 2020. In history, the notion of acquiring 'permission' in foreign land was generally a right granted by royalty in other parts of the world. For example, Varga writes of the case in feudal Hungary *see eg:* VARGA, N. The acquisition and loss of citizenship in feudal Hungary, *European Legal Studies and Research*, 2010.

[57] Although of course without the security reasons of the Safe Conduct in mediaeval times. *Also see:* COLLINS, D.A., Why the Vatican is so against family planning and immigration control, *Population and Environment*, 16, 543–546 (1995). https://doi.org/10.1007/BF02208563.

[58] Word origin Fr passeport, safe-conduct, orig., permission to leave or enter a port < passer, pass2 + port, port1 *See*: Collins Dictionary, Definition of ‚passport' < https://www.collinsdictionary.com/amp/english/passport > accessed 30 November 2020.

[59] The earliest reference to these documents is found in a 1414 Act of Parliament. In 1540, granting travel documents in England became a role of the Privy Council of England. And in 1548, the Imperial Diet of Augsburg required the public to hold imperial documents for travel, at the risk of permanent exile. *See*: CASCIANI, D., *supra* note 56. *Also see*: LEE,T.H., Safe-Conduct Theory of the Alien Tort Statute, *The Columbia Law Review*, Volume 106 830 (2006) < https://ir.lawnet.fordham.edu/faculty_scholarship/405 >accessed 17 November 2020.

[60] CARR,M., Beyond the Border, History Matters, *History Today*, 1 January 2013 < https://www.historytoday.com/archive/history-matters/beyond-border > accessed 17 November 2020.

[61] *Also see*: BBC, Experiences of immigrants in the Medieval era: Part of History Migration to Britain c1000 to c2010, < https://www.bbc.co.uk/bitesize/guides/z3nvxsg/revision/3 > accessed 17 November 2020.

[62] MUHAMMAD, P. M., *supra* note 43.

[63] *Ibid. Also see:* National Archives, Slavery, < https://www.nationalarchives.gov.uk/education/resources/slavery/ > accessed 17 November 2020.

[64] *Ibid.*

[65] Although the Anti-Slavery Society is reported to have been founded in 1823, anti-slavery efforts can be traced back to the Society for the Abolition of the Slave Trade founded in Britain by Granville Sharp and Thomas Clarkson in 1787. *See*: BBC, History Granville Sharp (1735-1813) < http://www.bbc.co.uk/history/historic_figures/sharp_granville.shtml> accessed 17 November 2020. These antislavery views influenced the 1793 Act to Limit Slavery in Canada, the first such legislation in the British colonies. Several abolitionist petitions organized in 1833 alone collectively garnered the support of 1.3 million signatories. 1833 - Britain passes Abolition of Slavery Act. Effective August 1, 1834, in 1833 Britain passed the Slavery Abolition Act granting freedom to enslaved people in most of the British Empire. The Act freed over "800,000 enslaved Africans in the Caribbean and South Africa as well as a small number in Canada." *See*: HASLAM, E., The Slave Trade, Abolition and the Long History of International Criminal Law: The Recaptive and the Victim, Routledge, October 4, 2019.

[66] The London Corn Trade Association (LCTA), founded in 1878, was to play a particularly important role, arguably acting as 'the benchmark model that was emulated by other professions in the following years and decades'. In particular, these trade associations encouraged the use of standard contracts, which became widespread, and not just in Great Britain. Because these standard contracts contained arbitration clauses, which specified that any dispute arising out of the contract would be finally settled under the rules laid down by the trade association, parties engaged in global trade had little choice but to submit their disputes to the arbitration mechanisms of the LCTA and other trade associations In fact, a number of key treaties and events, such as the Jay Treaty of 1794 between the United States and Great Britain, also relied on recourse to arbitration. *See*: SCHINAZI, M., *supra* note 3.

gal duty to respect neutrality during the American Civil War that broke out primarily as a result of the long-standing controversy over the enslavement of 'Black' people.[67] After which enslaved 'Black' people were also freed in the US slavery following the end of the civil war in 1865.[68] It is worth noting though, that the abolition movement may have been first reported in Britain but the Kingdom of Denmark-Norway was the first European country to put a ban on the transatlantic slave trade *de jure*, which turned the tide and followed by other countries at different times throughout history.[69] With efforts of moving away from slavery, migration control in the form of immigration criteria that increasingly emphasised skills and talents rather than countries of origin, as will be discussed in the following section of this paper, were still not essentially different from forced migration of labour to meet demand in the slave economy.[70] Except that migration would now be 'voluntary'. The concept of citizenship essentially appeared in the 19th century in continental Europe, without defining the term of citizen through nationality. The *Declaration of Rights of Man and Citizens* which defined individual and collective rights at the time of the French Revolution, took note of the concept of citizenship through civil rights as natural rights.[71] In the UK, the concept of citizenship appeared in the 20th century due to the historical and political events.[72] But, it was in 1873 that immigration controls based on nationality and ethnicity were introduced for the first time and so putting a damper on voluntary migration.[73]

Peace was ultimately sought as would later be institutionalised in the form of the League of Nations (that preceded the United Nations) with the goals of disarmament, preventing war through collective security, and diplomatic dispute settlement.[74] The institution adopted the Slavery Convention abolishing slavery in 1926,[75] and the United Nations General Assembly later adopted the Universal Declaration of Human Rights that included the article stating „No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."[76]

2.3 'Peace' Institutions on Nationality and Ethnicity controls- Post WW I

"A passport is a kind of shield: when you're a citizen of a wealthy democracy"- Atossa Araxia Abrahamian

Countries had considered the creation of permanent institutions to maintain peaceful relations amongst each other. WWI had a devastating effect on many national economies so this seemed even more urgent.[77] And the sharp rise in immigration, following the war, overwhelmed administrative control procedures at borders.[78] In response, France was followed by other European countries in abolishing passport and visa requirements.[79] But, advocated by the League of Nations as the permanent institution tasked with maintaining peace amongst countries, European governments re- introduced the notion of a passport needed to clear border controls following World War I.[80] It was also in this era of Institutionalization[81] that

67 SCHINAZI, M., *supra* note 3.

68 OAKES, J., Freedom National: The Destruction of Slavery in the United States, 1861-1865: The Destruction of Slavery in the United States, 1861–1865, WW Norton & Company, 2012.

69 *See*: Reuters, Chronology-Who banned slavery when? (Reuters, 22 March 2007) < https://www.reuters.com/article/uk-slavery-idUSL1561464920070322> accessed 17 November 2020. *Also see:* GOBEL, E., The Danish Slave Trade and Its Abolition. Brill Academic Pub. pp. 182– 183. ISBN 9789004330276, (2016).

70 Such as the United Kingdom from the late–20th century and the recent introduction of the points-based immigration system said to EU and non-EU citizens equally, to take effect in January 2021. *See*: UK Visas and Immigration, The UK's points-based immigration system: an introduction for employers (accessible version), (UK Visas and Immigration,30 September 2020) <https://www.gov.uk/government/publications/uk-points-based-immigration-system-employer-information/the-uks-points-based-immigration-system-an-introduction-for-employers > accessed 17 November 2020.

71 On 26 August 1789, the French National Constituent Assembly issued the *Déclaration des droits de l'homme et du citoyen* (Declaration of the Rights of Man and the Citizen) The French Revolution broke feudal and monarchic traditions. *See:* VARGA, N., European Citizenship or Citizenship in Europe, *supra* note 49.

72 *Ibid.*

73 CARR, M., *supra* note 60.

74 *Also see:* RAY, J. L., The Abolition of Slavery and the End of International War, *International Organization*, 43(3), 405-439. (1989). doi:10.1017/S0020818300032987. *Also see*: McGill, League of Nations,< https://www.cs.mcgill.ca/~rwest/wikispeedia/wpcd/wp/l/League_of_Nations.htm > Accessed 17 November 2020.

75 European Commission, 1926 Slavery Convention < https://ec.europa.eu/anti-trafficking/legislation-and-case-law-international-legislation-united-nations/1926-slavery-convention_en > accessed 17 November 2020.

76 United Nations, Universal Declaration of Human Rights;History of the Document< https://www.un.org/en/sections/universal-declaration/history-document/index.html > accessed 17 November 2020.

77 *See*: Heinrich-Böll-Stiftung, The Impact of the First World War and Its Implications for Europe Today < https://eu.boell.org/en/2014/06/02/impact-first-world-war-and-its-implications-europe-today > accessed 17 November 2020.

78 HUTCHINSON, E. P., Immigration Policy Since World War I, *The Annals of the American Academy of Political and Social Science*, vol. 262, 1949, pp. 15–21. JSTOR <www.jstor.org/stable/1026969> Accessed 17 Nov. 2020. *Also see:* KAYA, B., The changing face of Europe – population flows in the 20th century, Council of Europe Publishing, 2002.

79 France abolished passports and visas in 1861, followed by other European countries in 1861. By 1914, passport requirements had been eliminated practically everywhere in Europe. *See*: WSJ, A History of Passports (WSJ, 17 October 2005) < https://www.wsj.com/articles/SB112506690121624172> accessed 17 November 2020.

80 In 1920, the League of Nations convened in France for a conference on passports, the Paris Conference on Passports & Customs Formalities and Through Tickets. *See*: League of Nations Advisory and Technical Committee for Communications and Transit, Passport Conference Preparatory Documents, C641-M-230, II Resolution Adopted by the Conference on Passports Customs Formalities and Through Tickets in Paris (21 October 1920) < https://biblio-archive.unog.ch/archivplansuche.aspx >accessed 17 November 2020.

81 The Age of Institutionalization lasted until the 1950 s, when the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') ushered in a new era for international commercial arbitration. *See:* SCHINAZI, M, *supra* note 3.

the EEC was created to form a "common market" through the integration of its European member States.[82] And the momentum acquired by the pro-arbitration movement was such that the creation of specialized institutions were also devoted to international commercial arbitration.[83] And although the ICC was founded in 1920 to maintain peaceful relations between commercial parties from different countries in the world not necessarily European, it was relevant to parties participating in international commercial relations.[84] Africans may not have directly been excluded as the case under colonisation but by virtue of relevance as far as being equal participants in trade, would not participate.

Historically, the UK and Europe have been the major contributors of migrants.[85] However, the ethnicity of migrants has only become more diverse since the late–20th century.[86] Having been countries of emigration for more than two centuries, many European countries have become countries of immigration.[87] So during WWI, visa and passport requirements were reinstated not only security reasons but to also control the emigration of people with useful skills, as mentioned earlier in this paper.[88] In addition, although controversial and received with hostility as a „dehumanisation", stricter border controls were put in place beyond an attempt to retain skills but a restriction of an inflow into Britain based on nationality and ethnicity. The British Nationality Law and Status of Aliens Act 1914/1905[89] was introduced to this end following decolonisation, that also led to mass immigration into Britain and other parts of Western Europe in the second half of the 1980s (ie. Oil crisis and migration control)[90]. With the fear of ‚immigration pressure' to increase, immigration policies in Western Europe became heavily focused on control consisting of immigration regulation.[91] And heavily criticised,[92] the British Nationality law created different classes of British nationality closely related to the ethnic origins of their holders and so with fewer privileges. And although border controls have over time largely liberalised in Africa, they have tightened in Europe. Infact, borders have tightened for non-Europeans. The data for the1990s through to the mid 2000s reported 'migrants' more likely to be from non-EU countries as were the case once again in 2019.[93] And coined as the Age of Autonomy (from the 1950s to the present), these theories can be seen as attempts to give arbitration a theoretical foundation and explain its development as an autonomous system of law.[94]

Like the League of Nations, with a purpose to promote peace within Europe, the European Union was officially formed in 1993 by Western European countries along with the incorporation and renaming of the post World War II European Economic Community(EEC)[95] to the European Community(EC) which was incorporated into the newly found EU.[96] Originally confined in Western Europe, the political divisions between east and west Europe are finally declared healed when of the new countries to join the EU in 2004, were mostly Eastern European countries.[97] Beginning in 2004, the European Union granted EU citizens a freedom of movement and residence within the EU, and the term „immigrant" has since been used to refer to non-EU citizens, meaning that EU citizens are not to be defined as immigrants within the EU territory.[98] This free movement of workers forms part of the four freedoms upon which the European Community was founded in 1957.[99] Broadly in-

[82] European Union, The history of the European Union < https://europa.eu/european-union/about-eu/history_en > accessed 17 November 2020.

[83] SCHINAZI, M., *supra* note 3

[84] It was in this context that the ICC was founded in 1920, following the 1919 Atlantic City Conference. Its Court of Arbitration opened in 1923 and started administering cases soon thereafter. A few years later, in 1926, the American Arbitration Association (AAA) was established through the merger of the Arbitration Society of America and the Arbitration Foundation. *See:* SCHINAZI, M., *supra* note 3.

[85] *See*: Emigration watch UK, A Nation of Emigrants - Emigration from the UK < https://www.migrationwatchuk.org/briefing-paper/49/emigration-from-the-uk > accessed 17 November 2020.

[86] KAYA, B., *supra* note 78. *Also see:* The Migration Observatory at the University of Oxford, Work visas and migrant workers in the UK, (The migration observatory, 18 June 2020) < https://migrationobservatory.ox.ac.uk/resources/briefings/work-visas-and-migrant-workers-in-the-uk/ >accessed 17 November 2020.

[87] European Parliament, Laws for Legal Immigration in the 27 EU Member States, No 16 International Migration Law < https://publications.iom.int/search-books?keyword=European+Parliament%2C+Laws+for+Legal+Immigration+in+the+27+EU+Member+States%2C+No+16+International+Migration+Law & category=All & subject=All&book_lang=All&country=All&year=All > accessed 17 November 2020.

[88] NAYYAR, D., Cross-Border Movements of People, WIDER Working Paper Series wp-2000-194, World Institute for Development Economic Research (UNU-WIDER), 2000.

[89] The British Nationality Law 1981 in force, since 1 January 1983 < https://www.legislation.gov.uk/ukpga/1981/61 > accessed 17 November 2020.

[90] GARCÉS- MASCAREÑAS, B. (Ed), PENNIX, R. (Ed.), Integration Processes and Policies in Europe, *IMISCOE Research Series*, 2016.

[91] BROCHMANN, G. (Ed.), HAMMAR,T. (Ed.), Mechanisms of Immigration Control. London: Routledge, (1999). https://doi.org/10.4324/9781003086062.

[92] *See:* DUMMETT, A., The New British Nationality Act, British Journal of Law and Society Vol. 8, No. 2 (Winter, 1981), pp. 233-241 (9 pages) < https://doi.org/10.2307/1409722 > accessed 17 November 2020.

[93] The Migration Observatory at the University of Oxford, *supra* note 86.

[94] SCHINAZI, M., *supra* note 3.

[95] In 1957 the Treaty of Rome establishing the European Economic Community (EEC) was signed by 'The Original Six'; France, Germany, Italy and Benelux (Belgium, the Netherlands and Luxembourg). *See*: UK Parliament, From the Second World War to the Treaty of Rome <https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-europe/overview/post-ww2-to-treaty-of-rome/ > accessed 17 November 2020.

[96] The EU was created by the Maastricht Treaty, which entered into force on November 1, 1993.

[97] Most of which are Eastern European countries. *See*: The history of the European Union at: https://europa.eu/european-union/about-eu/history_en.

[98] European Parliament, *supra* note 87.

[99] New Europeans. Net, Where do my rights come from as an EU citizen? < https://neweuropeans.net/where-do-my-rights-come-eu-citizen > accessed 17 November 2020.

terpreted by the European Court of Justice as primarily focused on those who are nationals of the European Community and who are economically active, economically active EU migrant citizens/ workers, have long enjoyed an equal right with local workers.[100] But today, without the requirement to show any economic activity to move within the EU,[101] these rights apply to all EU citizens as the Single Market is completed with the ‚four freedoms' of: movement of goods, services, people and money.[102] Free movement has allowed EU citizens to work in any occupation while non-EU citizens have had to qualify for work visas that often have skill requirements.[103] And so, overall, non-EU workers are more likely to be working in high-skilled jobs than EU workers.[104] Interestingly, recent data reports that people migrating to the UK for work in 2019 were non-EU citizens. And the introductions of skills and salary restrictions on EU workers after Brexit can be expected to reduce the share of EU workers in lower skilled jobs over time.[105]

3. Diversity in International Arbitration towards visa-free access

Some scholars are of the view that the citizenship and passport of an arbitrator should not be relevant in international arbitration.[106] And that as neutrality is an advantageous element of international arbitration, some scholars argue that an arbitrator should be considered neutral if his nationality is different from that of the parties.[107] And in seeking diversity, this notion of 'neutral nationality' is widely followed and treats nationality of an arbitrator synonymous with neutrality.[108]

It is ideal for the party-appointed arbitrator to serve as a cultural intermediary in a dispute.[109] Only that this a problem when such a benefit is overwhelmingly biased towards the West and no representation of the non-Western nations. Indeed, in itself, nationality should not be an important or legally relevant factor but the process of determination of facts and application of the facts to the law (and the interpretation thereof) is a deeply cultural exercise that is linked to nationality.[110] So cultural diversity as evidenced by the dominance of Western arbitrators in disputes involving non-Western parties, could potentially be a source of misunderstanding in international arbitration as cultural proximity is important for cultural understanding and the accurate determination of facts. But if non-Western arbitrators are equally included, it could also improve the quality of outcomes because having culturally informed decision makers would not only give the parties confidence in international arbitration and ADR generally, it would enhance the prospects for the enforcement of arbitral awards by national court.[111] To this end, UK's visa system is seen as a threat to its international arbitration reputation as foreign lawyers are anecdotally unable to get a UK visa to participate in proceedings.[112]

The international arbitration institutions most often used by African parties are the ICC Court of Arbitration and the London Court of International Arbitration (LCIA)[113]. But African seated ICC arbitrations remain low.[114] It is now more common knowledge that governments in Africa are increasingly supporting the development of international arbitration at home in Africa with African arbitrators.[115] The ICC International Court of Arbitration continues its concerted efforts to also narrow cultural disparities.[116] It announced that it will establish an African Commission to coordinate its activities and continued growth on the continent as well as a Belt and Road Initiative to support Belt and Road disputes.[117] But another alternative to Western institutions, the LCIA-MIAC (now reverted to MIAC after the end of JV), is also actively promoting itself as a choice for Chinese-African disputes. Unfortunately, most JVs with LCIA have now ended.[118] And although the UK government has now detailed its new immigration system reported to treat

[100] BECK, G., The Macro Level: The Structural Impact of General International Law on EU Law The Court of Justice of the EU and the Vienna Convention on the Law of Treaties, *Yearbook of European Law*, Vol. 35, No. 1 (2016), pp. 484–512 doi:10.1093/yel/yew018.
[101] EC Treaty (Maastricht consolidated version), Art. 18 < https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12002E018&from=EN > accessed 17 November 2020.
[102] VAN MOL, C., DE VALK,H., Migration and Immigrants in Europe: A Historical and Demographic Perspective. In: GARCÉS- MASCAREÑAS, B. (Ed), PENNIX,R. (Ed.), Integration Processes and Policies in Europe, *IMISCOE Research Series*, 2016. https://doi.org/10.1007/978-3-319-21674-4_3.
[103] The Migration Observatory at the University of Oxford, *supra* note 86.
[104] *Ibid.*
[105] *Ibid*.
[106] *See*: BLACKABY, N., PARTASIDES, C., REDFERN, A., HUNTER, M., Redfern and Hunter on International Arbitration (6th Edition) Oxford: Oxford University Press, 2009.
[107] *See*: LALIVE, P., On the Neutrality of the Arbitrator and of the Place of Arbitration, *Swiss Essays on International Arbitration*, Lausanne, 1984 <https://www.lalive.law/publications/> accessed 17 November 2020. *Also see:* SHARMA,S., Neutrality v. Nationality,(Kluwer Arbitration Blog, 8 April 2014) < http://arbitrationblog.kluwerarbitration.com/2014/04/08/neutrality-v-nationality/> accessed 17 November 2020.
[108] *Ibid,* SHARMA, S.
[109] *See*: HOWARD, M, *supra* note 6.
[110] *See*: *Ibid*.
[111] SLATE II, W. K., Paying Attention to "CULTURE" in International Commercial Arbitration, *Dispute Resolution Journal*, August/October 2004.
[112] *See:* MCKINNEY,C.J., Visa inefficiencies denting London's international arbitration reputation (Free Movement,23 April 2019) < https://www.freemovement.org.uk/visa-inefficiencies-denting-londons-international-arbitration-reputation/ > accessed 17 November 2020.
[113] 86. *See* : WILLIAMS, D., *South Africa Arbitration Guide* IBA Arbitration Committee at www.werksmans.com.
[114] *See:* OSTROVE, M., SANDERSON, B., LAPUNZIMA VERONELLI, A., *Developments in African Arbitration, Global Arbitration Review* (2017) at: https://globalarbitrationreview.com/chapter/1139890/developments-in-african-arbitration.
[115] *See:* ONYEMA, E., *supra* note 7.
[116] ICC, Diversity in Arbitration. Available at: https://iccwbo.org/global-issues-trends/diversity/diversity-in-arbitration/. Accessed: 14 November 2020.
[117] *See: ICC Court to launch Africa Commission*, July2018. Available at: https://iccwbo.org/media-wall/news-speeches/icc-court-launch-africa-commission/
[118] With the exception of the LCIA-DIFC. *See*: LCIA< https://www.lcia.org/lcia-miac.aspx >accessed 17 November 2020.

EU and non-EU citizens equally by ending the EU's free movement of people through visas awarded based on gaining enough points as opposed to nationality,[119] it will still have to compete with the increasing option of regional institutions such as the China-Africa Joint Arbitration Centre (CAJAC) [120], MIAC and MARC [121] established as alternatives that accommodate cultural diversity considering increasing China-Africa relations.

And in the face of stiff competition, jurisdictions such as Hong Kong have also introduced a scheme that permits participants of international arbitration proceedings in Hong Kong to do so without an employment visa in order to strengthen Hong Kong's position as an international centre for legal and dispute resolution services in the Asia-Pacific region, and be in line with the Belt and Road Initiative.[122] Even so, Thailand immigration laws, that have long restricted foreign representatives and arbitrators from freely acting in arbitration proceedings governed by Thai law and conducted in Thailand.[123] These changes make the appointment of foreign arbitrators easier and so threaten London as well as other Western European centres' popularity as the preferred dispute resolution centres.[124]

4. Conclusion

Britain is supposedly the most positive in Europe on the benefits of immigration. However, the country's visa system is also called out for damaging relations with Africa and anecdotally denting London's international arbitration reputation, due to foreign lawyers' inability to obtain a visa to participate in hearings. Britain has not only been a major influence in international arbitration but is the home of the world's leading LCIA. So, numerous non-EU international arbitrators apply for visas to participate in LCIA proceedings seated in London as well as other leading centres in Western Europe, such as the ICC headquartered in Paris.[125] However, discourse on the lack of African representation in international arbitrations has circulated around bias and poor perception but unfortunately, isolated from Western European immigration laws. This link and consideration may be enlightening as the historical evolution of immigration laws has also been based on nationality and ethnicity, with strong Western European origins and historical examples of British immigration laws. With no preferential conditions, foreign representatives and arbitrators are required to go through the onerous process of applying for a work permit in this context. So in the face of competition for international positions as leading arbitral centres, Western Europe may begin to lose popularity to new centres in emerging markets that claim to promote diversity and provide visa-free access to foreign participants in proceedings seated in those emerging markets.

On the other hand, virtual international arbitration hearings could reduce or avoid the need for participants to travel to the place of the arbitration. Perhaps further research should be conducted on the use of virtual proceedings to promote diversity because visas will not be required. That way, local immigration law constraints will not be an issue. More specifically, at the failure of immigration laws, virtual proceedings can perhaps allow more African lawyers to be involved in arbitration hearings pertaining to disputes seated in Europe.

[119] Which will come into effect from 1 January 2021. by assigning points for specific skills, qualifications, salaries or professions. *See:* UK Visas and Immigration, Policy Paper: The UK's points-based immigration system: policy statement (19 February 2020) < https://www.gov.uk/government/publications/the-uks-points-based-immigration-system-policy-statement/the-uks-points-based-immigration-system-policy-statement > accessed 17 November 2020.

[120] A discussion on a dispute resolution with Chinese and African characteristics was held led to the formation of CAJAC.

[121] Mauritius international arbitration institution, MARC, gave a presentation on how it could better assist Chinese and African parties by providing arbitration and mediation services to disputes arising from the Belt and Road Initiative. *See*: MCCI, Visit of China-Africa Legal Research Institute Delegation, 3 December 2018 at:, https://www.mcci.org/en/media-news-events/business-updates/visit-of-china-africa-legal-research-institute-delegation/

[122] The Government of Hong Kong Special Administrative Region Press release, Government launches Pilot Scheme on Facilitation for Persons Participating in Arbitral Proceedings in Hong Kong < https://www.info.gov.hk/gia/general/202006/29/P2020062900772.htm > accessed 17 November 2020.

[123] SUCHARITKUL,V., Thawing the Restrictions on International Arbitration in Thailand, *Kluwer Arbitration Blog*, 17 December 2019 < http://arbitrationblog.kluwerarbitration.com/2019/12/17/thawing-the-restrictions-on-international-arbitration-in-thailand/ > accessed 17 November 2020.

[124] *See:* MCKINNEY, C. J, *supra* note 112.

[125] *See*: POULSEN, L., International arbitration venues: emerging hotspots, Thomson Reuters < https://uk.practicallaw.thomsonreuters.com/3-376-3400?transitionType=Default&contextData=(sc.Default)&firstPage=true > accessed 17 November 2020.

The Historical Roots of Family Businesses, the Entail and the Unification of Wealth

*Balázs Arató**

Abstract

Historical aristocratic families, as economic units, can in some ways be seen as the forerunners of today's family businesses. These wealthy families had essentially the same or similar issues and needs in terms of wealth transfer, inheritance and succession as today's family businesses.

The entail (fideicommissum) was the technical legal solution, or legal institution, which enabled the historic aristocratic families to preserve their economic strength from generation to generation, to keep their wealth together and to develop their specific succession arrangements which have survived for centuries.

However, prior to the legal declaration of the entail, the enforceability was always a question mark, and it is a problem that family businesses today are still faced with in relation to certain legal instruments and technical solutions in the area of succession.

This paper will first review the history of the development of family businesses and then examine the legal institution of the entail and its various forms, drawing parallels between the historical aristocratic families and the family businesses of today, based on essentially identical interests and aspirations.

Keywords: *historical aristocratic families; family business; succession; wealth transfer; entail; fideicommissum.*

1. Introduction

While in the Western Member States of the European Union, patterns of succession within the firm have been established over decades and centuries, in the Central and Eastern European region there is no continuity for historical reasons. In Hungary, and in our wider region, family businesses established during the change of regime are now, and will be in the coming years, reaching the stage where the management of a business built up over a lifetime of hard work and sacrifice, and the responsibility that goes with it, must be passed on to successors, as the age group of 30 to 40 at the time of its foundation enters their 60 s and 70 s.[1]

The generational change of family businesses in the region is also more challenging than for their Western European counterparts because there is no knowledge, experience and customary law accumulated over decades and centuries on how to prepare for this task and how to successfully manage the generational change. Placing family businesses in their historical context can help to understand the problems of succession and wealth transfer, to understand the decision-making criteria and to choose the appropriate legal instruments available under the law in force.

2. History of family businesses

If we are to look at the history of family businesses in the classical sense, we must first of all consider the social and other factors that have favoured the emergence of family-run businesses.

The roots of family businesses can be found in three different areas:

- peasant and feudal societies,
- in trade and commerce, and
- crafts and services.

In the pre-industrial era, especially in agriculture and crafts, it was common for all members of the family to work together. People living in the same household also worked together, which meant that the family and the work organisation were one and the same, an indissoluble unit. It should be stressed that the family already had a caring function in the event of illness, old age or disability, and that the parallel work organisation provided the necessary means to do this. The separation within the metalworking industry of the 15th century was more marked. Here, for example, there was a clearly defined division of labour: the husband typically ran the workshop and production as a kind of professional manager, while the wife was re-

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[1] See for example: CSÁKNÉ FILEP, J.: Családi vállalkozások – fókuszban az utódlás (PhD-thesis, Budapest, 2012). DRÓTOS, Gy. – WIESZT, A. – MERETEI, B. – VAJDA, É., Családi vállalkozások Magyarországon – kutatási jelentés a 2017-2018-as családi vállalkozási felmérésről (research report by the Corvinus University of Budapest, Centre for Family Enterprises), KONCZOSNÉ SZOMBATHELYI, M. – KÉZAI, P., Családi vállalkozások – generációk és dilemmák. In: *Prosperitas Budapest*, vol. 3., 2018, p. 48-76.

sponsible for purchasing and sales. The principle was that each member of the family had to contribute to the family's livelihood, and to this end the children were also given tasks. This was also the time of a change in attitude that was noteworthy for the development of family businesses. Previously, the main purpose of entrepreneurship had been self-sufficiency, but this was increasingly complemented by the need to increase income and improve the family's social position. The latter inevitably brought with it the need to increase and preserve family wealth, and increasingly determined the principles of marriage and child-rearing. From there, it was only a step to setting out family goals in writing and requiring family members to put their own self-interest aside if it conflicted with family goals. Such normative requirements have been partly embodied in concrete documents and partly passed down from generation to generation through customary law.[2]

The success of the family business was increasingly dependent on the status of the family, which determined the education of the children, their ability to study abroad, and the acquisition of the knowledge and contacts without which the future operation of the business was unthinkable. In addition to capital, the effectiveness of control mechanisms and the loyalty of family members exercising control were also important considerations. If all these factors were in place, the family and the family business could develop a synergy that would guarantee both parties long-term financial security and a positive social image.

Historical aristocratic families, as economic units, can in some ways be seen as the forerunners of today's family businesses. These wealthy families had essentially the same or similar issues and needs in terms of wealth transfer, inheritance and succession as today's family businesses. To start with, it is instructive to look at the legal technicalities and legal institutions of the time which, over the centuries, helped these families to preserve their economic strength, to maintain their wealth and their profitable economy, and to develop the specific succession arrangements which have been in place for centuries.

3. Legal instruments to overcome the fragmentation of family property in a historical context

By way of introduction, it is useful to start by looking at the earliest traces.

The need to keep accumulated wealth together after the end of life and to prevent fragmentation has been a concern for thousands of years. Already in the Scriptures we find references to this. The Old Testament describes personal property as a fact, and the question of inheritance is also addressed in several places. In the Old Testament, inheritance consists of the father's movable and immovable property, and the right of primogeniture is also blatantly mentioned. Noteworthy is the provision in the Old Testament which states that the land must remain in the hands of the family.[3] It is clear from this wording that even then there was a tendency to avoid dividing up the estate and that the family as a unit was at the centre of the succession, even though the eldest son inherited his father's property by virtue of primogeniture. However, this wealth had to be used in such a way as to provide for the subsistence of those members of the family who did not inherit directly from the deceased's estate (e.g. younger son, widow, etc.).

Roman law concentrated the power to administer the property in the paterfamilias and severely limited its transferability. The powers of the head of the family were not limited to the regulation of property matters, but also included the possibility of intervening in the lives of the family members. The family's importance was mainly economic. In exercising the powers conferred on the paterfamilias, it was important to preserve the family's wealth and, in this context, to provide the financial basis for the economic activities which the family wished to pursue.

The legal institution of the peculium is a milestone for our subject. It allowed the creation of separate property within the family as the property of the child under the father's authority. Under Roman law, the head of the family had the right to impose an obligation on the heir by will to transfer all or part of the estate (universal fideicommissum) to another person after a certain period of time.[4] Thus, until such time as the heirs are under an obligation to transfer or distribute the property entrusted to them, they must manage and safeguard it responsibly so as not to prejudice the interests of a third party designated by the testator. It can be seen that there is a need to keep certain family assets in one place and to manage them separately so as to avoid fragmentation by inheritance which would threaten the family's economic basis.

4. The legal institution of the Spanish mayorazgo and its distinction from the Roman fideicommissum

An important milestone in the legal regulation of the succession of property as a unit is the Spanish legal instrument of the "mayorazgo", which is in fact the ancestor of the legal instrument known in Hungarian as the hitbizomány (entail). It is from here that this particular system of succession spread throughout Europe. The existence of mayorazgoes in the Iberian Peninsula can be traced back to the 14th century.[5] The first traces of this legal institution can be found in the will of Hen-

[2] See in detail: KALSS, S. – PROBST, S., Familienunternehmen, Gesellschafts- und Zivilrechtliche Fragen. Wien, 2013, p. 9-33.

[3] Inheritance stories are found in the Old Testament, especially in the five books of Moses and Joshua.

[4] The essence of the fideicommissum is that the owner conveys his property or part of it to the fiduciarus as purchaser, who symbolically paid a sestertius to the owner, but at the same time undertook the obligation to transfer the property thus acquired to a third person, the fideicommissarius, to whom the owner could not otherwise bequeath it in the event of the death of the testator. Compare: MARTON, G., A római magánjog elemeinek tankönyve. Budapest, 1958, p. 298; TORRENT, A., Fideicommissum Familiae Relictum. Oviedo, 1973, p. 6-8., Fraydenegg and Monzello: Zur geschichte des österreichischen Fideikommißrechtes. In: NOVAK, R. – WESENER, G. - WÜNSCH, H. (Ed.), *Reforms of the Law. Festschrift zur 200 - Jahr - Feier des Rechtswissenschaftlichen Fakultät der Universität Graz*. Graz, 1979, p. 778-779.

[5] PERES, Zs., A hitbizományokra vonatkozó jogi szabályozás Spanyolországban; In: *PhD tanulmányok 3.* Pécs, 2005, p. 273-301.

ry II of 1374, from which jurisprudence derives the so-called 'donaciones enriqueńas' or 'mercedes enriqueńas'.[6]

In his will, Henry II, as a royal favour, allowed those who were loyal to him to leave all the property they had received from him as a gift to their first-born son, without having to distribute it among their descendants according to the legal succession. Thus, when the mayorazgo first came into existence, the exceptional succession regime applied to royal endowments, but, since the basis of the wealth was usually the royal endowment, it could be extended and applied to subsequent increases. Henry II's will was the first to provide in writing for the eventuality of the death of the holder of a royal endowment, i.e. the fideicommissum, without a son descendant. In this case, the title to the hereditament reverts to the King.

The legal institution of the mayorazgo became widespread with the entry into force of the laws of Toro in 1505. Known as the Toro Laws, the Castilian 'law package' of 83 laws contained mainly family and criminal law provisions. It also comprehensively dealt with the legal institution of the entail, thus creating the legal certainty that is a prerequisite for the widespread application and dissemination of a legal technique.[7] The Toro Laws were in force until 1889 (replaced by the Civil Code), but the creation of a new entail was prohibited by law as early as 1820.

The mayorazgo was essentially a royal authorisation, a licence to remove all or part of the property of a particular person from the general succession and to establish a special set of rules for the resulting unified and indivisible body of property, which would be passed down through the generations. The mayorazgo made it possible for the testator to bequeath his entire estate to his eldest son by testamentary disposition, even if he had several descendants and therefore several legal heirs. Three key features of the Spanish legal instrument are therefore relevant to our topic:

1. the separation of the indivisible unitary estate,
2. intergenerational character,
3. the creation of special rules of succession, different from the general succession regime.

The interesting feature of this legal instrument is that the founder was not obliged to determine the specific scope of the assets to be bound in fideicommissum (the assets could even increase over time), since he could determine the unit and the amount of entail assets, in such a way as to include the future acquisitions. He could also set a different set of rules of succession across generations, as he did not have to name his heir. The wealth could thus be consolidated over the centuries. In fact, the heir, or more precisely the holder of the entail, represented the founder and his principle of property settlement. It should be stressed that, as a rule, the entail property could not be encumbered, which, at the time of its creation, facilitated the economic interest in the indivisibility of the property, but which later proved to be a hindrance to economic development. The creditors did not lend to the heirs of the entail, since the assets could not be used as security for their unpaid claims, which meant that the heirs of the fideicommissum were unable to develop their estates because of a lack of capital.[8] At the turn of the 17th and 18th centuries, the strict prohibition on encumbrances was gradually lifted by legislation, precisely in order to enable the holders of the entail to raise fresh capital to develop, mechanise and modernise their farms, but the legal provision was not abolished, but merely allowed in certain cases to be used as collateral for loans for specific purposes (development, investment).

The regulatory features of the Spanish mayorazgo are reflected, directly or indirectly, in the fideicomissum which later became widespread in the German territories and the Austrian hereditary provinces, and later in the legal institutions known as the Hungarian hitbizomány.

The mayorazgo first spread from the Iberian peninsula to southern Italy during the two centuries of Spanish rule in Naples. Settling Spanish families brought the legal institution with them.[9] The landed aristocracy of southern Italy based their political leadership on the rules of primogeniture and the indivisibility of property. The Roman legal roots of the mayorazgo were also favourable to its expansion in southern Italy, since the legal institution of the 'fideicommissum familiae relictum', familiar from Roman law, was thought to be found in the mayorazgo by legal scholars of the time. The name fideicommissum was then given to this legal institution instead of mayorazgo. However, despite some similarities between the Spanish mayorazgo and the Roman legal fideicommissum familiae relictum (for example, both were intended to ensure the preservation of property as an indivisible unit for the family), there are significant differences between the two legal instruments, which cannot be considered to be fully compatible.

The main differences between the Roman fideicommissum familiane relictum and the Spanish mayorazgo can be summarised as follows:

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[6] PFAFF, L. – HOFFMANN, F., Zur Geschichte der Fideikommisse. In: *Separat Abdruck aus den Excursen über österreichisches allgemeines bürgerliches Recht II 3.* Wien, 1884, p. 10-11; p. 277-319

[7] PERES, Zs., A hitbizományokra vonatkozó jogi szabályozás Spanyolországban; In: *PhD tanulmányok 3*. Pécs, 2005, p. 16-17.

[8] Austria faced the same problem in 2018: the capital protection rules for the assets placed in trusts were so strict that the trustees could only invest this type of assets in a very conservative way (almost exclusively in government securities), so that the negative effects of inflation could not be avoided, the assets could not grow and were even gradually deflated, and the national economy lacked accumulated capital in trust.

[9] Such families were the Sanchez de Luna, Cordova, Cardoni, Alarconi, Mendozza, Leva, Padigli and Enriquez families, who thus made the land they had acquired hereditary for their families. Quoted from „Istoria civile del Regno di Napoli" of Pietro Giannone by PFAFF, L. - HOFFMANN, F., Zur Geschichte der Fideikommisse; In: *Separat Abdruck aus den Excursen über österreichisches allgemeines bürgerliches Recht II 3.* Wien, 1884, p. 277-319.

Roman law fideicommissum familiae relictum	Spanish mayorazgo
It was limited in time, as it only allowed the order of succession to be stipulated up to the fourth generation.	It was unlimited in time, so it remained in force from generation to generation for up to several hundred years.
It lacked a specific system of inheritance rules, since the heirs were either designated by name or, more often, the family itself was designated as the heir (in which case the order of succession followed the order of succession by operation of law).	It was not necessary to designate the heir specifically, it was sufficient to designate a universal order of succession across generations; the purpose of the institutional system was to define a specific set of rules other than the general rules of succession.
It was a simple legal institution of succession.	It was a privilege subject to royal approval, not infrequently with public law implications.
A fideicommissum could be appointed by anyone who had independent property and a ‚testamenti factio activa'.	Only the aristocracy, the class of persons granted this privilege by the king, could avail themselves of this possibility.
Fideicommissum could be established by will.	A mayorazgo could be created by will or by inter vivos transaction.

Despite the fact that the rules in southern Italy are similar to those of the Spanish mayorazgo, and for the reasons set out above, there is no legal continuity with fideicommissum familiae relictum of the Roman law, in Italy, however, the term fideicommissum, derived from Roman law, took root and became widespread, first among the aristocratic families of southern Italy and then among the patrician families of northern Italy, from where it later spread to the Habsburg-dominated territories, mainly through marriage.

It is worth mentioning here that the Habsburg dynasty became the Habsburg-Lotharingian dynasty after the marriage of Maria Theresa to Francis Stephen. The Lotharingian family in Italy had a written family statute from the 15th century onwards, which regulated a number of legal relationships within the family. However, the unification of the two families had already raised questions of property law during the reigns of Maria Theresa and Joseph II. From 1768 onwards, the issue of the benefits of the Lotharingian branch of the family was constantly on the agenda, but it was only decades later, in 1839, that the family members managed to settle the issue with a comprehensive Habsburg family statute.

5. The fideicommissum on German territory

In German territory, a version of the fideicomissum based on Roman law was developed. Interestingly, the first appearance of this legal institution at the level of a source of law was not in a statute, but in Philippus Knipschildt's Tractatus de fideicommissis.[10]

Kipschildt's treatise on the fideicommissum was often referred to as a code of law by practising lawyers of the time, as no prior study or written law had been available that described in detail and comprehensively the specific legal institution that was spreading throughout German territory. In his study, Kipschildt thus described in detail what was essentially a legal institution based on German common law. Of course, the legal institution itself already existed on German territory before the publication of the work: we find mainly in testamentary wills provisions based on Spanish-Italian models.

In his work, Knipschildt identified the entail with the 'Stammgut' and stressed the Roman legal theory of origin.[11] The 'Stammgut' differed from the Roman fideicommissum in that the absolute prohibition of alienation and encumbrance could be waived with the express consent of the beneficiary.[12]

The first written, non-statutory expression of fideicommissum in German territory is found in the will of Count Eberhard von Königstein of 3 July 1527, who, with royal authorisation, provided for the establishment of an entail, i.e. the indivisibility of his property and its special succession regime. In the Saurma family charter of 9 June 1569, the family property is referred to as property subject 'substitution und Fideikommiß', and the unity of property and the special succession order were maintained for centuries thereafter. In this document, the sons, who call themselves the 'Sauermann von der Jeltsch' brothers, use the term fideicommissum for the property inherited from their father Konrad Sauermann. In his will of 25 August 1569, Ulrich von Rechberg also established an entail on his property for the benefit of his son Wolf Christoph von Rechberg and his son's descendants. In 1575 the Fugger family established a fideicommissum on the family estates, and in 1576 the will of Wilhelm von Adelmann also contains entail provisions. In his will of 27 May 1582 Hans Ernst von Welden zu Erzholzheim established a fideicommissum for the survival of his family name and reputation.[13]

[10] Knipschildt submitted his dissertation on the fideicommissums to the University of Strasbourg in 1626, which he expanded 28 years later and first published in book form in Ulm in 1654.

[11] „Germanis dicuntur Stammgüter, so zu Erhaltung eines Fürstlichen, Gräffischen, Freyherrlichen, Adelichen Stammens und Namens verordnet sennd… Fideicommissa haec familiarum, si constituantur, vel consistantin aedibus, dicuntur Stamm – häuser et differunt ab aedibus seu arcibus istis, ex quibus nobilis aliqua familia originem et nomen ducit, eo quod hae regulariter alienari possint, illae vero alienationem non admittant." KNIPSCHILDT, P., *Tractatus politico-historico-juridicus de juribus et privilegiis nobilitatis*.Ulm, 1750, p. 7-8.

[12] FRAYDENEGG und MONZELLO, Zur Geschichte des österreichischen Fideikommißrechtes". In: *Berthold Sutter (Hg.), Reformen des* Rechts, Graz 1979, p. 783; GIERKE, O., *Die Steinsche Städteordnung*. Berlin, 1909, p. 104-105.

[13] MEYER, H., Die Anfänge des Familienfideikomisses in Deutschland. In: *Festgabe für Rudolf Sohm dargebracht zum doktor jubiläum von Freunden Schülern und Verehren*. München, 1914, p. 227-272, p. 229-240.

6. Entails in the Austrian hereditary provinces

According to its original purpose, the fideicommissum was also a legal institution for the maintenance of 'light and merit' in the Austrian hereditary provinces. It was transferred to the hereditary provinces through mixed marriages between Austria and Italy and through the mediation of students from Austrian territories who were studying law in Italy.

Its establishment was initially made conditional on a provincial licence, i.e. it was treated as a kind of privilege. In this way, the provincial lords essentially authenticated and confirmed the provisions of the wills of the nobles establishing the fideicomissum, in derogation of the general order of succession. Under the special succession order of the fideicommissum, the principle of which was generally primogeniture, the institution was referred to in wills as 'fideikommiß und primogenitur'.

Since it was not only the creation of a single estate but also the declaration of the exclusive right of the first-born as a special order of succession, the two terms became rooted together in the Austrian hereditary provinces. There are, however, some testamentary provisions of the period in which the governing order of succession is not primogeniture, but majorate, and these are therefore referred to in wills not as fideicommissum but as 'Majoratsordnung'.[14]

In the wills of the period in the Austrian hereditary provinces, women and male descendants who entered the Church were generally excluded from the succession, since in neither case would the original aim of maintaining the family's splendour and merit through the generations have been achieved. In the case of female descendants, the change of surname and the merging of property with that of the husband, and in the case of the heir who chose the (Roman Catholic) priestly vocation, the absence of a successor, would have had undesirable effects.

The first mention of this legal institution in the Austrian hereditary provinces is found in the case of Archduke Charles, who in 1584 established a perpetual entail on his estates in Styria. Subsequently, in 1621, Ferdinand II declared all his lands and provinces to be fideicommissum, although at that time there was no written Austrian legislation on the institution. Interestingly, this was the legal basis for the later Pragmatica Sanctio (1723), which determined the history of Central Europe, including Hungary, for many centuries. It was not until 1627 that the Austrian legislation was enacted. At that time, Ferdinand II issued a provincial order binding on the Czech lands, stipulating that entails in Czech territory could only be established by royal permission. In order to consolidate his power following the Czech revolt, the King confiscated the estates of the rebels and granted them to nobles loyal to him. He also allowed the establishment of fideicommiss on the royal grant, with the interesting proviso that the holder of the fideicommiss must remain loyal to the Roman Catholic religion.

Of decisive importance was the 1674 patent of Leo I, which already regulated the legal institution in detail. According to the patent, the declared aim of the entail was also to preserve the family's rank, splendour and prestige (the principle of splendor familiae at nominis) and to maintain the well-being of the family members. A noteworthy clause of the patent is that the heir to the fideicommissum is obliged to preserve the entail property and, if possible, to leave it in a better state than when he received it.[15] The essential point of the legislation is that it makes it compulsory, a condition of validity, to register the fideicommissum with the court having jurisdiction over the place where the property concerned is located, and thus requires the registration by the court (entry in the land register) and its publication, obviously for reasons of creditor protection.

With regard to the contemporary entails established in the Austrian hereditary provinces, the expression 'fideicommiss und primogenitur' appears in all but a few of the fideicommissum deeds. An entail founded in this way, for example:

- In his will of 8 December 1630, Seyfried Christoph Breiner, Count of Stübing, Fladnitz and Rabenstain, who, with the royal permission, founded a fideicommissum under primogeniture for his heirs. The Count made his first-born son Seyfried Leonhard Breiner and the descendants of his first-born son the general heirs of Stäz and Aspern. As soon as this branch dies out, the entail property will pass to the son of the founder's brother Maximilian Breiner, also in the order of first descent, and on their death the last entail holder will be free to dispose of the entail property. It is interesting to note here that Ferdinand III himself confirmed the will of Seyfried Christoph Breiner by royal seal on 12 April 1631

[14] PFAFF, L. – HOFFMANN, F., Zur geschichte der Fideikommisse. In: *Separat Abdruck aus den Excursen über österreichisches allgemeines bürgerliches Recht II 3*. Wien, 1884, p. 26-27.

[15] „... /daß nicht allein unterschiedliche Testatores und andere/ Durch ihre privatim aufgerichtete Majorat- und Fideicommissa das vorgesteckte Ziel/ nemblich ihre hinterlassene vinculierte Gutter unzertrennter auff ihres Geschlechts Posterität zu bringen/und dasselbe dardurch in besseren Stand zu erhalten/am wenigisten erraicht; sondern auch / indeme vergleichen Dispositiones bißweilen gleich von denen ersten Fidei-Commis-Erben supprimirt, und durch dieselben mit denen Fidei-Commiss-Güttern/als mit ihrem Aigethumb gehandlet: und dadurch viel gutherzige Creditores und Abtauffer/ welche von der Qualitate Fidei-Commissaria, wormit die verhypothecirt- oder gar verkauffte Gütter behafft/nichts wissen können/unverschuldter Dingen in Grossen Schaden eingefürht worden. Wann aber dem gemeinen Weesen mercklich daran gelegen/das die jenigen letzten Willen/und andere Dispositiones, welche vornemblich zu Erhaltung der Adelichen Geschlechter angesehen sennd/ununterbrüchig vollzogen: wie nicht weniger auch die jenigen/so auff ligende Gütter leihen/oder dieselbe kauffen wollen/mehrere Wissenschafft/was etwo für Onera und Vincula darauff hafften/erlangen/und desto sicherer contrahiren können/folglich solcher Gestalt im Land bey dem Credit Weesen mehrers Trawen und Glauben gepflanzt und erhalten werde: Als haben wir zu solchem Ende/über die/ von gehörigen Orthen eingelangte Bericht und Guetachten /am Fünffzehenden Tag deß nächst abgewichenen Monats Septembris, Uns dahin Allergnädigist resolvirt, daß Erstlich / so viel die berait gemachte/und mit dem Todt der Fidei-Committenten bekräfftigte Majoraten/und Fidei-Commissa betrifft/von denen Fidei-Commiss-Erben/ oder auch anderen auß der Familia, so darvon Wissenschafft/und das Testament/ oder andere Disposition, in handen haben/ bey Pöenfahl ein hundert Duggaten/welche sie ipso facto verwürckt haben sollen/inner Jahr und Tag/ von Publicierung dieseß Generals anzuraitten/bey den Testatoris oder anderen Fidei-Committenten ordentlichen Instanz, Schrifftlich angemeldt/ die Original-Disposition zugleich zu Gerichts handen erlegt/und solche/über ergangene Gerichtliche Verbschaidung/bey unserer R:D: Regierung in deß Unter-Marschallen/und bey dem Land-Marschallischen Gericht/in deß Weissbottens Protocoll, bey ander Instanzen aber in denen Grund-Büchern/oder an anderen gebührlichen Orthen/zu den Vormerckung unwerlängt/gebracht werden solle" HHStA Wien, Staatskanzlei, Patente, Kt. nr. 14. (Alt.11)

and ordered that it be carried out. The royal approval and ratification of the will was most certainly motivated by the need for legal certainty, the need for unchallengeability and the need for enforceability on the part of the testator and heirs.[16]

- Ten years later, Philipp Friedrich Breiner established a fideicommissum, modelled on the will of Seyfried Christoph Breiner.

However, we also find a different order of succession from the primogeniture, albeit not in many cases. For example, unlike Breiner's fideicommissum, the will of Count Georg Achatß Loßenstein of 23 November 1653 did not simply provide for a primogeniture but a more complex succession order in the case of the feudal succession.

Count Georg Achatß Loßenstein had a total of ten descendants (children): three sons and seven daughters. In order to keep the property in one estate, the Count created a fideicommissum, but he did not simply name his first-born son as heir, but his will also included the other two sons and their descendants, as well as the daughters and their descendants, but only under certain conditions. According to the special order of succession, the first-born son and his male descendants inherited the entail according to the order of primogeniture, but if the eldest (first-born) son died without a male descendant, the second-born son, Ferdinand Winzl and his male descendants, followed by the third son, Franz Anthon and his male descendants, were next in line of succession. If all three branches of the sons were to die without male offspring, the descendants of the count's daughters would share equally in the estate, which also meant that the fideicommissum would then ultimately cease to exist. Thus, the order of succession and the governing principle of the Loßenstein entail was not 'fideicommiss und primogenitur' but 'majoratus und primogenitura'. A further interesting provision of the will was that the heirs were also required to repay outstanding loans, but to a different extent: two-thirds of the loan amount was to be paid by the first-born son, Franz Adam Loßentstein, and the remaining one-third was to be paid in equal shares by the two younger sons, Ferdinand Winzl and Franz Anthon Loßenstein, even though the succession of the second and third sons could only occur in the event of the death of the first-born son without male descendants. On 15 January 1654, Ferdinand III confirmed this will with his royal seal.[17]

7. The fideicommissum in Hungary

Two articles on the old Hungarian law of the fideicommissum can be found in the law library.

The first is Act IX of 1687, which for the first time made it legally possible for the nobles of the country to establish an entail by will from their acquisitions, subject to royal approval. Placing the Act in its historical context, it becomes clear why it was from this year onwards that the magnates were given the legal possibility of establishing a fideicommissum with royal consent. Firstly, the orders had renounced their right to freely choose their king and their right of resistance under the Golden Bull at the Diet of Bratislava and, secondly, they had already in practice included provisions in their wills for an entail prior to the Act. The king's aim in this situation could therefore also have been to grant privileges to magnates loyal to him in order to ensure their loyalty and to enact an existing legal institution which would consolidate his power by making the establishment of the fideicommissum subject to his consent. In summary, the Hungarian legislation is a legal institution subject to royal authorisation, initially reserved exclusively for the nobility, and designed to keep property in one hand. To this end, the founder could lay down special rules of succession for the property separated by the entail, and the unity and indivisibility of the property thus created was protected by a prohibition on alienation and encumbrance. It is noticeable that there is a separation between property and possession, since the heir is given a right of use rather than actual ownership because of the clauses and restrictions. It is noteworthy that the founders of the entails imposed an obligation on the heirs to pay a fixed annual annuity from the profits of the estate to those family members nominally excluded from the estate by the founder.

Ignác Frank's 1845 formulation of the entail as a 'clan honoured inheritance' is extremely apt, since the founder essentially established a different order of succession to the indivisible estate in order to preserve the family's splendour.[18]

The Act L of 1723 amended the first article of the Entail Law in that it extended the right of creation of a fideicommissum to commoners and from then on an entail could be created not only by will but also by inter vivos transaction.

Géza Mille defined the term entail in his Practical Encyclopaedia of Economics.[19] This definition was later adopted by Béla Aczél.[20] According to these, an entail is "a case of a restriction of the right of ownership by the will of the owner. It was introduced for nobles in 1687 and for commoners in 1723. To establish it, an unencumbered estate, the issue of the legitimate portion and royal approval were required. The fideicommissum was inalienable and could only be encumbered subject to severe restrictions. The most common modes of inheritance are primogenitura (first-born), majoratus (inheritance by the male relative closest to the current holder) and senioratus (inheritance by the eldest male member of the clan)."

Subsequently, the Hungarian succession of entails was regulated by law on the basis of the Austrian Civil Code (octroi),

[16] Haus-, Hof- und Staatsarchiv (Österreichisches Staatsarchiv – Haus-, Hof- und Staatsarchiv), OLMA Urkunden B2 Seyfried Christoph Breiner Fideicommiss.

[17] Haus-, Hof- und Staatsarchiv (Österreichisches Staatsarchiv – Haus-, Hof- und Staatsarchiv), OLMA Urkunden B2 Seyfried Christoph Breiner Fideicommiss.

[18] FRANK, I., A közigazság törvény Magyarhonban. Buda, 1845, p. 461.

[19] Gyakorlati Gazdalexikon (edited by: Mille, Géza), Sylveszter Nyomda, Budapest, 1927, p. I./556.

[20] ACZÉL, B., A hitbizomány története, bírálatai és megreformálása. Pusztaföldvár, 1937, p. 1.

which entered into force in Hungary on 1 May 1853. This Austro-Hungarian legislation defined the concept of a fideicommissum as a provision by which the founder declares the property to be the inalienable property of the family for future generations. This definition is relevant to our topic because it refers to the family's property, which is inalienable in relation to several generations.

It is interesting to note that, before the advent of the entail, the only noble families to have a fideicommiss-like testamentary provision were the Thurzos, the Pálffys and the Esterházys. In the absence of statutory provisions, testamentary clauses were not enforceable, so it is instructive to examine how testators tried to persuade their descendants to comply with the testamentary provisions. In the clause of his will of 25 April 1664, Pál Esterházy wishes to persuade his children to follow the example of foreign families and not to start family discord and sharing after his death, but to voluntarily give up their individual interests in order to preserve the family property. He also writes openly in his codicil that he is well aware of the limits of the enforceability of what he has written in his will, but at the same time he strongly urges his descendants to act voluntarily in accordance with his will.

In 1678, Pál Esterházy made a new will, in which he set out in detail the reasons why his descendants should follow the order of succession he had laid down in order to keep the estate intact. This is relevant to our topic because Esterhazy is in essence giving his descendants a warning as to why it is important to keep the family estate together and what conduct should be adopted to this end, in effect doing what is typical of family businesses in Western Europe.

His main argument in favour of voluntary standard-setting was that their combined wealth made the Esterházys the most influential family, but sharing it would jeopardise this primacy, the options would be considerably reduced, and ultimately the fragmentation of wealth would be a disadvantage and a serious loss for all family members.

In order to reassure and encourage voluntary compliance by those descendants who are not "heirs to corpus of property" under the will, it is stated that, given the huge size of the estate held in one will, the current trustees will be able to provide adequately for the other family members.

Of course, the quoted admonitions had no legal binding force, but the clear and unambiguous wording, together with the paternal authority, served to set a voluntary standard. In many cases, the moral binding force is not primarily based on the place of the norm of conduct in the hierarchy of legal sources, but rather on the authority of the person who sets the norm of conduct and the ambiguity of the language.[21]

It is also noteworthy that in the period between the adoption of the law on fideicommissum and its extension to common nobles, only a few families in Hungary made use of the legal authority and established an entail. During this period the following persons established a regular fideicommissum: Ferencz Nádasdy (although he was sentenced to capital punishment and confiscation of property for his infidelity, so that the entail could no longer be in force at his death), Pál Esterházy, István Szirmay, György Erdődy and István Zichy.

It can be seen that only a few noblemen took advantage of the possibility of the first legal introduction of the fideicommissum, typically those who had the largest total assets and who, through their international experience, were familiar with the legal institutions applied abroad to ensure that the property was kept intact.

8. Summary

My historical research has shown that the noble families described above are the forerunners of the family business of today, since, both in the historical periods under study and today, family wealth, preserved as a unit, ensured profitability, wealth, prosperity, financial security and the long-term influence of the family. In passing on wealth, aristocratic families faced essentially the same challenges as today's family businesses. In both cases, the primary concern was to preserve and pass on wealth to the next generation, preferably in such a way that it would not be used up by the descendants but would be continually accumulated by them, while enhancing the family's reputation. To achieve these objectives, different legal instruments were put in place from one period to the next. The entail (fideicommissum) was the technical legal solution, or legal institution, which enabled the historic aristocratic families to preserve their economic strength from generation to generation, to keep their wealth together and to develop their specific succession arrangements which have survived for centuries.

It can be said, however, that where the transfer is made by means of a (solely) death transaction, the framework is determined by the law of succession in force at the time, which is not necessarily to the advantage of the family business.[22]

Prior to the legal declaration of the entail, the enforceability of the fideicommissum had always been questionable, and this is a problem that family businesses today are also confronted with in relation to certain legal instruments and technical solutions in the area of succession.

[21] On the requirement of norm clarity and some aspects of it, see in detail: Tóth J., Zoltán.: Clarity of norms in the light of the content requirements of legislation, legislative errors and their consequences – in general and with particular regard to the legislative requirements in Hungary; In: *Magyar Nyelvőr Special Issue*: *Norm Clarity,* vol. 146, Nr. 5, p. 3-15.; DOI: 10.38143/NYR2022. 5. 3., and ARATÓ, B. – BALÁZS, G.: The linguistic norm and norm of legal language; In: *Magyar Nyelvőr Special Issue*: *Norm Clarity,* vol. 146, Nr. 5., p. 91-103. DOI: 10.38143/Nyr.2022. 5. 91. and POKOL, B.: Clarity of norms and legal history: historical paths of divergence from legal rules to general norms; In: *Magyar Nyelvőr Special Issue*: *Norm Clarity,* vol. 146, Nr. 5., p. 19-35.; DOI: 10.38143/Nyr.2022. 5. 16.

[22] On some current problems in Hungarian succession law, see for example: BOÓC, Á., Comments on Some Important and Current Problems of the Law of Succession in Hungary – Cosidering Historical Aspects. In: *Journal on Europaen History of Law*, vol. 11, Nr. 2., 2020, p. 104-110.

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)

*Réka Pusztahelyi**

Abstract

At the very beginning of the twentieth century, during the period of heightened endeavours for the codification of the private law in Hungary, not only the influence of the "great" civil codes (BGB, ABGB, ZGB) was observable. This paper aims to demonstrate the special impact (or, unique renaissance) of the English equity doctrine of undue influence, among the invalidity rules concerning juridical acts, contracts or testaments. Since this examination cannot be carried on separately from scrutinising the legal thoughts and legislation on immoral and usurious contracts, after some general remarks, this work deals with relevant issues of the Hungarian legislation of usury, independently of civil code drafts or embedded into them. Then, it demonstrates the emergence of the undue influence doctrine in the academic discussion, in the civil code drafts and parallelly, in judicial practice. At this point, we should highlight the special interplay between these "sources of legal thinking", and as a consequence, how the approach to the notion of undue influence was forming in that period, alongside the draft texts (from the year 1900) up to the Proposal for a Private Law Bill (Private Law Bill, 1928). Although this writing focuses on invalidity issues of contractual transactions, one chapter is dedicated to showing the development of the concept of undue influence relating to testamentary dispositions.

Keywords: *undue influence; usurious contract; unfair exploitation; contracts contrary to good morals; law of succession; Hungary.*

1. Introduction

This study aims to highlight the parallel influence of the English equity doctrine of undue influence and the impact of § 138 of the German Civil Code (Bürgerliches Gesetzbuch, BGB) upon the codification of the private law in Hungary, at the very beginning of the twentieth century. In our point of view, the two concepts, or rather, the two different approaches to and legal assessments of unfair exploitation, the usurious contract and the undue influence intertwined in the pre-codification stage of modern Hungarian Private Law. Moreover, the legal expression of undue influence reflected in the Hungarian jurisprudence and legal literature between 1900 and 1959, before the adoption of the first Civil Code of Hungary (i.e. the old-HCC), gained a special interpretation differing not only from the original German approach to usurious contracts, but also from the common law doctrine of undue influence. For this reason, we cannot set aside dealing with the Hungarian regulatory development of the usurious contract and then show the slight influence of the English equitable doctrine of undue influence. These two concepts are 'in different layers' and they overlap each other while covering the relevant cases of application. Furthermore, according to some academic thoughts from the period to be examined, the English concept of undue influence was considered equivalent to a type of exploitative contract.[1] In addition, these concepts cannot be assessed separately from the whole system of invalidity grounds, as well as regarding the defects of consent. For the reason of length, however, this paper focuses on contractual transactions and exploitative (usurious) contracts.

In the field of contract law, the Hungarian Civil Code in effect contains specifically neither a rule for unfair exploitation nor a rule for undue influence. The concept of undue influence or unfair exploitation had merged with other concepts, concepts of contracts contrary to good morals or usury, and were built into the oldHCC, meanwhile, these rules today do not reflect all the subjective elements elaborated by the civil code drafts between 1900 and 1928.[2] Although the fact that the Commercial Code of 1875[3] contained provisions which

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1 SZLADITS JR., K., *Az angol jog kútfői*. [Sources of English Law] Budapest, 1937, p. 135-136.

2 For a comprehensive introduction to this topic see VÉKÁS, L., The Codification of Private Law in Hungary in Historical Perspective. In: *Annales Universitatis Scientiarum de Rolando Eötvös Nominatae, Sectio Iuridica*, vol. 51, Nr. 4, 2010, p. 51-63; HOMOKI-NAGY, M., Die Kodifikation des Ungarischen Zivilrechts im 19. Jahrhundert. In. *Rechtsgeschichtliche Vorträge*, vol. 25, 2004, Budapest, p. 3-10. For an introduction to the debate and early plans and drafts of the civil code, see BALOGH, J., How to Make a Civil Code: Plans and Drafts of General Rules in 19th Century Hungarian Private Law. In: *Journal on European History of Law*, vol. 11, Nr. 2, 2020, p. 95-103.

3 Law on commercial transactions no. XXXVII of 1875.

were generally applied to non-commercial obligations as well, due to the lack of codified civil law,[4] did not provide any rule on unfair influence.

On the contrary, taking into account the law of succession and the invalidity issues of wills, the approach to undue influence upon the testator's will had been considered differently. As it is scrutinised in chapter 5, *"dolosa circumventio"* was closely connected to other invalidity grounds concerning errors of consent, such as deceit or duress. Consequently, the direct relationship with the invalidity rules of the Austrian Civil Code (Österreichisches Allgemeines Bürgerliches Gesetzbuch, ABGB)[5] would be established here, as Emília Weiss also put it in her comprehensive work.[6] However, Lajos Králik reported that after 1848, our judicial practice in the application period of the ABGB became rigid as it interpreted error and threat in a very concrete way.[7]

By the time of the Private Law Bill of 1928, the Hungarian private law had reached the stage of development so that this draft contained unfair influence [in Hungarian: "tisztességtelen befolyásolás"] in Article 1709 as a sui generis ground for challenging a will – replacing the term "undue influence"[i.e. "illetlen befolyás"] used in the Third Draft of 1913–, independently of the concept of good morals, usury, error or threat. It means that before 1959, the undue or unfair influence was recognised by both the judicial practice and the legislation (in civil code drafts) independently of the unilateral or bilateral nature of the legal transaction at issue.[8]

Although the oldHCC of 1959 omitted almost all the subjective elements from the invalidity rule of usurious contract, and the unfair influence did no longer constitute a sui generis contractual invalidity rule in the judicial practice, the notion of undue influence, as an invalidity ground of the law of succession, a cause that fundamentally shaped the testator's will, still exists and is being in effect,[9] in the Hungarian Civil Code of 2013 (hereinafter HCC)[10], among other special rules regarding challenging a testamentary disposition, thus, relatively separately from the invalidity grounds of contract law.

Nevertheless, this study only aims to examine how changed the legislative, judicial and the academic approaches to the cases and legal concepts where the unfair influence was in the focal point which caused contractual dysfunctions, regarding the period of the XXth century drafts for a Hungarian civil (private) code, and its continuation.

2. General remarks on legislative approaches to the undue influence

Taking a retrospective, historical point of view and searching for the signs of direct or indirect impact of the undue influence doctrine upon the Hungarian legal culture, we can agree with Wagner's observations: 'Above all, however, undue influence represents a legal institution that has proven itself in practice by the courts to this day, so that an analysis of its development regarding both continuities and ruptures promises valuable insights overall.'[11] We hope that this examination serves a better understanding of the invalidity grounds of usury or immorality, as well.

Considering the scope of the legally relevant notion of undue influence, one should create a conceptual framework for defining which are the relevant invalidity grounds and how their interplay could be examined. In this regard, we could generalise *Attila Menyhárd*'s thoughts. As he put in connection with usurious contracts, one can distinguish between two approaches of the national law systems to usurious contracts as a ground of invalidity: (1) the legislator formulating the rule could start with the objective conditions (excessive benefit or unfair advantage) and continue with the subjective elements (any exploitation of the party's weakness or situation) or, alternatively (2) the formulation emphasises the subjective elements firstly (causing an error of will) and subsequently, the objective criteria would be added to it.[12]

For example, in HCC, the rule for usury pertains to the group of invalidity grounds entitled 'Error in the intended legal effect'. Moreover, similarly to the German Civil Code to-

[4] HORVÁTH, A., A magyar polgári magánjog történeti alapjai (1848-1945) [Historical foundations of the Hungarian Private Law (1848-1945)]. In: Mezey, B. (ed.), Magyar jogtörténet. [Hungarian legal history]. 4th edn. Budapest, 2007, p. 162.

[5] Cf. § 869-874 of ABGB (as in effect in 1900, before the revision started in 1904).

[6] Weiss, E., A szerződés érvénytelensége a polgári jogban.[Invalidity of Contract in the Civil Law] Budapest, 1969, p. 31.

[7] KRÁLIK, L., A magyar általános polgári törvénykönyv tervezetének 991.§-ához: Az illetlen befolyás. [On § 991 of the Draft of the Hungarian General Civil Code – Undue Influence] In: *Magyar Jogász Egyleti Értekezések*, Vol. XXI, Nr. 3, 1901, p. 71–92. (Extractions published: KRÁLIK L., A magyar általános polgári törvénykönyv tervezetének 991.§-ához: Az illetlen befolyás. In: *Jogtudományi Közlöny*, vol. 36, Nr. 3, 1901, p. 17-19). p. 86.

[8] It should be added here, contrary to its limited applicability as it was foreseen by academic literature, the rule of usury was proven to be applicable to one-sided transactions, such as gift contracts as well. We found evidence for this in the case law. According to a Curia decision from 1940, a gift between betrothed couples, as a result of psychological pressure, shall be challengeable as a usurious contract. Cf. Curia decision of 4, June of 1940, Nr. P. III. 937/1940. See NIZSALOVSZKY, E., et al. (eds.), *Grill-féle új döntvénytár* (1940-1941). Volume XXXIV. Budapest, 1942, p. 243-248.

[9] For analyses of current judicial practice of undue influence on testators' will, with the special regard to the Curia case No. 270 of 2020, see PUSZTAHELYI, R., A végakarat tisztességtelen befolyásolása mint érvénytelenségi ok a magyar bírói gyakorlatban.[Unfair Influence upon Last Will as Invalidity Rule in the Judicial Practice] In: *Miskolci Jogi Szemle*, vol. 16, Nr. 3, 2021, p. 90-104; PUSZTAHELYI, R., A végrendelkező akaratának tisztességtelen befolyásolása.[Unfair Influence upon the Testator's Will] In: *Jogtudományi Közlöny*, vol. 76, Nr. 9, p. 397-408; PUSZTAHELYI, R., Interplay between undue influence, usury, and immoral contracts in the light of the recent case law of Hungary. In: *European Integration Studies*, vol. 18, Nr. 2, 2022, p. 33-41. https://doi.org/10.46941/2022.e2.33-41

[10] See Art 7:40 (1) point c) titled *with 'Defects in the intention of the person making the disposition'*: A testamentary disposition shall be invalid if: the testator had been coerced into making the disposition by the use of threat or unfair influence; provided that the testator would not otherwise have made the disposition.

[11] WAGNER, S., *Interzession naher Angehöriger, Eine Untersuchung in historischer und vergleichender Perspektive.* Tübingen, 2018, p. 10.

[12] MENYHÁRD, A., A magánjogi uzsora.[Usury in Civil Law] In: FILÓ, M. (ed.), *Tanulmányok az uzsoráról* [Studies on Usury]. Budapest, 2016, p. 227.

day (Art. 138 BGB), it constitutes a subgroup of contract that is contrary to public policy (i.e. immoral contract) meanwhile the grounds of defects of consent (in contractual will) are separately regulated. In common law, its functional equivalent[13], the doctrine of undue influence, was developed by the Courts of Equity and it is closely connected to other types of error of will (especially duress and coercion). However, beside the cases of abuse of a position of trust, the cases of the unfair exploitation of a person's difficulties are also dealt with in Anglo-American law as instances of undue influence, which are covered by the notion of exploitative contracts in the Continental legal systems.[14] Compared to an elaborated set of model rules, in the Draft of Common Frame of References (DCFR), which incorporates the rule from Principles of European Contract Law (PECL)[15] *verbatim*, only with slight differences in wording, unfair exploitation is also formulated in the group of vices of consent (II.–7:207.)[16].

Accordingly, the examination of the development of undue influence in Hungarian civil law would not be complete without taking into consideration and focusing on other legal concepts such as usurious and immoral transactions, since these concepts intertwined with each other at the time, as our research led us to this first conclusion. We need to separate the concept of undue influence from other errors of intention, such as (fraudulent) misrepresentation, coercion or duress. We stress as the most important difference that the undue influence results in an excessive benefit or grossly unfair advantage to the detriment of the persuaded person, meanwhile the influence upon the contracting party's will is subtler than in the cases of coercion or duress; generally speaking.[17]

3. Usurious contracts and contracts contrary to good morals in the era of XXth century codification attempts in Hungary

As far as usury is concerned, the Hungarian act on usury and the provisions of the drafts on the civil code were being elaborated parallelly with other national, either criminal or civil law legislation in Europe.[18] It is necessary to point out here that Act XXV of 1883 on usury and harmful credit transactions limited the offence of usury *as a criminal offence* to the cases of credit transactions and deferred payment.[19] Cases of so-called *usury in kind* were not considered usury offences but were usually referred to as exploitative contracts. For example, when a wholesaler buys from an untrained or needy producer significantly below the market price or otherwise takes advantage of the situation of constraint, ignorance or recklessness of another to obtain undue unilateral advantage.[20]

The first draft of the Hungarian General Civil Code of 1900 (Magyar Általános Polgári Törvénykönyv, Máptk.)[21] contained the German model of the usury contract in Art. 957[22], and contrary to the above-mentioned law, it covered all types of usurious contracts, providing for the general consequence of nullity. The second draft (1913)[23] omitted the usury contract precisely because it would have been the subject of a dedicated bill. As this law was not adopted, the so-called Commission text of the draft of the Civil Code (1915) returned to the codification of the concept of exploitative transaction, i.e., unfair exploitation.[24]

It is worth noting that the Máptk (1900) had already regulated the contract contrary to good morals and public order

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[13] RALF, M., The Functional Method of Comparative Law. In REIMANN, M., ZIMMERMANN, R. (eds), *The Oxford Handbook of Comparative Law*, (online edn., 9 May 2019), Durham, North Carolina, 2019, p. 345-389. https://doi.org/10.1093/oxfordhb/9780198810230.013. 11. Cf. ZWEIGERT, K., KÖTZ, H., (translated Tony Weir): *An Introduction to Comparative Law.* Oxford, 1998, p. 329-331.

[14] Cf. ZWEIGERT, K., KÖTZ, H., *An Introduction to Comparative Law.* op.cit., p. 428.

[15] Article 4:109 PECL: Excessive Benefit or Unfair Advantage.

[16] Art. II.–7:207. in DCFR: *'A party may avoid a contract if, at the time of the conclusion of the contract:*
(a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill and
(b) the other party knew or could reasonably be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or grossly unfair advantage.'
See VON BAR, Ch., (et al.) Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR) Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) Based in part on a revised version of the Principles of European Contract Law. Munich, 2009. [DCFR Commentary] p. 532. See also: Article 4:109: Excessive Benefit or Unfair Advantage of PECL (Principles of European Contract Law).

[17] Thus, considering invalidity, always there is an objective condition to be assessed.

[18] For example, see BALOGH, J., Vélemény az uzsora és az ehhez hasonló gazdasági visszaélések tárgyában teendőkről.[Proposal for Agenda Concerning Usury and Economic Offences] In: *Budapesti Hirlap, kvny*, Budapest, 1905, p. 1-25. http://real-eod.mtak.hu/8757/.

[19] Art. 1 of Act XXV of 1883.

[20] For an illustration of the development of private usury and the distinction between credit usury and usury in kind see: MENYHÁRD, A., *A magánjogi uzsora*, op. cit., p. 228 et seq. Cf. VERESS, E., Az uzsora magánjogi következményei.[Civil Law Sanctions of Usury] In: KOLTAY, A. (ed.), *Balás P Elemér Emlékkönyv. Tisztelgés és antológia sajtójogi, szerzői jogi és személyiségi jogi műveiből halálának 70. évfordulóján*. Budapest, 2018, p. 107-133.

[21] M. KIR. IGAZSÁGÜGYMINISZTÉRIUM, *A magyar általános polgári törvénykönyv tervezete. Első szöveg* [Draft of the Hungarian General Civil Code. First Draft], Budapest, 1900.

[22] *'Any contract shall be void in particular whereby one party, by taking advantage of the inexperience, recklessness or situation of crisis of the other party, obtains for himself consideration disproportionately exceeding the value of his own services (usurious contract).'* Cf, Ibid., p. 216.

[23] M. KIR. IGAZSÁGÜGYMINISZTÉRIUM, *A magyar általános polgári törvénykönyv tervezete. Második szöveg*. [Draft of the Hungarian General Civil Code. Second Draft] Budapest, 1913.

[24] As will be shown later (see below), the impact of the English doctrine of undue influence upon the legislation was traceable at this point.

(Art. 956) separately, which was followed by the rule of usury contract (Art. 957). Therefore, we share the opinion of *József Trócsányi* that according to this regulatory approach, the usury contract, i.e., formerly a special case of immoral transactions, ceased to be a type of contract contrary to good morals *per se*, since it became a separate ground for invalidity by virtue of a special statutory provision.[25] This approach complied with the viewpoint adopted in this period of codification that the concept of immoral contract is *not to apply* to cases of undue influence and usury.[26] Thus, situations in which one party persuades the other party to conclude a contract by using unconscionable means do not imply that the contract is null and void based on immorality.[27]

Compared to German development, Hans-Peter Haferkamp puts it that the law on usury of 1880 had brought huge difficulties in proving the subjective elements of unfair exploitation. Accordingly, the courts were inclined to infer economic constraints from the obvious disproportionality.[28] After 1900, the judicial interpretation was continued, now under the Art. 138(2) BGB. Before 1914, for the *Reichsgericht*, the presumption rules already tried and tested under the law on usury made it sufficient to establish the subjective criteria of Art. 138(2) BGB to fight against usury.[29] However, in other categories of cases, case law already from 1900 showed a tendency to bypass the difficult-to-prove subjective prerequisites of paragraph 2 and to arrive at the relief of the conditions in special cases through paragraph 1, i.e. immorality (*Sittenwidrigkeit*).[30]

50 years after the Act XXV of 1883, and after the world economic crisis, as a success achieved in parallel with the civil law codification, the new Act VI of 1932 on usury was adopted and repealed the relevant provisions of the predecessor act. This law distinguished between usurious contract and its special subtype, the so-called exploitative contract, due to the political and academic debate[31] mainly on issues of usury in kind[32]. Its provision determined the concept of the usurious contract as mainly applied to credit transactions (this concept covered usury in kind as well, provided that any kind of lending transaction was included).[33]

The law prescribed the criminal and civil law consequences of the usurious contracts and contained provisions relating to the relative nullity of the exploitative transactions as civil law consequences. Nevertheless, it did not exactly determine the interactions between the relative nullity and the other civil law consequences elaborated by the judicial practice based on the civil code drafts.[34] It is remarkable that the exploitative transactions were not deemed as criminal offences[35] and their civil law consequences were determined also by the general civil law rules, not only the provisions of this special law. In the case of the exploitative transactions (Art. 9), the subjective conditions were the same, however, the exploitative transaction was not intended to be related to lending or a postponement of service, it was mainly related to cases where the performance and counter-performance are given simultaneously.[36] The second difference was that it required either a contractual agreement on or an acquisition of a gratuitous advantage or a manifestly excessive profit resulting in substantial damage to the other party, instead of striking obvious disproportionality of value between service and consideration, as it was provided by the rule of usurious contract under Art. 1.

All this was accomplished by this special law in such a way that the Private Law Bill of 1928,[37] in its Art. 977, paragraphs 1 and 2, had provided for this simultaneously in the following way. Nevertheless, not using the expression *undue influence*:

> 'A contract concluded with a person with an impaired mental disability by a person who took advantage of that disability is void if he knew at the time of concluding the contract that the other party would suffer substantial damage to property or other substantial detriments.
>
> Likewise, a contract by which a person, taking advantage of another's inexperience, recklessness, dependence, or distress, or of his relationship of trust with him, concludes or obtains for himself or a third person a gratuitous advantage or

[25] TRÓCSÁNYI, J., *Erkölcstelen ügyeletek (turpis causa).* [Immoral Contracts (Turpis Causa)] Budapest, 1909, p. 47.; However, in legal practice, the opposite was also experienced, since decisions of the Curia stipulated usurious contracts contrary to good morals, and therefore, null and void. Cf. for example decision of Curia of 11 February 1920. P. ÍH. 1712/1919. sz.), cited as case No. 82 in SZLADITS, K. (ed), *Magánjogi döntvénytár*. [Collection of civil law decisions] Volume XIII, 1921, Budapest, p. 105.

[26] See below.

[27] Menyhárd pointed it out: MENYHÁRD, A., *A jó erkölcsbe ütköző szerződések.* [Contracts contrary to good morals] Budapest, 2004, p. 26-28.

[28] HAFERKAMP, H-P., Sittenwidriges Rechtsgeschäft; Wucher. In: SCHMOECKEL, M., RÜCKERT, J., ZIMMERMANN, R., (eds.), *Historisch-kritischer Kommentar zum BGB*, Tübingen, 2003, p. 725-726.

[29] Ibid.

[30] Ibid.

[31] From the rich scientific literature, the work of Béni Grosschmid should be mentioned here: GROSSCHMID, B., *Hitel és reáluzsora*. [Usurious credit transactions and usury in kind] Budapest, 1902.

[32] Or more precisely, exploitative transactions other than lending/credit contracts.

[33] BALÁS P, E., *Az uzsoráról szóló 1932:VI. törvénycikk magyarázata*.[Commentary on Act VI of 1932 on usury] Budapest, 1932, p. 19.

[34] See remarks below on the Art. 782 of the third draft (1913).

[35] BALÁS P, E., Az uzsoráról szóló 1932:VI. törvénycikk magyarázata, op. cit., p. 101; WEISS, E., Die Entwicklung des Vertragsrechts im Lichte der Ungarischen Zivilrechtlichen Kodifikationsarbeiten. In: CSIZMADIA, A., KOVÁCS, K., *Die Entwicklung des Zivilrechts in Mitteleuropa,* Budapest, 1970, p. 292.

[36] BALÁS P, E., *Az uzsoráról szóló 1932:VI. törvénycikk magyarázata*, op.cit., p 99. The condition of immediate and simultaneous fulfilment was also noted by VERESS, E., Az uzsora magánjogi következményei. op. cit., p. 130.

[37] For a new edition of the Private Law Bill with an introduction written by Emőd Veress, see VERESS, E. (ed.), *Az 1928. évi Magánjogi törvényjavaslat*, [Private Law Bill of 1928] Cluj-Napoca, 2019.

disproportionate profit, to the substantial detriment of the other party, is also null and void.'[38]

As we stressed above, in this time of early civil codification attempts, it was not only the German BGB or the Austrian ABGB that had influence upon the drafts. *Antal Almási* remarked that among the situations of a usurious contract the party could exploit, one of them, i.e., the abuse of the relationship of trust (or reverence, or dependency), reflects the impact of the English concept on undue influence.[39] *Endre Kőnig* pointed out the same.[40]

According to our research, this different approach to exploitative contracts was originated from *Lajos Králik* who proposed to complete the conceptual framework of fraudulent misrepresentation and threat with undue influence.[41] This paper presents this phenomenon in the following sections.

4. The emergence of the doctrine of undue influence in the Hungarian civil law academic debate and its effects upon the drafts of Civil Code and judicial practice

4.1 On the fruitful interplay between judicial practice, legal literature and civil law codification

In 1860, the October Diploma abolished the constitutional application basis of the ABGB by restoring the authority of the Hungarian Parliament. In 1861, the Provisional Rules of Legislation (Ideiglenes Törvénykezési Szabályok, ITSZ) cancelled the temporary and mandatory application of the Austrian Civil Code (ABGB).[42] While the Hungarian Civil Code was being drafted from the 1870s onwards,[43] the possibility to continue applying the ABGB remained a minority point of view in the High Judge Conference (Országbírói Értekezlet) convened by the Emperor in 1861.[44]

Without statutory national civil law, the judicial practice and thus, customary law had an extraordinary role in the elaboration of the modern civil law of Hungary. As *Judit Balogh* also pointed out, 'judicial practice has played an extraordinary role in the unification of Hungarian law. The decisions of the Curia (Supreme Court) eliminated legal loopholes, as well as further developed old institutions. Its in-principle decisions were binding on the courts, and therefore, the application of this type of consuetudo has put down deep roots in Hungarian legal thinking.'[45]

It is remarkable that this particular interplay between statutory law, customary law (*consuetudo*) and legal science was *expressis verbis* worded even in the Private Law Bill. According to Art. 6 of the Private Law Bill (Mtj, 1928) 'on a legal question which is not governed by law, the court shall decide in accordance with the spirit of domestic law, the general principles of law and the scientific findings'. Thus, this provision above articulated the fact that judicial practice and civil code drafts influenced, developed and improved each other at that time.[46] After the failure of the codification of the Hungarian Civil Code before the Second World War, like the antecedent drafts, the Private Law Bill was also not considered to be an authentic legal source but rather a frame of references to define the content of the customary law, a source of the vivid civil law.[47] Károly Szladits described the continuous convergence between the drafts and judicial practice as a bridge-building process.[48]

For example, the concept of undue (unfair) influence embedded in Art. 751 of the Commission draft of the Civil Code (1915) (in detail, see below)[49] had appeared in judicial practice relatively soon. As Antal Almási wrote: 'Nothing proved this better than the decision of the Curia No. P VII. 2908/1920, which showed the direct impact of the Commission's text on judicial practice, i.e., the (re)discovery of undue influence as a private law institution'.[50] According to our research, earlier decisions

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[38] VERESS, *Az 1928. évi Magánjogi törvényjavaslat*, op. cit., p. 195.

[39] ALMÁSI, A., *Ungarisches Privatrecht*. Band I. Berlin-Leipzig, 1922, p. X.; ALMÁSI, A., Uzsorás szerződés és kizsákmányoló ügylet. [Usury and Exploitative Transactions] In: *Jogtudományi Közlöny,* vol. 67, Nr. 32, 1932, p. 181-183.

[40] *'Finally, it provides protection for those who were persuaded by their own trusted person, abusing their relationship of trust, to enter into an unfavourable contract: and thus covers cases of undue influence, as it is known in English law.'* See KŐNIG, E., A kizsákmányoló ügylet.[Exploitative Transaction] In: *Jogállam*, vol. 25, Nr. 7., 1926, p. 383.

[41] KRÁLIK, L., A magyar általános polgári törvénykönyv tervezetének 991.§-ához: Az illetlen befolyás, op.cit, p. 73.

[42] The Austrian civil code remained in force Transylvania, Croatia, Slavonia, the Banat of Temeswar, the Military Border Area and Fiume. Cf. Vékás, L., The Codification of Private Law in Hungary in Historical Perspective. In: *Annales Universitatis Scientiarum de Rolando Eötvös Nominatae Sectio Iuridica*, vol. 51, 2010, p. 51-63. It should be added here, that in Transylvania, the AGBG remained in force technically until the Second World War, despite the fact that in 1867, the Transylvanian Great Principality was reunited with Hungary. Cf. VERESS, E., Private Law Codifications in East Central Europe. In: SÁRY, P., (ed.), *Lectures on East Central European Legal History*. Miskolc, 2022, p. 179, https://doi.org/10.54171/2022.ps.loecelh_8.

[43] The codification work was ordered in 1876 by the Minister of Justice Boldizsár Horvát. Cf. KÉPES, Gy., The Birth and Youth of the Modern Hungarian Private Law. In: *Journal on European History of Law*, vol. 7, Nr. 2, 2016, p. 112.

[44] VERESS, E., *Fejezetek a Magyar magánjogi kodifikáció történetéből. Európai kitekintéssel*. Cluj Napoca, 2022, p. 90.

[45] BALOGH, J., Debates in Articles (Positions in the Legal Literature on the Possibilities of Private Law Codification, 1866-1900). In: *Journal on European History of Law*, vol. 11., Nr. 1, 2020, p. 130-131.

[46] ALMÁSI, A., A bírói gyakorlat jelentősége a magyar magánjogban. In: *A Jogállam könyvtára,* vol. 52, 1935, p. 20.

[47] VERESS, E., Private Law Codifications… op. cit., p. 181.

[48] SZLADITS, K., Magánjogi törvénykönyv és bírói gyakorlat.[Private Law Code and judicial practice] In: *Polgári jog*, vol. 5, Nr. 8, 1929, p. 372.

[49] M. KIR. IGAZSÁGÜGYMINISZTÉRIUM, A Polgári Törvénykönyv törvényjavaslatának tárgyalása a Képviselőház külön bizottságában, vol. II, Bizottsági jelentés. Budapest, 1916, p. 204-206.

[50] ALMÁSI, A., *Kötelmi jog.* Budapest, 1926, p. 14. Cf. (no author) *Szemle.* In: *Jogtudományi Közlöny*, vol. 56, Nr. 4, 1921, p. 32.

also show the same reflections.[51] Furthermore, Article 977 of the Private Law Bill (see below) was also referred to by the judicial practice.[52] From the year 1932, regarding contract law cases, the decisions mostly referred parallelly to the new law on usurious and exploitative transactions (i.e. Act VI of 1932).[53]

4.2 Legal literature and codification: Králik's critical reflections and their spillover effects

Here, we would like to touch upon the special movement in the legal literature of that period, which, as stated above, was originally triggered by Lajos Králik's lecture delivered at the meeting of the Hungarian Lawyers' Association in 1901, and by his subsequent publications.[54]

In his critical reflections on Art. 991[55] of the 1900 draft of the Hungarian General Civil Code (Máptk), Lajos Králik proposed the legal formulation of the concept on undue influence, in a way that would cover all legal transactions, especially with regard to family law relationships[56] and law of succession (testamentary dispositions). In his proposal, Králik placed undue influence as a ground for challenging a contract among the defects of consent and treated it as a ground for avoidance.

In order to present his concept and its influence upon Hungarian legal thinking, it is worth outlining briefly the origin of the doctrine. Besides the English law, Králik also pointed out the connection to the French *ancient droit* concept on *captation,* alongside the common Roman law traditions. And these similarities are not coincidental. According to Bell, at an early and key stage in its development English law was directly influenced by ideas from France. As Romilly commented on the precedent case Huguenin v. Baseley (1807) on undue influence, his knowledge of French law (especially Pothier's Traités) enriched the English legal doctrine.[57]

According to *du Plessis* and *Zimmermann*, through French law influence, the Roman civil law tradition established the equitable doctrine of undue influence before the Court of Chancery.[58]

By the time of Králik's research, the equitable doctrine of undue influence had been well-developed in English law.[59] In order to protect the freedom of formation of the consent, common law concentrates rather on the procedural fairness of the negotiations, instead of assessing the substantive justice of contracts. Today, there is no sharp borderline between the categories of economic duress, undue influence and unconscionable bargain, however, they are not interchangeable.[60] In most cases of undue influence, if the agreement has been obtained with improper pressure, this pressure did not amount to duress.[61]

Although in French law today, no legislative text provides expressly for undue influence, the doctrine and the jurisprudence acknowledge *captation* and *suggestion*.[62] Despite their vague meaning, in practice, these terms are used to denote dishonest conduct calculated to overreach a donor or testator and improperly influence the disposition of his or her property.[63] According to Bell, among the institutions of the applicable law, drawing a parallel between the French cases and their English

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[51] Case nos. 1094/1919. and P VI 2736/1914. listed by Lajos Vadász. Cf. VADÁSZ, L., *Magánjogi törvénykönyvünk és élő tételes jogunk*. [Our Private Law Code and Our Vivid Positive Law] Vol. II., Kötelmi jog [Law of Obligations]. Budapest, 1930, p. 31. According to the decision in Curia case nr. P VI 2736/1914, a contract for disproportionately high attorney's fees, where the attorney induced the party to conclude it by taking advantage of his or her distraught state of mind, may be challenged.

[52] Cf. Curia decisions (case nos. P. I. 5865/1929, P. V. 648/1930, P VII 6618/1930, P. III. 6074/1930) compiled in ISAÁK, Gy., PETROVAY Z., NIZSALOVSZKY E., TÉRFY, B. (eds), *Grill-féle döntvénytár* [Grill Case-Book] *24. 1930-1931*. Budapest, 1932, p. 265-266.

[53] SZLADITS, K., ÚJLAKY, M., VILLÁNYI, L. (eds.), *Magyar magánjog mai érvényében. Törvények, rendeletek, joggyakorlat. 3. rész. Kötelmi jog. I. kötet.* [Hungarian Private Law in Effect. Laws, Regulations, Practice. Third Part, Law of Obligation, First Volume] 2nd edition. Budapest, 1942,p. 74 et seq. It should be mentioned here that the new law on exploitative contracts left the question opened for debate whether the civil law consequences already elaborated by the judicial practice could be applied or not in the future alongside the provisions of the new law (see below).

[54] KRÁLIK, L., A magyar általános polgári törvénykönyv tervezetének 991.§-ához: Az illetlen befolyás. op.cit.

[55] Cf. Art 991 of Máptk: 'A party who has been induced to conclude a contract by fraudulent misrepresentation or unlawful threats is entitled to challenge his contractual agreement. Such an act committed by a third party shall not be a ground for avoidance unless the other party knew of it at the time of the conclusion of the contract or could have known of it with due care, or would have obtained a free advantage or disproportionate benefit from the contract to the detriment of the injured party.' Cf. IGAZSÁGÜGYMINISZTÉRIUM: *A magyar általános polgári törvénykönyv tervezete*, op. cit., p. 223.

[56] By that time, the act on matrimonial law was adopted (Act no. XXXI of 1894) and protected the free consents of the spouses from coercion, threat or duress (cf. Arts. 38 and 53). It is remarkable that in the evolving judicial practice, the doctrine of undue influence was also applied to family relationships, and in close connection with the above-mentioned defects of consent, especially mental duress. For example: a legal transaction concluded with the help of psychological pressure on the wife to solve her husband's serious situation (criminal investigation, arrest) is considered ineffective. cf. Curia case nr. 4625/1921 compiled in SZLADITS, K., FÜRST, L, *A Magyar bírói gyakorlat. Magánjog*. [Hungarian Judicial Practice, Private Law] Volume II, Budapest 1935, p. 67.

[57] BELL, A. P., Abuse of a Relationship: Undue Influence in English Law and French Law. In: *European Review of Private Law,* vol. 15, Nr. 4, 2007, p. 575.

[58] J. DU PLESSIS, J., ZIMMERMANN, R., The Relevance of Reverence; Undue Influence Civilian Style. In: *Maastricht Journal of European and Comparative Law,* vol. 10, Nr. 4, 2003, p. 363.

[59] Králik relied on the work of Pollock. Cf. POLLOCK, F., *Principles of Contract: Being a Treatise on the General Principles Concerning the Validity of Agreements in the Law of England.* 1885, p. 556-596.

[60] MENYHÁRD A., *A jó erkölcsbe ütköző szerződések*, *op.cit.,* p. 47.

[61] PEEL, E., TREITEL, G.H., *The Law of Contract*. London, 2015, p. 506-507.

[62] SCALISE JR, R. J., Undue influence and the law of wills: A comparative analysis. In: *Duke Journal of Comparative & International Law*, vol 19., Nr. 2008, p. 60-61.

[63] BELL, A.P., Abuse of a Relationship…, *op.cit.,* p. 568.

counterparts, it seems that *dol* (fraudulent misrepresentation) is the closest in meaning to undue influence.[64]

Králik's proposal was adopted with spectacular speed[65] by the Hungarian legal professional and academic circles. The general public saw in it a rediscovery of the achievements of ancient Hungarian private law, an effective means to fight against more subtle cases of manipulation of (contractual) intent not covered by misrepresentation and threat.[66] Thus in 1909, in the third edition of his Handbook on Hungarian Private Law, in connection with the contractual will based on Králik's study, Ferenc Raffay proposed the formulation of the legal concept of undue influence as an additional ground to challenge the contract, other than mistake, misrepresentation or threat.[67]

In the progress of the Hungarian civil law codification, one can also observe the problem faced by a legislator, i.e. the way of the legal formulation of unfair influence (an error of consent or error of intended legal effect) and its close connection to the above-mentioned legislative efforts on usurious contracts. In the next point, the challenge of the transcription of the vague phenomenon of undue influence into legal provisions will be examined.

4.3 The fate of *undue influence* upon contractual intent in the drafts between 1913 and 1915 (within the wording of the usurious contract and independently of it)

As stated above, the Second Draft of the Civil Code of 1913 did not contain any provision relating to usurious contract or undue influence.[68] However, the Third Draft of the Civil Code, which was slightly revised[69] by *Jenő Balogh*[70], Minister of Justice and submitted to the parliament[71] (the Bill of Civil Code, Draft presented to the Parliament on October 8,[72] 1913)[73], prescribed the followings, in Art. 782:

> 'If, by taking advantage of another's inexperience, recklessness, mental or moral infirmity, subordinate, dependent position or constrained situation, or position of trust in him, he deliberately induces him to enter into a contract with him, from which he or a third party benefits, to the material detriment of the other, without justification, the other party - the injured party -, may, at his choice, either demand the termination of the contract or the reduction of the obligation or burden assumed under the contract in proportion to what is equitable.'[74]

As it reads, this rule contained the subjective elements of undue influence, the means of unfair exploitation, however, it was not formulated only as an invalidity rule. It provided for the injured party a relatively great power to rescind the disadvantageous contract, since he was entitled to withdraw from it or claim its judicial modification, and at the same time, to claim for damages, respectively.[75] According to the Justification of the Draft, 'if the law were also to render the validity of legal transactions conditional on the intellectual capacity of the persons making the transactions, to a greater or lesser degree, or on their other personal circumstances, it would create an uncertainty which would fundamentally disturb the circulation of the transactions'.[76] It means that instead of invalidity,[77] the injured party is entitled to decide upon the effectiveness of his or her contractual obligations.[78]

One can observe, that in Art. 782, three special rules were embedded, one against the exploitation of intellectual or psy-

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64 Ibid.

65 Here, we only point out the work of the special commission to compile the critical studies and opinions attached to the Drafts, from 1900.

66 KRÁLIK, L., 1901, *op.cit.,* p. 86.

67 RAFFAY F., *A magyar magánjog kézikönyve.* Vol 1. Győr, 1909, p. 135 et seq, and footnotes.

68 Its § 747 provided for nullity of contracts contrary to good morals or public policy. Cf. A magyar általános polgári törvénykönyv tervezete. Második szöveg. [Second Draft] Budapest, 1913, p. 188.

69 The government saw no reason to substantially revise this second draft. Cf. STIPTA I., Balogh Jenő, az igazságügy református minisztere. In: *Jogtörténeti Szemle*, vol. 2017, Nr. 4, p. 42.

70 We think his amendment was not a coincident, because as legal scholar of criminal law and politician, he fought against usury. This can be observed from his remarks made during the general discussion of the Third draft. See: M. KIR. IGAZSÁGÜGYMINISZTÉRIUM, *A Polgári Törvénykönyv Törvényjavaslatának tárgyalása a Képviselőház külön bizottságában. Volume I: Általános tárgyalás*, Budapest, 1915, p. 91; and cf. BALOGH, J., 1905, *op. cit.*

71 VERESS, E., op.cit. p. 163.

72 For the date see: LÁNYI B., A Polgári Törvénykönyv javaslata a Parlament előtt. In*: Jogállam*, vol. XVI, Nr. 1-2, 1916, p. 20-33.

73 It was published in 1914. See M. KIR. IGAZSÁGÜGYMINISZTÉRIUM, *A Polgári Törvénykönyv Törvényjavaslata. Az országgyűlés elé terjesztett szöveg.* [Hungarian Royal Ministry of Justice: Bill of the Civil Code. Draft presented to the Parliament.] Budapest, 1914.

74 Ibid, p. 196.

75 For this interesting question of the consumer's right of withdrawal as a complementary tool of protection against claims stemmed from a null and void contract. See LORENZ, S., Grundsatz der Doppelwirkung und Verbraucherschutz bei der Vertragsanbahnung. In: DAMMAN, J., GRUNSKY, W., PFEIFFER, T. (eds.), *Gedächtnisschrift für Manfred Wolf*. München, 2011, p. 77-89.

76 See in Proceedings of the Chamber of Deputies of the National Assembly convened for 21 June 1910: *Képviselőházi irományok (1910-1915)* Volume XXXIII: A Polgári Törvénykönyv javaslatának indokolása 3. része, Budapest, 1914, p. 29-30. According to Hamza G., the author of the Justification was Gusztáv Szászy-Schwarz in general. Cf. HAMZA G., Szászy-Schwarz Gusztáv és az európai magánjogtudomány.[Gusztáv Szászy-Schwarz and the European civil jurisprudence] In: *Magyar Tudomány*, vol. 46, Nr. 12, 2001, p. 1495.

77 We can only briefly refer to the academic debate of that time on the types (nullity or avoidability) and subtypes (e.g. relative nullity) of invalidity. Cf. WEISS, A szerződés érvénytelensége… op.cit p. 38 et seq.

78 Several years later, actually, in the light of the judicial practice (the customary law), Almási exactly pointed out the optional tools available to the influenced party such as the right to terminate the contract, to claim for amending or to challenge the contract based on invalidity and the right to damages in all the three cases: According to him 'folge derselben is nach der Wahl de Beeinflussten alternativ: Ungültigkeit, Rücktrittsrecht oder Modifizierung des Vertrages, alle drei mit Schadenersatz verstärkt.' Cf. ALMÁSI A., *Ungarisches Privatrecht*, op. cit., p. X.

chological handicaps, one against the unfair and lucrative exploitation of a constrained situation, primarily addressing usury cases, and one against the unfair exploitation of relationship of trust.

It is remarkable that this approach to legal consequences of unfair exploitation differs from the nullity and the BGB origin. As anticipated above, the civil law codification was closely connected with the political fight against usury, a general legislative challenge[79] of this era in all European countries. The Hungarian legislation was influenced by the contemporary foreign usury laws and civil law codifications concerning unfair exploitation, among them, the Swiss one. The new Swiss Code of Obligation (Obligationenrecht, OR, in effect from January 1, 1912), in Art. 21 provided the legal consequences quite the same way: within one year, the party is entitled to withdraw from the contract, refuse performance, or claim reimbursement of performance already given.[80] Here, we can trace the influence of the OR on the Hungarian Draft.

Károly Szladits, who worked for the Ministry of Justice between 1895 and 1916,[81] in close collaboration with Jenő Balogh[82], published a summary of the new OR in 1912, emphasizing the moderative approach of the state protection reflected by the above-mentioned rule in OR.[83] Many years later, he kept supporting this one-year statutory period concerning relative nullity claims based on exploitative contracts.[84]

This provision on the meaning of undue influence [illetéktelen befolyásolás] was a referential rule for other invalidity rules in the Third Draft, in the field of law of succession. Since these provisions were not influenced by legislative considerations concerning usury, a separate chapter of this work is dedicated to them. As far as the legal transactions between spouses (matrimonial contracts) are concerned, the judicial practice also applied the rule for undue influence.[85]

The special codification committee led by Ferenc Nagy, began to discuss this Draft in 1914, and the provisions in Art. 782 received mixed reviews.[86] During the discussions of the special committee, this Article was changed significantly and was reshaped to a ground for invalidity. The explanation was that the injured party would not be only entitled to enforce a relative claim against the persuader but would also gain a higher level of protection through invalidity, which legislative goal was also reflected by the amendment of the rule of invalidity of immoral contracts since the word "content" (of the contract) was dropped out.[87]

According to Art. 751(1) of the so-called Commission Draft of the Civil Code of 1915,[88] a contract concluded with a person with a disability in order to take advantage of that disability is null and void if the person was aware at the time of concluding the contract that the other party would suffer substantial financial loss or other disadvantages. Other cases of undue influence were governed by Art. 751(2): 'A contract is also void whereby a person, taking advantage of another's inexperience, imprudence, dependence, or situation of constraint or his position of trust and confidence, concludes or obtains for himself or a third party a gratuitous advantage or disproportionate profit to the significant detriment of the other party.'[89] The common legal consequence was the relative nullity in favour of the contracting party who suffered detriment. As mentioned above, Almási pointed out the same: 'It applies the principles of undue influence by way of legal effect and, in particular, by estoppel, as known in English law, to usurious transactions and transactions with a mentally handicapped person (§ 751) and establishes this legal effect in relative nullity.'[90]

It should be noted here, that the above-mentioned rule for cases of undue influence was connected to the protection of free contractual intention of persons of impaired mental capacity.

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[79] For a brief assessment of the Hungarian law on usury of 1883 cf. Harrison, W.M., Foreign Usury Laws. In: *Journal of the Society of Comparative Legislation*, vol. 1, Nr. 2, 1899, p. 222-223.

[80] For citation of the original wording cf. Hedemann, J. W., Die Fortschritte des Zivilrechts im XIX Jahrhundert: Ein Überblick über die Entfaltung des Privatrechts in Deutschland, Österreich, Frankreich und der Schweiz, Erster Teil, Berlin, 1910, p. 133.

[81] HAMZA G., SÁNDOR, I., *Szladits Károly (1871-1956), a Magyar Tudományos Akadémia rendes tagja,* 2016, https://mta.hu/ix-osztaly/jubileumi-megemlekezesek-106146

[82] For this fact cf. A szakmák küldöttsége az igazságügyminisztériumban. In: *Népszava* (23 November 1913), p. 7-9. This newspaper article contains a minutes on the hearing of the press unions in the Ministry of Justice, when Balogh sent somebody for Szladits, said: 'We have to consult a private lawyer.' and later on: 'Coming soon, my esteemed friend Szladits…'

[83] 'However - and this is also a sign of these times - there is a certain temperance in the law regarding these protective rules.' Cf. SZLADITS, K., Az uj svájczi kötelmi jog. In: *Jogállam*, vol. 11, Nr. 4, 326-332. p. 329.

[84] SZLADITS, K., A kizsákmányoló ügyletek. [Exploitative transactions]. In: *Jogtudományi Közlöny*, vol. 67, Nr. 9, 1932, p. 53-54.

[85] For example: Matrimonial contract may be challenged on the grounds of unlawful moral constraint when the man was only willing to marry the woman whom he had seduced and promised to marry for years if the woman signs the contract. See Curia decision no. 1563/1914. P. I., cf. SZLADITS, K., ÚJLAKY, M., VILLÁNYI, L. (eds.), *Magyar magánjog mai érvényében*. op. cit., p 114.

[86] Mentioning a few: Mihály *Niamessny* welcomed this rule as a manifest of social and economical considerations upon the aims of a civil code. (*See*. M. KIR. IGAZSÁGÜGYMINISZTÉRIUM, *A Polgári Törvénykönyv Törvényjavaslatának tárgyalása a Képviselőház külön bizottságában. Volume I: Általános tárgyalás*, Budapest, 1915, p. 50.) *Elemér Hantos* saw in this rule a failure, an erroneous means to protect the 'weaker parties' which jeopardises the confidence in the binding force of the contract. *Ibid.* p. 70.

[87] Under Article 747 'the contract contrary to public policy or good morals is null and void'. *See*. M. KIR. IGAZSÁGÜGYMINISZTÉRIUM, *A Polgári Törvénykönyv Törvényjavaslatának tárgyalása a Képviselőház külön bizottságában. Volume II, Bizottsági jelentés*, Budapest, 1916, p. 204-206.

[88] Published in: M. KIR. IGAZSÁGÜGYMINISZTÉRIUM, *A Polgári Törvénykönyv Törvényjavaslatának tárgyalása a Képviselőház külön bizottságában. Volume III: A Törvényjavaslat bizottsági szövege*,[Discussion on the Civil Code Bill within the Special Commission of the Chamber of Deputies. Volume III. Commission Text of Draft Civil Code]. Budapest, 1916.

[89] *Ibid*, p. 215.

[90] ALMÁSI A., A Polgári Törvénykönyv Bizottsági javaslata [Commission Draft of the Civil Code]. In: *Jogállam*, vol. 14, Nr. 7-8, 1915, p. 502.

In other cases, where the party's weakness was of a different nature[91], the condition of this protection was that the other contracting party had gained a gratuitous advantage or disproportional profit.

Kőnig also drew attention to the fact that, compared to the original text, the proposal did not require gratuitous advantage or excessive profit as an additional condition in the case of exploitation of mental weakness (impaired mental capacity), although substantial damage to property or other substantial disadvantages must also be proved in this case.[92]

4.4 The academic debate on undue influence continued

Nevertheless, Article 751 of the Commission Draft did not gain unanimous approval in the academic circles either. In our opinion, before 1932, without statutory regulation of unfair exploitation and due to a limited concept of usurious contract, and on account of changing codification ideas, the approach to the subjective elements of usurious contract had changed in legal practice and in academical opinions of that time. The undue influence upon contractual intention was deemed as an error of will (i.e., vitiated consent or intention), rather than an error in the intended legal effect (as usurious contract and unfair exploitation as referred to in Act VI of 1932). Therefore, Almási criticised the fact that the Civil Code Draft of 1915 (Commission Draft) introduced Art. 751 among the errors of the intended legal effect by sacrificing the former Art. 782 (among the errors of contractual will). Since, he put an emphasis on the obvious disproportionality regarding the willpower and efficacy of the contracting parties.[93]

Tibor Lőw (1926) also pointed out that the undue (illegal) influence of contractual intention as a concept comprises all grounds of coercion, misrepresentation, or unfair exploitation of the party's situation. He emphasised that this undue influence refers to the contract concluded in such a way which is contrary to good morals.[94] As he pointed out, limiting the word *usury* to the credit contracts had the effect that other 'transactions which could be called usurious because they are also the result of the exploitation of the distress or imprudence or inexperience of one party and provide the other party or a third party with a consideration disproportionate to the service rendered, all fall into the category of transactions contrary to good morals.' Furthermore, he also explained that there may be further instances of undue influence on the will to enter into a contract, which are different from typical examples of immoral contract.[95] Szladits stated also that an exploitative contract is voidable not because of its object (the intended legal effect), but because of the vice of consent.[96]

László Szigeti also examined the subjective elements of the concept of usury. In his opinion, its very essence and the *differentia specifica* of usury is that the usurious party has obtained this disproportionate advantage by taking advantage of the distress, imprudence, mental weakness, inexperience, dependence or relationship of trust of the party who has contracted with him. 'Usury is nothing more than the use of unfair influence to negotiate credit terms.'[97]

One can also agree with his further conclusion that

> 'The concept of undue influence is a broadening of the scope of contracts with defective intent. Usury is therefore usurious and void, not because there is a striking difference in the value of the service and consideration, but because the benefit is obtained by taking advantage of the involuntary defective condition of the party being impaired.'[98]

Several years later, István Szászy also confirmed the same idea. He also noted the common law origin of undue influence as a ground for invalidity in judicial practice. However, he also pointed out a fundamental difference: while the English doctrine of undue influence is based on the unfair exploitation of a dependent legal situation, in Hungarian judicial practice the concept 'includes all the notions of unlawful threat, fraudulent misrepresentation and exploitative contract, i.e. all cases in which one party induces the other to enter into a transaction by unlawful means.'[99] Consequently, in judicial practice before 1959, the notion of undue influence covered wide range of instances from the field of defects of consent reaching(extending) to the conceptual scope of mental duress (i.e. psychological pressure).[100]

Thus, invalidity based on unfair influence appeared in Hungarian academic works primarily as an institution for the protection of contractual freedom, and within it the freedom

[91] A contract is also null and void by which someone, because of someone else's inexperience, credulity, dependence, situation of constraint or relationship of trust or confidence in him, to obtain or conclude for himself or a third party, to another's considerable detriment, a free advantage or disproportionate profit. Cf. Commission Text of Draft Civil Code, Budapest, 1916. p. 215. (Art. 751).

[92] Cf. KŐNIG, E., A kizsákmányoló ügylet, op. cit., p. 383.

[93] ALMÁSI, A., Az ügyleti akarat hiányai a Ptk. bizottsági szövegében.[Vice of consent in the light of Commission Draft of the Civil Code] In: *Jogtudományi Közlöny*, vol. 50, Nr. 38, 1915, p. 402-403.

[94] LŐW, T., A szerződési akaratelhatározás jogellenes befolyásolása.[Unlawful influence upon contractual intention] In: *Jogállam*, vol. 25, Nr.3, 1926, p. 140-149.

[95] *Ibid.*

[96] SZLADITS, K., A kizsákmányoló ügyletek.[Exploitative transactions] In: *Jogtudományi Közlöny*, vol. 67, Nr. 9, 1932, p. 53-54.

[97] IFJ. SZIGETI, L., Szolgáltatások értékaránya visszterhes szerződésnél.[Proportionality of reciprocal contracts] In: *Polgári Jog*, vol. 9, Nr. 5, 1933, p. 252.

[98] *Ibid.*

[99] SZÁSZY, I., *A magyar magánjog általános része*.[General Part of Hungarian Private Law] Vol. II, Budapest, 1948, p. 256.

[100] Just one example from the wide range of cases should be mentioned here: 'If the wife, fearing the prospect of a scandalous divorce suit, has agreed to a legal transaction at the husband's initiative which is clearly detrimental to her living conditions and economic situation, she may challenge the transaction, due to a mental coercion causally linked to her husband's unlawful conduct' Cf. III. 734/1924 compiled in SZLADITS, K., FÜRST, L., A magyar bírói gyakorlat. Magánjog, op. cit., p. 68.

of contractual will. Even though the Private Law Bill of 1928 (Mtj.) provided undue influence only as an element of the usurious contract.

By the time of the Civil Code of 1959 (Act IV of 1959), the concept of undue influence had faded away in the judicial practice of contract law. Similarly, the assessment of the defects of consent as subjective factors existing at the period of the (usurious) contractual agreement were pushed into the background. The Council of the Supreme Court of Justice had omitted all subjective elements from the instance of usurious contract in 1950, arguing that it can be inferred from the fact that a contracting party enters into a transaction which gives it a free advantage or a manifestly disproportionate profit that it has taken advantage of the situation of economic distress or urgent needs of the other party.[101] Consequently, the draft of the Civil Code of 1957 provided merely an objective rule for invalidity based on obvious disproportionality.

Act IV of 1959, the promulgated text of the Civil Code, in Art. 202, condensed the subjective elements of the facts into the phrase "by taking advantage of the position of the other party". Meanwhile, objective disproportionality of value has also been included as a separate ground for invalidity in Art. 201(2) (rule of *laesio enormis*), where the principle of reciprocity was also stipulated in Art. 201(1).

As the last step, the new Hungarian Civil Code (Act V of 2013) incorporated the definition of usury with unamended wording, as follows: 'If, by exploiting the other party's situation, a contracting party gains excessive benefit or unfair advantage when the contract is concluded, the contract shall be considered null and void'.[102]

5. Some additional remarks on the codification of undue influence in the Law of Succession

As aforementioned, Králik's explanations on undue influence particularly focused on family law[103] and the law of succession. In the following, this chapter shows the relatively independent development of undue influence as a sui generis invalidity ground of the law of succession through the civil code drafts.

Králik considered this protection essential in the law of succession because in testamentary dispositions the will must be genuinely free and autonomous, especially since it is in a field of law highly prone to abuse of confidentiality and intimate human relationships. However, his arguments were taken into consideration with no direct success in the following years, during the debate upon the first draft led by the special codification committee.

Ferenc Raffay also urged the application of the rule: 'It is desirable that so-called undue influence should at least in this respect be recognised by the customary law as a ground of challenge; which is all the more advisable, because under Article 3[104] of Act XXVII of 1715 *dolosa circumventio* (in Frank's translation: circumvention <*kerítés*>) is a ground for avoidance.'[105]

As stated above, although the Second Text of the Draft of the Hungarian General Civil Code published in 1913 did not contain any provision expressly relating to undue influence, its version proposed as a bill at the end of 1913 (Third Text) provided rules referring to undue exploitation of particular situations. Consequently, Art. 1709 stipulated that the testament would be challengeable if someone persuaded the testator to make his will with undue influence (with the Hungarian wording '*illetéktelen befolyásolás*') and for further explanation referred to the above-mentioned Art. 782, which rule, however, did not explain further what undue influence meant.[106] The situation was the same in the case of juridical acts for accepting or refusing the inheritance (in Art. 1852 of the Third Draft).[107]

The Justification of the Third Text, explained in detail the connection between these two provisions and highlighted the special purpose of this provision among invalidity rules relating to testamentary dispositions, which is a means against legacy hunters.[108]

As anticipated above, the Commission Draft of 1915 brought a new solution in Art. 751, among contract law rules and also reshaped the invalidity rule concerning testaments, cancelling the direct referencing between these two rules. Thus, Article 1716 provided as follows. 'if a testator has been induced to make a will by unlawful threats or by taking advantage of his or her impaired mental capacity or of a relationship of trust and confidence.' Thus, this special provision avoided the expression of undue influence, nevertheless, they created a more solid legal base for further developing the doctrine.

Private Law Bill of 1928 (Mtj). strengthen the codification of unfair influence (i.e., with the wording "tisztességtelen befolyásolás") as a ground for challenging the will in Art. 1953. In parallel with this rule, Art. 2069 provided for special ground challenging the declaration of acceptance or disclaimer of the inheritance or legacy.

[101] Leading decision of the Council of Supreme Court of Hungary No 9 of 1950.
[102] Art. 6:97 of HCC.
[103] In case of fraud or coercion.
[104] It reads: 'All kinds of fraud and cunning trickery which are often practised against the testator […] should always be avoided and guarded against under penalty of nullity.'
[105] RAFFAY, F., *A magyar magánjog kézikönyve*. [Hungarian Private Law Handbook] Vol. II, 3rd edn. Budapest, 1909, p. 639. Ignácz Frank's cited work cf. FRANK, I., A közigazság törvénye Magyarhonban.[Law of Public Justice in Hungary] Part I. Az osztó igazság törvénye Magyarhonban, Buda, 1845, p. 433.
[106] Izidor Schwartz criticised this method of legislation. Cf. SCHWARTZ I., Magánjogi törvénykönyvünk javaslatának 977.§-ához.[On Article 977 of Private Law Bill] In: *Polgári Jog*, vol. 10, Nr. 4, 1934, p. 225-226.
[107] A Polgári Törvénykönyv Törvényjavaslata. Az országgyűlés elé terjesztett szöveg, [Hungarian Royal Ministry of Justice: Bill of the Civil Code. Draft presented to the Parliament.] 1914. p. 470.
[108] M. KIR. IGAZSÁGÜGYMINISZTÉRIUM, Indokolás a Polgári Törvénykönyv Törvényjavaslatához. Vol. IV: Öröklési jog, Budapest, 1914, p. 103-104.

On the one hand, as stated above, Art. 977 of the Private Law Bill has abandoned the use of the expression *undue* or *unfair influence* in contractual transactions, and the *sui generis* ground of undue influence for invalidity of contractual transactions was merged again into the concept of usurious contract. On the other hand, through Art. 1953, Private Law Bill strengthened the well-established succession law rule of undue influence.

According to Art. 1953 paragraph 1 point 3 of the Private Law Bill, a testamentary disposition would be challenged if the testator has been persuaded to take the disposition by unlawful threats or undue influence, and if it can be assumed that the testator would not otherwise have made such a disposition. Here we should also briefly touch on the special corrective means of the Private Law Bill. 'If it can be established beyond reasonable doubt what the testator intended to do in place of the contested erroneous disposition, the disposition shall be so corrected.'[109]

In view of the difficulty of proving undue influence, the special interplay between invalidity grounds relating to defects of testamentary will, and, not least, the respect for the will of the testator, published decisions on undue/unfair influence are rare in this period.[110]

Miksa Teller pointed out that the circumstance that the testator decides to make a will as a result of the persuasion of another person and follows the advice of another person in determining the content of the will does not in itself render the will invalid.[111] In the same way, persuasion, even if it is violent and intrusive, cannot be considered moral and psychological coercion. It has been held that unfair influence affects the validity of a will only if it is of such magnitude that no opposing will could have been formed or, if formed, could not have been enforced against the will which influenced it.[112]

We have found a case confirming the above: 'The fact that the testator made the will at the heir's insistence only renders the will invalid [for undue influence] if it can be established that the testator did not make the will of his own volition, although it was made at the defendant's insistence, but against his better judgement and purely at the defendant's pressure, and even with a content different from his intentions and dictated by the heir.'[113]

Article 649 of the oldHCC provided unfair influence on the testator's will. According to the Justification of the oldHCC, the fact that the reason given for the testator's decision does not reflect the actual situation is taken into account much more widely in the law of succession than in contract law.[114] The interest in the reliability of transactions and the protection of contractual freedom (as opposed to state paternalism) seems to outweigh the invalidity on account of shortcomings of the inner formation of the will.[115] Contrary to this, a testamentary transaction not only can be contested on the same grounds as a sales and purchase transaction: duress, mistake, deception, but it is important to stress/underline that it can also be contested under 'less serious circumstances'.[116]

Furthermore, the undue influence, as a cause that fundamentally shaped[117] the testator's will, still exists and is in effect in the Hungarian Civil Code of 2013.[118]

Nevertheless, not only English (commonwealth countries) courts have to face multiple interpretational problems with undue influence, especially in the field of challenged wills, but also the Hungarian judicial practice is very cautious to apply this rule. Despite its poor judicial practice, this rule is a "living part" of the body of Hungarian Civil Law. Its significance has recently been demonstrated by the decision of the Supreme Court of Hungary No. 270 in 2020.[119]

5. Conclusion

This study aimed to present the long development and elusive nature of the doctrine of undue influence in Hungarian legal thinking and jurisprudence which resulted in different approaches both in the field of transactions *inter vivos* (i.e., invalidity questions of contract law) and transactions relating to Law of Succession (i.e., the invalidity of testament). In Hungarian

[109] Article 1953 para. 2 of Private Law Bill.

[110] For example: the will is challengeable if it is made by an elderly woman for the benefit of a man much younger than herself and having a love affair with her, where the will was written by the beneficiary, he provided witnesses and was present at the testamentary disposition, or where the influence was such that the testator could not have exercised a contrary will. Cf. KRENNER, Z., A végintézkedésekre vonatkozó legújabb bírói gyakorlat. In: Királyi Közjegyzők Közlönye, vol. 42, Nr. 1, 1943, (4-8), p. 4.

[111] TELLER, M., A végrendelet hatálytalansága.[Ineffectiveness of the testament] In: Szladits K. (ed.), *Magyar Magánjog, vol. VI: Öröklési jog.* Budapest, 1939, p. 375. (referred judicial case Nr.: 2696/1938. J. H. XII. 866.).

[112] The referred judicial case Nr. 3341/1936. J. H. XI. 12.; see *ibid*. p. 376.

[113] NIZSALOVSZKY, E. et al. (eds.), *Grill-féle új döntvénytár (1941-1942)*. [New Grill Case-Book] Volume XXXV, Budapest, 1943, p. 423.

[114] A Magyar Népköztársaság Polgári Törvénykönyve [Civil Code of People's Republic of Hungary] Budapest, 1959, p. 508.

[115] SZIGETI Jr., L., Szolgáltatások értékaránya visszterhes szerződésnél, op. cit., p. 252.

[116] TÓTH, L., *Magyar Magánjog – Öröklési jog*. [Hungarian Private Law – Inheritance Law] Debrecen, 1932, p. 272.

[117] That is, however, not a quantitative, but a qualitative epithet.

[118] See Art 7:40 (1) point c) HCC, titled *with 'Defects in the intention of the person making the disposition'*: A testamentary disposition shall be invalid if: the testator had been coerced into making the disposition by the use of threat or unfair influence; provided that the testator would not otherwise have made the disposition.

[119] 'Unfair influence occurs, among other things, when a person, or a person supported by him or her in order to benefit from the estate, engages in unethical conduct that may influence the testator's will. This is the case, in particular, where a person abuses the vulnerable position of the testator because of his or her old age and declining health or mental condition, by gaining the testator's trust, partially by formal gestures and false statements; by making false statements which misrepresent or discredit the chosen heir known to the testator.' Cf. Decision of the Supreme Court of Hungary Nr. 270 of 2020 (BH2020.270.).

contract law today, undue influence is not a *sui generis* ground of invalidity, however, it was intentionally chosen as a guiding element for analysing the related questions, rules and judicial practice. For this paper, there was no possibility to give a full review of the legal development with all related questions included (e.g. the errors of will, especially the issues on duress, coercion or misrepresentation), mainly the interplay between usurious contract and undue influence was put under examination in the light of the Hungarian private law codification attempts in the XXth century.

This writing was set out to emphasize the protection of the freedom of formation of the will, thus, the importance of the subjective elements in the concept of the usurious contract, the connection between the unfair influence upon the will of the contracting party and the concept of immoral contracts.

Although, by this time of the present period of Hungarian civil law, the concept of undue influence seems to be merged into other invalidity grounds in the practice and legislation, its close connection to the defects of contractual will highlighted by the legal literature from the period of the application of the Private Law Bill, or more precisely, the judicial practice of the time, from our point of view, had granted a special means to assess the unfair exploitation of the other party's weaknesses or situations of constraint, or a special relationship of trust, and provided a reason to formulate a sui generis rule for unfair influence in the field of law of succession, at least. The aim of this paper is to demonstrate that, in addition to the influence of Austrian-German law, the English doctrine of undue influence (as well as the common Roman law heritage) has had a clear impact on the development of modern Hungarian civil law.

Codex Theresianus of 1766: Codification Works, Structure, main Content and Significance of Roman Law Reception during its Conclusion Process

*Roman Savuliak**

Abstract

The purpose of the article is a step-by-step review of the codification works on the Codex Theresianus conclusion of 1766 and the outlining of the structure and the analysis of the main content of all Draft Code revisions, as well as clarifying the significance of the reception of Roman law during its conclusion. Hence, the author outlined the general work schedule of the Compilation Commission in Brno, which contained the primary structure of the Draft of Codex Theresianus. So, the content of the revisions of the Draft Code text, developed by the Compilation Commission, the Legislative Commission headed by Josef Azzoni, and the Legislative Commission under the supervision of Hofrat Zenker, were considered. In the process of this research, the author identified certain differences in the structure and revealed the peculiarities of some provisions in different versions. The durability of the Roman tradition of civil-law institutions and the content of some of their norms and, accordingly, the connection of the civil-law doctrine of the Austrian Empire with Roman law have been ascertained.

In addition, the article broadly presents an analysis of the state of research in Ukrainian historical and legal science, both modern and at the end of the 19th – beginning of the 20th centuries, history of the sources of law, including the Draft of Codex Theresianus, and individual institutions of civil law of the Habsburg monarchy.

Keywords: *Codex Theresianus; Maria Theresa; civil code; codification; Compilation Commission; Legislative Commission; Josef Azzoni; Hofrat Zenker; reception of Roman law; Habsburg monarchy.*

1. Introduction

1.1 Outlining of the problem

As a result of the first division of the Rich Pospolyta between Austria, Prussia, and Russia in 1772, Galicia was added to the Austrian Empire, and Bukovyna was added to it under the Kiychuk-Kainardzhiiskyi Peace Treaty of 1774, concluded between Russia and Turkey. Therefore, the question regarding the extension of Austrian law validity on the territory of Western Ukrainian lands arose, however, at that time, in the Austrian monarchy the codification work on the unification of law, started in the middle of the 18th century under the influence of educated absolutism ideas, was well underway. The unification of the law of a multinational state should have contributed to the management centralization of territories under control.[1] As it was noted by Ukrainian Prof. Ye. Kharytonov, these law-making processes were caused by the sufficient administration reform of the Austrian Empire, settled by the Empress Maria Theresa, the main aim of which was to unify all the inherited possessions in a single modern-type state, which was quite hindered by the dissimilarity and confusion of the law of different parts of the monarchy.[2] An Austrian scientist Ch. Neschvara also points out the importance of codification in the way of restructuring of interregional relations during the reign of Maria Theresa, which were planned to be rebuilt into a single federal monarchy state with enlightened absolutism system of government.[3] Therefore, the need for codification and modernization of the law was also caused by the development of bourgeois capitalist relations, which required revision and qualitative updating of the outdated legislation.

Thus, in 1753, a Codification Commission (also called a courtier) was created with the task to abolish law particularism and create unified codes, including civil one.[4] On May 3, 1753, Maria Theresa appointed a Compilation Commission in

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1 KULCHYTSKYI, V., LEVYTSKA, I., Dzherela, struktura, osnovni polozhennia Avstriiskoho tsyvilnoho kodeksu 1811 r. [Sources, structure, main provisions of the Austrian Civil Code of 1811]. In: *Visnyk Lvivskoho universytetu. Seriia yurydychna* [Bulletin of Lviv University. Legal series], Is. 48, 2009, p. 46 <https://library.nlu.edu.ua/POLN_TEXT/LVIV/visnyk_48.pdf> accessed 15 May 2023. (In Ukrainian).

2 KHARYTONOV, Ye., O., Pryiniattia novoho Tsyvilnoho kodeksy Ukrainy i dosvid kodyfikatsii tsyvilnoho zakonodavstva Avstrii [Adoption of the new Civil Code of Ukraine and experience of codification of the civil legislation of Austria]. In: *Naukovi pratsi Odeskoi natsionalnoi yurydychnoi akademii* [Scientific works of the Odessa National Law Academy], Vol. 1, 2002, p. 251 <http://dspace.onua.edu.ua/bitstream/handle/11300/19010/%d0%9d%d0%b0%d1%83%d0%ba.%20%d0%bf%d1%80%d0%b0%d1%86%d1%96%20%d0%9e%d0%b4%d0%b5%d1%81.%20%d0%bd%d0%b0%d1%86.%20%d1%8e%d1%80%d0%b8%d0%b4.%20%d0%b0%d0%ba%d0%b0%d0%b4.%20%d0%a2. 1. pdf?sequence=1&isAllowed=y> accessed 15 May 2023. (In Ukrainian).

3 NESHVARA, K., Peredmova [Foreword]. In: *Tsyvilnyi kodeks Halychyny, 1797* [*The Civil Code of Galicia, 1797*]; trans. from german: M. Martyniuk, O. Pavlyshynets, Ivano-Frankivsk, 2017, p. 11. (In Ukrainian).

4 KULCHYTSKYI, V., LEVYTSKA, I., Dzherela, struktura, osnovni polozhennia, p. 46.

Brno with the participation of leading lawyers of Lower and Upper Austria, Silesia, Bohemia, Moravia, and Styria, headed by a Professor from Prague Josef von Azzoni, with the main task of creating an accurate and uniform civil law for the whole Austria.[5] It should be noted that during the enlightened absolutism era, lawyers, who were close to the ruler had quiet great trust and gradually supplanted religious figures, who could do little in legal matters, in particular civil law.[6] So, in the future, the leading legal specialists played a fundamental role in the implementation of codification works in the Austrian monarchy.

It was emphasized that the Compilation Commission was not supposed to invent a brand-new private law, but was instead about to compile[7] the already existing law in the provinces and filled up the gaps "in accordance with the general principles of common-sense law[8]".[9] So, the Commission unified the existing legislation, taking into account the elements of customary, Roman, and natural law.[10] Therefore, the work on the conclusion of the compilation code under the name "Codex Theresianus" ("The Theresian Code", named after Empress Maria Theresa[11]) was finished in 1766. Such a long codification process, which lasted almost 15 years had several stages, on every stage the different version of the Draft Code was conducted. Every version of the draft Code requires a separate characterization in order to identify the peculiarities of the structure and specificity of certain provisions of the Code, and consequently, outlining the existence of the Roman tradition of civil law institutions and the content of their separate norms as well as the connection of the civil law doctrine of the Austrian Empire with Roman law.

1.2 The analysis of the state of scientific research of the problem

There are no researches devoted to the study of the Codex Theresianus of 1766 in the Ukrainian legal science. However, many researchers of the history of the Ukrainian law, in particular O. Blazhivska, I. Boiko, H. Dumych, V. Kulchytskyi, I. Levytska, M. Nykyforak, M. Pyrtko, R. Stefanchuk, Ye. Kharytonov etc., in their works briefly mention about the lasting codification works on the conclusion of this Code, the Draft of which was never approved by Empress Maria Theresa due to a number of its drawbacks. However, Ukrainian researchers did not study the content of this Draft and its previous versions, which, obviously, can be explained by the fact that the Codex Theresianus never entered into force.

At the same time, since the Western Ukrainian lands were part of the Austrian Empire and later the Austro-Hungarian Monarchy for almost 150 years: from 1772 Galicia and from 1774 Bukovyna – and until its disintegration in 1918, then in Ukrainian historical and legal science, both modern and at the end of the 19th – beginning of the 20th centuries, quite a lot of attention was paid to the study of the history of the state and law of the Habsburg monarchy of this period and the legal status of the Western Ukrainian lands within it. The works of the legal scientific community of the Western Ukrainian region of Ukraine are especially devoted to this issue, and the scientific interests of scientists of the Faculty of Law of the Lviv National University of I. Franko are primarily focused on this topic. Namely, the first studies of the history of Austrian civil law were carried out by the outstanding jurist, Prof. and Dean of the Law Faculty of Lviv University, public figure Oleksandr Ohonovskyi,[12] and the most thorough ones by Stanislav Dnistrianskyi[13] – prominent lawyer, Prof. of Lviv University, author of a number of fundamental monographic studies and numerous scientific articles on the theory of the state and law, philosophy of law, constitutional, family and civil law, political figure, twice elected deputy of the Reichsrat in 1907 and 1911.

[5] Obshchee grazhdanskoe ulozhenie Avstrijskoj imperii [General civil code of the Austrian Empire]; trans. by G. Verblovsky, St. Petersburg, 1884, p. 1. (In Russian).

[6] KOVALCHUK, I., V., *Pravovi osnovy orhanizatsii i diialnosti kraiovykh sudiv Halychyny v skladi Avstrii ta Avstro-Uhorshchyny (1850-1918 rr.): dys… d-ra filosofii: spets. 081 «Pravo» (haluz znan – 08 «Pravo»)* [*Legal foundations of the organization and activity of regional courts in Galicia as part of Austria and Austria-Hungary (1850-1918): diss… DPh: special. 081 "Law" (field of knowledge – 08 "Law")*], LNU of Iv. Franko, Lviv, 2021, p. 54-55 <https://shron1.chtyvo.org.ua/Kovalchuk_Ivan_Vasylovych/Pravovi_osnovy_orhanizatsii_i_diialnosti_kraiovykh_sudiv_u_Halychyni_v_skladi_Avstrii_ta_Avstro-Uhor.pdf?PHPSESSID=vd1t52id7jgm0gsunlsla3url4> accessed 15 May 2023. (In Ukrainian).

[7] Herefrom its name.

[8] That is natural law.

[9] FLOSSMAN, U., *Österreichische Privatrechtsgeschichte*, Wien, Neu-York, 1983, s. 13.

[10] KHARYTONOV, Ye., O., Pryiniattia novoho Tsyvilnoho kodeksy, p. 251.

[11] KULCHYTSKYI, V., LEVYTSKA, I., Dzherela, struktura, osnovni polozhennia, p. 47.

[12] See: OHONOVSKYI, O. *Avstriiske mainove pravo podruzhzhia. Ch. 1.* [*Austrian matrimonial property law. Part 1*], Lviv, 1880; *O zoboviazanniakh pryrodnykh* [*About natural obligations*], Lviv, 1890; *System avstryiskoho prava pryvatnoho* [*The system of Austrian private law*], Vol. 1-2, Lviv, 1897. (In Ukrainian).

[13] See: DNISTRIANSKYI, S., Trylitnii rechynets z § 1487, a.k.z.ts [Three-year term from § 1487, ABGB]. In: *Chasopys Pravnycha* [*Law Journal*], Lviv, Is. 5, 1895, p. 88-112; Opiky i kurateli [*Guardians and trustees*], Lviv, 1900, 104 p.; *Tsyvilne pravo. Zahalna chastyna* [*Civil law. General part*], Lviv, 1900; *Pravo podruzhia* [*Marriage law*], Lviv, 1900, 196 p.; *Rodynno-maietkove pravo* [*Family property law*], Lviv, 1900, 164 p.; Cholovik i yeho potreby v pravnim systemi. Rozvidka z avstriiskoho prava [Man and his needs in the legal system. Intelligence on Austrian law]. In: *Chasopys Pravnycha* [*Law Journal*], Lviv, Is. 10, 1900, p. 1-36; *Avstryiske pravo obligatsyine* [*Austrian contract law*], 1st edition, Lviv, 1901, 198 p., 2nd ed., Lviv, 1902, 228 p., 3rd ed., Lviv, 1909, 176 p.; *Avstriiske pravo pryvatne* [*Austrian private law*], Lviv, 1906, 308 p.; *Pravne vidnoshenie rodychiv do ditei* [*Legal relations between relatives and children*], Lviv, 1906, 184 p.; Reforma vyborchoho prava v Avstrii [Reform of electoral law in Austria]. In: *Chasopys Pravnycha i Ekonomichna* [*Law and Economic Journal*], Lviv, Is. 6, Vol. 9, 1906, p. 1-138; Prychynky do reformy pryvatnoho prava v Avstrii [Supplement to the reform of private law in Austria]. In: *Chasopys Pravnycha i Ekonomichna* [*Law and Economic Journal*], Lviv, Is. 7, Vol. 10, 1912, p. 1-111; Novelia do tsyvilnoho zakona [Amendment to the civil law]. In: *Pravnychiyi visnyk* [*Legal Bulletin*], Lviv, Is. 3, p. 1-4, 1913, p. 114-173; *Tsyvilne pravo* [*Civil law*], Vol. 1, Vienna, 1919, 1063 p.+XLIV (this work contained, in particular, a translation of the General Civil Code of the Austrian Empire of 1811); etc. (In Ukrainian); DNISTRIANSKI, S., *O zaręczynach w prawie austriyackiem* [*About betrothal in Austrian law*], Lwów, 1899, 69 p.; Przewodnia rola ubezpieczenia [The leading role of insurance]. In: *Przegląd prawa i administracyi* [*Review of Law and Administration*], Lwów, Is. 25, 1900, p. 489-508, 589-605, 681-701; *Wykład prawa familijnego* [*Family law lecture*], Lwów, 1901, 1902. 428 p.; O przejęciu długu: Trzy odezyty [About accepting a debt: Three responses]. In: *Przegląd prawa i administracyi* [*Review of Law and Administration*], Lwów, Is. 31, 1906, p. 18-38, 116-128, 208-224, 349-364, 467-481, 734-750; Projekt ustawy o zniesieniu własnowolności [The draft law on the abolition of ownership]. In: *Przegląd prawa i administracyi* [*Review of Law and Administration*], Lwów, Is. 35, 1910, p. 666-694; etc. (in Polish); DNISTRJANSKYJ, S., *Das Wesen des Werklieferungsvertrages im österreichischen Rechte*, Wien, 1898, 194 s.; *Die Aufträge zu gunsten Dritter*, Leipzig, 1904, 350 s.; Zur Lehre vom Verlöbnis. In: *Zeitschrift für das Privat und öffentliche Recht der Gegenwart*, Wien, Bd. 33, 1905, s. 1-126; Zur Lehre von der Schuldübernahme. In: *Prager Juristische Vierteljahresschrift*, Prage, Bd. 29, 1908; Vorbericht des Referenten über die Regierungsvorlage eines Gesetzes über die Entmündigung. In: *Parlamentsprotokolle*, Wien, 1910, s. 1-60; Die natürlichen Rechtsgrundsätze (§ 7 ABGB). In: *Festschrift zur Jahrhundertfeier des Allgemeinen Bürgerlichen Gesetzbuches*, Wien, 1911, s. 1-35; Das Recht des Besitzes und das Besitzrecht im österreichischen Tabularrechte. In: *Österreichischen Zentralblatt für die juristische Praxis*, Wien, Bd. 29, h. 7, 1911, s. 1-24; Das Allgemeine Bürgerliche Gesetzbuch im Lichte der Lehren Kants. In: *Zentralblatt für die juristische Praxis*, Wien, Bd. 44, 1926, s. 899-906; etc.

After, since the 1950s, the scientific researches of the founder of the modern Lviv historical and legal school, the honored Prof. of the Lviv National University of I. Franko Volodymyr Kulchytskyi were mostly related to the analysis of the legal status of Galicia as part of the Habsburg monarchy. So in 1954 he defended a dissertation for obtaining the scientific degree of candidate of legal sciences, and in 1970 – a doctoral dissertation, both on the specified problem; and he also studied the sources of Austrian law, including all codes.[14] Another luminary of Ukrainian historical and legal science, Prof. of the LNU Borys Tyshchyk published a work on the thousand-year history of the state and law of Austria and Austria-Hungary.[15]

The scientific works Prof. of the LNU Ihor Boiko is dedicated to the study of the history of Austrian law, including its sources and civil law.[16] It should be emphasized that Ukrainian legal historians, and not only those from Lviv, focus special attention on the study of the Civil Code for Eastern Galicia of 1797, spread in the province of the Habsburg Monarchy – the Kingdom of Galicia and Lodomeria, the meaning of which we described below. So, except Ihor Boiko, an associate Prof. of the Kharkiv National University of V. N. Karazin Anton Huzhva;[17] Prof., corresponding member of the National Academy of Legal Sciences of Ukraine and, by the way, Chairman of the Verkhovna Rada of Ukraine[18] from 2021, Ruslan Stefanchuk;[19] Prof., member of the Supreme Council of Justice Oksana Blazhivska[20] and others worked on it. Moreover, in the last decade, for the first time in Ukraine, a translation of this Code was published (and there are already four): the first was in Rus-

[14] See: KULCHYTSKYI, V., *Derzhavnyi lad i pravo v Halychyni (v druhii polovyni XIX – napochatku XX st.)* [*State system and law in Galicia (in the second half of the 19th – beginning of the 20th centuries)*], Lviv, 1965, 64 p.; KULCHYTSKYI, V., S., Dzherela prava v Halychyni za chasiv avstriiskoho panuvannia [Sources of law in Galicia during the Austrian rule]. In: *Problemy pravoznavstva* [*Problems of jurisprudence*], Is. 19, 1971, p. 46-47; KULCHYTSKYI, V., LEVYTSKA, I., Rehuliuvannia tsyvilnykh vidnosyn u Halychyni za Avstriiskym tsyvilnym kodeksom 1811 r. [Regulation of civil relations in Galicia according to the Austrian Civil Code of 1811]. In: *Problemy derzhavotvorennia i zakhystu prav liudyny v Ukraini: Materialy XV rehionalnoi naukovo-praktychnoi konferentsii (4-5 liutoho 2009 r.)* [*Problems of state formation and protection of human rights in Ukraine: Materials of the XV regional scientific and practical conference (February 4-5, 2009)*], Lviv, 2009, p. 65-67 <https://library.nlu.edu.ua/POLN_TEXT/LVIV_Conferenc/LVIV_2009.pdf> accessed 1 June 2023; KULCHYTSKYI, V., LEVYTSKA, I., Dzherela, struktura, osnovni polozhennia, p. 46-51; etc. (In Ukrainian).

[15] See: TYSHCHYK, B., Y., *Istoriia derzhavy i prava Avstrii ta Avstro-Uhorshchyny (X st. – 1918 r.): navch. posibnyk* [*History of the state and law of Austria and Austria-Hungary (10th century – 1918): study guide*], Lviv, 2003, 80 p. (In Ukrainian).

[16] See: BOIKO, I., Y., *Halychyna u derzhavno-pravovii systemi Avstrii ta Avstro-Uhorshchyny (1772-1918): navch. posibnyk* [*Halychyna in the state-legal system of Austria and Austria-Hungary (1772-1918): study guide*], Lviv, 2017, 312 p.; Avstriiskyi tsyvilnyi kodeks 1797 r. ta yoho zastosuvannia u Skhidnii Halychyni: deiaki dyskusiini pytannia [The Austrian Civil Code of 1797 and its application in Eastern Galicia: some controversial issues]. In: *Chasopys Kyivskoho universytetu prava* [*Journal of the Kyiv University of Law*], No. 3, 2015, p. 8-11 <http://nbuv.gov.ua/UJRN/Chkup_2015_3_3> accessed 1 June 2023; Avstriiskyi tsyvilnyi kodeks 1797 r. ta yoho aprobatsiia u Skhidnii Halychyni [The Austrian Civil Code of 1797 and its approbation in Eastern Galicia]. In: *Chasopys tsyvilistyky* [*Journal of Civil Studies*], Is. 20, 2016, p. 231-236 <http://nbuv.gov.ua/UJRN/Chac_2016_20_49> accessed 1 June 2023; Pravove rehuliuvannia tsyvilnykh vidnosyn na ukrainskykh zemliakh u skladi Avstrii ta Avstro-Uhorshchyny (1772-1918) [Legal regulation of civil relations on Ukrainian lands as part of Austria and Austria-Hungary (1772-1918)]. In: *Visnyk LNU. Seriia yurydychna* [*Bulletin of LNU. Legal series*], Is. 57, 2013, p. 88-96 <http://nbuv.gov.ua/UJRN/Vlnu_yu_2013_57_14> accessed 1 June 2023; Istorychnyi dosvid rehuliuvannia intelektualnoi vlasnosti v Halychyni u skladi Avstrii ta Avstro-Uhorshchyny (1772-1918 rr.) [Historical experience of intellectual property regulation in Galicia as part of Austria and Austria-Hungary (1772-1918)]. In: *Pravovyi chasopys Donbasu* [*Legal journal of Donbas*], No 4 (77), 2021, p. 23-29 <http://nbuv.gov.ua/UJRN/pppd_2021_4_5> accessed 1 June 2023; etc. (In Ukrainian).

[17] See: HUZHVA, A., M., Codex civilis pro Galicia Orientali – malovidoma storinka rozvytku tsyvilnoho zakonodavstva [Codex civilis pro Galicia Orientali – a little-known page of the development of civil legislation]. In: *Visnyk Kharkivskoho natsionalnoho universytetu imeni V. N. Karazina. Seriia «Pravo»* [*Bulletin of Kharkiv National University named after V. N. Karazin. Series «Law»*], No 13, 2012, p. 124-128; Retseptsiia rymskoho prava u Tsyvilnomu kodeksi Skhidnoi Halychyny 1797 r. [Reception of Roman law in the Civil Code of Eastern Galicia of 1797]. In: *Porivnialno-analitychne pravo* [*Comparative and analytical law*], Is. 5, 2014, p. 72-75; Halytskyi tsyvilnyi kodeks 1797 r. yak vzirets retseptsii rymskoho prava [The Galician Civil Code of 1797 as a model for the reception of Roman law]. In: *Chasopys tsyvilistyky* [*Journal of Civil Studies*], Is. 27, 2017, p.86-91 <http://dspace.onua.edu.ua/bitstream/handle/11300/17147/%d0%93%d1%83%d0%b6%d0%b2%d0%b0%20%d0%93%d0%b0%d0%bb.pdf?sequence=1&isAllowed=y> accessed 1 June 2023. (In Ukrainian); HUZHVA, A., M., Codex Civilis pro Galicia Orientali 1797: Creation and General Characteristic. In: *Journal on Eurpean History of Law,* Vol. 12, No. 1, 2021, p. 83-89 <http://www.historyoflaw.eu/english/JHL_01_2021.pdf> accessed 1 June 2023. By the way, it was A. M. Huzhva who carried out the Russian and Ukrainian translations of the Civil Code for Eastern Galicia in 1797.

[18] This means the Supreme Council of Ukraine – the Parliament of Ukraine.

[19] See: STEFANCHUK, R., Grazhdanskij kodeks Galicii 1797 g. kak odna iz pervyh mirovyh kodifikacij grazhdanskogo zakonodatelstva [Civil Code of Galicia of 1797 as one of the first world codifications of civil law]. In: *Chasopys tsyvilistyky* [*Journal of Civil Studies*], Is. 20, 2016, p. 227-230 <http://dspace.onua.edu.ua/bitstream/handle/11300/8726/48.pdf.pdf?sequence=1&isAllowed=y> accessed 1 June 2023. (In Russian).

[20] See: STEFANCHUK, R., BLAZHIVSKA, O., Ye., Do pytannia pro stvorennia Halytskoho tsyvilnoho kodeksu 1797 r. [To the issue of the creation of the Galician Civil Code of 1797]. In: *Zakon Ukrainy* [*Law of Ukraine*], Is. 2, 2014, p. 123-130; STEFANCHUK, R., BLAZHIVSKA, O., Istorychni aspekty stvorennia Halytskoho tsyvilnoho kodeksu 1797 roku [Historical aspects of the creation of the Galician Civil Code of 1797]. In: *Visnyk Natsionalnoi akademii prokuratury Ukrainy* [*Bulletin of the National Academy of the Prosecutor's Office of Ukraine*], No. 4, 2014, p. 42-48 <http://nbuv.gov.ua/UJRN/Vnapu_2014_4_9> accessed 15 May 2023. (In Ukrainian).

sian, and the rest in Ukrainian,[21] which testifies to the special interest in this legal act of the Habsburg monarchy not only by the scientific community, but also by a wide in general. Of course, Ukrainian researchers also pay attention to the General Civil Code of the Austrian Empire in 1811: in addition to those mentioned above, also correspondent members of the NALSU, Prof. of the National University "Odesa Law Academy" Yevhen Kharytonov,[22] assoc. Prof. of the LNU Hanna Fedushchak-Paslavska,[23] assoc. Prof. of the LNU Halyna Sanahurska[24] and many others. One of the newest Ukrainian studies of Austrian law, carried out by DPh. Mykhailo Pyrtko, concerns the legal reforms of Maria-Theresa and Joseph II.[25]

In addition to highlighting the history and sources of law of the Habsburg monarchy, Ukrainian scientists, in particular N. I. Shutko,[26]

[21] See: Grazhdanskij kodeks Vostochnoj Galicii 1797 g. = Codex civilis pro Galicia Orientali anni MDCCXCVII [Civil Code of Eastern Galicia of 1797 = Codex civilis pro Galicia Orientali anni MDCCXCVII], ed. O. Kutateladze and V. Zubar, trans. from lat. A. Huzhva, Odesa, Moscow, 2013, 536 p. (In Russian); Tsyvilnyi kodeks Halychyny, 1797 [The Civil Code of Galicia, 1797], Ivano-Frankivsk, 2017, 271 p. (which contains a Foreword by Ch. Neschvara); Codex civilis pro Galicia Orientali anni MDCCXCVII = Tsyvilnyi kodeks dlia Skhidnoi Halitsii 1797 r. [Codex civilis pro Galicia Orientali anni MDCCXCVII = Civil Code for Eastern Galicia of 1797], trans. A. M. Huzhva, ed. V. M. Zubar, O. D. Kutateladze, R. O. Stefanchuk, 2nd ed., Kyiv, 2018, 659 p.; Codex civilis pro Galicia Orientali anni MDCCXCVII = Tsyvilnyi kodeks dlia Skhidnoi Halitsii 1797 r.: tekst, per., nauk. koment. [Codex civilis pro Galicia Orientali anni MDCCXCVII = Civil Code for Eastern Galicia of 1797: text, trans., scientific commentary], trans. A. M. Huzhva, ed. V. M. Zubar, O. D. Kutateladze, R. O. Stefanchuk, 3rd ed., corrected, Kyiv, 2020, 573 p. (In Ukrainian).

[22] See: KHARYTONOV, Ye., O., Pryiniattia novoho Tsyvilnoho kodeksy, p. 250-257; Tsyvilni kodeksy «pasionarnoho» typu: yevropeiski prototypy [Civil codes of the "passionate" type: European prototypes]. In: *Aktualni problemy derzhavy i prava: zb. nauk. pr.* [*Actual problems of the state and law: coll. scientific works*], Is. 66, 2012, p. 7-16 <http://dspace.onua.edu.ua/bitstream/handle/11300/5186/Kharitonov%20apdp%2066.pdf?sequence=1 & isAllowed=y> accessed 1 June 2023; «Tsyvilnyi kodeks Skhidnoi Halychyny» chy «Avstriiskyi tsyvilnyi kodeks»: vstup do dyskusii ["Civil Code of Eastern Galicia" or "Austrian Civil Code": introduction to the discussion]. In: *Chasopys tsyvilistyky* [*Journal of Civil Studies*], Is. 20, 2016, p. 225-226 <https://web.archive.org/web/20171118153442/http://www.xn----7sbhwbbaphzlwdep3dj4zb.xn--j1amh/archive/20.pdf> accessed 1 June 2023. (In Ukrainian).

[23] See: FEDUSHCHAK-PASLAVSKA, H., M., Istorychno-pravovi ta filosofski peredumovy stvorennia Avstriiskoho zahalnoho tsyvilnoho ulozhennia [Historical, legal and philosophical prerequisites for the creation of the Austrian general civil code]. In: *Chasopys tsyvilistyky* [*Journal of Civil Studies*], Is. 19, 2016, p. 195-200 <http://dspace.onua.edu.ua/bitstream/handle/11300/8576/40.pdf.pdf?sequence=1 & isAllowed=y> accessed 1 June 2023. (In Ukrainian).

[24] See: SANAHURSKA, H., M., Poshyrennia avstriiskoho pryvatnoho prava na zakhidnoukrainskykh zemliakh [The spread of Austrian private law in Western Ukrainian lands]. In: *Tradytsii ta innovatsii rozvytku pryvatnoho prava v Ukraini: osvitnii vymir: materialy IV Vseukrainskoi naukovo-praktychnoi konferentsii (m. Poltava, 4 chervnia 2015 r.)* [*Traditions and innovations in the development of private law in Ukraine: educational dimension: materials of the 4th All-Ukrainian Scientific and Practical Conference (Poltava, June 4, 2015)*], Poltava, 2015, p. 60-63; Retseptsiia Avstriiskoho tsyvilnoho kodeksu 1811 r. v chynnomu Simeinomu kodeksi Ukrainy [Reception of the Austrian Civil Code of 1811 in the current Family Code of Ukraine]. In: *Visnyk Akademii advokatury Ukrainy* [*Bulletin of the Academy of Advocacy of Ukraine*], No 3 (25), 2012, p. 255-256 <http://nbuv.gov.ua/UJRN/vaau_2012_3_62> accessed 1 June 2023; Pravovyi status dytyny v Avstriiskomu tsyvilnomu kodeksi 1811 r. [The legal status of the child in the Austrian Civil Code of 1811]. In: *Naukovyi visnyk Lvivskoho torhovelno-ekonomichnoho universytetu. Seriia yurydychna. Zb. nauk. prats* [*Scientific Bulletin of the Lviv University of Trade and Economics. Legal series. Coll. scientific works*], Is. 4, 2017, p. 55-63. (In Ukrainian).

[25] See: PYRTKO, M., S., *Derzhavo-pravovi reformy v Avstrii u 40-90 rokakh XVIII st.: dys… d-ra filosofii: spets. 081 «Pravo» (haluz znan – 08 «Pravo»)* [*State and legal reforms in Austria in the 1840s-90s of the 18th century: diss… DPh: special. 081 "Law" (field of knowledge – 08 "Law")*], LNU of Iv. Franko, Lviv, 2021; Vplyv polityky absoliutyzmu na stanovlennia zakonodavstva v Avstriiskii monarkhii u XVIII st. [The impact of the policy of absolutism on the formation of legislation in the Austrian monarchy in the 18th century]. In: *Chasopys Kyivskoho universytetu prava* [*Journal of the Kyiv University of Law*], Is. 1, 2018, p. 51-57 <http://kul.kiev.ua/doc/CHAS18_1.pdf> accessed 1 June 2023; Pravovi reformy v Avstriiskii monarkhii v period pravlinnia Marii Terezii (1740-1780 rr.) [Legal reforms in the Austrian monarchy during the reign of Maria Theresa (1740-1780)]. In: *Naukovyi visnyk publichnoho ta pryvatnoho prava: zbirnyk naukovykh prats* [*Scientific Bulletin of Public and Private Law: Collection of scientific works*], Is. 1, Vol. 1, 2019, p. 61-66 <http://www.nvppp.in.ua/vip/2019/1/tom_1/13.pdf> accessed 1 June 2023; Sotsialno-politychni peredumovy ta teoretychne obgruntuvannia reform Marii-Terezii v Avstriiskii monarkhii (1740-1780 rr.) [Socio-political prerequisites and theoretical justification of the reforms of Maria Theresa in the Austrian monarchy (1740-1780)]. In: *Naukovyi visnyk Uzhhorodskoho Natsionalnoho universytetu: seriia Pravo* [*Scientific bulletin of the Uzhhorod National University: series Law*], Is. 58, Vol. 1, 2019, p. 43-48; Osnovni pryntsypy formuvannia avstriiskoi derzhavnoi polityky za imperatora Yosyfa II (1780-1790) [The main principles of the formation of Austrian state policy under Emperor Joseph II (1780-1790)]. In: *Yuvileinyi zbirnyk naukovykh prats na poshanu prof. V. S. Kulchytskoho z nahody 100 richchia vid dnia narodzhennia* [*Jubilee collection of scientific works in honor of Prof. V. S. Kulchytskyi on the occasion of the 100th anniversary of his birth*], ed. I. Y. Boiko, Lviv, 2019, p. 326-333 <https://zlibrary.to/pdfs/100-15> accessed 1 June 2023; etc. (In Ukrainian).

[26] See: SHUTKO, N., I., *Zoboviazalne pravo za Tsyvilnym kodeksom Avstrii 1811 roku ta yoho zastosuvannia na zakhidnoukrainskykh zemliakh (1811-1939 roky) : dys… kand. yuryd. nauk za spets. 12. 00. 01 «Teoriia ta istoriia derzhavy i prava; istoriia politychnykh i pravovykh uchen»* [*Obligatory law according to the Austrian Civil Code of 1811 and its application in the Western Ukrainian lands (1811-1939): diss… candidate of law sciences for special 12. 00. 01 "Theory and history of the state and law; history of political and legal teachings"*], LNU of Iv. Franko, Lviv, 2018, 258 p. <https://law.lnu.edu.ua/wp-content/uploads/2018/11/Dysertatsiia-SHutko-N-1.pdf> accessed 1 June 2023; Novelizatsiia Tsyvilnoho kodeksu Avstrii 1811 r. na pochatku XX st. [Novelization of the Civil Code of Austria of 1811 at the beginning of the 20th century]. In: *Istoryko-pravovyi chasopys* [*Historical and legal journal*], No 1(7), 2016, p. 248-253 <https://evnuir.vnu.edu.ua/bitstream/123456789/10815/1/%D1%88%D1%83%D1%82%D0%BA%D0%BE.pdf> accessed 1 June 2023; Diia Tsyvilnoho kodeksu Avstrii 1811 roku na uhorskykh zemliakh (1812-1918 roky) [The effect of the Austrian Civil Code of 1811 on Hungarian lands (1812-1918)]. In: *Visnyk LNU. Seriia yurydychna* [*Bulletin of LNU. Legal series*], No 63, 2016, p. 55-63 <http://dx.doi.org/10.30970/vla.2016. 63. 5025> accessed 1 June 2023; etc. (In Ukrainian).

the mentioned O. Ye. Blazhivska,[27] O. I. Nelin,[28] H. I. Kovalyk,[29] L. Ya. Korytko,[30] L. V. Mikhnevych[31] and etc., pay great attention to the study of individual institutions of its civil law. Along with the civilian also research Austrian civil procedural law such scientists as, for example, DPh. Khrystyna Dumych[32] and Prof. of the Chernivtsi[33] National University of Yu. Fedkovych Mykhailo Nykyforak[34] (whose research interests were focused on the study of the legal status of Bukovyna as part of the Habsburg Monarchy).

It is worth pointing out that my scientific research, which is aimed at writing a doctoral dissertation on the topic "Reception of Roman private law in Austria and Austria-Hungary and its

[27] See: BLAZHIVSKA, O., Ye., *Istoriia kodyfikatsii tsyvilnoho zakonodavstva na ukrainskykh zemliakh (1797-1991 roky): monohrafiia* [*History of codifications of civil legislation on Ukrainian lands (1797-1991): monograph*]. Kamianets-Podilskyi, 2014; *Kodyfikatsiia tsyvilnoho zakonodavstva na ukrainskykh zemliakh u period 1797-1991 rr.: Dys… d-ra yuryd. nauk: 12. 00. 01, 12. 00. 03* [*Codification of civil legislation on Ukrainian lands in the period 1797-1991: Diss… Doctor of law: 12. 00. 01, 12. 00. 03*], Institute of Legislation of the Verkhovna Rada of Ukraine, Kyiv, 2015, 400 p.; Istoryko-pravovyi analiz osobysto-mainovykh prav za Zahalnym tsyvilnym ulozhenniam Avstriiskoi imperii 1811 roku [Historical and legal analysis of personal property rights according to the General Civil Code of the Austrian Empire of 1811]. In: *Biuleten Ministerstva yustytsii Ukrainy* [*Bulletin of the Ministry of Justice of Ukraine*], No 6, 2014, p. 56-63 <http://nbuv.gov.ua/UJRN/bmju_2014_6_23> accessed 1 June 2023; Istoryko-pravovyi analiz rechovoho prava za Zahalnym tsyvilnym ulozhenniam Avstriiskoi imperii 1811 roku [Historical and legal analysis of property law according to the General Civil Code of the Austrian Empire of 1811]. In: *Yurydychna Ukraina* [*Legal Ukraine*], No 4, 2014, p. 15-20 <http://nbuv.gov.ua/UJRN/urykr_2014_4_5> accessed 1 June 2023; Osoblyvosti pravovoho rehuliuvannia okremykh vydiv dohovirnykh vidnosyn za Zahalnym tsyvilnym ulozhenniam Avstriiskoi imperii 1811 r. [Peculiarities of the legal regulation of certain types of contractual relations according to the General Civil Code of the Austrian Empire of 1811]. In: *Aktualni problemy pryvatnoho prava: materialy mizhnar. nauk.-prakt. konf., prysviach. 92-y richnytsi z dnia narodzh. d-ra yuryd. nauk, prof., chl.-kor. AN URSR V. P. Maslova (Kharkiv, 28 liut. 2014 r.)* [*Actual problems of private law: materials of the international science and practice conf., dedicated to 92nd anniversary from the day of birth Doctor of law, Prof., Member-Cor. Academy of Sciences of the USSR V. P. Maslova (Kharkiv, February 28, 2014)*], Kharkiv, 2014, p. 90-93 <https://library.nlu.edu.ua/POLN_TEXT/SBORNIKI_2014/Tezu_Maslov_2014.pdf> accessed 1 June 2023; Istoryko-pravovyi analiz prava volodinnia ta prava vlasnosti za Halytskym tsyvilnym kodeksom 1797 roku [Historical and legal analysis of the right of possession and ownership according to the Galician Civil Code of 1797]. In: *Universytetski naukovi zapysky* [*University scientific notes*], No 1, 2014, p. 61-68 <http://nbuv.gov.ua/UJRN/Unzap_2014_1_11> accessed 1 June 2023; Vchennia pro zoboviazannia za Halytskym tsyvilnym kodeksom 1797 roku: istoryko-pravovyi analiz [The doctrine of obligations under the Galician Civil Code of 1797: historical and legal analysis]. In: *Yurydychna Ukraina* [*Legal Ukraine*], No 5, 2014, p. 9-14 <http://nbuv.gov.ua/UJRN/urykr_2014_5_4; Zahalna kharakterystyka deliktnykh zoboviazan zghidno z Halytskym tsyvilnym kodeksom 1797 roku [General characteristics of tort obligations according to the Galician Civil Code of 1797]. In: *Universytetski naukovi zapysky* [*University scientific notes*], No 2, 2015, p. 60-68 <http://nbuv.gov.ua/UJRN/Unzap_2015_2_8> accessed 1 June 2023; Spadkove pravo za Halytskym tsyvilnym kodeksom 1797 roku: istoryko-pravovyi analiz [Inheritance law according to the Galician Civil Code of 1797: historical and legal analysis]. In: *Visnyk Natsionalnoi akademii prokuratury Ukrainy* [*Bulletin of the National Academy of the Prosecutor's Office of Ukraine*], No 2, 2014, p. 92-99 <http://nbuv.gov.ua/UJRN/Vnapu_2014_2_17> accessed 1 June 2023. (In Ukrainian).

[28] See: NELIN, O., I., Do pytannia uspadkuvannia v ukrainskykh zemliakh u skladi Avstro-Uhorskoi imperii [On the issue of inheritance in Ukrainian lands within the Austro-Hungarian Empire]. In: *Derzhava i pravo: Zb. nauk. prats. Yurydychni i politychni nauky* [*The state and the law: Coll. scientific works. Legal and political sciences*], Is. 45, 2009, p. 141-146 <http://dspace.nbuv.gov.ua/bitstream/handle/123456789/11144/26-%20Nelin.pdf?sequence=1> accessed 1 June 2023; Osoblyvosti spadkuvannia v Ukraini u period perebuvannia u skladi Rosiiskoi ta Avstro-Uhorskoi imperii u XIX – pochatku XX stolittia: istoryko-pravovyi aspekt [Peculiarities of inheritance in Ukraine during the period of stay as part of the Russian and Austro-Hungarian empires in the 19th - early 20th centuries: historical and legal aspect]. In: *Yurydychna Ukraina* [*Legal Ukraine*], No 9, 2014, p. 4-9 <http://nbuv.gov.ua/UJRN/urykr_2014_9_3> accessed 1 June 2023. (In Ukrainian).

[29] See: KOVALYK, H., I., Pravove rehuliuvannia servitutiv za Tsyvilnym kodeksom Avstrii 1811 roku [Legal regulation of servitudes according to the Austrian Civil Code of 1811]. In: *Naukovyi visnyk Mizhnarodnoho humanitarnoho universytetu. Seriia «Iurysprudentsiia»* [*Scientific Bulletin of the International Humanitarian University. Series "Jurisprudence"*], Is. 15, Vol. 1, 2015, p. 32-35 <http://www.vestnik-pravo.mgu.od.ua/archive/juspradenc15/part_1/11.pdf> accessed 1 June 2023. (In Ukrainian).

[30] See: KORYTKO, L., Ya., *Orhanizatsiino-pravovi zasady diialnosti subiektiv hospodariuvannia Skhidnoi Halychyny ta Bukovyny v skladi Avstro-Uhorshchyny: dys… kand. yuryd. nauk: spets. 12. 00. 01* [*Organizational and legal principles of activity of business entities of Eastern Galicia and Bukovyna as part of Austria-Hungary: diss… candidate of law sciences: special. 12. 00. 01*], Lviv State University of Internal Affairs, Lviv, 2010; *Stanovlennia i rozvytok pryrodookhoronnykh instytutiv v Avstro-Uhorskii imperii: istoryko-pravyi vymir (na materialakh Skhidnoi Halychyny 1867-1918 rr.): dys… d-ra yuryd. nauk: spets. 12. 00. 01* [*Formation and development of environmental protection institutes in the Austro-Hungarian Empire: historical-right dimension (based on the materials of Eastern Galicia 1867-1918): diss… Doctor of law: special. 12. 00. 01*], Lviv State University of Internal Affairs, Lviv, 2017; MAKARCHUK V., S., KORYTKO, L., Ya., Kharakterystyka avstriiskoho hospodarskoho zakonodavstva XIX – poch. XX st. [Characteristics of Austrian economic legislation of the 19th – beginning 20th centuries]. In: *Prykarpatskyi yurydychnyi visnyk* [*Carpathian Legal Bulletin*], Is. 1 (3), 2013, p. 76-86 <http://www.pjv.nuoua.od.ua/v1_2013/07.pdf> accessed 1 June 2023. (In Ukrainian).

[31] See: MIKHNEVYCH, L., V., Zakonodavche zakriplennia avtorskoho prava na ukrainskykh zemliakh Avstriiskoi (Avstro-Uhorskoi) imperii [Legislative consolidation of copyright in the Ukrainian lands of the Austrian (Austro-Hungarian) Empire]. In: *Naukovyi visnyk Uzhhorodskoho Natsionalnoho universytetu. Seriia Pravo* [*Scientific Bulletin of the Uzhhorod National University. Law series*], Is. 72, p. 1, 2022, p. 55-60 <https://doi.org/10.24144/2307-3322.2022. 72. 9> accessed 1 June 2023. (In Ukrainian).

[32] See: DUMYCH, Kh., M., *Tsyvilne sudochynstvo u Halychyni za Avstriiskym tsyvilnym protsesualnym kodeksom 1895 r.: dys… kand. yuryd. nauk: 12. 00. 01* [*Civil proceedings in Galicia according to the Austrian Civil Procedure Code of 1895: diss… candidate of law sciences: 12. 00. 01*], LNU of Iv. Franko, Lviv, 2016, 214 p. <https://law.lnu.edu.ua/wp-content/uploads/2016/02/%D0%94%D0%B8%D1%81%D0%B5%D1%80%D1%82%D0%B0%D1%86%D1%96%D1%8F-25.pdf> accessed 1 June 2023; etc. (In Ukrainian).

[33] The city of Chernivtsi historically was and still is the regional center of the ethnic and geographical region of Ukraine – Bukovyna.

[34] See: NYKYFORAK, M., V., Z istorii kodyfikatsii avstriiskoho tsyvilnoho ta tsyvilno-protsesualnoho prava [From the history of the codification of Austrian civil and civil procedural law]. In: *Naukovyi visnyk Chernivetskoho universytetu: Zbirnyk naukovykh prats* [*Scientific Bulletin of the University of Chernivtsi: Collection of scientific papers*], Is. 82: Jurisprudence, 2000, p. 18-21 <http://library.chnu.edu.ua/res//library/elib/visnyk_chnu/visnyk_chnu_2000_0082.pdf> accessed 15 May 2023; *Bukovyna v derzhavno-pravovii systemi Avstrii (1774-1918 rr.)* [*Bukovyna in the state-legal system of Austria (1774-1918)*], Chernivtsi, 2004, 384 p. (In Ukrainian).

spread in Western Ukrainian lands in 1772-1918: a historical and legal study", concerns sources and institutions civil law of the Habsburg monarchy and the reflection of the reception of Roman law in them.[35]

To sum up, we have provided an overview, of course, only of the main developments in Ukrainian legal science on the specified issue. But at the same time, as we can see, both in historical and legal and in civil science, researches of the history of the law of the Habsburg monarchy during the period the Western Ukrainian lands stay as part of it, that is, from 1772, are widely and comprehensively presented. Therefore, the study of the Codex Theresianus Draft concluded somewhat earlier – in 1766, as already mentioned, was not given sufficient importance.

Instead, researchers of the Austrian law history paid scrupulous attention to the elaboration of the text of the Codex Theresianus Draft of 1766. However, the matter of the development of the above-mentioned Code was thoroughly investigated by the Austrian judge and Prof. of the University of Vienna Philipp Harras Ritter von Harrasovsky (1833-1890) in his work in 1868 on the history of the codification of Austrian civil law.[36] This work was republished in 1968 in Frankfurt am Main, and a copy, which is kept at Harvard University has been digitized nowadays, making it available to the general public and in particular scholars. And it was on the basis of its detailed study that we were able to present our analysis of the revisions of the Codex Theresianus Draft, focusing on various approach-

[35] See: SAVULIAK, R., V., Dzherela pryvatnoho prava Avstriiskoi monarkhii i Avstro-uhorskoi imperii ta yikhnie poshyrennia na zakhidnoukrainskykh zemliakh [Sources of private law of the Austrian monarchy and the Austro-Hungarian Empire and their distribution in Western Ukrainian lands]. In: *Mizhnarodnyi naukovyi zhurnal «Hraal nauky», № 24 (liutyi, 2023): za materialamy V Mizhnarodnoi naukovo-praktychnoi konferentsii «Scientific researches and methods of their carrying out: world experience and domestic realities» (m. Vinnytsia (Ukraina) – Viden (Avstriia), 17 liutoho 2023 roku)* [*International scientific journal «Grail of Science», № 24 (February, 2023): with the proceedings of the: V Correspondence International Scientific and Practical Conference «Scientific researches and methods of their carrying out: world experience and domestic realities» (Vinnytsia, Ukraine – Vienna, Austria, February 17th, 2023)*], p. 178-180 <https://doi.org/10.36074/grail-of-science.17. 02. 2023.028> accessed 1 June 2023; Vydannia dzherel pryvatnoho prava Avstriiskoi imperii i Avstro-uhorskoi monarkhii ta yikhnie poshyrennia na zakhidnoukrainskykh zemliakh [Publication of sources of private law of the Austrian Empire and the Austro-Hungarian Monarchy and their distribution in Western Ukrainian lands]. In: *Mizhnarodnyi naukovyi zhurnal «Hraal nauky», № 25 (berezen, 2023): za materialamy V Mizhnarodnoi naukovo-praktychnoi konferentsii «Globalization of scientific knowledge: international cooperation and integration of sciences» (m. Vinnytsia (Ukraina) – Viden (Avstriia), 17 bereznia 2023 roku)* [*International scientific journal «Grail of Science», № 25 (March, 2023): with the proceedings of the: V Correspondence International Scientific and Practical Conference «Globalization of scientific knowledge: international cooperation and integration of sciences» (Vinnytsia, Ukraine – Vienna, Austria, March 17th, 2023)*], p. 111-114 <https://doi.org/10.36074/grail-of-science.17. 03. 2023.015> accessed 1 June 2023; Kodyfikatsii tsyvilnoho prava v Avstriiskii monarkhii u druhii polovyni XVIII st.: kodyfikatsiini roboty, zahalna kharakterystyka ta znachennia [Codifications of civil law in the Austrian monarchy in the second half of the 18th century: codification works, general characteristics and significance]. In: *Aktualni doslidzhennia pravovoi ta istorychnoi nauky (Vypusk 48): Mizhnarodna naukova konferentsiia (m. Kyiv, 9-10 bereznia 2023 r.)* [*Current research in legal and historical science (Issue 48): International Scientific Conference (Kyiv, March 9-10, 2023)*] <http://www.lex-line.com.ua/?go=full_article & id=3527> accessed 1 June 2023; Yozefinskyi kodeks 1787 r.: peredumovy ukladennia, kodyfikatsiini roboty, struktura, zahalna kharakterystyka ta znachennia [The Josephine Code of 1787: prerequisites for conclusion, codification works, structure, general characteristics and meaning]. In: *Zbirnyk naukovykh prats Scientia: za materialamy III Mizhnarodnoi naukovo-teoretychnoi konferentsii «Modernization of today's science: experience and trends» (m. Sinhapur (SGR), 24 liutoho 2023 roku)* [*Collection of scientific papers «Scientia»: with Proceedings of the III International Scientific and Theoretical Conference «Modernization of today's science: experience and trends» (Singapore, Republic of Singapore, February 24, 2023)*], p. 92-96 <https://previous.scientia.report/index.php/archive/article/view/749> accessed 1 June 2023; Tsyvilnyi kodeks dlia Halychyny 1797 roku : ukladennia, struktura, zahalna kharakterystyka ta znachennia [Civil code for Galicia of 1797: conclusion, structure, general characteristics and meaning]. In: *Tekhnolohii, instrumenty ta stratehii realizatsii naukovykh doslidzhen: materialy V Mizhnarodnoi naukovoi konferentsii (m. Kyiv, 24 liutoho 2023 roku)* [*Technologies, tools and strategies for the implementation of scientific research: materials of the 5th International Scientific Conference (Kyiv, February 24, 2023)*], p. 114-119 <https://archive.mcnd.org.ua/index.php/conference-proceeding/article/view/427> accessed 1 June 2023; Avstriiske zahalne tsyvilne ulozhennia 1811 r.: kodyfikatsiini roboty, struktura, zahalna kharakterystyka ta znachennia [Austrian General Civil Code of 1811: codification works, structure, general characteristics and meaning]. In: *Aktualni doslidzhennia pravovoi ta istorychnoi nauky (Vypusk 47): Mizhnarodna naukova konferentsiia (m. Kyiv, 8-9 liutoho 2023 r.)* [*Current research in legal and historical science (Issue 47): International scientific conference (Kyiv, February 8-9, 2023)*] <http://www.lex-line.com.ua/?go=full_article & id=3516> accessed 1 June 2023;. Podil rechei za Avstriiskym zahalnym tsyvilnym ulozhenniam 1811 r. yak retseptsiia polozhen rymskoho pryvatnoho prava [Division of things according to the Austrian General Civil Code of 1811 as a reception of the provisions of Roman private law]. In: *Elektronne naukove vydannia «Analitychno-porivnialne pravoznavstvo»* [*Electronic scientific publication "Analytical and comparative jurisprudence"*], No 6, 2022, p. 32-36 <http://app-journal.in.ua/wp-content/uploads/2023/02/7.pdf> accessed 1 June 2023; Ryzykovi dohovory za Avstriiskym zahalnym tsyvilnym ulozhenniam 1811 r. yak retseptsiia aleatornykh dohovoriv u rymskomu pryvatnomu pravi [Contracts of risk according to the Austrian General Civil Code of 1811 as a reception of aleatoric contracts in Roman private law]. In: *Yurydychnyi naukovyi elektronnyi zhurnal* [*Legal scientific electronic journal*], No 12, 2022, p. 43-49 <http://www.lsej.org.ua/12_2022/6.pdf> accessed 1 June 2023; Zobov`iazannia iz zapodiiannia shkody za Avstriiskym zahalnym tsyvilnym ulozhenniam 1811 r. yak retseptsiia polozhen rymskoho pryvatnoho prava [Obligations arising from damage under the Austrian General Civil Code of 1811 as a reception of the provisions of Roman private law]. In: *Aktualni problemy pravovoho rehuliuvannia v Ukraini ta krainakh blyzhnoho zarubizhzhia: Materialy XII mizhnarodnoi naukovo-praktychnoi Internet konferentsii (m. Lviv, 28-29 hrudnia 2022 roku): tezy dopovidei* [*Actual problems of legal regulation in Ukraine and the countries of the near abroad: Materials of the XII international scientific and practical Internet conference (Lviv, December 28-29, 2022): theses of reports*], Lviv, 2022. p. 153-156 <http://www.lute.lviv.ua/fileadmin/www.lac.lviv.ua/data/fakultety/Urydychny/2022/LTEU_YF_Zbirnyk-XII_v3.pdf> accessed 1 June 2023; Rymske pryvatne pravo – osnova tsyvilnoho prava derzhav romano-hermanskoi pravovoi simi [Roman private law – the basis of the civil law of the states of the Romano-Germanic legal family]. In: *Problemy derzhavotvorennia i zakhystu prav liudyny v Ukraini: Materialy XXIX zvitnoi naukovo-praktychnoi konferentsii: u 2-okh ch., Ch. 1 (m. Lviv, 2-3 liutoho 2023 roku)* [*Problems of state formation and protection of human rights in Ukraine: Materials of the 29th reporting scientific and practical conference: in 2 parts, P. 1 (Lviv, February 2-3, 2023)*], Lviv, LNU of Iv. Franko, 2023, p. 88-93 <https://law.lnu.edu.ua/wp-content/uploads/2023/02/chast_1.pdf> accessed 1 June 2023. (In Ukrainian).

[36] HARRASOWSKY, Ph., H., R., *Geschichte der Codification des österreichischen Civilrechtes*, Wien, 1868, s. 30-125 <https://babel.hathitrust.org/cgi/pt?id=hvd.32044056941719 & view=1up & se> accessed 15 May 2023.

es to the reception of certain provisions of Roman law in different revisions – because the researcher's work contains not only a description of the codification process for the conclusion of this Draft, but also review of the content of the text of all its versions. At the same time, it is obvious that this unique study by Ph.-H.-R. von Harrasovsky is known only to a rather narrow circle of scientists, and therefore we consider it appropriate and even necessary to pay attention to this work in our article.

Subsequently, Ph.-H.-R. von Harrasovsky presented the text of the Codex Theresianus Draft of 1766 in three volumes of five-volume edition (1883-1886) of versions of the Codex Theresianus with his remarks and comments.[37] Moreover, in the first three volumes (1883-1884), the text of three parts of the Draft Code was provided, respectively, and the 4th and 5th volumes (1886) contained drafts of further developments of the Draft of the Austrian Empire Civil Code. As of today, the digitized copies of volumes 1-3 are at Harvard University. Due to that, it becomes possible to conduct our research on the content of the Codex Theresianus Draft of 1766.

And in addition, the study of the materials of the Compilation Commission preparatory work for the conclusion of the Codex Theresianus Draft was carried out in detail by the modern researcher of Austrian law history Christian Neschvara. He published the preliminary text of the Draft Code, concluded by the head of this Codification Commission Josef Azzoni (a Prof. of the Department of Roman Institutions and Digest and later he became a Dean of the Law Faculty of Prague University, and since 1755 he was the Rector of the university[38]), with notes and remarks to the text by the member of Commission Josef Ferdinand Holger[39] (a Prof. of the Department of Roman Law Institutes and Dean of the Law Faculty of Vienna University and later a Rector of this university[40]); it should be noted that both authors of the Codex Theresianus Draft were at the same time court advisers at the Vienna Supreme Court.[41] Also, in the Introduction to this edition, Ch. Neschvara considered the prerequisites for Codex Theresianus Draft creation and revealed its significance for further codifications in the Austrian Empire in the second half of the 18th century.[42]

Special attention should be paid to newly found by Czech Dr. of Law Drahoslav Soyka in family archive of the Blumehen,[43] which is kept in Moravskyi state archive in Brno, original of the Introduction to the Codex Theresianus Draft of 1766 (Moravskyi state archive, fund G 76 (the Blumehen's family archive), description No. 70, case 847 (contains the Codex Theresianus with supplements), 53 sheet).[44] He was published it in the translation into the Czech language in 2009.[45] By the way, the above-mentioned Ch. Neschvara, in his article of 2017 dedicated to the research of the Codification Commission work in Brno, published an excerpt from the text of this Introduction of the Codex Theresianus.[46] It should be clarified that the so-called Introduction to the Codex Theresianus Draft found by D. Soyka, indeed was a fragment of the beginning of the text of the first part of the Draft "On the rights of individuals" created by the Legislative Commission, namely, it contained the Preface and Chapter I "On justice and rights".

Although the western Ukrainian lands were part of the Austrian Empire, and after the Austro-Hungarian Monarchy from the last quarter of the 18th century and before its disintegration in 1918, however, there are no Ukrainian studies of the Codex Theresianus, but instead, there are primary sources and significant foreign research material on this issue. Therefore, we consider it necessary for the first time pay attention to the complex study of the specified problem in Ukrainian legal science. Consequently, the aim of this article is to research the step-by-step codification work on the conclusion of the Codex Theresianus of 1766 and to characterize the structure, to analyze the main content of all revisions of the Draft Code, as well as to find out the significance of Roman law reception in a process of its conclusion. In this context, it should be emphasized that although the Codex Theresianus Draft was ultimately never approved, its revised text was soon adopted as the Josephine Code of 1787, which was soon replaced in the Galician Crown Region[47] by the Civil Code for

[37] HARRASOWSKY, Ph., H., R., (Hrsg. und mit anmerkungen versehen), *Der Codex Theresianus und seine umarbeitungen*, Wien, 1883-1886 <https://catalog.hathitrust.org/Record/008374646> accessed 15 May 2023.

[38] SOJKA, Dr., Členové kompilační komise [The members of the Compilation Commission]. In: *Codex Theresianus. Multimediální elektronický výukový materiál* [*The Teresian Code. Multimedia electronic educational material*]; ed. J. Tauchen, Brno, 2009 <https://is.muni.cz/elportal/estud/praf/ps09/codex/web/pages/clenove-kompilacni-komise.html> accessed 15 May 2023. (In Czech).

[39] NESCHWARA, Ch., (Hrsg.), *Die ältesten Quellen zur Kodifikationsgeschichte des österreichischen ABGB : Josef Azzoni, Vorentwurf zum Codex Theresianus – Josef Ferdinand Holger, Anmerckungen über das österreichische Recht (1753)*, Wien, Köln, Weimar, 2012 <https://library.oapen.org/bitstream/handle/20.500.12657/34350/1/437229.pdf> accessed 15 May 2023.

[40] SOJKA, Dr., Členové kompilační komise. In: *Codex Theresianus.*

[41] Ibid.

[42] NESCHWARA, Ch., (Hrsg.), *Die ältesten Quellen zur Kodifikationsgeschichte*, s. 15-47.

[43] Jindrick Kaetan fon Blumehen was the president of Compilation commission in Brno, which conducted the first codification work on the Codex Theresianus Draft.

[44] SOJKA, Dr., Použité prameny [Used sources]. In: *Codex Theresianus.* <https://is.muni.cz/elportal/estud/praf/ps09/codex/web/pages/pouzite-prameny.html> accessed 15 May 2023. (In Czech).

[45] SOJKA, Dr., Codex Theresianus – text. In: *Codex Theresianus.* <https://is.muni.cz/elportal/estud/praf/ps09/codex/web/pages/codex-theresianus-text.html> accessed 15 May 2023. (In Czech).

[46] NESCHWARA, Ch., Die Brünner Compilationskommission und ihr Entwurf für die Einleitung zum Codex Theresianus. Ein Beitrag im Hinblick auf «300 Jahre Maria Theresia». In: *Journal on European History of Law*, Vol. 8, Issue 2, 2017, p. 2-12 <http://www.historyoflaw.eu/english/JHL_02_2017.pdf> accessed 15 May 2023.

[47] From 1786 to 1849, the Galician Crown Region, which had the official name of the Kingdom of Galicia and Lodomeria, also included Bukovyna as a separate district, which was later allocated to a separate crown region of the Habsburg Monarchy under the name of the Duchy of Bukovyna.

Galicia of 1797 (separately for Western Galicia, which consisted of ethnic Polish lands, and Eastern Galicia, which consisted of ethnic Western Ukrainian lands[48]). Its introduction was in fact constituted the approbation of the practical implementation of its provisions before the spread of its effect to the entire territory of the Austrian monarchy. And therefore, on the basis of its refinement, the General Civil Code of the Austrian Empire of 1811 was subsequently adopted. And that is why we believe that for a comprehensive knowledge and scientific understanding of the history of the formation of the civil law of the Habsburg monarchy, a proper study of the prerequisites for the emergence of unified, codified civil legislation in the era of enlightened absolutism, a study of the features of the long-term codification process, and above all, an identification of the reception of Roman law in the early stages of the conclusion of a unified civil law of the Austrian Empire and, therefore, the tracing of the historical connection between the Austrian civil law doctrine and the Roman law.

2. Versions of the Codex Theresianus Draft of 1766

2.1 Codex Theresianus Draft of the Compilation Commission in Brno

It should be mentioned that in the process of presenting and analyzing the provisions of the Codex Theresianus Draft we used its authentic style and terminology as well as legal constructions, sometimes providing in the author's footnotes specifications or clarifications of their meaning and interpretation in accordance with modern legal terminology.

First of all, we shall highlight the procedure of concluding the Draft during the work of the Compilation Commission in Brno, paying special attention to its position regarding the importance of the Roman law reception in its activities. In addition, we shall present the structure of the Draft, defined in the final plan of the work of this Commission.

In numerous reports and memoranda on legislative issues, submitted to Empress Maria Theresa in the middle of the 18th century, government officials emphasized on the redundancy and inadmissibility of Roman law in the legal system of the Austrian Empire, which the rapporteurs recognized as only a cultural element, like other Roman antiquities.[49] Therefore, at the first meeting of the Compilation Commission in May 3, 1753, in the classification process of the material for the Code, it was decided not to adhere to the structure of any commonly used manual on Roman law, several of which were offered for this purpose. Therefore, the draft submitted to J. Azzoni was approved, however, like Roman law, it predetermined the main division of the code into three parts, which relate to people, things, and obligations, as well as to the legal process related to it.[50]

At the meeting of the Compilation Commission in June 9, 1753, during the discussion of the final plan of its work, only one passage in the Introduction to it was objected, according to which Roman law was to be expressly abolished. After all, despite the fact that the compilers were ordered to completely refrain from Roman law in their developments, it was still assumed that Roman law would have to be resorted during solving issues that could remain unconsidered in the future Codex Theresianus. Besides, the complete removal of Roman law which forms the basis of the law of the countries that belonged to the territory of the Holy Roman Empire would raise their criticism.[51] Therefore, in the penultimate paragraph of the first part of the final work plan of the Compilation Commission, which contained the guiding principles of its work developed by J. Azzoni, which amounted to 37 paragraphs of requirements for it,[52] it was stated that it should use Roman law as one of the adjuvants to express natural justice.[53]

It should be noted that the Codex Theresianus had to be made up not of three, but of four parts, devoted to the rights of individuals, property rights, law of obligations and civil procedural law. Each part contained chapters; the first part consisted of 9 chapters, the second – 15, the third – 14, and the fourth – 22. Each chapter was divided into subchapters, and those – into separate paragraphs. In the final work plan of the Compilation Commission, a brief description of their content was presented for each part and each section of the Code. Moreover, most quotations from Roman law were cited for its explanation. It is interesting that these citations were justified by the desire, on the contrary, to prevent giving preference to Roman law, since the theoretical provisions of the Code were based on Roman law, and therefore, the use of the German language in the text could cause vague wording, in contrast to established Latin legal constructions.

Therefore, the question of the correlation between the newly created law and the Roman law remained acutely topical for the Austrian codifiers, which was confirmed by the fact that they constantly were returning to it. This was most clearly reflected in the note made while outlining the content of the first part, dedicated to justice and rights. It was stated that Roman law should no longer have legal force, but the teaching of it in law schools should not stop, it should be studied because it produces the ability to apply the law skillfully and appropriately and "discovers natural justice", on which the newly created Austrian law should be based.

We should consider the structure of the Codex Theresianus Draft, defined in the final plan of the Compilation Commission in Brno in a more precise way. The first part "On the law of individuals" was divided into the following 9 chapters: I. On justice

[48] This region of Ukraine still bears the historical name of Halychyna – from the time of the existence of one of the lands of Kyivska Rus Halychyna (the name comes from the city of Halych, which is located in the Ivano-Frankivsk region, which was first mentioned in Hungarian sources in 896 and in Ipatiivskyi chronicles of 1113), and later the foundation in 1141 on its territory of the Principality of Galicia with its capital in Halych, which stretched from the Sian River and the Vyslok River in the west to the Danube River in the southeast and covered, including, Bukovyna.

[49] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 42.

[50] Ibid, s. 45-46.

[51] Ibid, s. 48.

[52] Ibid, s. 61.

[53] Ibid, s. 64-65.

and rights (which included subchapters: 1. rights in general; 2. public and special (private) law; 3. written laws and customs; 4. general Roman law and peculiarities of land (particular) state laws; 5. interpretation of the law and natural justice; 6. the essence of law); II. On the status of an individual (subchapters: 1. status of freedom; 2. status of citizenship; 3. status in the family); III. On parental authority (subchapters: 1. father's rights in relation to children; 2. children's rights in relation to parental authority; 3. mutual rights of a mother and a child; 4. acquisition and termination of parental authority); IV. On marriage engagements (subchapters: 1. marriage promises, dowry and inheritance of the groom; 2. dowry and marriage contracts; 3. gift and other gifts between the bride and groom; 4. the wife's own property except for the dowry; 5. securing the promise to enter marriage and fulfillment of relevant legal requirements); V. On relatives and kinship (subchapters: 1. degrees of kinship; 2. mutual rights of relatives); VI. On guardianship (subchapters: 1. guardianship over a will; 2. guardianship over close relatives; 3. guardianship defined by law; 4. the right to refuse the duties of a guardian; 5. procedure for registration of guardianship; 6. powers of the guardian; 7. disposition of the entrusted property of minors; 8. payment of care bills; 9. termination of guardianship; 10. responsibility for custodial property and its delivery in court); VII. On guardianship and care of minors and other people (subchapters: 1. insane and feeble-minded); 2. spendthrifts; 3. other cases when the court has entrusted someone with the care and maintenance of someone else's property; 4. duties of persons entrusted with guardianship and care); VIII. On lords and serfs (subchapters: 1. serfs; 2. acquisition and release from serfdom; 3. other not serfed people and their obligations); IX. On servants (subchapters: 1. actions of the lord towards his unruly servants; 2. duties of servants).

The second part "On the property rights" contained the following 15 chapters: I. On things that belong to everyone (which included subchapters: 1. movable and immovable things, goods and property; 2. corporeal and special corporeal things; 3. things which are present or expected to be); II. Acquisition of property (subchapters: 1.acquisition of property through natural and international law; 2. acquisition of property in a civil procedure; 3. sale of things, termination and change of ownership); III. Inheritance under a will (subchapters: 1.will in general and its solemnization. 2. wills that require little or no solemnization at all; 3. post-testamentary additional order; 4. incapacity or invalidation of the last will); IV. Appointment of heirs (subchapters: 1. appointment of heirs or disinheritance of children; 2. appointment of heirs or disinheritance of parents, brothers and sisters; 3. arbitrary or third-party heirs); V. Re-appointment of an heir or subsequent appointment (subchapters: 1. second appointment of a heir, if the first was not a heir; 2. further appeal in the event of the death of the appointed person under the age of 18; 3. subsequent appointment before inheritance from the appointed heir); VI. Transfer of the inherited property (subchapters: 1. what things and to whom can be bequeathed or acquired; 2. things that are transferred to several heirs at the same time; 3. cancellation or reduction of inheritance); VII. Obtaining a will and its further storage (subchapters: 1. opening and promulgation of the will; 2. time for acceptance of inheritance; 3. acceptance of inheritance; 4. division of inherited property); VIII. The order of inheritance and the rights of heirs (subchapters: 1. inheritance of the testator's descendants; 2. succession of ascending heirs; 3. inheritance of relatives; 4. inheritance of spouses; 5. inheritance by the state or an authorized community; 6. acceptance of inheritance by law); IX. Inheritance of joint-owned property (subchapters: 1. establishment of joint-owned property; 2. hereditary brotherhoods; 3. joint transfer of property; 4. joint-owned property of children); X. Donations upon death and during life (subchapters: 1. consequences of donations upon death; 2. consequences of donations during life; 3. donations that are not based on simple generosity; 4. revocation and recognition of donations as invalid); XI. Property rights (subchapters: 1. suitable property, right to inherit interest or tithe; 2. property on the surface; 3. right of usufruct; 4. right of use and residence); XII. Easements regarding urban and rural estates (subchapters: 1. easements regarding land and fields; 2. easements regarding outbuildings and homesteads; 3. acquisition and termination of easements); XIII. Pledge and right of pledge or security (subchapters: 1. order of pledge or security; 2. objects for which a pledge or security can be provided; 3. sale of pledged items; 4. cancellation of the right of pledge or security); XIV. Possession of things (subchapters: 1. acquisition of possession; 2. legal regime of possession; 3. return of possession); XV. Statute of limitations for things and real rights (subchapters: 1. statute of limitations for movable things; 2. statute of limitations for immovable property; 3. statute of limitations for real rights; 4. interruption of the statute of limitations; 5. things and rights to which the statute of limitations is not applied).[54]

The third part of the Codex Theresianus Draft dedicated to the law of obligations was divided into the following 14 chapters: I. On legal requirements for obligations (which included subchapters: 1. natural obligations; 2. legal obligations; 3. illegal obligations); II. Legal requirements on obligations according to the status of people (subchapters: 1. status of freedom; 2. status of citizenship; 3. status of family); III. Legal requirements on the property and other property rights (subchapters: 1. legal requirements regarding property; 2. grounds for recognition as an owner; 3. requirements regarding appropriate property; 4. claim of things by the statute of limitations; 5. the claim of things by the right of the easement; 6. claim of pledged items and the right of pledge; 7. claim of items sold to the detriment of their creditors). IV. Lawsuits on inheritance issues (subchapters: 1. claim to inheritance from both inheritances; 2. claim to entrusted inheritance; 3. claim to someone else's inheritance; 4. claim to estate contrary to will; 5. claim to additional payment to mandatory share; 6. claim to inheritance); V. Types of obligations (subchapters: 1. their differences according to Roman law; 2. their differences according to this general law); VI. Unilateral obligations (subchapters: 1. obligations and promises; 2. guarantees or obligations for others; 3. gifts and donations; 4. loans or borrowings; 5. promissory notes and debt obligations); VII. Obligations where one party is the principal and

[54] Ibid, s. 50-55.

the other is the obligee (subchapters: 1. loan for use; 2. trust storage or storage of things; 3. pledge and security; 4. mandate and power of attorney); VIII. Obligations where both parties are mutually obligated (subchapters: 1. mines; 2. purchase and sale; 3. legal requirement to carry out the purchase and sale; 4. lawsuit for reduction of value; 5. legal actions in case of refusal to purchase; 6. legal action for reduction by more than half; 7. terms of sale; 8. donation of sold things and representation; 9. lease or rental and duration of the lease; 10. legal claims and claims to which the tenant is entitled; 11. community); IX. Obligations arising from other types of obligations (subchapters: 1. management of the enterprise; 2. management of entrusted (property); 3. sharing things; 4. hereditary sharing of things; 5. obligations, which arise from inheritance; 6. the payment of the debt (solutio indebiti); X. Obligations arising as a result of a crime (subchapters: 1. obligations arising as a result of theft or forcible alienation; 2. obligations arising as a result of violent robbery; 3. damage caused as a result of accident; 4. obligations arising from defamation or misleading; 5. obligations arising as a result of any other misbehavior, abuse and violations); XI. Obligations that arise as if from crimes[55] (subchapters: 1. if someone harms another person due to inexperience in his service, art or craft; 2. if something was thrown, poured or hung dangerously from someone's home; 3. by causing damage or theft by subordinates, servants; 4. from other cases when something is recognized as a crime without the person's malicious intent); XII. Obligations arising from the essence of one's own nature (subchapters: 1. obligations from legal actions regarding the representation and inspection of things; 2. obligations from the freedom of unhindered use; 3. obligations from the simple course of circumstances; 4. obligations from unauthorized items); XIII. Simultaneous or secondary obligations (subchapters: 1. secondary obligations of other people or things; 2. obligations of co-participants or their heirs; 3. interest, usage, damages, expenses, withholding of payment, and anything else that is considered to be a cause of obligations); XIV. Change and termination of obligations (subchapters: 1. liquidation of things; 2. mutual decision or unification of property; 3. presentation of another debtor or creditor and renewal of debt; 4. the payment of the debt, receiving compensation; 5. statute of limitations regarding obligations).

We shall not touch upon the content of the fourth part of the Codex Theresianus Draft, which was dedicated to the judicial procedure, since in the course of further codification work, it was decided to separate the procedural part of the Code from the substantive one. A decision of not considering the judicial procedure as an integral part of this Code was expressed in the patent on the Codex Theresianus promulgation. Therefore, from that time on, civil law and the process were considered by Austrian legislators completely independently from each other, which led to the constant division into substantive and procedural law in the legal system of the Austrian Empire and, accordingly, was reflected in subsequent codifications of civil and procedural civil law.

It should be noted that during the work of the Compilation Commission in Brno on the development of the Codex Theresianus Draft, each member of the commission worked on the outlining of the current national laws of their Crown lands of the Austrian Empire, with the task of representing their difference in comparison to Roman law. In particular, Josef Azzoni in his work on the national legislation of Bohemia and Jindrick Xaver Hayek Waldstedten in his work on the law of Moravia emphasized that Roman law had no legal force in these regions. In this context, in view of the supreme legislative power of the sovereign, it was assumed that in all cases, which are not regulated by regional legislation, the decision of the Austrian emperor had to be obtained. However, despite this requirement, J. Azzoni noted that in Bohemia, the common law of the courts was applied on the basis of the provisions of Roman law. He tried to explain this contradiction by the fact that although Roman law did not act in Bohemia as a law or actual lex positiva, since it included undoubted general natural justice, therefore, it served as a reference point for the approval of truly reasonable decisions by the courts.[56]

2.2 Codex Theresianus Draft of the Legislative Commission supervised by Josef Azzoni

On April 9, 1755, the Vienna Revision Commission was created, which was authorized to revise the text of the Codex Theresianus Draft created by the Compilation Commission.[57] However, since the work of both Codification Commissions was conducted at a very slow pace, the Commission in Brno was liquidated on July 9, 1756, by order of Empress Maria Theresa, and the Vienna Commission was transformed into a Legislative Commission. Former members of the Compilation Commission J. Azzoni and J. Holger were included and J. Azzoni was tasked to develop the Draft of the Code on his own and J. Holger was responsible for collecting the necessary materials and submitting his comments to J. Azzoni, after which the text of the Draft was to be presented to the entire Legislative Commission for further discussion. Finally, the commission represented to the Empress the finally completed revised first part of the Code "On the rights of individuals" in June, 1758.

It is worth noting that the materials of the drafts, reports, comments, protocols of consultations and discussions of the codification commission, from which the first part of the Codex Theresianus Draft arose, had been partially preserved. The first drafts reproduce the prevailing views on natural law at that time. It was stated that "laws are based on the common good". It was emphasized that all positive resolutions are based on the commandment: "Love God above all else and your neighbor as yourself",[58] from which arose the duty of honor and obedience to God, self-care and preservation of human society (passage 2 of paragraph I of subchapter 1 of the chapter 1 of Part I).[59]

[55] That is obligations that arise from quasi-delicts.
[56] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 56-60.
[57] Ibid, s. 67, 69.
[58] Ibid, s. 72-74.
[59] SOJKA, Dr., Codex Theresianus – text. In: *Codex Theresianus.*

In the text of the first chapter "On justice and rights" of the first part of the Draft Code, there were some deviations from the original general plan of the Compilation Commission, since instead of six subchapters, only four were submitted, which related to law in general, freedoms and privileges, customs and interpretation.[60] Let's consider the content of this chapter in more details. As it was already mentioned above, the Czech Doctor of Law D. Sojka found in the Moravian State Archives in Brno the German original, so to speak, of the Introductory part of the Codex Theresianus. This fragment of the text of the Codex Theresianus Draft, presented by the Legislative Commission in June 1758, contained a short Preface (Introduction) to the Draft of the Codex Theresianus, which indicated the reasons and purpose of its publication (namely, to create a single, permanent, general law for all Austrian hereditary lands) and briefly presented its structure, and in addition it includes the first section of the first part, which covered 60 paragraphs.

In the Preface to the first chapter "On justice and rights" it was emphasized that "the whole law is based on the following: to live honestly, to do no harm to anyone and to give everyone what belongs to him, because this is how justice is created, which is the goal and result all rights". Moreover, justice must reasonably contribute to the common good, be permanent and generally known (passage 4 of paragraph IV of the first subchapter of the first chapter). In the first subchapter "On law in general" of the first chapter, it was asserted that human behavior should be based primarily on the natural law (ius naturale) instilled in man by God, which only reason prompts man to cherish good and condemn evil (passage 1 of paragraph I). Human law (ius humanum) summarizes everything that is commanded by divine law, for the sake of general or individual well-being, available to all participants of each nation and state (ius civile) or of all nations (international law) (paragraph III, passages 1-3 of paragraph IV). The first subsection also discussed the extension of the right of the Austrian Empire to foreigners (paragraph VII); on entry into force of laws two months after their promulgation in the capital (paragraphs X-XI); on the effect of the law in time (paragraph XII); on the conditions of termination of the law (paragraph XIII).

The second subchapter of the first chapter regulated in details the procedure for granting additional freedoms, benefits and privileges (paragraphs XV-XXVII). The third subchapter was dedicated to customs (ius consuetudinarium) (paragraphs XXVIII-XLII). Thus, it was emphasized that in order for a custom to acquire the force of law, it is necessary for it not to contradict common sense and it should be useful (passage 1 of paragraph XXXIII). Therefore, everything that contradict to natural and divine law, good morals, legality and general welfare, cannot be introduced (passage 2 of paragraph XXXIII). The fourth subchapter regulated the grounds, conditions and procedure for judicial interpretation of laws (paragraphs XLIII-LX).[61]

In the context of some above-mentioned provisions on justice, common good, utility, general availability, virtue and goodness, it should be emphasized that, in general, codification processes in the era of educated absolutism in the 18th century, in several European states, as noted by O. Omelchenko, were called to establish true and fair principles of social and state order.[62] After all, a feature of educated absolutism was the statement that an educated monarch can serve as an example of benevolence, high morality, willingness to sacrifice in the name of a common goal, the well-being of all people.[63] As we can see, the legal activities of Empress Maria Theresa, including social legislation aimed at creating general welfare in the state, were in many respects a reflection of these principles.

In the second chapter "On the status of individuals" of the first part of the Codex Theresianus Draft, the division into 3 subchapters was preserved, as in the final plan of the Compilation Commission: 1) the status of freedom; 2) citizenship status; 3) status in the family,[64] which was similar to the provision of Roman law about 3 legal statuses of a person: the state of freedom, civil status, and family status. In Ancient Rome a person could be free (status libertatis), unlike slaves; could be a Roman citizen (status civitatis), unlike foreigners; and could occupy a certain position in the Roman family (status familiae) as the head of the family (pater familias) or as a subordinate member of the family (filii familia).[65]

The text, which according to the general plan of the codification work was supposed to constitute the content of the penultimate eighth chapter "On masters and subjects" of the first part of the Draft Code and was subsequently divided by the Compilation Commission into two chapters, which were placed after the second chapter "On the status of individual". The first of these chapters, which now constituted to be the third chapter of the first part, which dealt with personal subordination, was divided into two subchapters: on subordination and on the consequences of subordination. The second chapter, which constituted a new fourth chapter, was dedicated to the unification of the relations of other types of subordination and the provisions applicable to all types of subordination. It contained four subchapters: on hereditary possessions, on the effect of inheritance law, on proper names of servants, on the consequences of sovereign rights.

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60 HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 77-78.

61 SOJKA, Dr., Codex Theresianus – text. In: *Codex Theresianus.*

62 OMELCHENKO, O., A., Pravovye principy prosveshchennogo absolyutizma (o nekotoryh problemah razvitiya prava v germanskih gosudarstvah i Rossii vo vtoroj polovine XVIII v.) [Legal principles of enlightened absolutism (on some problems of the development of law in the German states and Russia in the second half of the 18th century)]. In: *Voprosy istorii gosudarstva i prava Germanii i Shvejcarii. Sb. nauch. trudov* [*Issues of the history of state and law in Germany and Switzerland.* Collection of scientific papers], Moscow, 1985, p. 61-62. (In Russian).

63 TYMOSHENKO, V., I., Osvichenyi absoliutyzm [Educated absolutism]. In: *Yurydychna entsyklopediia: u 6 t.* [*Legal encyclopedia: in 6 vols.*]; resp. ed.: Yu. S. Shemshuchenko, Kyiv, 2002, Vol. 4: N-P <https://leksika.com.ua/10530524/legal/osvicheniy_absolyutizm> accessed 15 May 2023. (In Ukrainian).

64 HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 78.

65 KOZUB, I., G., BODNARUK, M., I., *Osnovy rymskoho tsyvilnoho prava: navch. posibnyk* [*Basics of Roman civil law: a study guide*], Chernivtsi, 2020, p. 77-78. (In Ukrainian).

The next one was the fifth chapter, dedicated to the law of marriage, which, according to the general plan, was about to follow the chapter on parental authority. Its subchapters had been slightly modified, namely: the last subchapter on security of promise to marry and security of matrimonial claims was deleted, and the content of the remaining four subchapters was divided into six subchapters. This chapter mostly regulated the property rights of the spouses; only the first subsection dealt with marriage engagements and, therefore, cases where the marriage was subject to giving permission. Such provisions of the Codex Theresianus Draft can be explained by the fact that there were no grounds for the legislative establishment of marriage law, since church jurisdiction in marriage matters was preserved. However, during the discussions, attempts to limit the influence of church jurisdiction were made. Thus, the Vienna Revision Commission held the position that the church court should be bound by secular law regarding the verification of personal legal capacity during the decision-making process on the validity of a marriage. Also, this commission tried to eliminate any interference of church courts in solving property issues. Therefore, settlements concluded before the church court in property cases were considered invalid.

It is worth noting that differences in status were especially traced in the provisions of property law, in particular regarding the validity of unofficial gifts between spouses, as well as regarding the limited admissibility of agreements on inheritance and community property between spouses. Thus, the Vienna Commission, referring to the existing practice in Austria, allowed the right to enter into agreements on joint marital property, but with a limitation of their admissibility for "ordinary people". It should be noted that the legislative prohibitions were aimed at ensuring that the freedom to dispose of one's property was not excessively restricted when entering a marriage. Therefore, any contract between spouses could affect no more than one-third of their property.

The attempt to replace the duty of family members to support the widow and their daughters, inherent in ancient Czech law, in accordance with their status, is of interest, since the amount of such support was not determined, and the identity of the debtor was not specified. Therefore, in the Codex Theresianus Draft of the Legislative Commission, the widow's claim for alimony was transformed into a claim for an inheritance, and collateral relatives, namely brothers, were exempted from the obligation to provide the orphan bride with a dowry.

The sixth chapter on kinship differed from the general plan only in the fact that its first subchapter was divided into two: on types of relatives and on degrees of kinship. It is worth admitting that among the rights common to relatives of both sexes, the legislators singled out the right to a separate procedure in disputes arising between relatives, to special respect for honor, and to some exceptions in the judicial procedure.

The seventh chapter on parental authority, unlike the general plan, was supposed to form a logical transition to the chapter on guardianship. According to the initial plan, its subchapters were to be demarcated according to the legal sphere of individuals participating in family relations – father, mother and child. However, in the version of the Codex Theresianus Draft of the Legislative Commission, the material was divided accordingly to the conditions for the onset, exercise, and termination of parental authority.

Contrary to the proposal of the Compilation Commission in 1753 to delay the age of majority until the child reached the age of 24, the Legislative Commission made attempts to soften this provision by limiting the duration of the father's authority to the son's age of 20, after which only the exercise of care instead of parental authority was allowed, and numerous cases were foreseen when the caretaker of an underage son was released from these functions. In addition, a provision that obliged the father to use only one-third of the child's property, which was in his use, to pay off debts or to improve the situation was established.[66] In this context, it should be emphasized that the essence of parental authority was recognized in the duties and not in the rights of the father, which was confirmed by a clear warning not to confuse the provisions of the Codex Theresianus Draft on parental authority with the Roman concept of patria potestas,[67] because the Draft involved control over the father to prevent mismanagement or even the sale of the children's property.

In comparison to the general plan, in the Draft of the Legislative Commission a change of concept regarding guardianship and care took place. Thus, guardianship and care, which should have been provided in two separate chapters, were instead combined into a single eighth chapter called "On guardianship". Its division into new subchapters showed that the different reasons for the origin of guardianship were not given the importance formulated in the original plan, which determined that each type of guardianship should be considered in a separate subchapter. It should be noted that the old position, which considered guardianship not only as a set of duties but also as a valuable right of the guardian, was still shown in the Draft. Blood relationship was recognized as the basis of both family guardianship and inheritance, and therefore a relative who did not submit an application of guardianship also lost the right to inherit the property. The desire to mitigate the consequences of the delay of coming of age showed up in the relevant provisions on guardianship, similar to provisions regarding parental authority, which were outlined in the article above.

First of all, the representation of the new concept of the guardianship legal nature can be traced in the regulations on the remuneration of guardians. Moreover, the Codex Theresianus Draft aimed at harmonizing the opposite norms of Austrian and Bohemian law on this issue, as far as Austrian law allowed to determine the guardian's remuneration at the judge's discretion, while Bohemian law set it at the level of one-sixth of the guardian's net income. Therefore, a scale was drawn up, according to which the guardian's remuneration depended on the size of his income, namely: with an income from 3,000 to 30,000 florins, the payment was from 500 to 4,000 florins, that is

[66] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 79-83.

[67] Patria potestas – the power of the head of the household, the essence of which was the power in the interests of the father, not the children.

about one-sixth of the guardian's income, but no more than this amount; with an income of more than 30,000 florins the reward was to be determined by the sovereign, and with an income of less than 3,000 florins – at the discretion of the judge.

The last, the ninth, chapter "On servants" was added precisely to the first part "On the right of individuals" of the Codex Theresianus Draft, because it was assumed that the lord had a certain power over his servants, and therefore the conclusion of a contract between a lord and a servant was not considered to be a sufficient basis for determining their relationship. The lord exercised jurisdiction over their servants and resolved accounting disputes with them, although the Draft Code tried to somehow limit the jurisdiction of the lord over the servant.

After the completion of the first part of the Codex Theresianus Draft, the Legislative Commission was instructed to resume work on the second part "On property rights", which had already been started by the Compilation Commission in Brno, which developed chapters on things in general, on property, on donations, and conducted preparatory work over the chapters related to inheritance law. During the review made by the Legislative Commission, and by Joseph Azzoni himself, the chapters on things and on the property presented by Joseph Ferdinand Tinnfeld, the member of the Compilation Commission (the concluded chapter on donations was not discussed at all), significant changes in the distribution of the material in them, in comparison to the initial general plan were made. Thus, instead of the previous three subchapters, the chapter on things contained an introduction, and seven subchapters: on things that are sacred to God; on things that are in use by all people; on things of the state or regions; on things of communities; the property of individuals; movable and immovable property; intangible property (incorporeal things).

As in the previous version, the chapter on property consisted of three subchapters, but with different content, namely: on the acquisition, on transfer, and on the consequences of ownership.[68] On the one hand, only Catholics were allowed to acquire immovable property, while, on the other hand, the dead hand provision[69] was deprived of the possibility of acquiring immovable property, and the owners of secular estates had the right to return the property previously acquired by the clergy.[70]

It was recognized that the right to private property derives from the relevant provisions of natural law and the law of nations. It was believed that the exercise of the right of ownership was based on the recognition by members of society of the right to alienate. Moreover, the emperor had the right to ownership of all state property. An interesting provision of the Codex Theresianus Draft is that there is no concept of ownerless things since all things are either inherited or are subject to the imperial inheritance law.[71] Therefore, property possession gave only the right to own it.

The drafting of the chapters on inheritance law by the Legislative Commission under the supervision of J. Azzoni lasted for two years. These issues were already partially singled out by the Compilation Commission in Brno, while its main attention was focused on the development of the general part, which, unlike the arrangement of the material in the general plan, was about to precede the provisions on wills and legal succession. Two preliminary drafts of J. Azzoni with these results were preserved, which concern inheritance and heirs in general. They reflected the concept that the rights of the testator should pass to the heir without any legal gaps and that the law should ensure that succession is not uncertain. It was believed that the only basis for legal succession was the positive legislation; the permission of inheritance by will derives from the property rights of the testator and his own capital, and the assumption of legal inheritance is based on the presumed will of the testator. These results of the Compilation Commission also contained the principles of relations between the heir and third parties, including others and other heirs. In particular, it was assumed that the heir could not take possession of the estate, since the descendants of the testator were allowed to dispose of all the property objects.

The Legislative Commission began to work on inheritance law at the end of 1758. On contrary to the Compilation Commission, the Legislative one decided to consider firstly a special part. Therefore, the division of inheritance law into three chapters was approved: inheritance by will, legal inheritance, general provisions on two types of inheritance. Firstly, they set a section on testamentary inheritance. In particular, the recognition of less solemn wills was first of all provided for, which was aimed at a very significant simplification, since the involvement of two witnesses were enough for the validity of such a will, while five witnesses were required for a solemn will. A less solemn will was provided for very large type of cases, for example: for all wills of peasants, for wills in favor of legal heirs, charitable foundations. Attention is drawn to the fact that the stability of society at that time was manifested in the provision of the Draft that the summons of three witnesses was declared sufficient for a solemn will, if they belonged to the ranks of lords or knights.

We should draw attention to interesting provision of the Codex Theresianus Draft on the prohibition to appoint so many heirs that it would be impossible to distribute the inheritance. In addition, the following conditions of the will were recognized as invalid "which the testator cannot reasonably justify or which are contrary to the general good, benefit, honor and dignity, prosperity, preservation of property and good management, and are based on the simple stubbornness of the testator without any useful or honorable intentions".

The Legislative Commission faced up with the greatest difficulties during the consideration of the chapter on the mandatory share in the inheritance. The unanimous view of the com-

[68] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 83-88.

[69] Dead hand provision – this is a rule of feudal law in the countries of Western and Central Europe, according to which the feudal lord had the right to seize part of property after the death of a peasant; and the dead hand provision of the church meant the prohibition of the alienation of the land property of church institutions.

[70] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 87-88.

[71] It means that the property is transferred to state ownership.

mission was that the special provisions applicable to the ranks of lords and knights, according to which daughters could only claim maintenance commensurate with their status and the provision of a dowry, should be modified in favor of daughters. However, the same unanimity was found in the statement of the commission that in order to preserve the family the priority in inheritance should be given to sons. Therefore, various proposals have been made to give credit to these two diametrically opposed approaches. Thus, according to the first version of the Draft made by J. Azzoni, daughters were to receive severance pay, for which a minimum limit of 6,000 florins for lords and 3,000 florins for knights was set. However, such compensation was recognized as a low-valued one, so it was decided to give the daughters the right to claim a share of the estate in 1/4 or 1/6, or 1/8. During the discussions, special combinations were proposed to prevent a son from having less than one daughter when a large number of sons competed with a daughter, and, on the other hand, to ensure that the quota assigned to daughters was sufficient for subsistence. However, this issue was never finally resolved by the Legislative Commission. Another long-discussed question about the right to the inheritance of the clergy and its right to a mandatory share remained unresolved, as the commission stood against such right with the demand to limit the acquisition of property rights by the dead hand provision in the public interest. Under the greatest interest are also the following provisions on the mandatory share in the inheritance, discussed by the Legislative Commission. Thus, it was argued that the right of ascending heirs to a compulsory share was based on an obligation base on gratitude. However, since this was not supposed to lead to enrichment, such a share was limited to one-third. In addition, J. Azzoni offered the provision that brothers and sisters of the deceased receive only the outfits, but they have an obligatory share in the property of the testator. However, this proposal was rejected by the commission, and instead, it was decided to give the testator's siblings and their children a mandatory share in the inheritance only if the testator was found to be a dishonest person.

2.3 Codex Theresianus Draft of the Legislative Commission supervised by Hofrat Zenker

As a result of the illness and shortly after the death of J. Azzoni in November 1760, Hofrat Zenker, a former member of the Compilation Commission, who led the report on the chapter on guardianship during the revision of the first part of the Codex Theresianus Draft, was entrusted with the drafting of the third part of the Code. In 1761 he was authorized to continue the conclusion of the second part and revise the first part of the Draft. Instead, J. Holger, the employee of J. Azzoni, was instructed to devote himself exclusively to work in the Criminal Commission.

The work of the Legislative Commission headed by H. Zenker was continued until the end of 1766, when the final Codex Theresianus Draft was completed and handed over to Empress Maria Theresa together with the draft of the promulgation patent, which established the postponement of the Code for one year after its promulgation. It is interesting that from the very beginning the Legislative Commission worked on the third, then on the second and, finally, on the first part of the Code.[72] It should be emphasized that not so many changes were made to H. Zenker's work during the commission's discussion, as his views were considered very influential. However, during the times of J. Azzoni, at his request, the Commission allowed to prevail in the language of the text of the Draft the exaggerated purism[73], which banned every word formed from a non-German root. In return, under the chairmanship of H. Zenker, the same members of the Commission unanimously allowed the use of foreign words and replaced German terms and legal constructions with Latin ones for greater clarity. A similar change in the position of the Legislative Commission took place in relation to the concept of Roman law, on which H. Zenker often grounded his report on the presentation to the Commission of the final Codex Theresianus Draft and which, according to the draft of the promulgation patent, was to remain in force as an auxiliary law. Moreover, only those provisions of Roman law, as well as regional laws, which were different from the existing law enshrined in the Codex Theresianus, were declared invalid.[74]

It should be noted that the structure of the Codex Theresianus compiled by H. Zenker differed somehow from the structure of the Azzoni's Draft. Each part was divided into chapters, which included paragraphs (instead of subchapters) (in total, the Code contained 8,358 paragraphs[75]), which contained articles (paragraphs). The paragraph numbering was continuous for each chapter and started a new in each subsequent chapter.[76]

The adaptation of the first part of the Code "On the right of individuals" by the Legislative Commission under the supervision of H. Zenker, which had begun it under the supervision of J. Azzoni, was essentially only aimed at shortening the text. However, the guardianship chapter was discussed in detail by the Commission.[77] In the end, seven chapters were concluded, instead of nine chapters provided in the general plan of work of the Compilation Commission and developed by the Legislative Commission directed by J. Azzoni, namely: I. On law in

[72] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 88-97.

[73] Linguistic purism (French – purisme, from the Latin purus – "pure") – means an excessive demand for the preservation of the original purity of the literary language; consists in protecting the language from the influence of foreign borrowings, resisting the filling of its vocabulary with elements of other languages and, therefore, promotes the use of lexical-semantic, phraseological, grammatical capabilities of the native language for the transfer of new concepts. See: YERMOLENKO, S., Ya., Puryzm [Purism]. In: *Ukrainska mova: entsyklopediia* [*Ukrainian language: an encyclopedia*], Kyiv, 2000 <http://litopys.org.ua/ukrmova/um79.htm> accessed 15 May 2023. (In Ukrainian).

[74] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 98.

[75] HARRASOWSKY, Ph., H., R. (Hrsg.), *Der Codex Theresianus*.

[76] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 100; SPEER, H. (Hrsg.), *Codex Theresianus: digitalisiertes Inhaltsverzeichnis mit Verlinkung zum Faksimile*, 2016 <http://repertorium.at/ns/codex_theresianus_inhalt.html> accessed 15 May 2023.

[77] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 97.

general (contains 6 paragraphs), II. On the status of an individual (4 paragraphs), III. On marriage bonds (6 paragraphs), IV. On kinship (4 paragraphs), V. On parental authority (4 paragraphs), VI. On guardianship (8 paragraphs), VII. On servants (4 paragraphs).[78] As can be traced, the sequence of the presentation of the chapters was similar to the version of the Draft by the Legislative Commission, guided by J. Azzoni. Only two chapters provided by it (the third and fourth) about lords and servants were deleted. However, the number and content of the paragraphs in the final version of the first part of the Codex Theresianus Draft differed slightly from the subchapters in the two previous versions.

The second part of the Code, with a specified in comparison with the previous versions' title "On things and property rights", possessed a significantly changed structure. Thus, instead of the fifteen chapters defined by the general plan of the Compilation Commission, it covered thirty chapters, namely: on things (8 paragraphs); on property rights (4 paragraphs); on ownership (4 paragraphs), on ways of acquiring ownership (5 paragraphs), on accretion or accession (16 paragraphs), on voluntary transfer of property (4 paragraphs); on donation (10 paragraphs); on the transfer of property by law (4 paragraphs); on statute of limitations (8 paragraphs); on legal succession in general (6 paragraphs), on inheritance by will (20 paragraphs), on the appointment of heirs (6 paragraphs), on the appointment of another heir after the opening of inheritance (10 paragraphs), on the compulsory share (7 paragraphs), on disinheritance of legal heirs (4 paragraphs), on inheritance (30 paragraphs), on opening, on publication and on the execution of a will (6 paragraphs), on the invalidity of a will (10 paragraphs), on individuals deprived of inheritance (4 paragraphs), on inheritance (25 paragraphs), on acceptance of inheritance (10 paragraphs), on division of inheritance (6 paragraphs), on contribution of previously received property to joint division (6 paragraphs); on right of possession (8 paragraphs); on the right of inheritance (4 paragraphs); on the right to the surface (4 paragraphs), on easements in general (6 paragraphs), on personal easements (8 paragraphs), house and land easements (24 paragraphs); on pledge (6 paragraphs).[79] So, from the presented structure of the second part of the Codex Theresianus, we can trace that the list of civil law institutions coincides with the list of the Compilation Commission, but the sequence of their presentation was quite different, and the scope and content of its chapters and paragraphs differed significantly.

Thus, in the general plan only the second chapter on the acquisition was dedicated to the right of ownership, while in the final version of the Draft Code it was covered within seven chapters: ownership, methods of acquiring ownership, growth or accession, arbitrary transfer of property; gift/donation; transfer of property by law; statute of limitations. As it was explained by the researcher of the Austrian law history Ph.-H.-R. von Harrasovsky, the transfer of the chapter on gifts/donations to the list of chapters on property, unlike the general plan, was probably motivated by the fact that donation was understood as a kind of way of acquiring property by voluntary transfer. The place of the statute of limitations in the structure of the institution of ownership is similarly substantiated since it is one of the ways of transferring property by law. The next method of acquiring property is finding a treasure. J. Holger offered the establishment of the state's share in the found treasure and it was defined for the first time during the time of J. Azzoni in the form of the transfer of property to the state without heirs.

The condition for the validity of the donation was the judicial notification of all donations of immovable and movable property worth more than 500 florins. Judicial notice also required of donations after death, as such a donation/gift could be revoked prior to judicial notice and was deemed revoked unless expressly confirmed in the will. The donation of all property was not allowed, as it was recognized as an act of «throwing away and wasting» and not of generosity; and besides, as noted by Ph.-H.-R. von Harrasovsky, from the report of H. Zenker, it can be concluded that this measure was aimed at enriching the clergy.[80]

It should be emphasized regarding the inheritance law, that it was the very branch of law in which the great differences could be traced between the existing regional laws of the Austrian Empire, so it was necessary to make the greatest efforts to unify it. H. Zenker was guided by the previous works of J. Azzoni during the reformation process of it. In particular, the distinction between solemn and less solemn wills was preserved, but the conditions for their application were significantly changed, namely: the list of heirs to whom a less solemn will was applied was narrowed, and instead, for a solemn will, drawn up in the country, the involvement of only two witnesses was required. In addition, chapter XI on testamentary succession provided subchapter four on codicils. To draw up a codicil[81] fewer formalities were established than for making a will.

Regarding the actively discussed, but not resolved by the Legislative Commission issue of the size of the compulsory share of daughters in legal inheritance, in the final version of the Codex Theresianus Draft, the size of such a share was determined as a quarter of the inherited property, while it was assumed that if the number of sons exceeded the number of daughters twice, then the legal share of sons and daughters should be divided equally. It should be noted that apostasy from the Christian faith and heresy were recognized as grounds for the disinheritance of legal heirs.

It should be noted that the authorized state bodies were given great freedom of action both in terms of determining the heir and in relation to the execution of the will. Thus, they were

[78] SPEER, H. (Hrsg.), Ibid; HARRASOWSKY, Ph., H., R. (Hrsg. und mit anmerkungen versehen), *Der Codex Theresianus und seine Umarbeitungen. Band 1*. Wien, 1883, s. 289-290 <https://babel.hathitrust.org/cgi/pt?id=hvd.32044056912082 & view=1up & seq=6> accessed 15 May 2023.

[79] SPEER, H. (Hrsg.), Ibid; HARRASOWSKY, Ph., H., R. (Hrsg. und mit anmerkungen versehen), *Der Codex Theresianus und seine Umarbeitungen. Band 2*, Wien, 1884, s. 527-534 <https://babel.hathitrust.org/cgi/pt?id=hvd.32044056912090 & view=1up & seq=6> accessed 15 May 2023.

[80] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 101-102.

[81] Codicil (from Latin codicillus, English codicil) – is an additional order to a will; a document that changes a will or supplements an existing will; under Roman law, a codicil was the last will of the testator, expressed in a letter to the heir or in another form.

responsible for solving the following issues: finding and publishing wills, informing the heirs, and appointing an attorney who was not previously appointed by the testator, who was to act as the executor of the will. The Draft Code set a six-week deadline for entrance into an inheritance. Moreover, the statute of limitations for filing any claims on inherited property in court was three years and six weeks. A condition for the invalidity of a will was the loss of testamentary capacity, even if it occurred after it was created; as well as the wills of people convicted of a crime, who committed suicide while aware of their guilt were declared invalid.

The most significant reforms were proposed in relation to succession. First of all, it no longer depended on the type of inherited property – movable or immovable property. There was also an improvement in the legal status of illegitimate children, who were allowed to be given a part of the inheritance. However, it should not exceed one-sixth, and in the presence of legitimate children of the testator – one-twelfth. The widowed side of the spouses was granted the right of ownership of a part of the estate in the inheritance received by the children.

In the final version of the Codex Theresianus Draft, the procedure for acceptance of inheritance was regulated in detail. Thus, an inheritance contract was introduced, which was concluded to guarantee the property rights of interested parties, in particular creditors. At the same time, it was assumed that during the distribution of inherited property, each creditor and heir should receive what belonged to them. A deadline for the application for acceptance of the inheritance of three months was set for the people present at the opening of the inheritance and six months for those who were absent. Interested individuals had the right to submit such an application even after the specified deadline had been missed, but at the same time they lost the right to inherit property that had been already transferred to creditors.[82]

The division of the inheritance was to be carried out in the form of non-claim proceedings, which were to be initiated on the basis of an application. It should be emphasized that during the implementation of the division, the following principle was preserved: "the elder divides, the younger chooses", and the heirs could themselves set the terms for the division and selection of the inherited property.

The priority in the division of inheritance remained among the agnates[83] of the male gender, who were granted the exclusive right on immovable property. Regarding the contribution of previously received property to the joint division of the inheritance, it was assumed that it should either be contributed in kind, or its value should be added to the inheritance.

According to the general plan of the Compilation Commission, the chapter on rights preceded the chapter on easements because it was related to them, as it covered the right of succession, the right of surface, the right of usufruct, the right of use, and residence. Therefore, in the final version of the Draft Code, all these provisions of the institutes of easement law were reflected in five separate chapters. At the same time, it was noted that the easement may consist of an obligation not only to tolerate some restrictions but also to perform something.

In the general plan, the last chapter, placed after the chapter on the right of lien, was devoted to the possession of things. Instead, H. Zenker in his report expressed views that partly had a decisive influence on later laws, arguing with those who considered possession only as a factual state of affairs and insisting that it has the quality of law, as it provided means of protecting the rights of the possessor. Therefore, he opposed the common practice in Bohemia, when everyone who filed a claim on a property, received the right to secure it. Accordingly, in the final version of the Codex Theresianus Draft, it was established that judicial enforcement should be granted only for the purpose of execution or in case of proven danger; and the lien was granted only to secure taxes and land charges, as well as rent payments.[84]

In the distribution of the material in the third part "On personal obligations" of the Codex Theresianus, H. Zenker deviated very significantly from the general work plan of the Compilation Commission. So, instead of the fourteen chapters proposed by the plan, it covered twenty-four chapters, namely: on obligations in general (10 paragraphs), promises, contracts and obligations (24 paragraphs), on contracts in general (9 paragraphs), real contracts, primarily loans and borrowings (8 paragraphs), loan for the usage (6 paragraphs), assignment or transfer of property for safekeeping to a trustee (6 paragraphs), pledge agreement (15 paragraphs), surety (8 paragraphs), purchase and sale (24 paragraphs), mine (4 paragraphs), appraisal contract (4 paragraphs), rent, hiring, leasing (10 paragraphs), inheritance agreement and interest agreement (11 paragraphs), partnership agreement (10 paragraphs), command agreement (8 paragraphs), insurance contract (4 paragraphs), interest, additional fees, and other obligations under contracts (14 paragraphs), negotiators, representatives, arbitrators, and other persons participating in contracts (14 paragraphs), actions that are equated to contracts (9 paragraphs), obligations arising from natural justice (6 paragraphs), obligations arising from crimes (24 paragraphs), obligations arising from actions that are considered crimes[85] (6 paragraphs), changing and transferring one's obligations to others (5 paragraphs), cancellation and termination of obligations (12 paragraphs).[86] Based on the analysis of the structure of the third part of the Codex Theresianus, we can state that the list of types of obligations provided by it (contracts, presented in thirteen chapters, and obligations arising from the infliction of damage, covered in two chapters) is identical to the list defined by the general plan of

[82] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 104-109.

[83] In Roman law agnatus (from the Latin agnatus – a relative by the father side) included all family members who were under the power of the householders: both those who descended in the male line from one ancestor and those who became a member of the family through marriage or adoption.

[84] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 109-111.

[85] That is obligations arising from quasi-delicts.

[86] SPEER, H. (Hrsg.), Ibid; HARRASOWSKY, Ph., H., R. (Hrsg. und mit anmerkungen versehen), *Der Codex Theresianus und seine Umarbeitungen. Band 3*, Wien, 1884, s. 433-440 <https://babel.hathitrust.org/cgi/pt?id=hvd.32044056912108 & view=1up & seq=7> accessed 15 May 2023.

the Compilation Commission, where similar types of contracts were placed in separate subchapters, and tort obligations – also in two chapters.

As it was stated by the researcher of Austrian law history Ph.-H.-R. von Harrasovsky, the most significant changes, compared to the general plan, consisted in the fact that the third and fourth chapters on the enforcement of claims arising from the right of individuals to property[87] or heritage were removed from the Draft Code.[88]

It should be emphasized that during the drafting of the three first chapters (on obligations in general; on promises, contracts and obligations; on contracts in general), as well as the entire third part of the Codex Theresianus, certain deviations from the doctrine of nationwide positive law were observed in individual provisions, but instead, an effort to implement the prevailing ideas of natural law at that time was made. The method of assuming an obligation based on consent was considered indirect, as opposed to a direct obligation arising from the law.

Interestingly, the distinction between contracts pacta stricti juris[89] and bonae fidei[90] was objected, since it was argued that all contracts should be considered as bonae fidei and to be interpreted ex aequo et bono.[91] Of even greater interest was the denial of the distinction between oral and consensual contracts, which was based on the fact that words were not the basis for the emergence of obligations and were used only to announce the consent of the will and facilitate future proof. Even in the general plan, the common basis of all obligations was seen in the manifestation of the will.

The classification of all obligations established in the Draft of the Codex Theresianus also attracts attention. In particular, they were divided into permitted (legal) and prohibited, while those arising from generosity, from concluded contracts, from equity, or from natural justice were recognized as legal. The contract was based on explicit or tacit consent, it arose on the basis of a declaration of consent or by transferring a thing. Characteristically, contracts were divided into named and unnamed, since named contracts do not cover all possible forms of contracts that can be concluded. Obligations arising from tortious actions are based on own fault or the fault of a third party.

It should be noted that the division of the material into separate paragraphs in chapters IV-XVI, which consider different types of contracts, was unified. Namely, the provisions regarding the nature, essence and basic conditions of the conclusion of the contract were firstly given, then a description of the characteristics of the contract participants and the content were given, then their rights and obligations were determined, and finally, usually, liability for fault, danger and randomness were regulated. In addition, some paragraphs were dedicated to revealing the peculiarities of certain types of contracts and, therefore, contain a large number of procedural instructions.

Let's dwell on a more detailed coverage of some of the most interesting provisions of certain agreements. Thus, the main part of the loan agreement concerned the conclusion and probative value of supporting documents. Moreover, the burden of proving the fact of the debt remained on the creditor, if such a claim was made within two months after the conclusion of the loan agreement. However, this term was one year if the promissory note holder died within two months after the loan was issued. Particular attention is drawn to the provision that the debtor could deny the fact of the debt without a time limit, if it was proved by him, since it was believed that those who want to avoid harm should had more advantages than those who seek to make a profit.

The main part of the pledge agreement contained many provisions that were already expressed in the main part of chapter XXX on the right of pledge of the second part of the Codex Theresianus Draft, and which, in particular, related to mortgages. Moreover, many prescribed norms of Roman law were reflected in them. It is typical that during the unification of additional contracts that could be related to the pledge contract, an attempt to prevent the possibility of deception or exploitation of the debtor was made, namely, the validity and content of the provisions of such contracts were subject to judicial review.

The provisions of Roman law were also partly contained in the main part of the surety, namely, the restriction of the personal capacity of the surety included the stipulation that women could not vouch. In addition, similarly to the norms of Czech regional law, it was assumed that the guarantor was not responsible for the debtor's actions and the guarantor's obligations did not pass to his heirs. Moreover, it was stipulated that the ensuring the performance of the obligation belonged to the guarantor.

A provision that prohibited to buy or sell things that had been withdrawn from circulation was established in the terms of concluding the contract of sale. Also, for the conduct of this contract, a penalty was provided as a guarantee, which was an attempt to prevent the difficulties of the compensation process, calculating the damage redundant, since the law defined the value of the thing as equivalent to the damage caused to the injured party.

Chapter XVII on interest, surcharges, and other contractual obligations was divided into five subchapters: interest, benefits and outfits, accruals or accretions, improvement efforts, and costs, and damages and costs. The legal limits of the interest rate of 5 % were established, which was reduced to 4 % shortly after the development of the third part of the Draft. It should be noted that H. Zenker in his report motivated the legality of charging interest and, moreover, justified that when charging for many years, it is not considered illegal to charge interest that exceeds the amount of the capital, just as it is allowed to charge interest from the benefit of offspring.

[87] It is about lawsuits for recovery of things.

[88] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 112.

[89] In Roman law these are contracts of strict law.

[90] In Roman law these are contracts based on good conscience.

[91] Ex aequo et bono (from the Latin "by right and good" or "by equity and conscience") – a term of Roman law that meant such a way of rendering a decision by a court in which the court was not bound by strict rules of law, but was guided by considerations of justice and common sense.

Chapter XVIII on negotiators, representatives, arbitrators, and other persons participating in contracts contained provisions on the remuneration of negotiators, which, following the example of Czech regional legislation, should not exceed 1 %; and in addition, regulated the arbitration procedure.

Chapter XIX defined actions that equated to contracts. This wording was used deliberately, as it was directed against the inherent theory of civil law understanding of quasi-contracts. Thus, even in the motivation of this position of the Austrian legislators in the general plan, where chapter IX on obligations arising from other types of obligations was provided for, it was noted that the allocation of quasi-contracts was not necessary, since such obligations consisted in the action itself. Therefore, the subdivisions mentioned in the general plan were supplemented in the final version of the Codex Theresianus Draft with paragraphs on border division; loading on a ship or van or unloading at barrel house; judicial appeal of the dispute.[92]

In the context of the above-mentioned, it should be clarified that a quasi-contract (from the Latin quasi – as if, almost; and contractus – agreement, contract) is an obligation that arises in the absence of a contract between the parties, but by its content and character it is similar to the obligations arising from the contract; namely, such similarity is manifested in the limits and conditions of the parties' liability. At the same time, a person performs certain actions on his own initiative, but they give rise to obligations to third parties, and sometimes to mutual obligations of the parties.[93] The types of quasi-contracts primarily included managing other people's affairs without a mandate and obligation for the unjustified enrichment of one person at the expense of another, for example, as a result of an erroneous payment, which was provided for in paragraph III[94] chapter XIX of the Draft Code. Incidentally, we note that the term "quasi-contract" is not used in the Ukrainian law.

Chapter XX was dedicated to obligations arising from natural justice. It should be noted that in the general plan, this chapter entitled obligations arising from the essence of one's nature was placed after obligations arising as a result of a crime and as if from a crime. At the same time, in the final version of the Codex Theresianus Draft, while defining the basic requirements for such obligations, there was a departure from the tendency, characteristic of the general plan, to oblige a person to take positive actions that would bring benefits to others without harming the very person. Therefore, only one basic rule was enshrined in the Draft, that no one should get rich at the expense of others.[95] Therefore, this chapter acquired a completely different meaning than it was in the general plan, as evidenced by its following paragraphs: about the return of a thing due to the non-existent reason for which it was given; the return of an item received for an improper or unfair reason; return of property of third parties obtained without reason; return of someone else's property used for someone else's benefit; refund of contribution for compensation of damage caused in emergencies as a result of a joint rescue.[96] Moreover, the provisions of the specified first three paragraphs actually refer to a quasi-contract, namely, they constitute the content of such a type of it as the obligation to unjustly enrich one person at the expense of another, as mentioned above. Regarding the last paragraph, we can state that it was about the application of the provisions of Roman law about the lex Rhodia de jactu.[97] So, lex Rhodia de jactu, set forth in Title II "On the law of Rhodes on thrown into the sea (De lege Rhodia de jactu)" of Book XIV of Digests of Justinian,[98] provided that if a part of the cargo is thrown overboard in order to relieve or save the ship, the damage must be distributed proportionally between the owner of the saved ship and the owners of the saved cargo (D.XIV.II).[99] The content of this paragraph on the return of the contribution for compensation for damage caused in emergency situations as a result of joint rescue gave the reason to H. Zenker, in his report, to propose applying the lex Rhodia de jactu to similar cases related to the threat of fire. Moreover, he considered it very expedient to create a public fund from which compensation could be paid.

The provisions of chapter XXI on obligations arising from crimes have been quite significantly expanded, compared to the similar chapter X of the general plan. The chapter was divided into four subchapters, the first of which was dedicated to general provisions on crimes, in particular, it established the term of completion of obligations arising from crimes and also determined the combination of criminal and civil proceedings in such cases. It was assumed that a person who was acquitted in criminal proceedings should no longer be held criminally responsible in the corresponding civil proceedings. In cases of defamation, the initiation of a criminal case prevented the subsequent open-

[92] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 113-118.

[93] YEROMENKO, H., V., Kvazikontrakt [Quasi-contract]. In: *Yurydychna entsyklopediia: u 6 t.* [*Legal encyclopedia: in 6 vols.*]; resp. ed.: Yu. S. Shemshuchenko, Kyiv, 2001, Vol. 3: K-M <https://leksika.com.ua/11190912/legal/kvazikontrakt> accessed 15 May 2023. (In Ukrainian).

[94] HARRASOWSKY, Ph., H., R. (Hrsg.), *Der Codex Theresianus und seine Umarbeitungen. Band 3*, s. 326-330.

[95] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 119.

[96] SPEER, H. (Hrsg.), Ibid; HARRASOWSKY, Ph., H., R. (Hrsg.), *Der Codex Theresianus und seine Umarbeitungen. Band 3*, s. 337-345.

[97] Lex Rhodia de jactu – the law of the island of Rhodes, developed on the basis of its customary law by Roman lawyers. See: Rodosskoe morskoe pravo [Rhodes maritime law]. In: *Enciklopedicheskij slovar' Brokgauza i Efrona: v 86 t. (82 t. i 4 dop.)* [*Encyclopedic Dictionary of Brockhaus and Efron: in 86 vols. (82 vols. and 4 addit.)*], St. Petersburg, 1899, Vol. XXVIa: Resonance and resonators – Rosa di Tivoli, p. 920 <https://ru.wikisource.org/wiki/%D0%AD%D0%A1%D0%91%D0%95/%D0%A0%D0%BE%D0%B4%D0%BE%D1%81%D1%81%D0%BA%D0%BE%D0%B5_%D0%BC%D0%BE%D1%80%D1%81%D0%BA%D0%BE%D0%B5_%D0%BF%D1%80%D0%B0%D0%B2%D0%BE> accessed 15 May 2023. (In Russian).

[98] Digests of Justinian contain 9,200 excerpts (fragments) from 2,000 works of 39 of the most prominent Roman jurists – mostly those who had the right to officially interpret laws. See: PIDOPRYHORA, O., A., Dyhesty [Digests]. In: *Yurydychna entsyklopediia: u 6 t.* [*Legal encyclopedia: in 6 vols.*]; resp. ed.: Yu. S. Shemshuchenko, Kyiv, 1999, Vol. 2: D-Y <https://web.archive.org/web/20131103202512/http://cyclop.com.ua/content/view/1048/58/1/11/> accessed 15 May 2023. (In Ukrainian).

[99] Pamyatniki rimskogo prava: Zakony 12 tablic. Institucii Gaya. Digesty Yustiniana [Monuments of Roman law: Laws of 12 tables. Guy's Institutions. Digests of Justinian], Moscow, 1997, p. 386-388. (In Russian).

ing of similar civil proceedings, and conversely, a civil action against a person precluded criminal charges against him. In addition, the responsibility of the heirs for the crimes of the testator was regulated, a court appeal for which was not required, but only a court summons was sufficient.

The following three subchapters of the chapter dealt with crimes committed against a person; crimes that encroach on the rights and property of other individuals; agreements of honor and crimes that encroach on honor and good reputation. Moreover, in each of these subdivisions, only the crimes that could be the basis of civil liability were indicated.[100] Thus, the second subchapter of this chapter dealt with only a few crimes that could endanger bodily integrity, personal freedom, and sexual honor. The third subchapter provided for wrongful alienation; causing various types of damage; fraud and deception. The fourth subdivision defined obligations arising from agreements of honor, from dishonor, as well as from encroachment on the reputation that causes damage to a person or property.[101]

Chapter XXII on obligations arising from actions considered as crimes deviated somewhat from the provisions established in the general plan. Thus, among the damages that may be caused by inexperience in professional activity, it listed only the damages caused by the inexperience of the judge, but the damage caused by inexperience in arts or crafts, which was provided for in the first subchapter of chapter XI of the general plan, was ignored. Unlike the other cases established in the fourth subchapter of the chapter XI of the general plan, when something is recognized as a crime without a person's malicious intent, the final version of the Codex Theresianus Draft contained provisions only about damage caused by other people's livestock.

The content of the last XIV chapter of the general plan in the final version of the Draft Code was divided into two subchapters. In the report on the first of these chapters (XXIII), which concerned the change and transfer of one's obligations to others, H. Zenker confronted to Lex Anastasiana, which hindered the ease of agreements between the parties of the obligation and the interests of those in need of money.[102] In this context, it should be clarified that the transfer of one's obligations to other individuals included the right to assign a claim, which was subject to special restrictions in late Roman law. Namely, the decree of Emperor Anastasia (Lex Anastasiana) of 506 (c.22.C.4.35) forbade claim buyers to collect more from debtors than they paid themselves. This decree was aimed at fighting usury and professional speculator buyers, but at the same time it had a negative impact on the entire circulation of claims. After all, if a claim is purchased whose term has not yet arrived, then it is obvious that the buyer will always offer less than the nominal price of the obligation, and the price difference will be affected not only by the amount of interest that the buyer could receive for his cash, which is already paid now but also a general or lower risk of future foreclosure. By forbidding buyers to charge more than they paid, Lex Anastasiana did not take into account this point of risk at all, and of course, it could only lead to a complete cessation of the circulation of claims in case of constant apply. However, this law led to various practical evasions of its implementation, which Justinian testified in the decree which confirmed Lex Anastasiana (c.23.C.4.35).[103]

The last chapter XXIV on cancellation and termination of obligations contained many procedural provisions. It is interesting that a special way of terminating the obligation, paragraph XII recognized it's objection. At the same time, it was assumed that in case of denial of non-payment of money on the basis of the presence of a corresponding receipt for the return of the debt, the burden of proving the fact of non-payment was relied on the creditor, who contested the authenticity of the receipt. However, the receipt could not be used as proof that the debt was paid if it was disputed within thirty days from the date of its issuance.[104]

3. Conclusion

On the basis of the codification works on the conclusion of the Codex Theresianus of 1766 analyzed in the article, we can summarize that they took place in several stages. At every stage, a different version of the Draft Code was developed, which, accordingly, differed in terms of the structure of the Draft and its individual provisions. Thus, at the meeting of the Compilation Commission in Brno in June 9, 1753, the final plan of its work was discussed, which contained the primary structure of the Codex Theresianus Draft.

The Compilation Commission concluded the first part of the Draft "On the law of individuals" and partially developed the second part "On property law" within three years. Moreover, the structure of these parts was somehow different from the one proposed in the final plan.

However, due to the very slow work of the Commission, it was dissolved on July 9, 1756 by order of Empress Maria Theresa, and the Vienna Revision Commission, which was created on April 9, 1755, was instead transformed into a Legislative Commission. Moreover, the implementation of new codification works was entrusted to former members of the Compilation Commission J. Azzoni, who had to independently develop the Draft Code, and J. Holger, who had to submit his comments to J. Azzoni during the work. Therefore, J. Azzoni concluded a new version of the first and second parts of the Draft.

However, due to illness and death of J. Azzoni in November 1760, H. Zenker, a former member of the Compilation Commission, was authorized to develop the third part of the Codex. In 1761, he was instructed to continue the conclusion of the second part and revise the first part of the Draft. The work of the Legislative Commission headed by H. Zenker continued

[100] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 119-120.
[101] SPEER, H. (Hrsg.), Ibid; HARRASOWSKY, Ph., H., R. (Hrsg.), *Der Codex Theresianus und seine Umarbeitungen. Band 3*. s. 355-379.
[102] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 120-121.
[103] POKROVSKIY, I., A., *Istoriya rimskogo prava* [*History of Roman law*], reissue 4th ed., Petrograd, 1918; St. Petersburg, 1999, p. 448 <http://ancientrome.ru/publik/article.htm?a=1524230073#003> accessed 15 May 2023. (In Russian).
[104] HARRASOWSKY, Ph., H., R., *Geschichte der Codification*, s. 121.

until the end of 1766 when the final Codex Theresianus Draft was completed and handed over to Empress Maria Theresa. The scope of the Draft, its structure, as well as the content of individual provisions in the final version made by H. Zenker was quite different from the previous works.

In addition, in each version of the Codex Theresianus Draft, the issue of the reception of Roman law was raised in one way or another, and many of its provisions were reflected in the text of the Draft. However, at the same time, the Austrian codifiers denied the expediency and relevance for the 18th century Austrian law of some of its principles and norms. However, in general, we can state the relationship of the Roman tradition of civil law institutions and the content of their separate provisions and, accordingly, the connection of the civil law doctrine of the Austrian Empire with Roman law.

However, it should be noted that although the project of the promulgation patent established the postponement of the Code for one year after promulgation, as it was already indicated above. However, the Codex Theresianus did not receive approval and support from the State Council, to which it was submitted for examination, as well as from the empress.[105] In particular, Chancellor Wenzel Anton von Kaunitz-Rietberg considered it imperfect, as it was not suitable for practical use in jurisprudence[106] as a result of a number of shortcomings: enormous bulkiness (8 folios and over 8,000 articles), inherent to it in many respects the nature of a textbook rather than a regulatory act,[107] the difficulty of perception, archaic nature of some provisions; as well as a direct connection to Roman law, in particular pandect law, because of which, in order to be able to use it, it was necessary to have a thorough knowledge of the norms of Roman law, and there were few of such specialists among judges at that time.[108]

Therefore, W.-A. Kaunitz suggested simplifying some provisions of the Code and classifying legal concepts more clearly, which was subsequently carried out by the new Codification Commission headed by Johann Bernhard Horten,[109] created in 1772 on the basis of Maria Theresa's patent for the revision of the Codex Theresianus in terms of its greater clarity, comprehensibility, accessibility and brevity. In the end, the revised text of the Code was named "Josephine Code of Laws" ("Josefinisches Gesetzbuch"),[110] also called Josefiana, since it had already been approved by the successor of Maria Theresa, by Emperor Joseph II. Since January 1, 1787 it was set into effect in the German hereditary lands of the Austrian monarchy (where it was into action until December 31, 1811[111]), and from May 1, 1787 – also in Galicia.[112]

[105] HARRASOWSKY, Ph., H., R. (Hrsg.), *Der Codex Theresianus und seine Umarbeitungen. Band 1*. s. 8-13; NYKYFORAK, M., V., Z istorii kodyfikatsii, p. 18.

[106] SZABO, F., *Kaunitz and Enlightened Absolutism 1753-1780*, New York, 1994, p. 182.

[107] MASLOV, S., S., Predislovie [Foreword]. In: *Vseobshchij grazhdanskij kodeks Avstrii = Allgemeines Bürgerliches Gesetzbuch* [*Austrian General Civil Code*], Moscow, 2011, p. III <https://jurkniga.ua/contents/vseobshchiy-grazhdanskiy-kodeks-avstrii.pdf> accessed 15 May 2023. (In Russian); KHARYTONOV, Ye., O., Pryiniattia novoho Tsyvilnoho kodeksy, p. 251.

[108] STEFANCHUK, R., BLAZHIVSKA, O., Istorychni aspekty stvorennia, p. 43.

[109] SZABO, F., Ibid, p. 182.

[110] OHONOVSKYI, O., *System avstryiskoho prava pryvatnoho. T. 1. Nauky zahalni i pravo richeve* [*The system of Austrian private law. Vol. 1. General sciences and property law*], Lviv, 1897, p. 4. (In Ukrainian).

[111] In the German hereditary lands of the Austrian monarchy the Josephine Code of 1787 was in effect until December 31, 1811, that is before the spread of the General Civil Code of the Austrian Empire of 1811, and in Galicia – until the introduction of the Civil Code for Galicia of 1797.

[112] KULCHYTSKYI, V., LEVYTSKA, I., Dzherela, struktura, osnovni polozhennia, p. 47.

Rechtsnormen und Logische Analysis: ein Briefwechsel - Was Kelsen tricked?

*Vinicius Magalhães Casagrande**

Abstract

The article aims to uncover the actual discussion that took place between Ulrich Klug and Norbert Wiener, a philosopher of law and a mathematician, on the question of whether it was possible for a machine to apply law using logic. This discussion took place in 1957 and was mentioned by Ulrich Klug in an exchange of letters with Hans Kelsen.

Hans Kelsen and Ulrich Klug exchanged letters in which they discussed the application of logic to law. These letters formed the basis for a book entitled Legal Rechtsnormen und logische analyze: ein Briefwechsel 1959 bis 1965.

The correspondence between Hans Kelsen and Ulrich Klug was analyzed and from it the correspondence between Klug and Norbert Wiener. The research source comes from Wiener's personal collection at the Massachusetts Institute of Technology. As a result, we find the letters exchanged between Klug and Wiener. We can conclude that both disagree on the possibility of creating a logical machine that applies the law. From this we can conclude that Klug's statement to Kelsen that Wiener accepted the existence of a machine that applies the law through logic is false.

Keywords: *letters; Hans Kelsen; Ulrich Klug; Norbert Wiener; legal logic; cybernetics; Rechtsnormen; logische analysis; Briefwechsel.*

1. The Law and the Machine

The Law is one of the many human creations to organize and improve life in society. The design of useful lives for many people also includes creating machines to assist in the most varied tasks, whether to perform simple household chores, transport loads, or even perform intellectual activities. Be it a mystical artificial being like the Golem of the Jewish tradition, be it the Talos or the golden robots of Hephaistos, this desire for the invention of androids was portrayed in mythology.

The realization of a feasible idea of creating a machine that could replace a human mental operation occurred when Gottfried Wilhelm von Leibniz designed a calculator in 1671 which, according to Nobert Weiner [1], would be the precursor to a general idea of the computing machine. Currently, computers replace human beings in various intellectual activities, having myriad applications.

Nevertheless, what is the relationship between Law and the machine? Would it be possible to solve legal problems using a computer?

The machine often has its construction regulated by Law, which determines its purchase and sale modes, warranty rights, and several aspects of its use. However, the existence of a non-human entity that would apply the Law in specific cases is somewhat of an anathema for many, being rejected by the vast majority. Those who deny any possibility of using a machine that applies and interprets the Law might imagine a Frankenstein that would turn against its creator or Isaac Asimov's protective robots in *The Evitable Conflict*. They claim that interpretation is an essentially human activity, as it needs a language and "*epistemological bases inseparably connected to intersubjectivity*." [2] In this notion, interpretation is seen as exclusive of human beings. People are taken as unique in the universe for having souls, and machines are perceived as mere material entities without such traits.

However, for some scientists and philosophers, machines and men are both material beings; thought and interpretation do not occur in the soul but result from the human brain's physical-chemical processes.

Nowadays, it is easy to imagine a computer program helping in legal activities. In many countries, this is already a reality. For instance, the DoNotPay program helps to challenge american' traffic tickets; another example was Ross, which helps in searching for precedents. Some of the applications of computing in the Judiciary are artificial intelligence to suggest draft decisions, grouping processes by similarity or subject, and the treatment of mass demands. Thus, computers occupy an increasingly important space in all areas of society, which bases its economy on computer technology.

As examples of applying artificial intelligence in law, Stanley Greenstein emphasizes the usage of predictive models to pre-

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1 WIENER, N., *Cybernetics*. Massachusetts, 2019, p. 43.

2 ZANCHET, G., *Complexo*. In: https://www.conjur.com.br/2020-set-05/complexo-vira-latas-mixagens-teoricas-direito-high-tech, access in 09/08/2020.

dict human behavior[3] which can be apply in surveillance and criminal investigation.

2. Legal Logic

However, long before the current technological reality, in the 1950s and 1960s, two prominent jurists seriously discussed whether there was a legal logic and the possibility of automated application of the rules: Ulrich Klug and Hans Kelsen. Within the dialogue between the two, depicted in the book "*Rechtsnormen und logische analyze: ein Briefwechsel 1959 bis 1965"*, Klug mentions that he maintained correspondences with Prof. Nobert Wiener on the possibility of logical deduction of legal problems by a machine.

Norbert Wiener was a mathematician at MIT who, in the 1950 s, founded the theory of cybernetics. In his books, *Cybernetics: Or Control and Communication in the Animal and the Machine*, *The Human Use of Human Beings* and *God & Golem, Inc.: A Comment on Certain Points Where Cybernetics Impinges on Religion*, Wiener theorizes the use of automation. Wiener's opinion was highly respected in academia. The MIT keeps his entire personal collection, whether notes or correspondence, preserved. Wiener's theory was very relevant when Ulrich Klug used it to convince Hans Kelsen about the existence of logical principles applied directly to legal norms. What is the importance of the study of Logic in general, and a 'legal logic,' particularly for robots based on artificial intelligence or computer programs that assist or even apply and interpret Law?

"*The search for Logic means the search for all legality. Moreover, outside of Logic, it is all a fluke*", said Wittgenstein.[4] The possibility of describing the world of Law through Logic says nothing about the legal world itself, but the existence of a legal logic can act in a context of computational programming, as a norm goal that would allow the application and perhaps the interpretation of the Law by a machine.

The Judiciary is using programs to solve legal problems by using machine learning algorithms. Through the analysis of several decisions already made by judicial bodies, these instruments reproduce the solution of past cases and apply the Law. As an example, we have the VICTOR program, developed at the STF (Brazilian superior constitutional court). At the current technological stage, the machine does not interpret the Law but only reapplies it, based on machine learning and Artificial Intelligence.

The critics claim that the result of employing such tool is a consequentialist and automated decision. This decision is realistic and based on empirical premises fixed to all existing hypotheses. Deontological interpretation (norm-based) would not base these decisions.

The advantage of mechanical application would be greater predictability since much of the programmed content would be past decisions. This past decision has already been a result of a right interpreted by humans.

Legal formal Logic is an attempt to build a set of truth propositions necessary for the application of Law and even for its interpretation. A computational machine that applied but interpreted the Law would have to be informed by three normative levels; the first would be the target legal norm ('legal logic'), the second the set of existing rules, and the third, the set of existing decisions.

3. Rechtsnormen und logische analyze

However, it is necessary to understand why Hans Kelsen contradicted Ulrich Klug's 'legal Logic'. On 3. 6. 1959, Hans Kelsen wrote his first letter to Ulrich Klug, in which he claims to have read Klug's book "*Juristische Logik* ". In this letter, he asks Professor Klug two questions: whether the rules of Logic apply to Law as a set of rules or only to the Science of Law? And second, how is it possible to apply Logic to Law (norms) if it is restricted to affirmations, which can be true or false?[5]

In Kelsen's book Pure Theory of Law, the author distinguishes legal norms (rules), which is an imperative command that uses 'ought to be' verbal tenses, and the science of Law, that describes legal norms. The first is governed by phrases of 'ought to be,' imperatives, and the second by statements of being, 'is', which can be true or false. For Kelsen, imperative phrases cannot be true or false.

On 4. 27. 1959, Ulrich Klug replied to Hans Kelsen's letter concluding that there was no difficulty in applying the rules of Logic to normative propositions.[6] This is because there could be a conversion of propositions of 'ought to be' into a predictive and affirmative calculation, which would imply the possibility that the propositions of 'ought to be' are valued as false or true.[7]

Ulrich Klug's option to theorize the existence of a machine for the logical application of Law based on legal Logic is also fundamental for us to understand why Klug defends its existence. In his book, *"Juristische Logik*," Klug states again that he talked to Nobert Wiener about a computer's theoretical existence capable of applying Law logically.[8] Klug was even more emphatic in defending the practical application of Logic to solve legal problems when referring again to 'some correspondence' exchanged with Nobert Wiener about the existence of autonomous logical machines that would apply Law. In correspondence[9] dated 7. 17. 1959, Klug wrote to Hans Kelsen that:

> *"A notable confirmation of the above results from the possibility of an electronic calculating machine, whose logical basis is the bivalorative calculation of affirmation of general norms as a program (that is, in the terminology of Logic, the system of axioms, or, as it was said in the past, the system of major premises). This, moreover, has already been done with a tax law in a case that I learned about here in the Federal Republic of Germany. In this way, it was revealed, to the surprise of the competent official offices, that the legislator, when drafting the corresponding rules, contradictions that no one had previously discovered escaped; however, the legal provisions had already been in practice*

[3] GREENSTEIN, S., *Our Humanity Exposed*. In: http://urn.kb.se/resolve?urn=urn:nbn:se:su:diva-141657 , access in 09/08/2020, p. 433.
[4] WITTGENSTEIN, L., *Tractatus logico-philosopicus.* São Paulo, 2017, p. 249.
[5] KELSEN, H. and KLUG, U., *Rechtsnormen und logische analyse*. Wein, 1981, p. 9.
[6] KELSEN, H. and KLUG, U., op. cit., p. 12.
[7] Ibid., p. 11.
[8] KLUG, U., *Juristische Logik*. Berlin, 1966, p. 241.
[9] KELSEN, H. and KLUG, U, op. cit., p. 34.

applied for some time. This is a beautiful example of the fact that the direct application of logical principles to norms is not faced with fundamental difficulties. Furthermore, I had a brief correspondence, some time ago, with Norbert Wiener, on the question of the basic possibility of using machines programmed to deduct legal problems. Wiener fully agreed with me that, with reference to the rational parts of the legal argument, there are, in principle, no obstacles.[10]"

Apparently the same letters exchanged by Ulrich Klug with Norbert Wiener referred to in the dialogue with Hans Kelsen, depicted in the book " *Rechtsnormen und logische analyze: in Briefwechsel 1959 bis 1965*" were also mentioned in the book "*Juristische Logik* ". Ulrich Klug always relies in his conclusions on authoritative arguments to claim that a machine can solve legal problems. This authority is Prof. Norbert Wiener.

Norbert Wiener's opinion, responding to Ulrich Klug's question regarding the possibility of the Law be applied by computers, has never been published until now. In Wiener's book "*the human use of human beings: cybernetics and society*," he treats the Law as an ethical control applied to communication and language. A settlement adjustment process, in which there are areas where there is no semantic agreement between the Law and the real situation. For the author, the legal system is created to deal with conflict, in which the parties play, in von Neumann's terms, talk and entice decision-makers. Nobert Wiener says that the interpretation technique is to know what the court says and what it will say because he knows only common Law, and the problems of the Law are problems of communication and cybernetics, problems of systematic and repeated control of certain situations criticisms.

Norbert Wiener saw a relation between the Law and the principles of cybernetics (theory he created). In his book, the existence of logical principles used to apply Law as intended by Ulrich Klug never was stated. On the contrary, the Wiener theory is that Law and cybernetics use the same communication principles, and therefore Law would be an ethical control applied to communication.[11].

Ulrich Klug explicitly says that through bivalent propositional Logic is possible to build an "electronic automata."[12] based on cybernetics principles,

"*Thus, for example, the mechanical preparation of tax decisions, widely used in the Federal Republic of Germany, represents the production of a legal decision by means of electronic data processing. From the juridical-systematic point of view, these are cases that occur in great numbers and in which the application of the Law takes place by means of machines, which free jurists from routine decisions. Similar developments can be observed for most time in most countries, and they often take place early. It is not uncommon for scientific literature to treat them under the heading of Cybernetics*"[13]

However, Kelsen sees no possibility of directly applying logical laws to a norm, as "ought to be," in the sense of representation of a factual procedure.[14]. Only indirectly does Kelsen recognize the possibility of applying logical principles to norms, only through the science of Law, in a described manner.

Kelsen's objection is that the legal norm depends on the Grundnorm to obtain its validity. Validity is a specific feature of the legal norm, of its existence. The norm's effectiveness, the fact that the prescribed conduct materializes, and the circumstance that the other proceeds following the legal norm provisions are not to be confused with the legal norm's validity. Propositions about Law's efficacy (application) are true or false, and corresponds to a "be" or a de facto procedure. For Hans Kelsen, there is an unacceptable contradiction in the concept of the prescription of 'ought to be' created by Ulrich Klug because in this 'prescription of ought to be,' validity and efficacy are not separated.[15]

Hans Kelsen thus distinguishes between when someone proceeds according to the legal order in a certain way, a judgment made by the science of Law based on what "is," and when to proceed according to the legal order, carried out in imperative language. The first judgment is a description that can be true or false, depending on when the reality is in the same direction or not with the norm. Thus, if someone describes an action by a particular person who proceeds according to a specific legal norm, we affirm that conduct can be true, as long as the description follows what is prescribed by the legal norm. Such a description demonstrates the effectiveness of the legal norm.

However, when somebody says that someone must proceed somehow, it cannot be either true or false because it is imperative. It is a command based on a standard that can be valid or invalid. It is a command based on the validity of a standard. Said rule is only valid if legislated according to Grundnorm, with the rules that establish the rules for a given law to be valid within a legal system. Such a rule is not true or false, as it is only an imperative, which is observed or not, having validity according to the rules of legislation. An order is not true or false; it is only a valid or invalid order.

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[10] Ibid., p. 34: "Eine bemerkenswerte Bestätigung des Gesagten ergibt sich aus der Möglichkeit, einer elektronischen Rechenmaschine, deren logische Grundlagen der zweiwertige Aussagekalkül ist, generelle Normen als Programm (d. i. in der Terminologie der Logik das Axiomensystem oder wie man früher sagte, das System der obersten Prämissen) zu geben. In einem mir bekannten Fall hier in der Bundesrepublik ist das bereits bei einem Steuergesetz gemacht worden. Dabei zeigte es sich zur Überraschung der zuständigen Regierungsstellen, daß dem Gesetzgeber beim Erlaß der betreffenden Normen Widersprüche unterlaufen waren, die vorher noch niemand entdeckt hatte, obwohl die gesetzlichen Bestimmungen bereits einige Zeit in der Praxis angewandt wurden. - Ein m. E. schönes Beispiel dafür, daß der direkten Anwendung der logischen Prinzipien auf Normen keine grundsätzlichen Schwierigkeiten im Wege stehen. Ich habe übrigens vor einiger Zeit mit Herrn Norbert Wiener über die Frage der grundsätzlichen Verwendungsmöglichkeit von programmgesteuerten Maschinen für die Deduktion juristischer Probleme kurz korrespondiert. Herr Wiener hat mir voll darin zugestimmt, daß hinsichtlich der rationalen Teile juristischer Argumentation keine prinzipiellen Hindernisse bestehen".

[11] WIENER, N., *The Human Use of Human Beings*. Massachusetts, 1988, p. 105.

[12] KLUG, U., op. cit., 1966, p. 243.

[13] Ibid., p. 242: Es handelt sich hier im Geltungsbereich des deutschen Rechts vor allem um den Einsatz elektronischer Automaten im Steuerrecht, z.B. bei der Herstellung des Einkommensteuerbescheides. Rechtssystematisch ist das der Fall einer Gesetzesanwendung durch eine Maschine. Ähnliche Maschinenanwendungen kennt man im Sozialversicherungsrecht. Diese Entwicklung kann zur Zeit in den meisten Ländern beobachtet werden.

[14] KELSEN, H. and KLUG, U, op. cit., p. 15.

[15] Ibid., p. 15.

Logical laws do not deal with the validity or invalidity of legal norms. It is even possible to have two legal rules governing certain conduct in a contradictory manner. The norms are neither true nor false but valid or invalid. Until an authority duly empowered to declare one of the two rules invalid excludes one of the rules, both rules remain valid in the legal system. Thus, in the legal system, the fundamental logical principle of non-contradiction does not exist. One of the two rules will be declared invalid, not because it contradicts the other[16], but because it does not belong to a specific legal order. The validity value does not correspond to the truth value[17]. Thus, concludes Kelsen,

"*The norms of established Law are not, however, logically judgments of the ought to be, but commandments, imperatives, permissions, which the Science of Law undoubtedly describes in judgments of the ought to be. Following traditional Jurisprudence, Klug does not distinguish, with sufficient clarity, the prescription issued in the act of will by the legal authority, the rules it places, from the statements and propositions in which Legal Science, as knowledge of the Law, describes such rules*[18]"

The main characteristic of the norms of Law, established by the legal authority will be that they do not affirm something about an object already determined, but first of all, they produce the object about which the Science of Law can affirm something[19], according to Kelsen.

We can conclude, for Kelsen, there would be no possibility of a machine that would help apply the Law using Logic. The argument of that for Nobert Wiener would be possible to a machine apply the Law did not convince Kelsen.

There would be another impediment for a machine to apply the Law. The machine would not be an autonomous being. Kelsen never directly addressed this requirement for autonomy. Kelsen does, however, deal with the question of will formation and insists that an exercise of will is necessary for norm creation. So the question would be whether a machine is capable of this.

Currently, the possibility of an artificial intelligence machine being completely autonomous is far from any achievement perspective. Some people foresee the case of a device being self-sufficient in the concept of artificial general intelligence. When this concept occurs, the AI will achieve the same intelligence level as humans and do everything humans can do. There is also the concept of singularity when AI will surpass humans. However, these possibilities are unsure, and, perheaps, this level of artificial intelligence autonomy would never happen.

4. Wiener and Klug letters

To date, no research has been carried out about what were the terms of the letter from Nobert Wiener and Ulrich Klug. A research was done at the Massachusetts Institute of Technology (MIT) for the letters' content. The first letter sent by Ulrich Klug on 7/17/1957 has the following content:

"*Karsrule, July 17th, 1957 (Germany)*
Kriegssstrasse 152
Professor Norbert Wiener
Boston, Mass.
USA
Dear Professor Wiener!
In connection with investigations into the question of the extent to which the calculations developed in the area of 'symbolic logic' can be used for the analysis and better specification of legal problems, please allow me to contact you with the following questions:
(1) Have attempts been made to use electronic machines to determine inferences from legal axioms?
(2) Have electronic machines already been used for other legal (not purely computational) purposes?
Thank you very much for answering these questions. I just hope that my request does not bother you too much, and at the same time, I would like to apologize for the fact that I write in German, as my English language skills are very poor.
With the most binding recommendations
I am
Your very devoted."[20]

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[16] Ibid., p. 46: "Der Konflikt zwischen zwei Normen ist kein logischer Widerspruch, sondern ein teleologischer Gegensatz".

[17] Ibid., p. 49: "der Geltungswert nicht dem Wahrheitswert entspricht"

[18] Ibid., p. 26: "Die Normen des gesetzten Rechtes sind aber logisch nicht Soll – "Urteile", sondern Gebote, Imperative, Erlaubnisse, die allerdings von der Rechtswissenschaft in Soll-Urteilen beschrieben werden. Der traditionellen Jurisprudenz folgend unterscheidet Klug nicht, oder nicht deutlich genug, die in Willensakten von der Rechtsautorität erlassene Vorschreibung, die von ihr gesetzten Normen, von den Aussagen, den Sätzen, in denen die Rechtswissenschaft, als Erkenntnis des Rechts, diese Normen beschreibt".

[19] Ibid., p. 36.

[20] Correspondence, 1957 - 1957, Box: 16, Folder: 226-238. Norbert Wiener papers, MC-0022. Massachusetts Institute of Technology. Libraries. Department of Distinctive Collections. https://archivesspace.mit.edu/repositories/2/archival_objects/151216 Accessed June 23, 2020:
Karsruhe, den 17. 7. 1957
(Germany)
Kriegssstr.152
Professor Norbert Wiener
Boston, Mass.
USA
Sehr geehrter Professor Wiener!
Im Zusammenhang mit Untersuchungen über die Frage, inwieweit sich die im Bereich der 'symbolic logic' entwickelten Kalküle für die Analyse und bessere Präzisierung von juristischen Problemen verwenden lassen, gestatten Sie mir bitte, mich mit folgenden Fragen an Sie zu wenden:
(1) Sind schon Versuche angestellt worden, elektronische Automaten zur Bestimmung von Folgerungen aus juristischen Axiomen zu verwenden?
(2) Sind elektronische Automaten für sonstige juristische (nicht rein rechnerische) Zwecke bereits eingesetzt worden?
Für eine Beantwortung dieser Fragen wäre ich Ihnen sehr zu Dank verbunden. Ich hoffe nur, dass Ihnen mein Anliegen nicht allzu viel Mühe macht, und bitte gleichzeitig freundlichst zu entschuldigen, dass ich deutsch schreibe, da meine englischen Sprachkenntnisse sehr mangelhaft sind.
Mit den verbindlichsten Empfehlungen
Bin ich
Ihr sehr ergebener
Ulrich Klug"

Ten days later, Nobert Wiener answered Ulrich Klug in a very general way, with the following content:

"*South Tamworth*
New Hampshire
July 27, 1957
Prof. Dr. Jur. Ulrich Klug
Karsrule
(Germany)
Kriegssstr. 152
Dear Dr. Klug:
It is already standard practice to set up problems in the algebra of Logic on suitable computing machines, dependent on sequences of switching operations. While I am not aware that any explicit use has been made in juristic problems, such a use is certainly possible.
As I am up in the White Mountains on vacation, I do not have at present access to whatever publications may have been made on the subject. I suggest that you write to Dr. Claude Shannon at the Massachusetts Institute of Technology, Cambridge, Massachusetts.
Sincerely yours,
Norbert Wiener[21]"

In October of the same year, Ulrich Klug wrote back to Norbert Wiener, with the following content:

Wiesbaden, October 22, 1957
Humbolsdstr. 35
Tel. 57129
Prof. Dr. Nobert Wiener
Massachusetts Institute of Technology
Cambridge, Massachusetts
USA
Dear Professor Wiener
As a result of several trips, I am unfortunately only in a position today to reply to your kind lines dated July 27, 1957. Thank you for pointing out Dr. Claude Shannon, whom I will turn to shortly.
Allow me to take this opportunity to enclose a little work by a friend of mine which may be of interest to you with regard to the history of the adding machine. I don't have another copy available and I had to include the one with the author's dedication addressed to me. Since I am neither a mathematician nor a technician, I cannot comment on the explanations.
I am with the most authoritative recommendations
Yours very devoted
Ulrich Klug[22]

Dr. Claude Shannon worked directly with Dr. Nobert Wiener. He is famous for having founded information theory with an article published in 1948. He is also credited with founding both the digital computer and the digital circuit project in 1937, when, at the age of 21 and master's student at MIT, he wrote a thesis demonstrating that an electrical application using Boolean algebra could solve any logic problem[23]. To celebrate the centenary of his birth, the film The Bit Player was created[24].

Dr. Claude Shannon's personal files are stored in the Library of Congress. Due to the corona pandemic, it was not possible to conduct a personal search in the library. However, in email conversations with those responsible for the archives, it was impossible to locate any correspondence between Dr. Ulrich Klug and Dr. Claude Shannon. The fact that Dr. Ulrich Klug never wrote to Dr. Claude Shannon, as recommended by Dr. Nobert Wiener, is a great pity. Dr. Claude Shannon is the inventor of the bit; without him, right now, we would be using the typewriter to write essays instead of computers. Perhaps today, we would have computers applying the Law if Dr. Claude Shannon had been interested in the subject. Alternatively, even there would be a tremendous advance in the dogmatics of Logic proper to the Law. Dr. Ulrich Klug was also not concerned with Hans Kelsen's criticisms, as he was confident that Kelsen had a limited and backward view of Logic,

"*It is no surprise that modern Logic - historically developed independently - leads from other metalogical positions to other prerequisites and consequences. For example, Sigwart has not yet found*

[21] Correspondence, 1957 - 1957, Box: 16, Folder: 226-238. Norbert Wiener papers, MC-0022. Massachusetts Institute of Technology. Libraries. Department of Distinctive Collections. https://archivesspace.mit.edu/repositories/2/archival_objects/151216 Accessed June 23, 2020.

[22] Correspondence, 1957 - 1957, Box: 16, Folder: 226-238. Norbert Wiener papers, MC-0022. Massachusetts Institute of Technology. Libraries. Department of Distinctive Collections. https://archivesspace.mit.edu/repositories/2/archival_objects/151216 Accessed June 23, 2020:
Wiesbaden, 22. Oktober 1957
Humboldstr. 35
Tel. 57129
Prof. Dr. Nobert Wiener
Massachusetts Institute of Technology
Cambridge, Massachusetts
USA
Sehr verehrter Professor Wiener
Infolge mehrerer Reisen bin ich leider erst heute in der Lage, auf Ihre freundlichen Zeilen vom 27. 7. 1957 zu antworten. Ich danke Ihnen für den Hinweis auf Herrn Dr. Claude Shannon, an den ich mich in Kürze wenden werde.
Gestatten Sie mir, Ihnen bei dieser Gelegenheit eine kleine Arbeit eines Freundes von mir beizufügen, die Sie im Hinblick auf die Geschichte der Rechenmaschine vielleicht interessieren wird. Ich habe kein weiteres Exemplar zur Verfügung und musste das mit der an mich gerichteten Widmug des Verfassers hier mitschicken. Da ich weder Mathematiker noch Techniker bin, kann ich zu den Ausführungen nicht Stellung nehmen.
Mit den verbindlichsten Empfehlungen bin ich
Ihr sehr ergebener
Ulrich Klug

[23] In https://pt.wikipedia.org/wiki/Claude_Shannon (access in 03/11/2021).

[24] In https://en.wikipedia.org/wiki/The_Bit_Player (access in 03/11/2021).

anything about the metalogical distinction between logical syntax (with the possibility of constructing uninterpreted, so-called abstract calculi), semantics, and pragmatics. And if these systems of Logic are only about consistency and not about truth in the classical sense, the emergence of the divergent discussions is legitimate and, moreover, certainly stimulating"[25].

5. Conclusion

Another point is that Nobert Wiener never wrote to Ulrich Klug that "there are, in principle, no obstacles" to use "machines programmed to deduct legal problems." Nobert Wiener state only that such use is "certainly possible" and asked Ulrich Klug to write to Dr. Claude Shannon. There was a misinterpretation on the part of prof. Ulrich Klug of the response wrote by Norbert Wiener. The letters cited in this article demonstrate such a discovery.

The question about solving legal problems using a computer program with "legal logic" has remained unanswered since 1957. Today's machines assist in applying the Law, but there are significant obstacles to solving common legal problems with Logic. The use of artificial intelligence raises many concerns about who controls these machines' coding. It is even impossible for a judge and a lawyer to understand the programming codes' nuances. Such facts alone are an impediment. The Artificial Intelligence applicability causes a limitation of the magistrate's powers due to their lack of transparency.

[25] KELSEN, H. and KLUG, U, op. cit., p. 101: "Daß die moderne Logik - historisch selbständig erarbeitet - von anderen metalogischen Positionen ausgehend zu anderen Voraussetzungen und Konsequenzen führt, ist keine Überraschung. Beispielsweise konnte man über die metalogische Unterscheidung zwischen logischer Syntax (mit der Möglichkeit der Konstruktion ungedeuteter, sog. abstrakter Kalküle), Semantik und Pragmatik bei Sigwart noch nichts finden. Und wenn es bei diesen Systemen der Logik nur um Folgerichtigkeit und nicht um Wahrheit im klassischen Sinne geht, ist die Entstehung der Diskussionsdivergenzen legitim und zudem sicherlich anregend".

Durchsetzung von Ansprüchen auf Bescheidung und Gewährung von Pensionsleistungen als Vertragsbedienstete von verschiedenen EU-Behörden – Rechtsgeschichte der frühen Jahre der EU als „Lehrmeisterin" und gutachterliches „Handwerkszeug"*

(Enforcement of Claims for Decision and Granting of Pension Benefits as Contract Staff of Various EU Authorities – Legal History of the Early Years of the EU as a "Teacher" and Expert "Tools of the Trade")

*Thomas Gergen***

Abstract

The question of entitlement to pension benefits based on temporary („freelance") contracts with EU authorities arises precisely when these have not been explicitly excluded. Although the interpretation must rightly be restrictive, there are cases that go back to the early jurisprudence of the EU and thus to the young history of European law; it can be consulted as a „teacher" for today's interpretation.

Keywords: *EU pension rights; staff and „other servants" of the EU; „Plaumann formula" (1963).*

1. Einführung

Die Frage der Entstehung von Pensionsleistungen aufgrund von Zeitverträgen (so genannte „Freelance"-Ausübung hoheitlicher Tätigkeiten resp. Dienstleistungen) bei EU-Behörden stellt sich gerade dann, wenn diese nicht explizit ausgeschlossen wurden. Eine Entscheidung des Gerichts der EU, die am 16. Dezember 2019 erging, lehnte sämtliche Ansprüche in der Sache ab. Schon in der Station der Zulässigkeit äußerte es Zweifel, die es am Zentralbegriff „Bediensteter" festmachte. Die Entscheidung ist publiziert.[1]

Welche wenn auch geringen und in der Sache wohl unwahrscheinlichen Möglichkeiten hätte ein Antragsteller trotzdem? Anders formuliert: Hätte jemand sie trotzdem gehabt, geht man davon aus, dass die Frage infolge formeller und materieller Rechtskraft endgültig geklärt und damit erledigt ist. Kann die europäische Rechtsgeschichte der Anfänge der EU hier noch Argumente liefern und als „Lehrmeisterin" dienen? Schon früh gab es Regelungen der Ende-1950er Jahre zu den Bediensteten sowie die „Plaumann-Formel" Anfang der 1960er Jahre. Wir haben also vor uns: Rechtsgeschichte der EU-Institutionen als gutachterlich-praxisrelevantes „Handwerkszeuge" und „Lehrmeisterin" zum Zwecke der Argumentationsfindung im geltenden Recht.

Erwähnenswert bleibt unterdessen, dass eine Wiederaufnahme des Verfahrens unter Angabe von Gründen innerhalb eines Zeittraumes von 10 Jahren nach Kenntniserlangung der Gründe lediglich innerhalb von drei Monaten möglich ist, siehe Art. 125 bis 128 Verfahrensordnung (VerfO) EuG (Verfahrensordnung beim Europäischen Gericht). Diese restriktiv zu interpretierenden Artikel setzen überragend wichtige Gründe voraus; solche sind hier wohl nicht ersichtlich.

Festzuhalten und hinzuweisen ist auf die eingetretene formelle und materielle Rechtskraft dieser Entscheidung. Dies bedeutet, dass der Streitgegenstand konsumiert, also erschöpft ist, sozusagen gesperrt für allfällige weitere gerichtliche wie behördliche Überprüfungen. Daher erscheint die erneute Beschäftigung *prima facie* völlig aussichtslos und von Anfang an ohne Erfolg gekrönt. Eingedenk dieser Beobachtung und des Hinweises auf Bedeutung der Rechtskraft und der Konsequenzen will unser Beitrag wegen des Umfangs und der Bedeutung im Folgenden gleichwohl auf schon vorgetragene wie neue Aspekte eingehen. Dies umso mehr als neue Bescheide von Seiten der EU-Kommission ergehen, gegen die etwaige Rechtsbehelfe zu prüfen sind (PMO).

Das PMO ist das Amt für die Feststellung und Abwicklung individueller Ansprüche, d.h. kommissionsinterner Dienst für die Feststellung und Zahlung der Ruhegehälter der Beamten und sonstigen Bediensteten der EU-Behörden. Es existieren die Allgemeinen Bestimmungen, die beim Abschluss von Verträgen des Amtes für Veröffentlichungen mit Korrektoren angewendet

* Der Aufsatz reiht sich ein in das Hauptmotto zur „Rechtsgeschichte als Lehrmeisterin" der Budapester Tagung von Ende Mai 2023.

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[1] Bekannt ist (alle Internet-Quellen der Fußnote abgerufen am 02. März 2021): http://curia.europa.eu/juris/documents.jsf?text=freelance & oqp=& for=&mat=or & jge=&td=%3BALL & jur=C%2CT%2CF & page=1 & dates=&pcs=Oor & lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=de&avg=& cid=856540
Dort wurde die Klage „negativ" beantwortet, also zurückgewiesen.
Beachtlich:
http://curia.europa.eu/juris/document/document.jsf;jsessionid=46E09926524F2357DCF59FFADE882D11?text=freelance & docid=221840 & page Index=0 & doclang=de & mode=req&dir=&occ=first&part=1&cid=5768268#ctx1

wurden: „Conditions générales régissant les prestations des correcteurs indépendants (freelance)“, anwendbar seit/applicables depuis 1. 1. 84. Es erwähnt eine vorhergehende Regelung, die mit der Neuregelung annuliert wird und die vorangegangene ersetzt: „Les présentes conditions générales entrent en vigeur le 1. 1. 1984. Elles annulent et remplaçent la rčglementation précédente.“

Die Vorlage von Nachweisen entsprechender Beitragszahlungen kann nicht erfolgen, weil sie offensichtlich unmöglich ist, wenn der Antragsteller nicht vorgetragen hat, jemals solche Beiträge entrichtet zu haben. Wären solche Beiträge eingezahlt worden, wären sie mit an Sicherheit grenzender Wahrscheinlichkeit leicht nachweisbar und „in den Akten“. Daher müssen die Pensionsansprüche auf andere Weise als bisher begründet werden, materiell über eine europarechtlich-methodologisch gebotene weite Interpretation des Merkmals „sonstige Bedienstete“. Eine Nichtigkeitsklage gegen entsprechende Ablehnungsschreiben der EU-Kommission ist prüfungswürdig, was die formelle Hinsicht anbelangt. § 46 § 2 VerfO EuG nennt schließlich als Zulässigkeitsvoraussetzung die Vorlage einer durchgeführten Beschwerde bei der Klagebeantwortung des Beklagten, also die EU-Kommission[2].

2. Zulässigkeit der Nichtigkeitsklage[3] gegen das die Ansprüche ablehnende Antwortschreiben

Die Nichtigkeitsklage ermöglicht es, die Rechtmäßigkeit von Handlungen der Unionsorgane und der sonstigen Einrichtungen der EU zu überprüfen. Ziel ist es, sekundäres Unionsrecht (wenn primäres Unionsrecht dadurch verletzt wurde) durch den EuGH (bzw. das EuG) für nichtig erklären zu lassen, vgl. Art. 264 I AEUV (= Vertrag über die Arbeitsweise der Europäischen Union). Die Nichtigkeitsklage kann – sollte es um die Nichtigkeit von Beschlüssen gehen – ähnlich der Form einer Anfechtungsklage oder – sollte es um Richtlinien und Verordnungen gehen – ähnlich der Form einer Normenkontrollklage ausgestaltet sein.

Folge einer erfolgreichen Nichtigkeitsklage ist immer die Nichtigkeitserklärung der beanstandeten Handlung gemäß Art. 264 I AEUV. Diese wirkt *ex tunc* und *erga omnes*, d.h. von Anfang an und gegenüber allen. Art. 266 I AEUV verordnet den betroffenen Organen eine Folgenbeseitigungspflicht. Der Rechtsweg zum EuGH resultiert aus Art. 19 III EUV in Verbindung mit Art. 263 AEUV, sobald eine Verletzung von Unionsrecht gerügt wird. Es gilt insoweit das im Europarecht allgemeingültige „Prinzip der begrenzten Einzelermächtigung“ laut Art. 19 III EUV. Siehe insbesondere Art. 19 III lit. c EUV: „in allen in den Verträgen vorgesehenen Fällen“.

2.1 Sachliche Zuständigkeit

Sachlich zuständig ist grundsätzlich das EuG[4], vgl. Art. 256 I S. 1 AEUV.

2.2 Parteifähigkeit und Beteiligtenfähigkeit

Aktiv parteifähig, d.h. vor dem Gericht antragsberechtigt, sind gemäß Art. 263 II AEUV die Mitgliedstaaten, das Europäische Parlament, der Rat und die Kommission, gemäß Art. 263 III AEUV der Rechnungshof, die EZB und der Ausschuss der Regionen, sowie gemäß Art. 263 IV AEUV alle natürlichen und juristischen Personen.

Passive Parteifähigkeit bedeutet, vor Gericht verklagt zu werden. Passiv parteifähig sind das Europäische Parlament, der Rat, die Kommission, die EZB, der Europäische Rat, vgl. dazu Art. 263 I 1 AEUV. Weiterhin sind Einrichtungen und sonstige Stellen der Union passiv parteifähig, sofern ihre angegriffenen Handlungen Rechtswirkungen gegen Dritte entfalten, Art. 263 I 2 AEUV.

Der Antragsteller ist als natürliche Person aktiv parteifähig, die EU-Kommission passiv parteifähig.

2.3 Klagegegenstand

Klagegegenstand können nur Handlungen mit Rechtswirkung sein. Daher werden neben Verordnungen, Richtlinien und Beschlüssen gleichermaßen Handlungen erfasst, die dazu bestimmt sind, Rechtswirkungen zu erzeugen. Unerheblich ist dabei ihre formelle Bezeichnung. Empfehlungen und Stellungnahmen sind mangels Rechtswirkung kein zulässiger Klagegenstand, Art. 263 I 1, 288 V AEUV. Primärrechtliche Bestimmungen können nicht Klagegenstand sein.

Geltend gemacht werden kann indes, dass die streitige Handlung keine anfechtbare Handlung im Sinne von Art. 263 AEUV sei, weil sie keine verbindlichen Rechtswirkungen entfalte. Sie sei allenfalls eine vorbereitende Handlung, mit der sich die Kommission nicht auf eine endgültige Haltung festlege.

Ein PMO-Schreiben, das eine Ablehnung von Pensionsansprüchen beinhaltet, also unmittelbar Rechtwirkungen zulasten einer antragstellenden Person erzeugt, stellt keine bloße Auskunft, Empfehlung oder Stellungnahme dar, sondern eine definitive Ablehnung von Ansprüchen, die nicht aus Primärrecht resultieren. Ebenso wenig liegt einem solchen Antwortschreiben eine bloß vorbereitende Handlung zugrunde.

2.4 Klagebefugnis

Die Voraussetzungen der Klagebefugnis bestimmen sich grundsätzlich danach, wer als Kläger auftritt.

a) Privilegierte und teilprivilegierte Klagebefugnis

Treten Unionsorgane und Mitgliedstaaten nach Art. 263 II AEUV als Kläger auf, ist eine Klagebefugnis nicht erforderlich. Es handelt sich für diese um ein sog. objektives Verfahren, d.h. sie sind privilegiert klagebefugt. Berechtigte nach Art. 263 III AEUV, folglich die EZB, der Rechnungshof und der Ausschuss der Regionen sind hingegen nur teilprivilegiert klagebefugt. Sie müssen die Verletzung eigener Rechte substantiiert geltend

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[2] *§ 2. In den Streitsachen zwischen der Union und deren Bediensteten müssen der Klagebeantwortung die Beschwerde im Sinne von Artikel 90 Absatz 2 des Beamtenstatuts und die Ablehnungsentscheidung mit Angabe des Datums der Einreichung der Beschwerde und der Mitteilung der Entscheidung beigefügt sein.*

[3] https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=LEGISSUM%3Aai0038 – abgerufen 06. 04. 2021.

[4] Für Nichtigkeitsklagen von Mitgliedstaaten und EU-Organen wäre jedoch abweichend davon der EuGH zuständig, vgl. Art. 51 Satzung des EuGH, was hier außen vor bleibt.

machen, da sie nur zur „Wahrung ihrer Rechte“ klagen dürfen. Hier unstreitig nicht einschlägig.

b) Nichtprivilegierte Klagebefugnis

Berechtigte nach Art. 263 IV AEUV, d.h. alle natürlichen und juristischen Personen, sind nicht privilegiert klagebefugt. Für sie handelt es sich um ein sog. subjektives Verfahren, d.h. sie müssen ein spezifisches Rechtsschutzbedürfnis nachweisen, um klagen zu können. Die Anforderungen an dieses spezifische Rechtsschutzbedürfnis werden in Art. 263 IV AEUV genannt. Danach kommen drei Varianten in Betracht:

- Die natürlichen und juristischen Personen müssen entweder Adressat der Handlung sein (Var. 1) oder
- durch die Handlung unmittelbar und individuell betroffen sein (Var. 2) oder
- die Handlung ist ein Rechtsakt mit Verordnungscharakter, der sie unmittelbar betrifft und keine Durchführungsmaßnahmen nach sich zieht (Var. 3).

Dies heißt des Näheren:

aa) den Kläger unmittelbar und individuell betreffende Handlungen

(1) Unmittelbare Betroffenheit liegt immer dann vor, wenn sich die beanstandete Maßnahme auf die individuelle Interessens- oder Rechtslage der natürlichen oder juristischen Person direkt dadurch auswirkt, dass keine weiteren Vollzugsakte mehr notwendig sind, anders ausgedrückt, dass der ausführenden Stelle kein Ermessen in Form eines inhaltlichen Entscheidungsspielraums eingeräumt wird. Es kommt dabei nicht darauf an, ob formal noch ein weiterer Rechtsakt erforderlich ist.

(2) Individuelle Betroffenheit liegt, nach der vom EuGH entwickelten und klassisch gewordenen „**Plaumann-Formel**“ dann vor, wenn der Rechtsakt den Kläger wegen bestimmter persönlicher Eigenschaften oder besonderer, ihn aus dem Kreis aller übrigen Personen heraushebender Umstände berührt und ihn daher in ähnlicher Weise individualisiert wie den eigentlichen Adressaten (EuGH, Rechtsache = Rs. 25/62 (Plaumann), Sammlung = Slg. 1963, 213 [238]).

Individuelle Betroffenheit bedeutet somit „tatsächliche“ Betroffenheit.

bb) Rechtsakte mit Verordnungscharakter sind nach EuGH-Judikatur nur solche Rechtsakte, die nicht in einem Gesetzgebungsverfahren erlassen wurden, d.h. keine Gesetzgebungsakte gem. Art. 289 III AEUV sind[5]. Der Terminus „Rechtsakt mit Verordnungscharakter“ geht auf den Verfassungsvertrag zurück. In diesem wurde zwischen Gesetzgebungsakten und Rechtsakten mit Verordnungscharakter unterschieden. Weiterhin muss nach EuGH aus systematischen Gründen der Begriff enger sein als der der Handlung (s.o. Var. 1 und 2). Damit werden insbesondere Rechtsakte nach Art. 290, Art. 291 II AEUV erfasst sowie sonstige Rechtsakte, die allein von Rat oder Kommission erlassen werden. Die unmittelbare Betroffenheit wird dabei wie bisher nach der Plaumann-Formel (siehe oben) ermittelt.

Infolge der Versagung der Pensionsansprüche als natürliche Person ist ein Antragsteller von Pensionsansprüchen unmittelbar und individuell in seinen Rechten betroffen.

2.5 Klagegründe

Sämtliche Klagegründe sind in Art. 263 II AEUV normiert: Unzuständigkeit, Verletzung wesentlicher Formvorschriften, Verletzung des Vertrags oder einer bei seiner Durchführung anzuwendenden Rechtsnorm oder Ermessensmissbrauch.

2.5.1 Plausible Darlegung

Die Klagegründe können *in casu* plausibel dargelegt werden. Das bedeutet lediglich die Geltendmachung, das tatsächliche Vorliegen des Klagegrundes ist regelmäßig Teil der Begründetheit, d.h. dass er durch die nicht korrekte Anwendung resp. Interpretation des Merkmals „Bediensteter“ womöglich in seinen Rechten verletzt ist. Denn es ist wahrscheinlich, dass die Interpretation zu kurz greift und daher natürliche Personen, die im Dienst der EU standen, im rechtsfreien Raum zurücklässt. Eine richterliche Überprüfung fände nie statt, da ein anderer Rechtsweg hier nicht eröffnet sein kann, da die nationalen Gerichte unzuständig sind. Eine Verneinung des Klagegrundes käme einem „déni de justice“ gleich.

2.5.2 Rechtsverletzung und Rechtsverweigerung bei Nichtzuständigkeit des EuG

Ein Verweis auf das für den Antragsteller örtlich zuständige Arbeits- oder gar Verwaltungsgericht an seinem gewöhnlichen Aufenthalt Luxemburg könnte Rechtsschutz bieten, sobald der europäische Rechtsschutz versagt bleibt. Nationaler Rechtschutz ist eindeutig nicht gegeben, da kein luxemburgisches[6] oder belgisches Gericht zuständig ist nach nationalem Verfahrens-/Gerichtsverfassungsrecht. In der Sache nächstliegende Gerichtsbarkeit kann nur die der EU-Organe sein; alles andere wäre „Rechtsverweigerung“, die nach EU-Recht anerkannt ist.

Des Näheren von Belang zum Thema der Rechtsverweigerung („déni de justice“) sind folgende Bemerkungen.

In dem klassischen Fall „Algera“ hat der EuGH sich für das europäische Gemeinschaftsrecht zum Verbot des „déni de justice“ bekannt, als über die im Vertrags- und Gesetzesrecht nicht geregelte Frage des Widerrufs von Verwaltungsakten auf dem Gebiet des Beamtenrechts zu entscheiden war.

Der Gerichtshof betonte in dieser Situation, dass er, „um sich nicht dem Vorwurf einer Rechtsverweigerung auszusetzen“, verpflichtet sei, „**diese Frage von sich aus unter Berücksichtigung der in Gesetzgebung, Lehre und Rechtsprechung der Mitgliedstaaten anerkannten Regeln zu entscheiden**“ (EuGH, verb. Rechtssachen 7/56 und 3/57 bis 7/57, Urteil v. 12. 7. 1957, Bd. III, S. 83, 118.16)

Das rechtsstaatliche Gebot der Eröffnung des Zugangs zum Gericht beinhaltet also zugleich die Pflicht für das Gericht, den Fall sachlich nach Rechtsgrundsätzen zu entscheiden. In vergleichbarer Form ist das Prinzip „Zugang zur Justiz“ mit seinem

[5] EuGH, Rs. C-583/11 P (Inuit), Urteil v. 03. 10. 2013 = Juristische Schulung = JuS 2014, 184 = Juristische Arbeitsblätter = JA 2014, 236.

[6] Vgl. unsere Rezension zu: Einführung in das luxemburgische Recht von Pereira/Zenthöfer. In: *ZErb – Zeitschrift für die Steuer- und Erbrechtspraxis* 3/2019, S. 82-84.

formalen und materiellen Gewährleistungsinhalt in allen unseren mitgliedstaatlichen Rechtsordnungen anerkannt, so bereits die prominente Stelle des französischen Code civil, Art. 4, die seit nahezu 220 Jahren unverrückbar lautet[7]: *Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra ętre poursuivi comme coupable de déni de justice.*

Für die Folgerungen[8], die aus diesem Prinzip für das europäische Gemeinschaftsrecht zu ziehen sind, kann man vor allem auf die Entscheidung des EuGH im Fall „Les Verts" abstellen. In dieser Rechtssache entschied der Gerichtshof, dass die Europäische Gemeinschaft „eine Rechtsgemeinschaft" darstellt und „ein umfassendes Rechtsschutzsystem" geschaffen hat[9].

Das EuG ist dieser Konzeption in seinem Urteil in der Rechtssache „Solgema" vom 8. 10. 2008 ausdrücklich gefolgt und hat sie auf die Europäische Agentur für den Wiederaufbau (EAR) folgendermaßen angewandt:

„Aus diesem Urteil kann der allgemeine Grundsatz abgeleitet werden, dass jede Handlung einer Gemeinschaftseinrichtung, die dazu bestimmt ist, Rechtswirkungen gegenüber Dritten zu erzeugen, gerichtlich nachprüfbar sein muss. Zu Art. 7 EG zählte *in casu* die Europäische Kommission unstrittig. Jedoch ist die Situation der Gemeinschaftseinrichtungen mit der Befugnis, Handlungen vorzunehmen, die dazu bestimmt sind, Rechtswirkungen gegenüber Dritten zu erzeugen, identisch mit der Situation, die zum Urteil „Les Verts" führte: In einer Rechtsgemeinschaft kann es nicht hingenommen werden, dass solche Handlungen der richterlichen Kontrolle entzogen werden.[10]

2.6 Form und Frist

Die Klagefrist beträgt zwei Monate ab Bekanntgabe oder Kenntnisnahme des Klägers von der angegriffenen Handlung, vgl. Art. 263 VI AEUV. Bezüglich der Fristberechnung sind Art. 49 ff. VerfO EuGH, bzw. Art. 101 f. VerfO EuG[11] zu beachten.

Die Klage muss schriftlich erhoben werden, vgl. Art. 21 Satzung EuGH. Zum Inhalt der Klageschrift siehe gleichfalls Art. 21 Satzung EuGH.

Da konkret allerdings davor eine Beschwerde gemäß § 46 § 2 VerfO EuG vorausgesetzt wird, wird zur Sicherheit angeraten, zunächst noch eine Beschwerde gegen ein etwaiges Ablehnungsschreiben zu formulieren und bei selbiger Stelle einzureichen.

Notwendigkeit einer vorhergehenden Beschwerde nach Art. 90 Beamtenstatut, sobald dies analog auf „sonstige Bedienstete" anwendbar ist gemäß Art. 90 der **VERORDNUNG Nr. 31 (EWG) 11 (EAG) über das Statut der Beamten und über die Beschäftigungsbedingungen für die sonstigen Bediensteten der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft (ABl. 45 vom 14. 6. 1962, S. 1385)**[12].

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[7] Legifrance, Code civil promulguée le 15 mars 1803. Weiterführend: Gergen, Commémorer les 210 ans du Code Napoléon (1804-2014) : La traduction latine du Code civil réalisée par le Père Gibault de Poitiers. In: *Les Cahiers du droit luxembourgeois* 22 (2014), S. 23-44; Ders., Gerichtsbarkeit in Napoleonischer Zeit. Neuordnung des Gerichtswesens, Trennung von Justiz und Verwaltung, Cinq Codes, Rheinische Institutionen, Appellationsgericht Trier. In: *Recht. Gesetz. Freiheit. 200 Jahre Pfälzisches Oberlandesgericht Zweibrücken, Ausstellungskatalog*, Veröffentlichungen der Landesarchivverwaltung Rheinland-Pfalz Band 121, Koblenz/St. Ingbert 2015, S. 26-35. Sowie Ders., Vorzeitige Auflösung einer französischen SCI nach Art. 1844-7, 5° Code civil. In: *ZErb – Zeitschrift für die Steuer- und Erbrechtspraxis* 5/2019, S. 109-111.

[8] In dieser Hinsicht kann das Großthema der Translation von Recht angeschnitten werden. Dazu: Gergen, Rezeption, Translation und Examination bei grenzüberschreitenden Rechtsfällen. In: *Les Cahiers du droit luxembourgeois* 21 (2014), S. 21-59, sowie Ders., Translation von und durch Normen. Forschungsansätze zur juristischen Übersetzung. In: *Pasicrisie luxembourgeoise* 4/2014, S. 309-336.

[9] M. Jaeger, Les voies de recours sont-elles des vases communicants? In: G. C. Rodriguez Iglesias et al. (Hrsg.), *Mélanges en hommage à Fernand Schockweiler*, Baden-Baden 1999, S. 233ff.

[10] EuGH, Rs. 294/83, Les Verts/Europäisches Parlament, Slg. 1986, S. 1339, Rn. 23.18 EuG, Rs. T-411/06, Sogelma, Urteil v. 8. 10. 2008, Rn. 37; EuGH, Rs.C-385/07 P, Der Grüne Punkt, Urteil v. 16. 7. 2009.

[11] Zehntes Kapitel
FRISTEN
Artikel 101
§ 1 Die in den Verträgen, in der Satzung und in dieser Verfahrensordnung vorgesehenen gerichtlichen Fristen werden wie folgt berechnet:
a) Ist für den Anfang einer nach Tagen, Wochen, Monaten oder Jahren bemessenen Frist der Zeitpunkt maßgebend, zu dem ein Ereignis eintritt oder eine Handlung vorgenommen wird, so wird bei der Berechnung dieser Frist der Tag, in den das Ereignis oder die Handlung fällt, nicht mitgerechnet.
b) Eine nach Wochen, Monaten oder Jahren bemessene Frist endet mit Ablauf des Tages, der in der letzten Woche, im letzten Monat oder im letzten Jahr dieselbe Bezeichnung oder dieselbe Zahl wie der Tag trägt, an dem das Ereignis eingetreten oder die Handlung vorgenommen worden ist, von denen an die Frist zu berechnen ist. Fehlt bei einer nach Monaten oder Jahren bemessenen Frist im letzten Monat der für ihren Ablauf maßgebende Tag, so endet die Frist mit Ablauf des letzten Tages dieses Monats.
c) Ist eine Frist nach Monaten und nach Tagen bemessen, so werden zunächst die vollen Monate und dann die Tage gezählt
d) Eine Frist umfasst die gesetzlichen Feiertage, die Sonntage und die Samstage.
e) Der Lauf einer Frist wird durch die Gerichtsferien nicht gehemmt.
§ 2 Fällt das Ende einer Frist auf einen Samstag, Sonntag oder gesetzlichen Feiertag, so endet die Frist mit Ablauf des nächstfolgenden Werktags. Das vom Gerichtshof aufgestellte und im Amtsblatt der Europäischen Union veröffentlichte Verzeichnis der gesetzlichen Feiertage gilt auch für das Gericht.
Artikel 102
§ 1 Beginnt eine Frist für die Erhebung einer Klage gegen eine Maßnahme eines Organs mit der Veröffentlichung der Maßnahme, so ist diese Frist im Sinne von Artikel 101 § 1 Buchstabe a vom Ablauf des vierzehnten Tages nach der Veröffentlichung der Maßnahme im Amtsblatt der Europäischen Union an zu berechnen.
§ 2 Die Verfahrensfristen werden um eine pauschale Entfernungsfrist von zehn Tagen verlängert.

[12] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1962R0031:20140101:DE:PDF [12. 04. 2021].

Art. 90 lautet wie folgt:
TITEL VII
BESCHWERDEWEG UND RECHTSSCHUTZ
Artikel 90

(1) Jede Person, auf die dieses Statut Anwendung findet, kann einen Antrag auf Erlaß einer sie betreffenden Entscheidung an die Anstellungsbehörde richten. Diese teilt dem Antragsteller ihre begründete Entscheidung binnen vier Monaten nach dem Tag der Antragstellung mit. Ergeht innerhalb dieser Frist kein Bescheid, so gilt dies als stillschweigende Ablehnung, gegen die eine Beschwerde nach Absatz 2 zulässig ist.

(2) Jede Person, auf die dieses Statut Anwendung findet, kann sich mit einer Beschwerde gegen eine sie beschwerende Maßnahme an die Anstellungsbehörde wenden; dies gilt sowohl für den Fall, daß die Anstellungsbehörde eine Entscheidung getroffen hat, als auch für den Fall, daß sie eine im Statut vorgeschriebene Maßnahme nicht getroffen hat. Die Beschwerde muß innerhalb einer Frist von drei Monaten eingelegt werden. Für den Beginn der Frist gilt folgendes:

Die Frist beginnt am Tag der Bekanntmachung der Maßnahme, wenn es sich um eine allgemeine Maßnahme handelt; sie beginnt am Tag der Mitteilung der Entscheidung an den Empfänger, spätestens jedoch an dem Tag, an dem dieser Kenntnis davon erhält, wenn es sich um eine Einzelmaßnahme handelt; besteht jedoch die Möglichkeit, daß eine Einzelmaßnahme einen Dritten beschwert, so beginnt die Frist für den Dritten an dem Tag, an dem dieser Kenntnis von der Maßnahme erhält, spätestens jedoch am Tag der Bekanntmachung der Maßnahme; sie beginnt am Tag, an dem die Beantwortungsfrist abläuft, wenn sich die Beschwerde auf die stillschweigende Ablehnung eines nach Absatz 1 eingereichten Antrags bezieht. Die Anstellungsbehörde teilt dem Betreffenden ihre begründete Entscheidung binnen vier Monaten nach dem Tag der Einreichung der Beschwerde mit. Wird innerhalb dieser Frist keine Antwort auf die Beschwerde erteilt, so gilt dies als stillschweigende Ablehnung, gegen die eine Klage nach Artikel 91 zulässig ist.

Zur Begründetheit (II.) geht unser Beitrag auf den Begriff des „Bediensteten" ein.

3. Zur Begründetheit

Im Kern geht es um das Merkmal „Bediensteter", hier genderkonform und inklusionsgerecht aufgefasst, im Folgenden in der genannten Form zur besseren Lesbarkeit einheitlich in Gebrauch. Hierzu bedarf es eines Rundkurses zur Ausübung einer Amtstätigkeit durch ein Organ oder einen Bediensteten der Union. Die Durchmessung und Abgrenzung des Begriffes begegnet im Staatshaftungsrecht und wie im Erörterungsfall, wenn es sich um aktives Dienstrecht resp. Ansprüche (Versicherungs- und Versorgungsleistungen) daraus handelt. Anknüpfungsbegriff ist primär die „Organschaft".

3.1 Organe der Union

„Unionsorgan" im Sinne des Art. 340 Abs. 2 AEUV (Art. 288 Abs. 2 EG a.F.) sind in erster Linie die in Art. 13 EUV (Art. 7 EG a.F.) genannten Organe, also das Europäische Parlament, der Rat, die Kommission, der Rechnungshof und der EuGH. In der Rechtspraxis sind bislang nur Ansprüche wegen Maßnahmen des Rates oder der Kommission relevant geworden.[13]

Der Organbegriff des Art. 340 AEUV (Art. 288 EG a.F.) ist jedoch weiter als der des Art. 13 EUV (Art. 7 EG a.F.) und umfasst alle Einrichtungen, die „im Namen und für Rechnung" der Union handeln[14]).

Umstritten ist zum Beispiel die Organqualität von Ausschüssen, die durch den Vertrag selbst oder durch Handlungen der Organe eingesetzt worden sind[15]. Eine bloß beratende Funktion schließt jedenfalls eine Haftung der Union für den Ausschuss nicht aus, da auch durch Beratung einem Rechtsträger ein Schaden zugefügt werden kann[16]. Damit liegt im Haftungsrecht eine weite Auslegung des Terminus zugrunde, der festgehalten wird. Keine Organe im Sinne des Art. 340 AEUV (Art. 288 EG a.F.) sind indessen Fraktionen des Europäischen Parlaments. Ein Anspruch auf Schadensersatz wegen einer Fraktionstätigkeit kann deshalb allein vor den nationalen Gerichten und nur gegenüber den handelnden Personen geltend gemacht werden (Vgl. EuGH, Slg. 1990, I-1183, Tz. 14 f. – Le Pen).[17]

3.2 Bedienstete

Bedienstete sind die Beamten und sonstigen Bediensteten der Union[18]. Vergleichbar sind sie ergo den „Beamten im haftungsrechtlichen Sinn" im deutschen Amtshaftungsrecht. Zur besseren Ausleuchtung kann im Einzelnen die Kommentierung zu Art. 33 Grundgesetz und § 839 BGB herangezogen werden. Allerdings ist diese für die europarechtliche Interpretation hier unmaßgeblich, denn eine Auslegung „im Lichte des Europarechts" findet allein EU-binnenrechtlich statt und gerade nicht vor dem Hintergrund eines nationalen Rechts, zu dem der Antragsteller eine besondere Verbindung hat, statt (hier deutsches oder ggf. luxemburgisches Verwaltungs-/Staats-/Haftungsrecht). *A fortiori* kann ein beliebiges nationales Recht, so günstig es für die eine oder andere beteiligte Partei sein mag, nicht herangezogen werden.

Zu den Bediensteten zählen aber auch Beliehene[19]. In diesem Rahmen haftet die Union auch für nationale Behörden, die auf Weisung der Kommission Entscheidungen treffen.[20]

Gerade diese **extensive Interpretation** zulasten der EU, jedoch **zugunsten etwaiger Betroffener bzw. Geschädigter** bleibt festgehalten.

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[13] Ossenbühl/Cornils, *Staatshaftungsrecht*, 6. neubearbeitete Auflage, München, 2013, S. 684.
[14] Calliess/Ruffert – Ruffert, *EUV/AEUV: das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta: Kommentar,* 5. Aufl., München 2014, Art. 288 EG, Rn. 8. Konkret mit Hinweis auf EuGH Rs. C-370/89, Slg. 1992, I-6211, Tz. 16 – SGEEM und Etroy/EIB.
[15] Grabitz/Hilf-v.Bogdandy, *Das Recht der Europäischen Union*, hier in 71. Ergänzungslieferung, München 2020, Art. 288 EGV, Rn. 62.
[16] Grabitz/Hilf-v.Bogdandy, Art. 288 EGV, Rn. 62.
[17] Grabitz/Hilf-v.Bogdandy, Art. 288 EGV, Rn. 62.
[18] Ossenbühl/Cornils (Staatshaftungsrecht), S. 684; Calliess/Ruffert – Ruffert, Art. 288 EG, Rn. 9.
[19] Rengeling/Middeke/Gellermann, *Handbuch des Rechts der EU*, 3. Aufl., München, 2014, § 9 Rn. 32.
[20] Grabitz/Hilf-v.Bogdandy, Art. 288 EGV, Rn. 63; Detterbeck, Haftung der Europäischen Gemeinschaft und gemeinschaftsrechtliches Staatshaftungsrecht. In: *Archiv für öffentliches Recht = AöR* 2000 (Band 125), S. 202-256, hier S. 209.

3.3 Amtstätigkeit

Die „Amtstätigkeit" ist im Sinne eines „hoheitlichen Handelns" zu interpretieren[21]. Für ein **weiteres Begriffsverständnis** plädieren zurecht Gilsdorf/Neujahr[22].

Das haftungsrelevante Verhalten umfasst aktives Handeln und – sofern eine Rechtspflicht zum Handeln besteht – auch das Unterlassen[23]. Eine allerdings für die EU-Rechtsinterpretation nicht ins Gewicht fallende Parallele existiert zum deutschen Amtshaftungsrecht. Unter den Begriff der Amtstätigkeit fällt jedes Verhalten der Organe oder der Bediensteten der Union, das eine „unmittelbare innere Beziehung" zu den von den Organen wahrzunehmenden Aufgaben aufweist[24].

Handlungen der Organe repräsentieren jedenfalls insoweit Amtshandlungen, als sie die im EU- und AEUV-Vertrag eingeräumten Kompetenzen wahrnehmen[25]. Bei Beamten oder anderen Bediensteten fehlt es dementsprechend an einer Amtstätigkeit, wenn die schadenstiftende Handlung außerhalb oder nur bei Gelegenheit der Amtstätigkeit erfolgt. Es reicht gerade nicht aus, dass die schädigende Handlung während des Dienstes oder am Dienstort erfolgt ist[26]. Für Schäden, die Beamte oder Bedienstete außerhalb der Amtstätigkeit verursachen, haften diese persönlich nach den allgemeinen zivilrechtlichen Bestimmungen[27]. Die Haftung richtet sich dann nach dem Recht des Tatorts[28].

Nach der Betrachtung des Terminus „Bediensteter" nach der Stellung im Rechtskosmos (systematische Auslegung) sowie Sinn und Zweck der Norm (teleologische Auslegung) im Kontext der Organhaftung stellt sich die Frage, ob eine weite Interpretation auch im Kontext der Pensionsansprüche vom Gesetzgeber gewollt ist. „Bediensteter" könnte danach jeder sein, der in irgendeiner Form eine Dienstleistung im Rahmen einer hoheitlichen Aufgabe eines EU-Organs übernommen hat. Gleichwohl begegnen allgemeine Darstellungen für „agents contractuels" sowie Einschränkungen. Unterschieden werden Vertragsbedienstete (agents contractuels) und Zeitbedienstete bei EU-Institutionen. Bei den Vertragsbediensteten sind zwei Gruppen zu unterscheiden:

aa) Bedienstete der ersten Gruppe werden eingestellt für die Arbeit in einer Generaldirektion der Kommission (für manuelle und unterstützende verwaltungstechnische Tätigkeiten), in Ämtern der Kommission, die einer Generaldirektion unterstellt sind (wie den beiden Ämtern für Infrastruktur, Anlagen und Logistik in Brüssel und Luxemburg und dem Amt zur Feststellung und Abwicklung individueller Ansprüche), in Agenturen, so z. B. Europäische Polizeiakademie (CEPOL), Europäisches Organ zur Stärkung der justiziellen Zusammenarbeit (Eurojust), Europäisches Polizeiamt (Europol), Europäische Umweltagentur (EEA), Europäische Agentur für Flugsicherheit (EASA) oder auch das Europäische Zentrum für die Förderung der Berufsbildung (Cedefop) und in Vertretungen und Delegationen der Kommission. Bei Vertragsbediensteten dieser Gruppe bestehen längerfristige Beschäftigungsaussichten, nach einem ersten befristeten Beschäftigungsverhältnis mit einer Laufzeit von höchstens fünf Jahren, das höchstens für weitere fünf Jahre verlängerbar ist, können unbefristete Beschäftigungsverhältnisse eingegangen werden.

bb) Bedienstete der zweiten Gruppe werden bei den Generaldirektionen der Kommission eingesetzt, um Kommissionsbedienstete zeitweise zu ersetzen, in Zeiten hohen Arbeitsdrucks den akuten Mangel an EU-Beamtinnen und -Beamten auszugleichen oder befristet Arbeiten durchzuführen und so in besonderen Sachgebieten, für die keine EU-Beamtinnen bzw. -Beamte mit den erforderlichen Fähigkeiten zur Verfügung stehen, zusätzliche Kapazitäten bereitzustellen. Das Beschäftigungsverhältnis dauert höchstens drei Jahre und mindestens drei Monate.

Zu den Zeitbediensteten bei EU-Institutionen wird schließlich folgendermaßen ausgeführt: Bedienstete auf Zeit können zur Ausübung sehr unterschiedlicher Aufgaben z. B. zur Besetzung auf Zeit eingerichteter Planstellen oder für fachlich hoch spezialisierte Stellen, zur Behebung von Personalmangel in Fällen, in denen die Reservelisten aus Auswahlverfahren ausgeschöpft sind, für die Büros der Kommissionsmitglieder („Kabinette") oder zur Deckung von Sonderbedarf im Bereich Forschung eingesetzt werden. Die Bestimmungen über die Dauer des Beschäftigungsverhältnisses und der Verlängerungsmöglichkeiten sind verschieden, doch lässt sich generell sagen, dass Zeitbedienstete für höchstens sechs Jahre eingestellt werden (außer Zeitbedienstete, die in Büros der Kommissionsmitglieder eingesetzt sind, dort ist die Beschäftigungsdauer an das Mandat des Kommissionsmitglieds geknüpft).

Die Dienststelle zahlt bei beiden Einsatzmöglichkeiten keine Dienstbezüge und/oder Auslandsdienstbezüge. Die Vergütung hängt in der jeweiligen Funktionsgruppe und von der Berufserfahrung ab.[29]

Die Darstellung geht allerdings nicht auf Einschränkungen ein. Diese werden in den durch die EU-Kommission vorgelegten „conditions générales" geprägt:

- Bezeichnung als „freelancer" und expliziter Ausschluss der Pensionsansprüche und des Aufbaus derselben mittels regelmäßiger Zahlungen wie Beamte und sonstige Bedienstete
- Reine Versicherungsleistungen für Arbeitsunfähigkeit in Eigenregie

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[21] Rengeling/Middeke/Gellermann, § 9 Rn. 33.

[22] Siehe in: Von der Groeben / Schwarze / Hatje (Hrsg.): *Europäisches Unionsrecht. Vertrag über die Europäische Union - Vertrag über die Arbeitsweise der Europäischen Union - Charta der Grundrechte der Europäischen Union, Kommentar,* hier 7. Auflage, vier Bände, München 2015, Art. 288 EG, Rn. 28.

[23] Ossenbühl/Cornils (Staatshaftungsrecht), S. 685; Detterbeck, *AöR = Archiv für öffentliches Recht* 125, 202, 210.

[24] Detterbeck, AöR 125, 202, 210; Grabitz/Hilf-v.Bogdandy, Art. 288 EGV, Rn. 65.

[25] Grabitz/Hilf-v.Bogdandy, Art. 288 EGV, Rn. 64-65.

[26] Grabitz/Hilf-v.Bogdandy, Art. 288 EGV, Rn. 66.

[27] Ossenbühl/Cornils (Staatshaftungsrecht), S. 668.

[28] Rengeling/Middeke/Gellermann, § 9 Rn. 38.

[29] Diese Darstellung folgt derjenigen der Berliner Senatsverwaltung, siehe unter https://www.berlin.de/sen/europa/europa-in-berlin/europakompetenz/artikel.34075.php - abgerufen 06.04.2021.

Den „conditions générales“ widersprechen ggf. aber wesentliche Gründe, die für die Gleichstellung von Tätigkeiten vertraglich Betroffener mit den sonstigen Bediensteten zu sprechen, weswegen eine analoge Anwendung des Merkmals „sonstiger Bediensteter“ nicht allein bloß „passend“, sondern europarechtlich-methodologisch und aus der europäischen Rechtsgeschichte entwickelt, geboten ist.

4. Neue Ansätze der Auslegung „sonstige Bedienstete“

Dieser Auslegungsweg begründet sich wie folgt.

1) Falsche Bezeichnung schadet nicht, sie darf a fortiori *nicht schaden.*

Falsa demonstratio non nocet. Die irrtümlich als „Freelance“-Tätigkeit in den „conditions générales“ bezeichneten und ausgewiesenen Tätigkeiten dürfen nicht zulasten des Beschäftigten ins Feld geführt werden, zumal die Realität die eines Bediensteten war. Dies lag in örtlicher, zeitlicher und vor allem substanzieller Hinsicht vor. Also wenn eine „attestation“ z.B. über 1500 „jours de travail“ (Arbeitstage) auflistet.

2) Akkreditierte Tätigkeit

Wird eine Person über gut 10 Jahre mit Tätigkeiten betraut und führte damit hoheitliche Tätigkeiten aus dann drängt sich der Vergleich mit einem „Beliehenen“ verwaltungs- und dienstrechtlich auf: Der Tätige übt hoheitliche Tätigkeiten aus, die zwar ein Beamter ebenso gut durchführen könnte, doch wurde die Person damit betraut, weil sie thematisch der Sache sehr nahestand, entsprechende Kompetenzen einbrachte und qualitativ beanstandungsfrei wie regelmäßig resp. notorisch Dienste ausfüllte. Im Übrigen stand die Person auch haftungsrechtlich wie ein Bediensteter, was oben ausführlich ausgeführt wurde und für eine weite Interpretation des Begriffes „Bediensteter“ ins Feld geführt werden darf.

3) Keine Scheinselbständigkeit

Als *argumentum e contrario* sei entwickelt, dass eine solch intensiv und lange anhaltende Tätigkeit nicht in eine zumindest sonstige Bedienstetenstellung einmünden soll, weil sie für den Tätigen rechtsmissbräuchlich ist, eine Scheinselbständigkeit provoziert und nach EuGH-Rechtsprechung in eine Verstetigung des Arbeitsverhältnisses einmünden müsste, um Kettenarbeitsverträge und -beauftragungen zu vermeiden.

4) Sozialversicherungspflichtigkeit

In diesem Ausmaß hätte eine Freelance-Tätigkeit vorher enden bzw. in ein verstetigtes Bedienstetenverhältnis einbiegen müssen. Dass ein Betroffener keine Sozialversicherungsbeiträge entrichten durfte, kann nicht zu seinen Lasten gehen. Daher ist der Beschwerde, hilfsweise später der Klage stattzugeben. Ferner sind alle Nachteile zu beheben, die zulasten des Betroffenen nachhaltig gewirkt haben und wirken (werden). Dies fließt aus der Nichtigkeitsklage: Art. 266 I AEUV verordnet den betroffenen Organen eine Folgenbeseitigungspflicht. Daraus folgt, dass die Organe schon vorher darauf hinarbeiten müssen, solche Folgenbeseitigungspflichten im Vorfeld zu vermeiden und EU-Recht richtig anzuwenden.

5) Ergebnis: Ermessensreduzierung auf Null

Die EU-Kommission muss die Stellung des Betroffenen als „sonstiger Bediensteter“ mithin anerkennen. Ihr Ermessensspielraum verdichtet sich und strebt mithin gegen Null.

Il postliminio di Ostilio Mancino*

(Hostilius Mancinus' Postliminium)

*Stefano Barbati***

Abstract

The purpose of the article is to inquire thoroughly into the sources about Mancinus' postliminium. The most relevant sources for the legal issues related to the topic are Cicero, Pomponius and Modestinus. Common source of those authors are the 18th libri iuris civilis of Quintus Mucius, published around 90 b. C., in which the matter was discussed in the heading related to postliminium, according to its explanation in the dialogues on tilgen ius civile, published by the jurist Brutus between 135 and 133 b. C., and to what Quintus Mucius' father, Publius Mucius, has told his son during his education. The essay shows at first how all the relevant issues took place during 136 b. C.: the surrendering (deditio) of the past (137 b. C.) consul Mancinus to the enemies (the Numantini), their refusal to accept him, his return to Rome, his entrance to the Senate, his expulsion decreed by a tribune and the immediately following discussion on Mancinus' status in the Senate between the senator Brutus, preeminent jurist, and the pretor Publius Mucius, as well preeminent jurist. To solve the groovy state of our sources, the essay distinguishes among 6 relevant topics: Publius Mucius' thought; Brutus' thought; the content of the statute law enacted as to regard Mancinus' case; Quintus Mucius' interpretation of it (90 b. C.); Cicero's interpretation of it (between 70 and 44 b. C.); Modestinus' interpretation of it (around 240 a. C.). On each of those topics, the article enlightens at first the state of the art and then proposes the author's view. The author thinks that Publius Mucius adhered to the traditional nullity of the deditus' postliminium, no matter if he was accepted or not by the enemies; that Brutus thought that a deditus rejected by the enemies was not a deditus, since deditio had to be conceived as a bilateral instead of an unilateral act; that the statute law enacted on the case adhered to Brutus' view because of its approval by the senator and preeminent jurist Manilius, counselor of the consul Furius Philus who proposed the law itself to the people's assembly: the statute law confirmed Mancinus's citizenship instead of reinstalling him into Roman citizenship; that also Quintus Mucius adhered to Brutus' new conception, followed, with some misunderstanding, by Cicero; that Modestinus, living far away from the later Republic, fell into deep misunderstanding of Mancinus' case, whose he read tilgen in commentaries on the work of Quintus Mucius and Sabinus.

Keywords: *Roman Law; Later Roman Republic; Law of Persons; Relationships with Foreign People; Jurisprudence.*

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1. La vicenda di Ostilio Mancino suscitò una vasta eco nella società romana, riflessa nelle numerose fonti in tema.[1]

Qui interessano quelle che presentano il problema giuridico che pose il suo rientro a Roma, e che si manifestò quando egli decise, da senatore quale era anteriormente alla sua *deditio* ai Numantini, di fare rientro in Senato, in occasione di una sua seduta.

Quaestio iuris che spaccò *in primis* i giuristi contemporanei agli eventi, che si vedranno consistere nel pretore del 142, Marco Giunio Bruto, e nel pretore del 136, Publio Mucio Scevola.

Lo testimonia Cicerone, quando, in quello «smagliante dialogo»[2] sulla figura, a tutto tondo, dell'avvocato, che vede protagonisti i due principi del foro dell'epoca in cui l'Arpinate ambienta l'azione, vale a dire la prima decade del settembre del

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* Il presente contributo afferisce al progetto di ricerca *Das postliminium der Personen und der Sachen im römischen Recht*, finanziato dalla fondazione Gerda Henkel di Düsseldorf (AZ 12/V/16), a cui va ancora tributato un ringraziamento.

Scioglimento delle sigle di seguito adottate:
RE = Real Enciclopädie der Classischen Altertumswissenschaft (Hrsg. PAULY, A. - WISSOWA, G.);
RISG = Rivista italiana per le scienze giuridiche;
SDHI = Studia et documenta historiae et iuris.
Se, nella citazione da sede di ripubblicazione, si omette l'indicazione tra parentesi dell'anno originale di edizione, ciò significa che lo scritto è inedito.

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1 Per l'elenco sia consentito rinviare a CRIFÒ, G., Sul caso di C. Ostilio Mancino. In: BAGNALL, R.S. - HARRIS, W.V. (eds.), *Studies A.A. Schiller*, Leiden, 1986, p. 19-32, part. p. 19 e nt. 1.

2 Come lo definisce BONA, F., Cicerone e i libri iuris civilis di Quinto Mucio Scevola (1985). In: *Lectio sua. Studi editi e inediti di diritto romano*, Padova, 2003, II, p. 833-909, spec. p. 835. «Brillante dialogo, capolavoro tra gli scritti retorici di Cicerone», «pagine… smaglianti di un'opera celebrata fin dal suo primo apparire» (BONA, F., L'ideale retorico ciceroniano ed il ius civile in artem redigere [1980]. In: *Lectio sua*, cit., II, p. 717-831, *praec*. p. 734, p. 825). «Smaglianti libri sul *perfectus orator*» (BONA, F., Il docere respondendo e il discere audiendo nella tarda Repubblica. In: *Lectio sua*, cit., II, p. 1131-1160, part. p. 1143 nt. 36).

91, dunque i due censori in carica, Lucio Licinio Crasso e Marco Antonio, nel *de oratore* – si diceva –, l'Arpinate fa dire (Cic. *de orat*. 1.238) ad Antonio che «… nella controversia relativa a Ostilio Mancino… vi fu un aspro dibattito in punto di diritto fra gli stessi massimi esperti della materia» (*… in C. Hostilii Mancini controversia… fuit inter peritissimos homines summa de iure dissensio*).

Tale punto controverso di diritto fu poi di ardua comprensione per gli interpreti antichi, anche a distanza temporale relativamente breve dagli eventi (nei tempi dilatati dell'antichità).

A maggior ragione, perciò, lo è fra gli studiosi moderni, calati in un contesto storico inevitabilmente eterogeneo rispetto a quello degli inizi dell'ultimo secolo della Repubblica romana.

Prima di presentare sommariamente la vicenda storica, è bene riportare subito, in ordine cronologico discendente, le fonti giuridicamente rilevanti per la fattispecie. Va premesso che il sostantivo *deditio* e il verbo *dare* vengono volutamente tradotti in maniera ambivalente, cioè con i termini «abbandono/consegna» e i verbi «abbandonare/consegnare», per restituire le due diverse interpretazioni rese da Publio Mucio e Bruto sul punto: ad avviso del primo era scontato infatti che la *deditio* fosse atto unilaterale, di abbandono, mentre il secondo la concepì, innovativamente, come atto bilaterale, secondo quanto si avrà qui modo di vedere in dettaglio.

Cic. *Caec*. 98: «… Ma chi sia stato abbandonato/consegnato dal capo dei feziali o venduto dal suo avente potestà o dal popolo, in base a quale diritto perde la cittadinanza? Rispondo: un cittadino romano viene abbandonato/consegnato per sciogliere la città da un impegno solenne; e quand'egli è stato accettato da coloro a cui è stato consegnato, appartiene a questi ultimi; ma, se non lo accettano, come i Numatini verso Mancino, egli conserva intatta la sua condizione e il suo diritto di cittadinanza…»[3] (*… Quid? quem pater patratus dedidit aut suus pater populusve vendidit, quo is iure amittit civitatem? Ut religione civitas solvatur civis Romanus deditur; qui cum est acceptus, est eorum quibus est deditus; si non accipiunt, ut Mancinum Numantini, retinet integram causam et ius civitatis…*).

Cic. *de orat*. 1.181-182 (parla Crasso): «Ometto di citare parecchi altri esempi di cause importantissime, che sono innumerevoli. Spesso può accadere che poggi su una questione di diritto la nostra stessa sorte di uomini[4]. Se infatti il tribuno della plebe Publio Rutilio, figlio di Marco, ordinò che fosse espulso Caio Mancino, ex console, uomo assai valente e di nobilissima stirpe, dopo che questi era rientrato in patria e aveva dato per scontato di potere entrare in Senato – a causa dell'ostilità ingenerata dall'accordo di pace con i Numantini il *pater patratus* lo aveva infatti abbandonato/consegnato, sulla base di un senatoconsulto, ai Numantini, che non lo avevano però ricevuto –, adducendo Rutilio a fondamento dell'espulsione che Mancino non fosse più cittadino, dal momento che l'inveterata consuetudine voleva che chi era stato venduto dal proprio avente potestà o dal popolo, o chi era stato abbandonato/consegnato dal *pater patratus*, non beneficiasse di alcun postliminio, ebbene, tra tutte le fattispecie civilistiche, quale causa e controversia più importante potremmo mai rinvenire di quella che riguardi la posizione sociale, la cittadinanza, la libertà, la stessa vita di un ex console? Tanto più che essa non consisteva in un reato, che egli potesse negare di avere commesso, ma in una questione di diritto privato…» (*Omitto iam plura exempla causarum amplissimarum, quae sunt innumerabilia; capitis nostri saepe potest accidere ut causae versentur in iure. Etenim si C. Mancinum nobilissimum atque optimum virum atque consularem, cum propter invidiam Numantini foederis pater patratus ex S.C. Numantinis dedidisset eumque illi non recepissent posteaque Mancinus domum revenisset neque in senatum introire dubitasset, P. Rutilius M. f. tr. pl. iussit educi, quod eum civem negaret esse, quia memoria sic esset proditum quem pater suus aut populus vendidisset aut pater patratus dedisset, ei nullum esse postliminium, quam possumus reperire ex omnibus rebus civilibus causam contentionemque maiorem quam de ordine, de civitate, de libertate, de capite hominis consularis, praesertim cum haec non in crimine aliquo, quod ille posset infitiari, sed in civili iure consisteret?*).

Cic. *de orat*. 2.137 (parla Antonio): «… Se consideriamo infatti la causa di Mancino in relazione al solo Mancino, ogni volta che un cittadino abbandonato/consegnato al nemico dal capo dei feziali non sarà ricevuto, nascerà una nuova questione. Se invece quella controversia genera la questione (astratta) se il soggetto abbandonato/consegnato dal *pater patratus*, e non ricevuto, benefici o meno del postliminio, la persona di Mancino non riveste alcun interesse né per la tecnica forense né per gli argomenti a disposizione della difesa»[5] (*… Nam si Mancini causam in uno Mancino ponimus, quotienscumque is, quem pater patratus dediderit, receptus non erit, totiens causa nova nascetur, sin illa controversia causam facit, videaturne ei quem pater patratus dediderit, si is non sit receptus, postliminium esse, nihil ad artem dicendi nec ad argumenta defensionis Mancini nomen pertinet*).

Cic. *top*. 37: «… Sulla base di questa etimologia (*sc*. quella di *postliminium* proposta da Quinto Mucio)[6] può sostenersi, nella fattispecie concernente Mancino, che egli abbia fatto ritorno a titolo di postliminio; non si perfezionò la *deditio* perché non avvenne la ricezione; infatti non possono concepirsi né *deditio* né donazione senza accettazione»[7] (*… Quo genere etiam Mancini causa defendi potest, postliminio redisse; deditum non esse, quoniam*

[3] Trad. CASORATI, F., *Marco Tullio Cicerone. L'orazione per Aulo Cecina*. Milano, 1973, p. 104, con modifiche.

[4] Traduzione di questa frase – «può… uomini» – di GUARINO, A., *La coerenza di Publio Mucio*. Napoli, 1981, p. 100.

[5] Trad. MARINO, R. In: LI CAUSI, P. - MARINO, R. - FORMISANO, M., *Marco Tullio Cicerone. De Oratore. Traduzione e commento*, Alessandria, 2015, p. 173, con modifiche.

[6] Sulla quale si tornerà più dettagliatamente nella monografia che si intende pubblicare quale frutto principale del progetto di ricerca menzionato sopra nt.*, e che verterà in particolare sul postliminio delle *res*. V. comunque, succintamente, oltre § 4.

[7] «Sulla base di questo genere può essere difesa anche la causa di Mancino, sostenendo che egli sia ritornato per postliminio. Costui non fu consegnato, perché non fu accettato. Non si può intendere, infatti, una *deditio* o una donazione senza accettazione» (CANTARONE, P., Ius controversum e controversie giurisprudenziali nel II secolo a.C. In: *Philia. Scritti G. Franciosi*, I, Napoli, 2007, p. 405-463, part. p. 431).

non sit receptus; *nam neque deditionem neque donationem sine acceptione intellegi posse*).

Cic. *off*. 3.109: «… la stessa cosa accadde molti anni dopo, quando C. Mancino parlò a favore della proposta di legge che Lucio Furio e Sesto Atilio portarono, sulla base di un senatoconsulto, all'approvazione del popolo: proposta di legge che prevedeva che fosse abbandonato/consegnato ai Numantini, con i quali aveva concluso un accordo di pace senza l'autorizzazione del Senato; approvata la proposta di legge, fu abbandonato/consegnato ai nemici…» (*… quod idem multis annis post C. Mancinus, qui, ut Numantinis, quibuscumque sine senatus auctoritate foedus fecerat, dederetur, rogationem suasit eam, quam L. Furius, Sex. Atilius ex senatus consulto ferebant*; *qua accepta est hostibus deditus…*).

Pomp. 37 *Q.M.*, D. 50. 7. 18: «Se qualcuno colpisce l'ambasciatore dei nemici, si ritiene che ciò sia commesso contro il diritto delle genti, poiché gli ambasciatori sono considerati inviolabili. E perciò se viene dichiarata guerra a una popolazione i cui ambasciatori si trovano presso di noi, è stato risposto che essi rimangono liberi: ciò infatti per diritto delle genti conviene che sia. E così Quinto Mucio era solito rispondere <scrive che è consueto rispondersi> che chi avesse percosso un ambasciatore dovesse essere abbandonato/consegnato ai nemici a cui gli ambasciatori appartenevano. Qualora i nemici non lo avessero accettato, ci si chiese se egli rimanesse cittadino romano: secondo alcuni lo sarebbe rimasto, per altri no, dal momento che l'autorizzazione popolare alla consegna/abbandono equivarrebbe ad espulsione dalla comunità, come avverrebbe se fosse interdetto all'acqua e al fuoco. Opinione della quale sembra fosse Publio Mucio. Ciò è stato dibattuto soprattutto nel caso di Ostilio Mancino, che i Numantini non accettarono come a loro abbandonato/consegnato: riguardo al quale fu tuttavia varata successivamente una legge, in modo tale che fosse cittadino romano, e si dice che ricoprì anche la pretura» (*Si quis legatum hostium pulsasset, contra ius gentium id commissum existimatur, quia sancti habentur legati. Et ideo, cum legati apud nos essent gentis alicuius, bellum cum eis indictum sit, responsum est liberos eos manere: id enim iuri gentium convenit esse. Itaque eum, qui legatum pulsasset, Quintus Mucius dedi hostibus, quorum erant legati, solitus est respondere <solitum esse respondi scribit*: GUARINO, A., *La coerenza di Publio Mucio*, cit. [nt. 4], p. 179 nt. 200>. *Quem hostes si non recepissent, quaesitum est, an civis Romanus maneret: quibusdam existimantibus manere, aliis contra, quia quem semel populus iussisset dedi, ex civitate expulsisse videretur, sicut faceret, cum aqua et igni interdiceret. In qua sententia videtur Publius Mucius fuisse. Id autem maxime quaesitum est in Hostilio Mancino, quem Numantini sibi deditum non acceperunt: de quo tamen lex postea lata est, ut esset civis Romanus, et praeturam quoque gessisse dicitur*).

Mod. 3 *reg.*, D. 49. 15. 4: «Anticamente si ritenne che coloro, i quali vengono catturati dai nemici o sono loro abbandonati/consegnati, ritornino per diritto di postliminio. Il problema se sia cittadino romano colui che, abbandonato/consegnato ai nemici, sia tornato e da noi non ricevuto è stato discusso, con posizioni contrastanti, fra Bruto e Scevola: ed è ovvio che non ottenga la cittadinanza»[8] (*Eos, qui ab hostibus capiuntur vel hostibus deduntur, iure postliminii reverti antiquitus placuit. An qui hostibus deditus reversus nec a nobis receptus civis Romanus sit, inter Brutum et Scaevolam varie tractatum est: et consequens est, ut civitatem non adipiscatur*).

Passate in rassegna le testimonianze rilevanti, della vicenda storica è presto detto.[9]

Console nel 137, il plebeo Ostilio Mancino, era impegnato nella provincia spagnola (in specie, quella citeriore, nella regione della Tarragona, l'attuale Catalogna) a domare gli irriducibili Numantini, la popolazione che, insieme ai Lusitani dell'altro lato della penisola iberica (nella provincia *ulterior*), creò maggiori problemi di sottomissione ai Romani. Accerchiato e persa ogni speranza di prendere Numanzia, Mancino scelse onorevolmente, anche su suggerimento del questore Tiberio Gracco, di salvare la vita dei cittadini romani e degli alleati Latini ed Italici, concludendo un trattato di pace con cui, in cambio non soltanto della vita ma anche della libertà, il popolo romano levava l'assedio della città.

Come purtroppo la storia insegna, simili atti di eroismo vengono per lo più scambiati per l'esatto contrario dalle classi dirigenti e dall'opinione pubblica che normalmente sta loro acriticamente dietro,[10] ragione per cui il Senato romano (a cui competeva *auctoritas* e *iussus* sopra i *foedera*: v. Cic. *off*. 3.109) non ratificò il *foedus* con i Numantini concluso dal console, una volta cessato quest'ultimo dalla carica. Su deliberazione, anzi, del Senato stesso, il console del 136 Furio Filo (insieme al collega, che qui non interessa) propose ai comizi centuriati di disporre la *deditio* di Mancino ai Numantini, legge la cui approvazione lo stesso Mancino dignitosamente caldeggiò (come visto in Cic. *off*. 3.109 e come anni prima l'Arpinate aveva fatto direttamente dire, nei primi mesi del 129, a Furio Filo stesso, che ivi – Cic. *rep*. 3.28 – attestava di avere chiesto lumi *de Numantino foedere*, prima di portare al comizio, *ex senatus consulto*, la proposta di legge sulla *deditio*, agli altri due protagonisti principali del dialogo *de re publica* inscenato in occasione delle *feriae Latinae* del 129, ossia i consolari Caio Lelio e Manio Manilio, che lo assistevano *in consilio*). Della legge in questione si fanno per l'appunto testimoni Cicerone nel *de officiis* (e nel *de re publica*) nonché Pomponio nel commento a Quinto Mucio, quindi, di fatto, Quinto Mucio nel suo trattato civilistico. L'Arpinate, una decina di anni prima, si era invece direttamente rifatto, per

[8] Trad. STOLFI, E. In: FERRARY, J.-L. - SCHIAVONE, A. - STOLFI, E., *Quintus Mucius Scaevola. Opera*, Roma, 2018, p. 341 nt. 804, con modifiche. «Anticamente si decise che coloro che fossero catturati dai nemici o ad essi consegnati potessero ritornare (in patria) per diritto di postliminio. Fra Bruto e Scevola fu variamente trattato, se fosse cittadino romano colui che, consegnato ai nemici, fece ritorno (in territorio romano) senza essere stato 'accettato' da noi. È conseguente che egli non acquisisca la cittadinanza» (CANTARONE, P., Ius controversum, cit. [nt. 7], p. 422).

[9] V. altresì GUARINO, A., *La coerenza di Publio Mucio*, cit. (nt. 4), p. 98-100.

[10] È concorde sul primo punto GUARINO, A., *La coerenza di Publio Mucio*, cit. (nt. 4), p. 98 s., che valorizza peraltro (ex Vell. Pat. *hist. Rom*. 2. 2. 1), l'attività persuasiva del questore Tiberio Gracco sul console, il quale, secondo lo studioso, non si sarebbe altrimenti convinto di concludere la pace, prefigurandosi la mancata ratifica da parte del Senato.

bocca di Crasso, nel *de oratore* (*de orat*. 1.181), al senatoconsulto, quale atto che ordinava al *pater patratus* la *deditio* di Mancino ai Numantini. *Deditio* il cui scopo – aveva una quindicina d'anni prima chiarito Cicerone nella difesa di Aulo Cecina – era quello di liberare la comunità romana dal vincolo fiduciario assunto verso i nemici da un suo membro, il quale sarebbe stato per l'appunto abbandonato/consegnato ai nemici stessi (perché essi ne facessero quanto avrebbero ritenuto opportuno). Approvata dunque la legge, condotto davanti a Numanzia Mancino, lo sventurato fu lasciato, nudo e con i polsi legati, davanti alle porte della città, ma, visto il rifiuto dei Numantini di prenderlo, egli fu ricondotto all'accampamento romano e di lì a Roma. Giunto in città, dopo qualche tempo egli fece pure ingresso in Senato, evidentemente perché, quale senatore prima della *deditio* ai Numantini, a ciò riteneva di avere diritto, una volta rientrato in patria. Sorse qui una controversia circa la fondatezza o meno di tale diritto che egli avanzava, risolta con una legge evidentemente a lui favorevole, tanto che alcune fonti riportavano che egli avesse ricoperto ancora una volta la carica di pretore, dopo questi accadimenti.

Fatti, legati agli eventi storici appena rammentati, meritevoli di essere approfonditi, sono rappresentati dal luogo e l'anno in cui si ebbe la discussione sugli effetti del ritorno di Mancino (il Senato, nel 136, come si dirà) e dall'anno di approvazione della legge concernente lo *status civitatis* di Mancino, che Pomponio indica genericamente varata *postea* le *dissensiones* nate in merito fra i giuristi (ragionevolmente ancora il 136, come si vedrà oltre § 2).

Bisognerà poi dare conto dello stato degli studi in merito (§ 3).

Piuttosto che procedere ad una frammentaria ricognizione delle posizioni assunte dai singoli autori, converrà distinguere tra gli orientamenti presenti in letteratura relativamente:

al pensiero che avrebbe espresso Publio (per taluni Quinto) Mucio sul punto (1);

a quello manifestato da Bruto (2);

al contenuto della legge votata per Mancino (3);

all'interpretazione retrospettiva della fattispecie proposta da Quinto Mucio (4);

all'interpretazione retrospettiva della fattispecie profilata da Cicerone (5);

all'interpretazione retrospettiva della fattispecie propria di Modestino (6).

Si avanzerà poi (§ 4), sempre seguendo la scansione tracciata, un'autonoma interpretazione, in certi passaggi con spunti originali, della *quaestio iuris* involta nel caso di Mancino.

2. A corollario della succintamente descritta vicenda storica di Mancino, occorre chiarire quando e dove fu discusso il problema giuridico che essa involgeva e in che anno fu votata la legge riguardante la reintegrazione del console del 137.

La legge che ne dispose la *deditio* ai Numantini fu votata nel 136, in quanto fu proposta dai consoli Furio Filo e Sesto Atilio, supremi magistrati nell'anno che nella cronologia attualmente invalsa nei Paesi europei si indica come 136 a.C.: lo mostra Cicerone, nel passo sopra riportato del *de officiis* (3.109) e nel richiamato *rep*. 3. 28.

Da ciò deriva che la discussione successiva al rientro in patria di Mancino non potette svolgersi prima del 136: e, a elidere qualsiasi dubbio, sta ancora una volta la produzione ciceroniana, che in *de orat*. 1.181 s., attesta che il caso fu discusso quando Mancino era già *consularis*, dunque scaduto dall'anno di carica.

Posto che la *deditio* avvenne nel 136 stesso,[11] appena approvata la legge in tal senso, come dichiara Cicerone in *off*. 3.109, vanno distinti due piani temporali: quando Mancino fece rientro a Roma ed entrò in Senato (a) e quando ebbe luogo la controversia giuridica che tale ingresso scatenò (b).

Se l'ex console fu lasciato a mani legate dai Feziali (Vell. Pat. *hist*. *Rom*. 2. 1. 5) davanti alle porte di Numanzia, per poi essere ripreso dall'esercito romano – preso atto del tacito rifiuto dei Numantini di riceverlo –, è ovvio che egli ritornò in città nel 136 stesso (nessun interesse vi sarebbe stato a mantenerlo nel campo delle operazioni militari). Evidentemente convinto di avere fatto valido rientro (cioè postliminio) e quindi di avere ripreso la precedente posizione, Mancino non avrà tardato a partecipare a una seduta del Senato:[12] di qui la condivisibile conclusione dottrinale che il suo ingresso in Senato ebbe luogo nel 136 (a).[13] Essa può appoggiarsi in specie al testo di *de orat*. 1.181, in cui Cicerone non appone marcatori temporali atti a distanziare il rientro di Mancino in patria dalla sua decisione di prendere parte alle sedute del Senato.

Ciò non toglie che la relativa *summa dissensio de iure* fra i *peritissimi homines* potrebbe avere avuto luogo anni dopo il 136, magari in sede scritta, affrontando il tema del postliminio, con relativi casi problematici (b).

Peritissimi homines che dal disposto combinato delle testimonianze di Pomponio e di Modestino – fonte della notizia il trattato civilistico muciano, come si vedrà (§ 3 s.) – si apprendono essere stati Publio Mucio e Bruto,[14] con piena rispondenza al periodo in cui si collocherebbe la *summa dissensio* leggendo le affermazioni di Crasso e Antonio agli inizi del settembre del 91, che verrebbe infatti spontaneo fare risalire alla generazione precedente quella dei due grandi avvocati.

L'urgenza e le implicazioni politiche del caso portano a ragionevolmente escludere che il dissenso fra Publio Mucio e Bruto circa la ripresa della precedente posizione da parte dell'ex console Mancino potesse essersi dipanato in una sede teorica quale gli scritti degli stessi, con una riflessione *a posteriori* sulle impli-

[11] E v. infatti BONA, F., Sulla fonte di Cicero, de oratore, 1, 56, 239-240 e sulla cronologia dei decem libelli di Publio Mucio (1973). In: *Lectio sua*, cit. (nt. 2), II, p. 615-679, part. p. 664.

[12] Non si hanno conferme *aliunde* che Publio Rutilio, figlio di Marco, fu tribuno della plebe nel 136, se non per l'attestazione nel *de oratore*. Sarebbe pertanto tautologica la conclusione che l'ingresso in Senato di Mancino avvenne nel 136 perché uno dei tribuni di quell'anno era Rutilio. Altro conto poi che le prosopografie concludano in tal senso proprio per la datazione storica della vicenda di Mancino: v. allora MÜNZER, FR., Rutilius 9. In: *RE*, I.A.1 (1914), p. 1249 s. nonché BROUGHTON, T.R.S., *The Magistrates of the Roman Republic* I. Cleveland, 1951, p. 487.

[13] Tacitamente in tal senso BONA, F., Sulla fonte, cit. (nt. 11), II, p. 677.

[14] Di qui l'ovvia conclusione in tal senso nella letteratura: v., per tutti, BONA, F., Sulla fonte, cit. (nt. 11), p. 664 s.

cazioni giuridiche della vicenda. Dovette essere proprio l'obiezione giuridica sollevata dal tribuno Rutilio Rufo all'ingresso di Mancino in Senato – vale a dire che la *deditio* escludeva consuetudinariamente la liceità dell'eventuale postliminio del *deditus* – a scatenare immediatamente il caso.[15] Nel passo richiamato (*de orat*. 1.181) Cicerone lo mette bene in risalto, facendo dire a Crasso che quella di Mancino era la vicenda per antonomasia in cui la stessa vita (*caput*) di un individuo dipendeva dalla soluzione di una questione giuridica, e per di più di diritto privato, non relativa alla perpetrazione o meno di un reato. Quest'ultima eventualità si risolverebbe secondo l'Arpinate su un piano fattuale, inverato dalla possibilità per l'imputato di negare l'addebito, si vedrà in giudizio se fondata o meno. Con ciò Cicerone asserisce implicitamente che le questioni giuridiche controverse si incentravano fino ad allora – 91 – sul diritto privato (del resto i dieci punti che fino ad allora avevano dato luogo a forti discussioni fra i giuristi – citati in *de orat*. 1.175-183 – riguardano tutti questioni privatistiche, ma la generalizzazione implicitamente attuata dall'Arpinate dovrebbe essere eccessiva).

Ne viene perciò che la discussione fra Bruto e Publio Mucio ebbe luogo proprio nel 136.[16]

Ciò detto relativamente al *quando*, va detto dell'*ubi*, prima di concludere con la data della legge relativa alla reintegrazione di Mancino.

Se la controversia fu accesa dal decreto di espulsione di Mancino dal Senato, fu allora proprio in Senato, dopo l'ordine di Rutilio e le motivazioni addotte dal tribuno a fondamento dell'espulsione di Mancino, che ebbe luogo il dibattito[17] (forse in un'unica piuttosto che in plurime sedute)[18]. Dalla sua soluzione dipendeva la sorte di Mancino, dunque esso non poté consistere in una discussione «a bocce ferme», dopo che lo status dell'ex console fosse stato già risolto da una legge votata in tema.

Si può ragionevolmente supporre che il dissenso fu acceso dalla contestazione, piuttosto che dall'approvazione, dell'ordine tribunizio.

Fu allora Bruto a contestare la motivazione addotta dal tribuno della plebe a sostegno del suo decreto, motivazione che fu invece a quel punto difesa da Publio Mucio (adducendo un ulteriore esempio di fattispecie in cui l'eventuale postliminio sarebbe stato inefficace), contro lo sbalorditivo attacco dell'ex pretore.

Lo sfondo storico-costituzionale non è contrario a questa ricostruzione perché Bruto era stato senz'altro nominato senatore dopo l'ultimo censimento, quale ex pretore (carica ricoperta nel 142), mentre Publio Mucio aveva partecipato alla seduta come pretore in carica (senza pertanto diritto di voto) nel 136.[19]

Il dibattito suscitato fra i *patres* e i *conscripti* circa la legittimità o meno dell'allontanamento di Mancino ordinato da Rutilio sfociò nella deliberazione – determinata dall'orientamento assunto dai senatori consolari Manilio e Caio Lelio, che consigliavano come visto il console in carica Furio Filo – con cui si suggeriva ai consoli di proporre una legge che confermasse lo *status civitatis* di Mancino, in accoglimento della tesi di Bruto, favorevole all'ex console.

Proprio a proposito della data della legge votata circa Mancino – sul cui contenuto, appena anticipato, v. meglio oltre § 4 – il relativo dubbio nasce dal fatto che Pomponio scrive che la legge sulla reintegrazione di Mancino fu votata *postea* la *dissensio* che scatenò il suo rientro. L'avverbio temporale è stato infatti interpretato in senso largo: l'ex console avrebbe preso atto della negazione del suo postliminio, optando dunque per l'esilio (onde evitare sanzioni da parte della comunità), esilio da cui fu richiamato con la legge in questione – la quale gli riattribuiva la cittadinanza –, che sarebbe stata allora varata nel 133, dopo la presa di Numanzia.[20]

L'interpretazione tradizionale, secondo cui il provvedimento fu approvato nello stesso 136,[21] risolvendo così il dubbio che i diversi punti di vista di Publio Mucio e di Bruto avevano ingenerato nella classe dirigente, è dal contesto generale della vicenda – a proposito della quale nessuna fonte accenna all'esilio di Mancino, peraltro – resa più verosimile rispetto all'ipotesi alternativa or ora menzionata.

3. Con riferimento allo stato della dottrina conviene come annunciato dare conto distintamente degli orientamenti presenti circa la posizione assunta da Publio Mucio, quella di Bruto, il contenuto della legge votata dopo il rientro di Mancino,

[15] Al contrario WIEACKER, F., *Römische Rechtsgeschichte. Quellenkunde, Rechtsbildung, Jurisprudenz und Rechtsliteratur I. Einleitung, Quellenkunde, Frühzeit und Republik*. München, 1988, p. 585, stima che la questione fosse eminentemente politica e che furono semmai i giuristi a neutralizzarla in termini giuridici, dando un primo saggio dell'argomentazione *post hoc-propter hoc*. Discutere il pensiero del Maestro di Gottinga porterebbe troppo lontano, dovendosi in tal caso affrontare i rapporti tra diritto e politica: che Rutilio avesse per qualche motivo ostilità verso Mancino non lo si può certo escludere, ma resta fermo che tutta la questione si giocò sul filo del ragionamento giuridico. Se poi quest'ultimo sia una sovrastruttura, atta a ricoprire il terreno su cui tutto ha luogo – vale a dire quello dei rapporti di forza fra chi quel terreno calca –, secondo la dottrina che fa in primo luogo capo a Marx, non fa qui mestieri di accennare: molto dipenderà dal fatto se i giuristi sappiano elevarsi sopra il terreno dei rapporti di forza e, come sempre, ciò sarà legato alla libertà che soltanto la propria forza morale può dare all'interprete.

[16] Ancora una volta in tal senso BONA, F., Sulla fonte, cit. (nt. 11), p. 677. La complessiva esposizione della vicenda da parte del Maestro (BONA, F., Sulla fonte, cit., p. 664 s., p. 677-679) mostra come egli ritenga che la *deditio*, il rientro di Mancino a Roma, il suo ingresso in Senato e il dibattito che da ciò scaturì fra Publio Mucio e Bruto avvennero tutti nel 136: i termini giuridici della controversia furono riportati da Quinto Mucio nel suo trattato civilistico. Tale impostazione si fa preferire rispetto alla generica indicazione (di BRETONE, M., *Tecniche e ideologie dei giuristi romani*[2]. Napoli, 1982, p. 16 s.) che l'«importante polemica… fra il giurista M. Giunio Bruto e il giurista P. Mucio Scevola» si svolse «intorno al 136».

[17] Giustamente in tal senso BONA, F., Sulla fonte, cit. (nt. 11), p. 677.

[18] Pensa invece che alla questione furono dedicate più sedute del consesso BONA, F., Sulla fonte, cit. (nt. 11), p. 677 i.f.

[19] Sulla carica pretoria rivestita da Publio Mucio nel 136 v. BARBATI, S., *Manio Manilio, Marco Giunio Bruto, Publio Mucio Scevola, qui fundaverunt ius civile*. Roma/Bristol, 2022, p. 164-176.

[20] V. DE VISSCHER, F., *Le régime romain de la noxalité. De la vengeance collective a la responsabilité individuelle*. Bruxelles, 1947, p. 126 i.f. V. altresì l'ulteriore letteratura citata da CRIFÒ, G., Sul caso di C. Ostilio Mancino, cit. (nt. 1), p. 30 nt. 76.

[21] Ritiene verosimile che la legge fosse stata approvata lo stesso anno, immediatamente dopo i fatti, BAUMAN, R.A., *Lawyers in Roman Republican Politics. A Study of the Roman Jurists in their Political Setting. 316-82 (BC)*. München, 1983, p. 239 e nt. 104.

e l'interpretazione retrospettiva della vicenda data da Quinto Mucio, Cicerone e Modestino.

Per ciò che riguarda il pensiero di Publio Mucio (1) sui termini giuridici del caso di Mancino, dalla chiara indicazione che emerge in tal senso dalle testimonianze di Cicerone (*de orat*. 1.181) nonché Pomponio (37 *Q.M*., D. 50. 7. 18), prevale in letteratura l'indirizzo alla stregua del quale Publio Mucio si sarebbe pronunciato per la perdita della cittadinanza da parte di Mancino, a cui non poteva rimediare il suo postliminio, in concreto inefficace.[22]

Perdita della cittadinanza perché la *deditio* era atto unilaterale, rispetto al quale era perciò irrilevante l'accettazione o meno del *deditus* da parte dei nemici: atto unilaterale che i più ritengono proprio Publio Mucio avesse equiparato all'*interdictio aqua et igni*[23] (accostamento che invece secondo altri sarebbe stato proposto da Pomponio).[24]

L'inefficacia del postliminio alla stregua di un'eccezione consuetudinaria vigente per il *deditus*, valevole anche nei casi delle bilaterali alienazioni a titolo oneroso, fuori dai confini patri (*trans Tiberim*), dell'*alieni iuris* da parte dell'avente potestà e del renitente alla leva da parte della comunità (perché non censitosi – *incensus* – oppure perché inadempiente rispetto alla chiamata alle armi – *infrequens* –), sarebbe stata invece autonomamente richiamata dal tribuno Rutilio: a sostegno della regola consuetudinaria invocata dal tribuno Publio Mucio avrebbe come detto aggiunto l'esempio, più recente, dell'*interdictus aqua et igni*.[25]

Nell'ambito del filone prevalente, va sottolineata la variante tesa a mettere in risalto l'originalità dell'opinione di Publio Mucio: infatti il principio consuetudinario – richiamato dal tribuno – circa l'esenzione dal postliminio in caso di *deditio* operata dal *pater patratus* sarebbe valso solamente in caso di *deditio* accettata dai nemici (particolare su cui il tribuno preferì non soffermarsi). Publio Mucio propose con successo l'estensione (frutto pertanto di un ragionamento estensivo piuttosto che analogico) della regola consuetudinaria – con relativa perdita della *civitas*, non rimediata dal postliminio, inefficace – alla diversa ipotesi della *deditio non accepta*, in cui versava Mancino; il pontefice valorizzava così l'aspetto sacrale della *deditio*, postulandone l'unilateralità. In tal modo la *civitas* si sarebbe comunque liberata dallo *scelus impium* commesso dal *deditus*, senza dovere dipendere o meno dall'accettazione nemica.[26]

A proposito appunto della posizione di Bruto (2) la dottrina pressoché unanime sostiene che il giurista si fosse pronunciato a favore della conservazione della cittadinanza da parte di Mancino. Il passo di Modestino consente infatti di ravvisare in Bruto uno dei *quidam*, ricordati da Pomponio, che postulò il *manere* di Mancino, *deditus non receptus*, nella cittadinanza romana.

Non è raro che non si aggiunga altro, perché nessuna motivazione è espressamente attribuita al pretore del 142 a sostegno della sua presa di posizione.[27]

Chi invece afferma – senz'altro correttamente (v. oltre § 4) – che Bruto motivò tale presa di posizione, richiama il carattere bilaterale della *deditio*, che il pretore del 142 avrebbe sostenuto, come si desumerebbe dalla *pro Caecina* e dai *topica* di Cicerone, le cui argomentazioni in senso favorevole alla struttura bilaterale della *deditio* potrebbero venire solamente da un giurista, per l'appunto Marco Bruto. Non essendo intervenuta la *receptio* nemica, non si era perfezionata la *deditio*, così come una donazione non si concludeva senza l'accettazione del donatario.[28] Vi

[22] Nella maniera più chiara HORAK, F., *Rationes decidendi*. *Entscheidungsbegründungen bei den älteren römischen Juristen bis Labeo*. Aalen, 1969, p. 239 s. Così anche BAUMAN, R.A., *Lawyers*, cit. (nt. 21), p. 238 (il quale [*Lawyers*, cit., p. 238, p. 299] ritiene peraltro la tesi di Publio Mucio «più persuasiva» e «più logica» rispetto a quella di Bruto) nonché CRIFÒ, G., Sul caso di C. Ostilio Mancino, cit. (nt. 1), p. 23. La tesi contraria di KORNHARDT, H., Postliminium in Republikanischer Zeit. In: *SDHI*, 19, 1953, p. 1-37, spec. p. 34, secondo cui Publio Mucio si sarebbe pronunciato a favore del postliminio di Mancino, è frutto di un equivoco: poiché l'autrice attribuisce erroneamente a Publio Mucio, piuttosto che a Quinto Mucio, la definizione di *postliminium* in Cic. *top*. 37, ella pensa che lo stesso Publio ne avesse fatto applicazione a Mancino. Quest'ultimo sarebbe stato considerato prigioniero di guerra, in quanto pervenuto *ad hostes*, e, come tale, avrebbe fruito del postliminio una volta rientrato in patria.

[23] In tal senso, per tutti, WIEACKER, F., Die römischen Juristen in der politischen Gesellschaft des zweiten vorchristlichen Jahrhunderts. In: BECKER, W.G. - SCHNORR VON CAROLSFELD, L. (Hrsg.), *Sein und Werden im Recht*. *Festgabe U. von Lübtow*, Berlin, 1970, p. 183-214, *praec*. p. 206 e nt. 133 nonché WIEACKER, F., *Römische Rechtsgeschichte*, cit. (nt. 15), p. 585 e nt. 68.

[24] Così CRIFÒ, G., Sul caso di C. Ostilio Mancino, cit. (nt. 1), p. 28-32. STOLFI, E., Quintus Mucius Scaevola, cit. (nt. 8), p. 340 nt. 799, lascia invece aperta la possibilità che l'analogia con l'*aqua et igni interdictio* fosse stata instaurata da Quinto Mucio.

[25] In questi termini, per tutti, PUGLIESE, G., Appunti sulla deditio dell'accusato di illeciti internazionali. In: *RISG*, 101, 1974, p. 1-44, part. p. 27.

[26] Così DE VISSCHER, F., *Le régime romain*, cit. (nt. 20), p. 123-135, part. p. 128-131. Nell'ambito della tesi dominante argomentazioni più sottili si rinvengono in GUARINO, A., *La coerenza di Publio Mucio*, cit. (nt. 4), p. 97-107, part. p. 106 s., ad avviso del quale Publio Mucio avrebbe voluto sostenere – preso atto della perdita della *civitas* a seguito della *deditio* – la reintegrazione di Mancino nel corpo civico a seguito del suo postliminio, ma, attesa l'altissima considerazione che il pontefice nutriva per la carica tribunizia (rinsaldata dalla redazione degli *annales* pontificali che egli stava in quegli anni curando), appoggiò il gesto del tribuno e le motivazioni da lui addotte (prospettazione «suggestiva, ma non suffragata sul piano giuridico»: CURSI, M.F., *La struttura del postliminium nella Repubblica e nel Principato*. Napoli, 1996, p. 68 nt. 101). V. pure WATSON A., *The Law of Persons in the Later Roman Republic*. Oxford, 1967, p. 245 s. (con argomentazioni qui non del tutto chiare) nonché CURSI M.F., *La struttura del postliminium*, cit., p. 61, p. 67.

[27] Così PUGLIESE, G., Appunti sulla deditio, cit. (nt. 25), p. 27 nonché CRIFÒ, G., Sul caso di C. Ostilio Mancino, cit. (nt. 1), p. 23 e nt. 37, p. 31. Più sfumato DE VISSCHER, F., *Le régime romain*, cit. (nt. 20), p. 127, il quale osserva come non si disponga di fonti circa le argomentazioni addotte da Bruto (v. oltre nt. 30, per la necessità del postliminio sostenuta secondo l'autore da Bruto, che non conseguiva tuttavia alla perdita della cittadinanza).

[28] In tal senso KORNHARDT, H., Postliminium, cit. (nt. 22), p. 33 nonché WIEACKER, F., Die römischen Juristen, cit. (nt. 23), p. 205 s. e, con aperta esclusione della necessità del postliminio, nt. 132. Anche BAUMAN, R.A., *Lawyers*, cit. (nt. 21), p. 238 e nt. 97 nonché WIEACKER, F., *Römische Rechtsgeschichte*, cit. (nt. 15), p. 585 e nt. 69. Così pure BEHRENDS, O., Tiberius Gracchus und die Juristen seiner Zeit – die römische Jurisprudenz gegenüber der Staatskrise des Jahres 133 v. Chr. (1980). In: AVENARIUS, M. - MÖLLER, C. (Hrsg.), *Zur römischen Verfassung*. *Ausgewählten Schriften*, Göttingen, 2014, p. 17-98, part. p. 53 s. e nt. 102, che vi vede conferma del pensiero maggiormente innovativo, fra i *tres*, di Bruto, e si chiede se la dottrina di Bruto possa avere esercitato influssi sulla concezione contrattuale della *traditio* nella scuola sabiniana (Iul. 13 *dig*., D. 41. 1. 36, passo che invero pare da interpretarsi in senso opposto a quanto voluto dallo studioso, dal momento che Giuliano asserisce ivi essere irrilevante, ai fini del trasferimento della proprietà, il dissenso circa la causa della *traditio*). «Ben possibile» la motivazione della struttura bilaterale della *deditio*, secondo Bruto, ad avviso di GUARINO, A., *La coerenza di Publio Mucio*, cit. (nt. 4), p. 104; soltanto «forse», invece, per WATSON, A., *The Law of Persons*, cit. (nt. 26), p. 246.

è anche chi[29] osserva come il testo della *pro Caecina* restituisca nella maniera più fedele il pensiero di Bruto, circa la *retentio* del proprio status e del connesso *ius civitatis* in caso di mancata *acceptio* da parte dei nemici.

Dalla conservazione della cittadinanza a causa dell'assenza di *deditio* (a struttura bilaterale) discende ovviamente che Mancino non necessitasse del postliminio perché faceva difetto il suo principale requisito di applicazione, vale a dire la perdita della *civitas* oppure (nel caso della restrizione della libertà personale subita all'estero, in guerra o meno) della *civitas libertasque*.[30]

Minoritario è l'orientamento secondo cui Bruto avrebbe invece parimenti sostenuto, come Publio Mucio, la perdita dello *status civitatis* da parte di Mancino. Se nell'immediatezza dei fatti Bruto affermò la sufficienza del postliminio per la reintegrazione di Mancino nello *status civitatis* (mentre Publio Mucio si schierò a favore della necessità di una legge che gli riattribuisse la *civitas* – soltanto essa avrebbe infatti rimediato alla nullità del postliminio del *deditus non receptus* –), riprendendo la questione del *deditus non receptus* (quello *receptus* avrebbe invece goduto pacificamente del postliminio: v. ancora oltre) da un punto di vista generale, tra il 115 e il 110 (discutendone con il giovane Quinto Mucio), egli avrebbe lievemente modificato la sua posizione. Bruto avrebbe cioè visto nella mancata *receptio* nemica un'offerta tacita del *deditus* – non più cittadino – alla comunità romana. Quest'ultima l'avrebbe potuta accettare sia tacitamente (non contestando il rientro in patria – postliminio – del *deditus*), sia espressamente, tramite la votazione di una legge di riattribuzione della *civitas*.[31]

Per quanto concerne poi il contenuto della legge votata a proposito di Mancino (3), assolutamente prevalente è la tesi secondo la quale il provvedimento legislativo fu varato presupponendo la concezione di Publio Mucio circa la perdita della cittadinanza, non rimediabile con il postliminio: la legge attribuì per l'appunto la cittadinanza a Mancino, tenendo luogo di quel postliminio escluso consuetudinariamente.[32] Circa il rapporto di Publio Mucio con la legge in questione, in generale si sottintende il favore del giurista per essa, talora esplicitato sostenendo che il provvedimento in questione fu proprio richiesto da Publio Mucio.[33]

Una variante dell'indirizzo in questione afferma che la legge fu varata dopo che, constatata la nullità del postliminio di Mancino, l'ex console andò in esilio, da cui fu richiamato dalla legge in questione, la quale lo reintegrò nei suoi diritti civici (v. già sopra § 2).[34]

Isolata è l'opinione la quale sostiene, al contrario, che la legge in esame accolse la visione di Bruto (ed altri, come si evincerebbe dal testo di Pomponio): il provvedimento confermò implicitamente la cittadinanza di Mancino, mirando a sanare la contraddizione che si era venuta a creare per il fatto che la legge di *deditio* era rimasta inefficace, non avendo i Numantini accettato Mancino ed essendo così il console rimasto cittadino.[35]

Professa l'agnosticismo, invece, chi postula che dalle fonti tramandate non è possibile prendere posizione circa il carattere conservativo (di conferma cioè della *civitas*) oppure innovativo (di attribuzione dunque della cittadinanza) della legge: esercizio comunque inutile perché «i dubbi sulla conservazione della cittadinanza da parte di Mancino e le ragioni a favore dell'unilateralità della *deditio* erano sufficientemente forti da indurre all'emanazione di una legge».[36]

Eclettica, infine, la posizione di chi postula che la legge non accolse né la visione di Publio Mucio – circa la perdita della *civitas* – né quella di Bruto – sulla conservazione della cittadinanza –: il provvedimento dispose infatti la reintegrazione *ex nunc* nella sola cittadinanza, senza volere surrogare gli effetti del postliminio, il quale avrebbe invece riattribuito, con effetto retroattivo, il patrimonio e i diritti politici. Prova ne è che Mancino riprese il posto in Senato gestendo *ex novo* la pretura, non quale ex

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[29] WIEACKER, F., *Römische Rechtsgeschichte*, cit. (nt. 15), p. 206 nt. 132.

[30] WATSON, A., *The Law of Persons*, cit. (nt. 26), p. 246, WIEACKER, F., Die römischen Juristen, cit. (nt. 23), p. 205 s. e nt. 132, GUARINO, A., *La coerenza di Publio Mucio*, cit. (nt. 4), p. 104, WIEACKER, F., *Römische Rechtsgeschichte*, cit. (nt. 15), p. 585 nt. 69. Non è qui chiaro perché DE VISSCHER, F., *Le régime romain*, cit. (nt. 20), p. 127, possa sostenere che, alla conservazione della *civitas* da parte dell'ex console, Bruto fece seguire il postliminio in capo a quest'ultimo (onde riattribuirgli anche i diritti patrimoniali?). V. anche BAUMAN, R.A., *Lawyers*, cit. (nt. 21), p. 238 nt. 97, qui risultato oscuro (l'autore non sembra sufficientemente avvertito circa la delicatezza del punto). Vaghi spunti nel senso dell'applicazione del postliminio nella prospettiva di Bruto pure in CURSI, M.F., *La struttura del postliminium*, cit. (nt. 26), p. 68.

[31] Così, complessivamente, CANTARONE, P., Ius controversum, cit. (nt. 7), p. 422 s., p. 426-433.

[32] In tal senso HORAK, F., *Rationes decidendi*, cit. (nt. 22), p. 239, GUARINO, A., *La coerenza di Publio Mucio*, cit. (nt. 4), p. 102, p. 107, BAUMAN, R.A., *Lawyers*, cit. (nt. 21), p. 238 e nt. 97, BRETONE, M., *Tecniche*[2], cit. (nt. 16), 269 s., CURSI, M.F., *La struttura del postliminium*, cit. (nt. 26), p. 65, p. 67 s., CANTARONE, P., Ius controversum, cit. (nt. 7), p. 426, p. 430-433. BAUMAN, R.A., *Lawyers*, cit., p. 238 e nt. 97, pensa che Cicerone, nella *pro Caecina* e nei *topica*, cerchi di occultare il fatto che la legge accolse la concezione di Publio Mucio, a causa dell'atteggiamento ambivalente nutrito dall'Arpinate verso Publio Mucio (su ciò v. ancora oltre nel testo). BRETONE, M., *Tecniche*[2], cit. (nt. 16), p. 269 s., osserva (in astratto a ragione) che l'*interpretatio* non poteva spingersi al punto di attribuire la *civitas* a chi l'aveva persa (e che per questo si rese necessaria l'approvazione della legge di riattribuzione della medesima).

[33] In particolare GUARINO, A., *La coerenza di Publio Mucio*, cit. (nt. 4), p. 107. O, in maniera più coerente, portato da lui stesso davanti alle centurie, come pretore in quell'anno, il 136: BAUMAN, R.A., *Lawyers*, cit. (nt. 21), p. 239 e nt. 104 (il provvedimento in questione non poteva comunque consistere in un plebiscito, vertendo in materia di cittadinanza, in accordo a una norma costituzionale romana di cui l'autore non si avvede).

[34] Gli riattribuì il titolo di cittadino, secondo DE VISSCHER, F., *Le régime romain*, cit. (nt. 20), p. 126. Lo reintegrò nel suo *status* giuridico ad avviso di WATSON, A., *The Law of Persons*, cit. (nt. 26), p. 245, p. 247 nt. 2.

[35] CRIFÒ, G., Sul caso di C. Ostilio Mancino, cit. (nt. 1), p. 23 e nt. 36, 27 s., p. 30 nt. 76. Dal canto suo STOLFI, E., Quintus Mucius Scaevola, cit. (nt. 8), p. 341 nt. 803, rileva che la legge vanificò «l'esito interpretativo per cui aveva inclinato Publio Mucio Scevola» (confermando allora la *civitas* di Mancino?).

[36] PUGLIESE, G., Appunti sulla deditio, cit. (nt. 25), p. 29.

consolare.[37] La legge che reintegrò senza effetti retroattivi l'ex console nella cittadinanza tenne quanto meno in conto la visione più restrittiva, circa la perdita della cittadinanza da parte di Mancino, secondo il tribuno Rutilio non rimediabile nemmeno dal postliminio.[38]

Relativamente a Quinto Mucio (4), occorre considerare quattro punti: se (a) il console del 95 trattò della fattispecie di Mancino nei suoi *libri iuris civilis*; se (b), nell'ipotesi positiva, Modestino consultò o meno direttamente il trattato civilistico muciano nel dare conto della fattispecie (nei termini individuati in letteratura di cui si dirà a breve); se (c) lo *Scaevola* citato dal giurista tardo severiano fosse Publio Mucio o appunto Quinto Mucio; infine (d) quale fosse il pensiero di Quinto Mucio relativamente alla fattispecie di Mancino.

Relativamente al primo punto (a) – cioè se Quinto Mucio prese in considerazione il caso di Mancino nei suoi diciotto *libri iuris civilis* – gli studiosi sono orientati in senso positivo.[39] Chiaro indizio in tal senso la trattazione da parte di Pomponio nel suo commentario a Quinto Mucio, sebbene si affermi talora che il console del 95 non avrebbe fatto riferimento alla legge che riattribuì la *civitas* a Mancino perché quest'ultima avrebbe sconfessato la tesi paterna, secondo cui l'ex console era irrimediabilmente escluso dalla cittadinanza, essendo inefficace il suo postliminio.[40] Si è inoltre sottolineato che la stessa menzione della fattispecie di Mancino nel *de oratore* provenga all'Arpinate dal trattato civilistico muciano.[41] Quest'ultimo doveva dedicare un apposito *caput* al postliminio:[42] qui, piuttosto che in un *caput* sull'*iniuria*, era descritta la vicenda problematica (circa l'applicazione del postliminio stesso) del console del 137.[43]

Appurato pertanto che Quinto Mucio aveva riportato, in termini più estesi di quanto non li si trovi nel sunto pomponiano (o compilatorio?),[44] il dibattito fra il padre e Bruto (che egli doveva naturalmente nominare nei *libri iuris civilis*),[45] si dubita se direttamente al trattato muciano[46] oppure ai suoi commentatori[47] si fosse rifatto Modestino (b), nel trattare concisamente dei *dediti* ai nemici.

Lo *Scaevola* da quest'ultimo citato si individua (c) in Publio Mucio da parte dei più,[48] ma un indirizzo minoritario non manca di ravvisarvi il console del 95,[49] all'occorrenza attribuendo valore temporale ad *inter*, e ritenendo così che *inter Brutum et Scaevolam* alluda al lasso di tempo intercorso tra il pretore del 142 e il console del 95, periodo in cui la vicenda di Mancino suscitò accese contese fra gli esperti di diritto.[50]

Infine, per quanto concerne il pensiero di Quinto Mucio sulla fattispecie di Mancino (d), il punto è stato preso in considerazione da chi si è espresso con nettezza a favore dell'identificazione dello Scevola citato da Modestino con Quinto Mucio.[51]

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[37] Così WIEACKER, F., *Römische Rechtsgeschichte*, cit. (nt. 15), p. 207 (e tuttavia non si può evitare di rispondere alla questione se la legge favorevole a Mancino, quale professata da Wieacker, avesse effetti accertativi oppure costitutivi della sua cittadinanza romana). Non troppo distante dai tratti di fondo dell'assunto di Wieacker TONDO, S., Note esegetiche sulla giurisprudenza romana. In: *Iura*, 30, 1979, p. 34-77, part. p. 44 s., il quale afferma però che, riguardo allo *status civitatis*, prevalse la tesi di Bruto della sua conservazione, attesa la natura bilaterale (Bruto) piuttosto che unilaterale (Publio Mucio) della *deditio*, mentre, con riguardo al pieno recupero dei diritti, che soltanto il riconoscimento del postliminio avrebbe potuto assicurare, si impose secondo lo studioso la visione sfavorevole sostenuta da Publio Mucio: l'autore non precisa espressamente che la legge confermò solamente lo *status civitatis* di Mancino, conclusione che sembra comunque obbligata, nella sua ottica. La legge in questione concesse, al contrario, il postliminio a Mancino ad avviso di SERTORIO, L., *La prigionia di guerra e il diritto di postliminio*, Torino, 1915, p. 32 nt. 5 i.f.; analogamente KORNHARDT, H., Postliminium, cit. (nt. 22), p. 35 e nt. 60 (come prigioniero di guerra rientrato in patria, accogliendo la visione di Publio Mucio: v. sopra nt. 22).

[38] È una precisazione – quest'ultima – di WIEACKER, F., *Römische Rechtsgeschichte*, cit. (nt. 15), p. 585 nt. 69.

[39] Nei termini più decisi BONA, F., Sull'animus remanendi nel postliminium (1961). In: *Lectio sua*, cit. (nt. 2), I, p. 223-278, part. p. 260 nt. 46, BONA, F., Cicerone e i libri iuris civilis, cit. (nt. 2), tilgen, p. 842 s., BONA, F., Sulla fonte, cit. (nt. 11), p. 664 s. Già peraltro WIEACKER, F., Die römischen Juristen, cit. (nt. 23), p. 206 nonché BRETONE, M., *Tecniche*[2], cit. (nt. 16), 17. Così anche STOLFI, E., Quintus Mucius Scaevola, cit. (nt. 8), 339-341 e, con ulteriore letteratura, nt. 801. Va registrato l'assunto contrario di BREMER, F.P., *Iurisprudentiae antehadrianae quae supersunt* I. Leipzig, 1896, p. 96 nonché di LENEL, O., *Palingenesia iuris civilis*. Roma, 2000 (rist.: ed. orig. 1889), I, p. 762.

[40] Così STOLFI, E., Quintus Mucius Scaevola, cit. (nt. 8), p. 341 e nt. 803.

[41] V. in particolare BONA, F., Cicerone e i libri iuris civilis, cit. (nt. 2), p. 855 e nt. 50. Per quanto concerne invece Cic. *top*. 37 v. oltre, a proposito del pensiero di Cicerone sulla vicenda di Mancino.

[42] Nel libro XV, ad avviso di STOLFI, E., Quintus Mucius Scaevola, cit. (nt. 8), p. 154 s., p. 342 e, con ulteriore letteratura, nt. 808. Ad una rubrica *de foederatis et de hostibus*, sempre nel libro XV, pensa invece BREMER, F.P., *Iurisprudentiae antehadrianae*, cit. (nt. 39), p. 96, rubrica intitolata tuttavia *de civibus deditis et de postliminio* ancora da BREMER, F.P., *Iurisprudentiae antehadrianae*, cit., p. 64.

[43] In tal senso, per tutti, STOLFI, E., Quintus Mucius Scaevola, cit. (nt. 8), p. 154-157, p. 342. Al *caput de iniuria*, a causa dell'impiego del verbo *pulsare* nel brano di Pomponio, si rivolge invece SCHULZ, F., *Geschichte der roemischen Rechtswissenschaft*. Weimar, 1961, p. 112 nt. 4 = trad. it. (NOCERA, G.), *Storia della giurisprudenza romana*. Firenze, 1968, p. 173 s. nt. 4, criticato già da WATSON, A., *Law Making in the Later Roman Republic*, Oxford, 1974, p. 147 nt. 3.

[44] Lascia aperte entrambe le possibilità BONA, F., Sulla fonte, cit. (nt. 11), p. 665 nt. 141. Ad una sintesi effettuata da Pomponio pensa GUARINO, A., *La coerenza di Publio Mucio*, cit. (nt. 4), p. 101 s., il quale non esclude comunque un intervento di un «manipolatore postclassico».

[45] Come osserva BONA, F., Sulla fonte, cit. (nt. 11), p. 665: fu Pomponio ad evitarne la citazione nominale. A quest'ultimo riguardo PUGLIESE, G., Appunti sulla deditio, cit. (nt. 25), 28 e nt. 52, ritiene che nei *quidam* menzionati da Pomponio fossero compresi altresì giuristi dell'ultimo secolo della Repubblica, i quali appoggiavano la tesi di Bruto.

[46] Così CANTARONE, P., Ius controversum, cit. (nt. 7), p. 422 s.

[47] Come inclina a ritenere STOLFI, E., Quintus Mucius Scaevola, cit. (nt. 8), p. 341 nt. 804.

[48] Per tutti STOLFI, E., Quintus Mucius Scaevola, cit. (nt. 8), p. 342 e, con dottrina conforme, nt. 807 (fra cui, pur con qualche tentennamento, CURSI, M.F., *La struttura del postliminium*, cit. [nt. 26], p. 66).

[49] WATSON, A., *Law Making*, cit. (nt. 43), p. 147 e nt. 3, LENEL, O., *Palingenesia*, cit. (nt. 39), I, p. 755 s., p. 762, CANTARONE, P., Ius controversum, cit. (nt. 7), p. 426 s., SCHIAVONE, A., *Ius. L'invenzione del diritto in Occidente*[2]. Torino, 2017, p. 530 nt. 83 i.f.

[50] Come fatto da CANNATA, C.A., *Per una storia della scienza giuridica europea*. *I. Dalle origini all'opera di Labeone*. Torino, 1997, p. 227 nt. 66.

[51] In particolare CANTARONE, P., Ius controversum, cit. (nt. 7), p. 422-433, part. p. 426-433.

Quinto Mucio avrebbe così dibattuto, tra il 115 e il 110 (prima di riprendere i termini della controversia nel trattato civilistico, ivi peraltro non dando conto della tesi di Rutilio circa la tradizionale nullità del postliminio del *deditus acceptus* dai nemici, in quanto non prevalsa), con l'anziano Bruto, da un punto di vista astratto (svincolato dalla sollecitazione concreta fornita dalla vicenda di Mancino), la questione del trattamento giuridico da riservare al *deditus non acceptus* dai nemici (quello *acceptus* dai nemici sarebbe stato invece reintegrato in caso di rientro in base al postliminio).[52] Quinto Mucio avrebbe appoggiato la visione espressa dal padre relativamente al console del 137, dandole sanzione generale: inefficace il postliminio del *deditus non acceptus*, sarebbe stata necessaria una legge, attributiva della cittadinanza, come atto uguale e contrario a quella di *deditio*, che l'aveva fatta perdere, pure nell'ipotesi in cui il rientro del *deditus non acceptus* non sollevasse obiezioni (mancata *receptio*, cioè) nel consorzio civico romano. Bruto avrebbe invece sostenuto che nell'assenza di contestazioni si sarebbe potuta riscontrare un'accettazione tacita dell'offerta, parimenti per fatti concludenti, del *deditus* fatta dalla comunità nemica, che non lo aveva accolto.

Relativamente alle posizioni assunte riguardo all'orientamento di Cicerone (5), occorre distinguere fra chi pensa che l'Arpinate riporti le tesi dei giuristi e chi stima invece che il grande statista avesse maturato una sua visione della fattispecie, autonoma oppure mutuata da Bruto, in quest'ultimo caso fraintendendo la concezione del giurista (come dai più si ritiene) oppure addirittura migliorandola (come isolatamente si afferma).

Per quanto concerne allora l'indirizzo «cronachistico», esso sostiene che Cicerone faccia del suo meglio per celare, nella *pro Caecina* e nei *topica*, che la concezione di Publio Mucio prevalse, dando ivi a credere che si impose quella di Bruto. Ma che la teoria del pontefice circa la perdita della *civitas* da parte di Mancino avesse vinto risulterebbe non soltanto da Pomponio e Modestino, ma dallo stesso Cicerone, nel *de oratore*, in particolare nel resoconto della controversia in *de orat*. 1.181. L'Arpinate mostrerebbe in ciò uno dei suoi atteggiamenti oscillanti, con punte di veemente critica, nei confronti degli Scevola.[53]

Con riferimento all'orientamento – prevalente – secondo cui l'Arpinate espresse un'autonoma posizione sulla vicenda di Mancino, va subito rammentato che vi è chi ritiene che la sua tesi – del carattere contrattuale della *deditio* – non avesse connotazioni giuridiche bensì fosse informata a pragmatismo politico.[54]

I più stimano invece che la teoria di Cicerone avesse precisa impronta giuridica, e che fosse stata da lui autonomamente elaborata, o altrimenti in scia a Bruto, fraintendendo l'argomentare di quest'ultimo o, all'opposto, migliorandolo in alcuni suoi punti deboli.

Nella versione più compiuta la tesi sull'autonomia della posizione di Cicerone passa giustamente in rassegna la posizione dell'Arpinate in ordine cronologico, dunque dal 69 (*pro Caecina*) al 55 (*de oratore*) al 44 (*topica*).

Nella *pro Caecina* Cicerone afferma che la *deditio* è atto bilaterale, per cui senza l'accettazione del nemico essa non si perfeziona, e Mancino è rimasto cittadino (se si fosse invece perfezionata, con l'accettazione nemica, il soggetto avrebbe perso la cittadinanza, che avrebbe recuperato al rientro, grazie al postliminio).

Nel *de oratore* l'Arpinate si interroga poi se il *deditus non acceptus* dai nemici, rientrato in patria, goda o meno del postliminio, lasciando la questione aperta.

Risposta positiva viene fornita undici anni dopo, nei *topica*, a partire dalla definizione di postliminio data da Quinto Mucio.

Mancino è uscito dai confini romani ed è pervenuto agli *hostes*, facendo poi ritorno in patria: le condizioni per l'applicazione del postliminio, ai sensi della definizione muciana, vi sono tutte. Cicerone non si avvede tuttavia che, avendo sostenuto nei *topica* stessi che non era intervenuta la *deditio* (a struttura bilaterale), in realtà Mancino non aveva perso la *civitas*, dunque nemmeno sussistevano i presupposti per l'applicazione del postliminio (come già avrebbe dovuto dire nel 55, nel *de oratore*, a ben vedere). Il console del 63 incorrerebbe nell'errore a causa della natura astratta della questione, mero caso di scuola, poiché la vicenda di Mancino fu l'ultima in cui i Romani procedettero alla *deditio* di un loro concittadino.[55]

Proprio le motivazioni addotte a favore del postliminio di Mancino in *top*. 37, proverebbero che di esse fosse autore Cicerone perché, nella prospettiva di Bruto (mutuata nel 69 nella *pro Caecina*?), il console del 137 non aveva perso la *civitas* e dunque non vi era alcuna necessità di applicazione del postliminio.[56]

In generale si afferma che l'argomentazione – giuridica – addotta dall'Arpinate a proposito del caso di Mancino fu la natura bilaterale della *deditio*, con conseguente conservazione della cittadinanza, sebbene non sempre ci si avveda delle tensioni che

[52] Così CANTARONE, P., Ius controversum, cit. (nt. 7), p. 425. La trattazione dell'autrice non è però priva di tensioni, giacché ella dapprima (CANTARONE, P., Ius controversum, cit., p. 425) sostiene che «i *dediti* di cui alla disputa tra Bruto e Scevola sono quelli consegnati ai nemici, accettati da essi, ritornati in patria e non 'accolti' dai Romani», ma poi, più coerentemente con la regola per cui tale specie di *dediti* – quelli accolti dai nemici – fruirebbe del postliminio, afferma (CANTARONE, P., Ius controversum, cit., p. 426-433) che Bruto e Quinto Mucio discussero tra il 115 e il 110 della sorte del *deditus non acceptus* dai nemici (e, però, ancora una volta non senza increspature, che si manifestano nel riferimento occasionale ai *dediti accepti* dai nemici e ai *dediti* in generale, fossero stati accettati o meno dai nemici).

[53] Così, complessivamente, BAUMAN, R.A., *Lawyers*, cit. (nt. 21), p. 238 e nt. 97. BAUMAN, R.A., *Lawyers*, cit., p. 238 nt. 99, lascia impregiudicato, in alternativa alla consueta polemica verso gli Scevola, che l'Arpinate, evidentemente nei posteriori *de oratore* e *topica*, non voglia che il lettore possa rammentare la sua vicenda (con l'esilio e il successivo ritorno).

[54] HORAK, F., *Rationes decidendi*, cit. (nt. 22), p. 240.

[55] Così, complessivamente, CURSI, M.F., *La struttura del postliminium*, cit. (nt. 26), p. 61-65, p. 72.

[56] In tal senso WIEACKER, F., Die römischen Juristen, cit. (nt. 23), p. 206 e nt. 32.

ciò crea rispetto all'applicazione del postliminio, chiaramente postulata da Cicerone in *top*. 37.[57]

Proprio su quest'ultimo punto si fonda chi postula il fraintendimento da parte dell'Arpinate della tesi di Bruto, pur da lui sposata: in particolare Cicerone avrebbe seguito l'argomentazione circa il carattere bilaterale della *deditio*, ma avrebbe equivocato nel professare nei *topica* l'applicazione del postliminio, escluso a causa della conservazione della cittadinanza.[58]

In una versione più elaborata, si dice che Cicerone avrebbe sostenuto che il postliminio si sarebbe applicato in ogni caso al *deditus*, accettato o meno dai nemici. Su quest'ultimo punto – l'applicazione del postliminio al *deditus* non accettato dai nemici – l'Arpinate avrebbe confuso rispetto all'argomentazione di Bruto. Il giurista non avrebbe infatti postulato l'applicazione del postliminio al *deditus non acceptus*, ma avrebbe piuttosto visto nel rientro di quest'ultimo, senza contestazioni, un'accettazione tacita dell'offerta del *deditus* fatta implicitamente dai nemici con la loro mancata *acceptio*, senza tuttavia escludere la possibilità di un'accettazione espressa, nelle forme della legge.[59]

All'opposto, infine, vi è chi sostiene che Cicerone sanò le contraddizioni in cui era caduto Bruto: quest'ultimo aveva affermato – non si sa sulla base di quale argomentazione – il mantenimento della *civitas* da parte di Mancino e ciò non di meno l'applicazione all'ex console del postliminio, ai fini della sua reintegrazione. Dai *topica* emergerebbe che la concezione contrattuale, puramente laica, della *deditio*, fosse stata portava avanti autonomamente e originalmente da Cicerone, con conseguente conservazione della *civitas* – visto che non si trattava nemmeno di un *deditus* – e inutilità del postliminio. La struttura bilaterale della *deditio* non era mai stata sostenuta prima da alcun giurista, perché finiva per rimettere nelle mani nemiche la conclusione di quest'ultima, in tal modo non consentendo mai a Roma di sciogliersi dai legami religiosi (verso cui Cicerone era evidentemente meno sensibile).[60]

Per quanto concerne infine il testo di Modestino (6), va subito detto che la seconda parte (*an qui hostibus-tractatum est*), con la chiusa finale (*et consequens est*, *ut civitatem non adipiscatur*), quest'ultima giustamente ricondotta al pensiero del giurista tardo severiano,[61] si ritiene esporre, in forma generalizzata, il caso di Mancino.[62]

I problemi che pone il brano del III secolo sono principalmente due: il primo della sua coerenza interna, dato che prima si riconosce il postliminio ai soggetti che vengono consegnati ai nemici (che non sono ovviamente quelli che si consegnano da se stessi ai nemici perché il testo reca *dederi* non *se dedere*),[63] poi si nega il recupero della cittadinanza da parte del soggetto *deditus* ai nemici che faccia ritorno, ma non venga accettato dai Romani; il secondo è rappresentato dal contrasto della prima parte del testo, che riconosce il postliminio ai *dediti*, con l'asserzione del tribuno Rutilio in Cic. *de orat*. 1.181, ad avviso del quale era anzi principio consuetudinario che il postliminio dei *dediti* fosse nullo.

Rispetto a questi due – gravi – problemi, la letteratura ha assunto sostanzialmente tre posizioni.

Quella del fraintendimento in cui sarebbe incorso Modestino.

Quella dell'intervento tardo o giustinianeo o ancora del guasto nella tradizione editoriale della *littera florentina*.

Quella, infine, della difesa del passo, nello stato tràdito.

Per quanto concerne il fraintendimento in cui sarebbe caduto Modestino, si è affermato, con particolare riguardo alla concessione del postliminio ai *dediti*, che il giurista si sia confuso con la situazione che si aveva nell'ipotesi di *deditio* del nucleo demico a Roma (che assicurava per consuetudine internazionale la salvaguardia della vita ai suoi abitanti).[64] Relativamente poi al seguito – con l'esposizione in forma generalizzata del caso di Mancino – la confusione sarebbe testimoniata dal rovesciamento della fattispecie:[65] Modestino parla infatti di mancata *receptio* romana, mentre quest'ultima era propria dei nemici, che non avevano accettato il *deditus*.[66]

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[57] V. in particolare CRIFÒ, G., Sul caso di C. Ostilio Mancino, cit. (nt. 1), p. 23 s. (CRIFÒ, G., Sul caso di C. Ostilio Mancino, cit., p. 31 s., osserva che il console del 63 non menziona mai l'analogia del *deditus non receptus* con l'*aqua et igni interdictus*, segno che tale accostamento fu proposto non da Publio Mucio bensì da Pomponio [v. sopra e nt. 24]). V. altresì GUARINO, A., *La coerenza di Publio Mucio*, cit. (nt. 4), p. 101, p. 103 s., secondo cui l'Arpinate banalizzò i termini giuridici della fattispecie, riducendoli alla questione della struttura unilaterale oppure bilaterale della *deditio*, opzione quest'ultima verso cui egli inclinò (forse preceduto da Bruto). PUGLIESE, G., Appunti sulla deditio, cit. (nt. 25), p. 27 s., sostiene espressamente che la conservazione della *civitas libertasque*, a causa della bilateralità della *deditio* (che resta incerto se fosse già stata sostenuta da Bruto e da chi aveva seguito la tesi del pretore del 142), non dava luogo all'applicazione del postliminio (non avvedendosi con ciò della contraddizione con *top*. 37, pur citato dall'autore, ma senza per l'appunto riferimento alla parte in cui si allude al postliminio).

[58] V., in particolare, WATSON, A., *The Law of Persons*, cit. (nt. 26), p. 246.

[59] Così, complessivamente, CANTARONE, P., Ius controversum, cit. (nt. 7), p. 131 s.

[60] In tal senso DE VISSCHER, F., *Le régime romain*, cit. (nt. 20), p. 127, p. 132-134.

[61] Da CANTARONE, P., Ius controversum, cit. (nt. 7), p. 422-424, la quale ascrive le due parti precedenti ad una rielaborazione, per mano di un giurista tardo, del testo muciano (scettico STOLFI, E., Quintus Mucius Scaevola, cit. [nt. 8], p. 341 nt. 804).

[62] Si tratta di un punto pacifico, tanto che è quasi più proficuo rammentare chi, isolatamente, lo nega: CANTARONE, P., Ius controversum, cit. (nt. 7), p. 428-433. A favore della tesi tradizionale, per tutti, STOLFI, E., Quintus Mucius Scaevola, cit. (nt. 8), p. 341 e, con ulteriore letteratura, nt. 805.

[63] V. la corretta critica a chi non se ne è avveduto (proponendo l'interpretazione rigettata nel testo) da parte di CURSI, M.F., *La struttura del postliminium*, cit. (nt. 26), 71. Non è pertanto esatto sostenere che la tesi qui criticata è «ineccepibile sotto il profilo linguistico come risulta dalla semplice consultazione di un dizionario», al contrario di quanto scrive MAFFI, A., *Ricerche sul postliminium*. Milano, 1992, 64 s.

[64] Così MOMMSEN, TH., *Digesta seu Pandectae Iustiniani Augusti* II. Berlin, 1870, p. 885 *apparatus*.

[65] Di cui discorrono BONA, F., Sulla fonte, cit. (nt. 11), p. 665 nt. 138 nonché STOLFI, E., Quintus Mucius Scaevola, cit. (nt. 8), p. 341.

[66] Nel senso del fraintendimento cfr. MOMMSEN, TH., *Digesta* II, cit. (nt. 64), p. 885 *apparatus*, secondo cui «… *certe secundum antiquos prudentes Modestinus sic potius scribere debuit*: Eos qui ab hostibus capiuntur, iure postliminii reverti antiquitus placuit. An qui hostibus deditus a nobis nec receptus est reversus civis Romanus sit…». V. altresì WIEACKER, F., Die römischen Juristen, cit. (nt. 23), p. 206.

Con riferimento all'intervento sul passo di Modestino da parte dei compilatori oppure di un anonimo parafraste tardo, o altrimenti al guasto nella tradizione editoriale,[67] può essere in particolar modo interessante ricordare l'opinione di chi[68] ritiene interpolato l'*incipit*, nel tratto *vel hostibus deduntur*,[69] mentre ritiene che il seguito – con il riferimento generalizzato al caso di Mancino – sia ammorbato dalle incomprensioni di Modestino.

Nella produzione scientifica più recente prevale invece l'interpretazione tesa a salvaguardare la coerenza interna del passo.[70]

Sostanzialmente si afferma che l'*incipit* alluderebbe ai *dediti accepti* dai nemici, i quali, come i prigionieri di guerra a cui sono accostati, godono pacificamente del postliminio.

Il seguito farebbe invece riferimento ai *dediti non accepti* dai nemici: a costoro, invece, sarebbe negato il postliminio.

Secondo una tesi[71] perché costoro avrebbero sì perso la *civitas* con la legge di *deditio*, ma sarebbe loro inapplicabile il postliminio, non essendo pervenuti ai nemici: la reintegrazione sarebbe stata possibile solamente tramite legge.

Ad avviso di una diversa teoria[72] perché, persa la *civitas* con la *lex* di *deditio*, secondo Quinto Mucio sarebbe dovuta necessariamente intervenire una legge di attribuzione – atto eguale e contrario alla *deditio* –, mentre ad avviso di Bruto qualora non fossero stati frapposti ostacoli alla reintegrazione nel corpo civico in ciò si sarebbe dovuta ravvisare – non che un postliminio – un'accettazione tacita dell'offerta – parimenti per fatti concludenti – del *deditus* fatta dai nemici tramite la mancata *acceptio*.

Posto che nell'*incipit* si faccia riferimento ai *dediti accepti* (muniti di postliminio) e nel seguito ai *dediti non accepti* (privi di postliminio), si preoccupa della conciliazione con il diverso principio sancito da Rutilio – volto a qualificare come nullo il postliminio dei *dediti* – chi afferma che l'eccezione consuetudinaria fu superata già prima della pubblicazione del trattato civilistico da parte di Quinto Mucio (che per questo non la ricorda).[73] Parimenti per chi sostiene che ancora ai tempi di Modestino sarebbe stato negato il postliminio al *deditus* consegnato onde evitare la guerra: se costui fosse scappato dalla potestà straniera non gli si sarebbe potuto riconoscere il postliminio, perché ciò sarebbe equivalso a fornire alla popolazione estera una giusta causa per scatenare – adesso sì – il conflitto: soltanto al termine dello stesso si sarebbe potuto accordare ai *dediti* il postliminio, come a tutti i prigionieri di guerra.[74]

4. Anche nell'esposizione della tesi qui proposta converrà distinguere i sei punti sui quali sviluppare l'argomentazione, questa volta con il sussidio dei testi ciceroniani (in particolare della *pro Caecina*, del *de oratore* e dei *topica*) nonché dei passi dei giuristi Pomponio e Modestino.

Nel 91, Antonio e Crasso informano che sulla vicenda di Mancino vi è stata fra i massimi esperti una *summa dissensio*, *dissensio* che dal contesto di *de orat*. 1.175-183, con i dieci casi controversi ivi elencati,[75] si evince concernere la soluzione da adottare piuttosto che le motivazioni a sostegno della identica risposta al problema.

Cicerone non lo precisa, ma dai testi di Pomponio e di Modestino risulta, al di là di ogni ragionevole dubbio, che gli assertori dei diversi punti di vista furono Publio Mucio e Bruto.

Il punto di vista di Publio Mucio (1), quello di Bruto (2), il contenuto della legge votata per Mancino (3), le posizioni di Quinto Mucio (4), Cicerone (5) e Modestino (6), dunque.

Per quanto concerne il primo punto, Publio Mucio difese la legittimità del decreto di Rutilio, confermando le argomentazioni addotte dal tribuno a sostegno dell'espulsione di Mancino dal Senato e aggiungendovi la similitudine con l'*aqua et igni interdictus*, come emerge da un'interpretazione complessiva di Cic. *de orat*. 1.181 e dei testi di Pomponio e Modestino (1).

Consuetudinariamente il postliminio del *deditus ab hostibus* era nullo, il che presupponeva che Mancino avesse perso la *civitas* con la legge di *deditio*, seguita dall'uscita dal confine romano.

Secondo Publio Mucio l'*acceptio* nemica era irrilevante e ciò probabilmente per due motivi, uno privatistico, l'altro colorato di venature pubblicistiche: da un lato, infatti, la *deditio* andava configurata come un abbandono liberatorio piuttosto che una convenzione, la quale avrebbe necessitato della manifestazione

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[67] Così, in generale (senza esagerare nella sottigliezza di distinguere fra autori a seconda della tricotomia), DE VISSCHER, F., *Le régime romain*, cit. (nt. 20), p. 126 nt. 136, p. 127 nt. 140 (che più propriamente discorre di un testo sunteggiato, a proposito della seconda e terza parte dello stesso), HORAK, F., *Rationes decidendi*, cit. (nt. 22), p. 269 nt. 14, PUGLIESE, G., Appunti sulla deditio, cit. (nt. 25), p. 27 nt. 50 s.

[68] CRIFÒ, G., Sul caso di C. Ostilio Mancino, cit. (nt. 1), p. 25 s. e nt. 48, ma l'autore fa comunque salva la possibilità che il passo di Modestino sia rielaborato (CRIFÒ, G., Sul caso di C. Ostilio Mancino, cit., p. 21 nt. 14).

[69] Inciso ritenuto spesso non genuino: v. WATSON, A., *The Law of Persons*, cit. (nt. 26), p. 247 e nt. 5 (glossa aggiunta al testo, dovuta alla *brevitas* di Modestino) e l'ulteriore letteratura citata da CURSI, M.F., *La struttura del postliminium*, cit. (nt. 26), p. 71 nt. 106.

[70] MAFFI, A., *Ricerche sul postliminium*, cit. (nt. 63), p. 60-69, part. p. 67 s., CURSI, M.F., *La struttura del postliminium*, cit. (nt. 26), p. 65-67, p. 70-72, CANTARONE, P., Ius controversum, cit. (nt. 7), p. 422-433.

[71] CURSI, M.F., *La struttura del postliminium*, cit. (nt. 26), p. 65-67, p. 70-72.

[72] Formulata da CANTARONE, P., Ius controversum, cit. (nt. 7), p. 425-433.

[73] Così CANTARONE, P., Ius controversum, cit. (nt. 7), p. 428.

[74] In tal senso MAFFI, A., *Ricerche sul postliminium*, cit. (nt. 63), p. 68.

[75] Su cui v., per una prima indagine (a cui l'autore avrebbe voluto fare seguire una disamina più dettagliata, purtroppo non avvenuta e a cui, dandosene la possibilità, si vorrebbe in futuro attendere), BONA, F., Cicerone e i libri iuris civilis, cit. (nt. 2), p. 835-862. Va subito chiarito che non tutti diedero luogo a una controversia giudiziaria, alla quale furono segnatamente estranei i casi di Mancino e quello per certi versi omologo di Publicio Menandro. Talvolta (ma non parrebbe solitamente, al contrario di quanto sostiene BONA, F., Cicerone e i libri iuris civilis, cit., p. 841 e nt. 9, ivi con efficace critica dell'asserto) il dato viene trascurato e, dall'accostamento operato da Antonio in *de orat*. 1.238, tra la *causa Curiana* e la controversia relativa a Mancino, si conclude che il caso di quest'ultimo sfociò in un giudizio (davanti al tribunale centumvirale, attesa la menzione da parte di Antonio di questo organo giudiziario nell'*incipit* di *de orat*. 1.238): per tutti TALAMANCA, M., L'oratore, il giurista, il diritto nel de oratore di Cicerone. In: *Ciceroniana*, 13, 2009, p. 29-100, part. p. 50 nt. 65, p. 62 s.

del consenso da parte della popolazione nemica, escluso in radice dall'incapacità giuridica dell'*hostis*, ragione per cui non si vedeva per quale motivo professare la bilateralità della *deditio*, tanto più che qui erano involte ragioni religiose, tali per cui l'adempimento del voto verso la divinità non poteva dipendere dalla volontà della comunità estera; dall'altro, Publio Mucio adottava nei rapporti con le popolazioni straniere un criterio rigidamente romano centrico, volto cioè a ignorare le determinazioni e la prospettiva della comunità estera (*a fortiori* se nemica), come testimonia il suo parere relativo alla concomitante vicenda del postliminio di Publicio.[76]

Mancino, in quanto *deditus* (*acceptus* o meno, è irrilevante nell'ottica di Publio Mucio), ha perso la cittadinanza, ma il suo postliminio è consuetudinariamente nullo, come lo è altresì quello dell'*interdictus aqua et igni*, figura più recente rispetto al sottoposto venduto fuori dalla città dall'avente potestà e dal renitente alla leva parimenti alienato oltre Tevere quale (futuro) schiavo dalla comunità. Tutti casi rientranti in astratto nella sfera di applicazione del postliminio, ma concretamente esclusi dallo stesso o, *rectius*, in cui esso era eccezionalmente nullo.

La comunità restava pertanto libera di sanzionare nel modo ritenuto più opportuno l'apolide Mancino, senza che questi godesse delle garanzie procedurali accordate al cittadino romano qualora l'apparato pubblico mettesse in gioco la sua stessa vita. Ciò è peraltro ben riflesso da quanto Cicerone fa dichiarare a Crasso nel *de oratore*, in cui il censore del 91 mette in risalto che se il postliminio di Mancino era privo di effetti, allora il suo *ordo*, la sua *civitas*, la sua *libertas* e il suo stesso *caput* erano a rischio. *Ordo* come posizione sociale, *in primis* nella famiglia, in specie quale persona *sui iuris* (con *a latere* il corollario costituito dalla sua pregressa posizione di senatore). *Civitas* come stato di cittadino romano. *Libertas* come condizione di uomo libero. *Caput* come essere umano in vita oppure privato di quest'ultima. Per inciso Cicerone si concentra sulle conseguenze personali del postliminio, a conferma che nel 91 erano queste ad essere involte dal rientro, mentre a quest'ultimo non seguiva la ripresa del patrimonio, ormai apertasi la successione legittima con l'apprensione all'estero (nel caso di Mancino il breve lasso di tempo intercorso tra *deditio* e rientro avrà ovviamente impedito di fatto l'apertura della successione legittima stessa).

Il contenuto della legge, quale si vedrà attestato dal passo di Pomponio per il tramite del trattato civilistico muciano, smentisce la possibilità che Publio Mucio si fosse fatto sostenitore di tale provvedimento, onde sostituire o tenere parzialmente luogo dell'inefficace postliminio. Secondo il pretore in carica quell'anno (Publio Mucio, appunto), la comunità avrebbe potuto sanzionare Mancino a piacimento, essendo consuetudinariamente privo di efficacia il rientro (postliminio) che egli aveva fatto ed essendo perciò egli rimasto nella condizione di apolide.

Venendo all'opinione di Bruto (2), egli si oppose, con una visione innovativa, alla tesi di Publio Mucio (o, meglio, per primo sollevò obiezioni contro le motivazioni dell'espulsione di Mancino dal Senato decretata dal tribuno Rutilio). Se il tribuno aveva posto alla base del suo provvedimento la constatazione che Mancino aveva perso la cittadinanza romana, perdita non reintegrata dal postliminio alla luce dell'esclusione da esso di cui soffrivano i *dediti*, anche *non accepti*, Bruto stimava al contrario che il *deditus non acceptus* restasse cittadino, secondo quanto si evince dai brani di Pomponio e Modestino.

L'argomentazione addotta dal pretore del 142 è desumibile dalla *pro Caecina* e dai *topica* ciceroniani.

Dalla *pro Caecina* emerge chiaramente che il *deditus* perde la *civitas* solamente al momento dell'*acceptio* da parte dei nemici; se quest'ultima non interviene, come nel caso di Mancino, il soggetto conserva intatto il suo status (*causa*) e la cittadinanza (*ius civitatis*). È vero che in quell'atto difensivo Cicerone aveva interesse a sostenere quella tesi, ma è parimenti vero che se essa fosse stata destituita di qualsiasi *auctoritas* nella tradizione dei giuristi, l'avvocato della controparte non avrebbe mancato di rilevarlo, facendo cadere Cicerone nel più banale dei tranelli: né Cicerone era avvocato così sprovveduto da non conoscere i meccanismi della dialettica forense, di cui nel 69 l'ancora giovane Arpinate si stava avviando a diventare l'indiscusso «leader» nel foro più prestigioso del mondo mediterraneo. L'argomentazione di Bruto ritorna – con la mediazione del trattato civilistico muciano (già utilizzato nel 69 oppure Cicerone si era in quell'occasione rifatto di prima mano ai dialoghi di Bruto, il cui *incipit* citava tre anni dopo davanti ad una giuria criminale [*Cluent*. 139 s.]?) –, l'argomentazione di Bruto ritorna, si diceva, nei *topica*. La *deditio* ha, come la donazione, struttura bilaterale, dunque si perfeziona unicamente con la *receptio* da parte dei nemici. L'analogia con la donazione, che non aveva un'autonoma identità in epoca tardo repubblicana, bensì scaturiva dalla conclusione di negozi tipici effettuati con intento liberale (una *mancipatio* con il corrispettivo meramente simbolico apposto sulla bilancia, una *acceptilatio* a scopo liberale, e così via), Cicerone poteva rinvenirla sia nei *libri iuris civilis* di Quinto Mucio (dove si appoggiava la visione di Bruto, come subito si vedrà) sia nei dialoghi *de iure civili* di Bruto: l'espresso ricalco di *top*. 36 s. sul trattato civilistico muciano (con ivi citazione testuale da Quinto Mucio) rende tuttavia più credibile che l'Arpinate leggesse nel trattato civilistico muciano questa asserzione circa la struttura della *donatio*; l'atto mancipatorio crea come sempre tensioni, nell'unilateralità della dichiarazione di acquisto compiuta dal *mancipio accipiens* (che richiamava, almeno nella sua prima parte, la presa delle *res hostium*), ma che, in termini moderni, l'acquisto mancipatorio fosse a carattere derivativo piuttosto che originario, dunque bilaterale piuttosto che unilaterale, alla dottrina giuridica romana non fu mai dubbio.[77]

Bruto non pone dunque in discussione né struttura, né effetti, né fattispecie che eccezionalmente non fruivano del postliminio: egli revocava in dubbio la struttura unilaterale della *deditio* e così, quando – come di regola – fosse mancata l'*acceptio* nemica, non vedeva ragioni per ravvisare la perdita della citta-

[76] Parere sui cui contenuti v., in sintesi, BARBATI, S., *Manio Manilio*, cit. (nt. 19), p. 20.

[77] Nutre invece perplessità al riguardo WIEACKER, F., Die römischen Juristen, cit. (nt. 23), p. 207, il quale critica la dottrina di Bruto appunto perché inconciliabile con le dichiarazioni unilaterali che dominavano gli atti formali (e atta a richiamare gli acquisti – unilaterali – *inter vivos* o *mortis causa* degli eredi, proibiti dalla *lex Cincia* e dalla *lex Furia*).

dinanza. Del resto le stesse alienazioni *trans Tiberim* effettuate dalla *civitas* e dall'avente potestà, parimenti escluse dal postliminio, erano bilaterali (fatte addirittura dietro corrispettivo).

Non si faceva perciò questione di postliminio, di cui il *deditus acceptus* non avrebbe fruito nemmeno secondo Bruto: un *deditus non acceptus* non era un *deditus* e dunque era rimasto sempre cittadino, perché la *deditio* aveva struttura bilaterale. Vi sono due corollari della teoria di Bruto: da un lato, dal punto di vista internazionalistico, la desacralizzazione della *deditio* che essa comportava perché, in quest'ottica, non si poteva ragionevolmente pensare di fare dipendere la *solutio* della *civitas* dal *votum* verso gli dei dalla volontà della comunità nemica; dall'altro, da un punto di vista privatistico, è lecito chiedersi se l'opinione di Bruto – come ripresa adesivamente nel trattato civilistico muciano e, di lì, nella tradizione civilistica (lo si vedrà subito) – aprì la strada all'affermazione nel diritto vivente del carattere bilaterale della *noxae deditio* (in epoca preclassica attuata invece tramite abbandono liberatorio?), da effettuare pertanto tramite *mancipatio*, quale attestata in Gai 4.79 (con relativi dissensi tra le scuole circa la sufficienza dell'unica mancipazione oppure la necessaria triplicità della medesima).

Venendo poi al contenuto della legge votata al rientro di Mancino (3), all'opposto di quanto ritiene la dottrina pressoché unanime, essa dovette accogliere la visione innovativa di Bruto: lo si comprende dai verbi impiegati da Pomponio per connotarla, vale a dire *manere* e, con specifico riferimento al provvedimento legislativo, *esse*. La legge su Mancino fu votata *ut esset civis Romanus*. Non si usa un verbo come *adispiscere*, quello non a caso impiegato, nell'ottica della perdita della *civitas* da lui fatta propria, da Modestino. La legge in questione confermò pertanto la cittadinanza di Mancino, presupponendo che egli l'avesse sempre mantenuta (piuttosto che l'avesse ripresa per postliminio). Non interessa poi che nel testo compilatorio Pomponio paia fondere – e così confondere (oppure tale confusione è frutto di tagli al testo operati dai commissari giustinianei?) –[78] i presupposti del caso di Mancino con la pregressa trattazione generale (senz'altro presente nel capo sul postliminio del capolavoro muciano) sulla *deditio* di colui che aveva colpito gli ambasciatori stranieri, sembrando cioè che Mancino fosse un cittadino che avesse violato questi ultimi (di qui talune confusioni, che non mette conto di sottolineare, nella letteratura secondaria non specialmente dedicata al caso del console del 137). Cicerone, nella finzione letteraria del *de republica*, fa dire al console del 136 che egli chiese il parere di Manilio e Caio Lelio, i membri del suo *consilium*, circa la legge di *deditio* di Mancino, non di quella reintegrativa, ma, se quest'ultima fu approvata nel 136 stesso (v. sopra § 2, in senso positivo), potendo trattarsi unicamente di legge consolare o pretoria – vertendosi in materia di cittadinanza –, essa avrebbe ben potuto essere caldeggiata da Manilio (e Caio Lelio).[79] In altri termini, per quanto qui rileva, Manilio dovette appoggiare l'innovativa visione di Bruto, circa la struttura bilaterale della *deditio*. Con ciò Manilio diede un contributo decisivo, insieme all'assennato – per definizione – Caio Lelio, ai fini dell'adozione del senato consulto con cui si raccomandò ai consoli di fare votare dalle centurie una legge che confermasse la cittadinanza di Mancino – il cui testo sarebbe stato scritto dai due stessi esperti, sarebbe insensato negarlo –, con la quale dare sanzione legislativa all'innovativa teoria. In futuro non si sarebbe comunque posto il problema se approvare ancora o meno *leges de civitate confirmanda*, relative a *dediti non accepti*, perché i Romani non procedettero più a *deditiones* di propri cittadini ai nemici.[80]

La tesi di Bruto fu perciò ragionevolmente appoggiata da Manilio, mentre altri sostennero quella – tradizionale – di Publio Mucio.

Fra questi ultimi vi fu in primo luogo il figlio?

Nella scarsa letteratura che ha preso in considerazione il problema è scontata la risposta positiva, come visto sopra § 3, sebbene non manchino isolate – ed espresse incidentalmente – opinioni contrarie, secondo le quali Quinto Mucio avrebbe cioè aderito alla tesi di Bruto, di contro a quella paterna.[81]

La testimonianza più qualificata sul punto è quella di Pomponio, dalla quale può desumersi che Quinto Mucio sostenne l'opinione di Bruto, a discapito di quella paterna (e con ciò si

[78] Eccessiva la possibile lettura del frammento profilata – per respingerla – da BONA, F., Sulla fonte, cit. (nt. 11), p. 664 s. nt. 136, nel senso che la disputa possa avere riguardato non il caso di Mancino bensì la conseguenza di una mancata accettazione del *deditus* a seguito della violazione dell'immunità degli ambasciatori nemici. Più interessante osservare che, ad avviso dello studioso, non si tratterebbe di una confusione in cui incorse Pomponio o di un mal riuscito raccordo compilatorio, bensì il passo restituirebbe che «Quinto Mucio (o Pomponio?)» generalizzò il caso di Mancino, onde ricavarne una conclusione valevole per tutti i casi di postliminio del *deditus non receptus*, a prescindere dalla causa della *deditio*. Parrebbe invece più probabile che, nel *caput* sul postliminio, nel terminare la trattazione con i casi in cui il postliminio era nullo, tra cui quello dei *dediti* (fra i quali andavano annoverati i rei di avere violato l'immunità degli ambasciatori stranieri, a proposito dei quali Quinto Mucio aveva citato alcuni suoi [piuttosto che di precedenti autori, al contrario dell'interpretazione professata, intervenendo sul testo tràdito, da GUARINO, A., *La coerenza di Publio Mucio*, cit. {nt. 4}, p. 179 nt. 200] pregressi responsi in tal senso, resi senz'altro in Senato: i responsi precedenti, forse pontificali [di Tiberio Coruncanio, leggibili negli annali pontificali redatti da Pubio Mucio?], erano quelli che acclaravano l'immunità degli ambasciatori, data come premessa da Quinto Mucio), nel capo sul postliminio, si diceva, Quinto Mucio aveva chiarito come i *dediti non recepti* rimanessero cittadini, non facendosi allora questione di postliminio, prendendo le mosse dal caso che quasi cinquant'anni prima aveva diviso il padre da Marco Bruto, schierandosi a favore di quest'ultimo (anche perché la legge del 136 aveva in realtà stabilito in generale che i *dediti non recepti* restassero cittadini, dunque *nulla quaestio*?).

[79] BEHRENDS, O., Tiberius Gracchus und die Juristen seiner Zeit, cit. (nt. 28), p. 126, attribuendo a Furio Filo la qualifica di giurista di eccellenza – esponente del positivismo giuridico di marca scettica (importato da Carneade) –, ritiene invece che fu il console del 136 a giocare un ruolo da protagonista nei profili giuridici della vicenda, tanto che quest'ultima gli fornì l'occasione per scrivere un libro di diritto internazionale pubblico, conformemente ai suoi interessi pubblicistici.

[80] In quest'ultimo senso CURSI, M.F., *La struttura del postliminium*, cit. (nt. 26), p. 60. Ma rimane qui il dubbio – a cui ostano le fonti citate (che tuttavia potrebbero applicare al caso concreto la portata più generale del provvedimento) – che la legge fosse espressa in termini generali, confermando la cittadinanza dei *dediti non recepti*, ciò di cui si sarebbe fatta immediata applicazione a Mancino. Attesa l'approvazione di questa legge, nel 136, non vi fu poi più necessità di varare disposizioni identiche (v. sopra nt. 78 i.f.).

[81] Così, in particolare, LEHNE, CHR., *Iurisperiti et oratores. Eine Studie zu den römischen Juristen der Republik*. Wien/Köln/Weimar, 2019, p. 92.

viene al punto 4 dell'argomentazione, relativo alla prospettiva di Quinto Mucio). Lo si evince, in particolare, dal fatto che il giurista antoniniano – senza che i compilatori giustinianei ritennero di dovere tagliare la precisazione – ha cura di osservare che Publio Mucio fu dell'opinione che Mancino (come ogni *deditus*, per qualsiasi causa fosse avvenuta la *deditio*) avesse perso la *civitas* tramite la *lex* di *deditio*, seguita dall'uscita dai confini, alla stregua dell'*interdictus aqua et igni* (il *dictum* popolare consisteva in quest'ultimo caso in una sentenza, seguita anche qui dall'uscita dai confini).

In un commentario al trattato civilistico muciano in cui – almeno nella selezione e sintesi compilatoria (che potrebbe giocare un ruolo non secondario, va rilevato) – è omesso da parte del commentatore qualunque riferimento a giuristi anteriori all'autore commentato, vale a dire ai giuristi che Quinto Mucio citava, questo ricordo non può non balzare agli occhi. Esso trova giustificazione molto più armonica qualora si ritenga che, eccezionalmente, Quinto Mucio si discostasse dall'opinione paterna. Il punto doveva avere colpito Pomponio – come fa un certo effetto sullo stesso studioso moderno –, ma forse, piuttosto che corroborare la desacralizzazione della *deditio* tramite la sua concezione convenzionale, il pontefice Quinto Mucio dava qui conferma della prospettiva non esclusivistica nei rapporti con le comunità estere, che lo allontanava dal padre. Infatti, nel suo esercizio della pretura e poi nel trattato civilistico, Quinto Mucio ammetterà le popolazioni non alleate alla tutela giurisdizionale, non considerandole per ciò solo nemiche, al contrario della visione fino ad allora invalsa, quale si riscontra anche nella definizione del *postliminium receptum* nel di poco anteriore dizionario giuridico di Elio Gallo, come si confida di potere mostrare in una futura indagine sul postliminio delle *res*.

Le altre fonti che attingono dal trattato civilistico muciano, Cicerone nel *de oratore* e nei *topica* nonché Modestino, incorrono in una certa confusione sul punto.

Di esse – di Cicerone e di Modestino – si passa pertanto a dire adesso.

L'Arpinate (e con ciò si viene al punto 5 delle tesi qui sviluppate) fonda l'argomentazione del passaggio della *pro Caecina*, strumentale ai suoi interessi – volti a circoscrivere il raggio applicativo dell'*ademptio civitatis* –, sui dialoghi di Bruto, in maniera diretta o indiretta (in quest'ultimo caso, tramite la mediazione dei *libri iuris civilis* del console del 95): il *deditus* perde la *civitas* con l'accettazione nemica, altrimenti rimane cittadino, con tutte le prerogative del caso.

Nel *de oratore*, invece, l'Arpinate si dovrebbe più direttamente basare sui *libri iuris civilis*, per quanto di poco posteriori al 91, anno in cui è ambientato il dialogo.[82] Dal confronto tra il brano del *de oratore* e il testo di Pomponio, quest'ultimo senz'altro ispirato al trattato civilistico muciano, emergono tuttavia alcune ragioni di dubbio. Da un lato, l'omissione del riferimento all'*interdictio aqua et igni* nel *de oratore*, al contrario che nel commento di Pomponio a Quinto Mucio. Dall'altro, la mancanza di riferimenti, nel brano di Pomponio (almeno nella versione compilatoria, va da sé), alle argomentazioni del tribuno Rutilio, che Quinto Mucio ben poteva avere ignorato (non trattandosi ovviamente dell'amico Rutilio Rufo, allievo del padre, che nel 136 doveva avere circa vent'anni). Questi due dati dovrebbero dare quanto meno dignità di dubbio alla congettura che nel *de oratore* Cicerone potesse essersi ispirato ad una tradizione orale (che egli aveva tutto per padroneggiare) oppure a qualche aneddotica scritta, nel 55 si dovrebbe pensare orientata al genere annalistico (che oramai abbondava) piuttosto che a quello pedagogico, piuttosto grossolano, alla Valerio Massimo. Altro conto, poi, che Cicerone fosse a conoscenza della vicenda di Mancino anche sotto il profilo della trattazione che ne avevano fatto i giuristi, in particolare Bruto e soprattutto Quinto Mucio.

Nel dialogo del 91 tutta la questione ruota intorno alla nullità oppure all'efficacia del postliminio di Mancino e del *deditus non receptus*, in generale: la soluzione viene lasciata aperta. Nei *topica*, invece, quest'ultima viene esplicitata, sostenendo l'efficacia del postliminio di Mancino (e quindi, se si vuole, del *deditus non receptus*), sulla base della definizione muciana dell'istituto, riportata appena prima: in base ad essa, quanto esce dal confine ed entra nella potestà nemica, se fa ritorno nei confini, torna per postliminio, in accordo all'etimologia della parola, da *post* e *limen* (oltre il confine, in entrambe le direzioni). Cicerone aggiunge però che Mancino non era *deditus* perché la *deditio* non si era perfezionata senza l'*acceptio* nemica, quale atto bilaterale, alla stregua della donazione. Evidente qui la confusione dell'Arpinate, in quanto il non perfezionamento della *deditio* varrebbe a conservare lo *status civitatis* di Mancino, prevenendone altresì il *pervenire ad hostes*, mettendo così per definizione fuori causa l'operatività del postliminio, all'esatto opposto di quanto ivi sostenuto dal grande statista. Se così è sorge il sospetto che egli abbia in parte frainteso la trattazione del caso di Mancino nel *caput* sul postliminio dei *libri iuris civilis* di Quinto Mucio – posto alla base delle asserzioni al riguardo nei *topica* –, confondendo i vari piani: quello della conservazione o meno dello *status civitatis*; quello, operante soltanto nella seconda ipotesi (di perdita cioè dello *status civitatis*), dell'efficacia o della nullità del postliminio di Mancino. Nei *libri iuris civilis* si dava conto della tesi che negava la perdita dello *status civitatis*, sul presupposto della bilateralità della *deditio*, e che quest'ultima teoria (di Bruto) potesse essere stata appoggiata da Quinto Mucio lo mostra proprio l'analogia con la *donatio* (che difficilmente si ascriverà a Cicerone) e l'argomentazione a favore di Mancino tratta dalla struttura bilaterale della *deditio* stessa effettuata da Cicerone, in connessione con la definizione muciana di postliminio. A parte cioè il fraintendimento dell'Arpinate – in parte giustificato dalla difficoltà della fattispecie –, Cicerone traeva dal trattato muciano gli argomenti favorevoli alla *retentio* della *civitas* e dei conseguenti diritti da parte di Mancino, risultato a cui egli era peraltro giunto venticinque anni prima nella *pro Caecina*, stimolato dal dovere di tutelare al meglio il suo assistito. Nei *topica* egli ribadisce ancor meglio la bilateralità della *deditio*, quale già espressa nella *pro Caecina*. Nell'opera del 44 egli parla tuttavia impropriamente di ritorno tramite efficace postliminio, forse perché l'Arpinate si faceva parzialmente fuorviare dal trovare la questione discussa nel *caput* sul postliminio del trattato muciano.

[82] In tal senso BONA, F., Cicerone e i libri iuris civilis, cit. (nt. 2), p. 862 s., p. 870, al termine di una serrata analisi.

Basandosi sul commentario al trattato civilistico muciano, ma di Pomponio piuttosto che suo,[83] relativamente ad una fattispecie che, quasi intorno al 250, è un lontano caso di scuola, in confusione ancora più grande incorre Modestino – e con ciò si viene all'ultimo punto (6) qui sviluppato –, per di più per la necessità di dovere estrarre regole, come il genere letterario in cui si stava cimentando – i *libri regularum* – gli imponeva di fare.

Pur accedendo all'assunto che il testo, a parte la sintesi compilatoria, possa essere accettato nello stato in cui è trasmesso, lascia insoddisfatti salvaguardarne anche la coerenza interna sostenendo che esso faccia prima riferimento al *deditus acceptus*, a cui sarebbe riconosciuto il postliminio come ai prigionieri di guerra, e poi al *deditus non acceptus*, generalizzando la fattispecie di Mancino.

Ponendosi in una prospettiva storica, si dovrebbe sostenere che la nullità del postliminio del *deditus*, ricordata ancora – tramite la menzione del decreto di Rutilio – da Cicerone come principio quanto meno presente nel *ius quo utimur* (almeno nel 91), valesse unicamente per il *deditus non acceptus*, mentre per quello *acceptus* si sarebbe riconosciuta sempre l'efficacia del postliminio.

In astratto ciò è possibile,[84] e salvaguarderebbe la coerenza del brano del giurista tardo, il quale, con riferimento al *deditus non acceptus*, sosterrebbe la tesi di (Rutilio e di) Publio Mucio circa la perdita della *civitas*, non rimediata dal postliminio (senza che Modestino, almeno nella sintesi compilatoria, alluda alla necessità di una legge reintegratrice). *De oratore* 1.181, contiene tuttavia un riferimento affatto generale alla *deditio* operata dal *pater patratus*, rispetto alla quale sembra irrilevante l'*acceptio* o meno nemica, che peraltro normalmente non interveniva: non a caso risiede proprio nella generalità della regola consuetudinaria, che nega il postliminio del *deditus*, il profilo contestato da Bruto. Ad avviso del pretore del 142, scontata la nullità del postliminio del *deditus* ricevuto dai nemici, se invece non interveniva l'*acceptio* nemica non diventava efficace il postliminio, ma, a monte, ne difettava il presupposto di applicazione, vale a dire la perdita della *civitas*, in quanto non si era perfezionata la *deditio* e dunque l'interessato era sempre rimasto cittadino romano.

Le difficoltà in cui incorre Modestino nel comprendere la fattispecie sono testimoniate anche dall'improprio riferimento alla non *receptio* romana, mentre essa era una non *acceptio* da parte dei nemici.

L'affermazione dell'*incipit* del brano – secondo cui fin dai tempi antichi si stabilì la liceità del *postliminium* dei *dediti* – si spiega plausibilmente perché Modestino aveva letto nei commentari all'opera muciana – in particolare in quello di Pomponio – dell'avvenuta reintegrazione nel consorzio civico di Mancino (con approvazione della tesi di Bruto da parte di Quinto Mucio), e, nel suo dichiarato intento generalizzatore, ne aveva tratto la regola della legittimità del postliminio del *deditus*.

Nel generalizzare ulteriormente, nella frase successiva, il caso del console del 137, il giurista tardo si concentra sul diverso aspetto rappresentato dallo *status civitatis* del *deditus reversus nec tilgen receptus* dalla comunità romana, dando atto chi vi fu una disputa al riguardo tra Bruto e Scevola, e concludendo per la logicità della soluzione che negava la ripresa della cittadinanza da parte del *deditus a nobis non receptus*.

La mancata *receptio* dovrebbe alludere alla tesi di Publio Mucio contraria all'efficacia del postliminio di Mancino, di cui il commento di Pomponio ai libri muciani dava conto. Un grave problema è però costituito dalla menzione nominativa di Bruto, che si dovrebbe allora gioco-forza al commento di Pomponio, contrariamente alla tesi sopra esposta circa la mancata citazione degli autori menzionati da Quinto Mucio da parte di Pomponio, salvo casi eccezionali. A tale proposito, tutto sommato scartando l'ipotesi che Modestino avesse direttamente letto i libri di Quinto Mucio (ciò che comunque non si può del tutto escludere), si dovrebbe o concludere che Pomponio citasse eccezionalmente anche Bruto – ma è tesi verso cui qui non si propende, pur non potendola rigettare – oppure che il ricordo della tesi in proposito del pretore del 142 venisse ricavato *aliunde* dal giurista tardo, ovviamente sempre dalla tradizione civilistica. In tal caso verrebbe fatto di pensare che egli avesse letto qualcosa a riguardo nel compendio civilistico sabiniano (dove si riprendeva il tema del postliminio e se si menzionava l'eccezione per i *dediti*, si richiamavano senz'altro gli autori citati da Quinto Mucio, riferimento costante di Sabino) o, ancor meglio, nei commenti ad esso dedicati, segnatamente da Pomponio, Paolo e Ulpiano. Ed è significativo richiamare come Ulpiano citasse senz'altro dal compendio civilistico sabiniano, quando ricordava la tesi di Bruto circa l'appartenenza della prole generata dalla schiava concessa in usufrutto (Ulp. 17 *Sab*., D. 7. 1. 68pr.).

Combinando le asserzioni presenti nel brano di Modestino (per come lo presentano i commissari giustinianei, con una sintesi probabilmente ingarbugliata), ne risulta una teorizzazione insufficiente: difettando le basi storiche per comprendere la differenza fra *deditus acceptus* e *non acceptus* dai nemici, Modestino si concentra unicamente sulla presenza o meno di contestazioni, da parte di Roma (nec *receptio*). Se il *deditus* fa ritorno egli fruisce di principio del *ius postliminii*. Se però insorgono contestazioni

[83] Il dubbio nasce perché in D. 41. 1. 53-54, si menziona rispettivamente un libro 14 e 31 del commentario a Quinto Mucio di Modestino (*rectius*, con la citazione di un *Idem*, dopo che D. 41. 1. 52 è attribuito al libro settimo delle regole di Modestino). La critica afferma tuttavia che ci si trova di fronte ad un guasto della tradizione manoscritta del Digesto: i compilatori avrebbero piuttosto fatto riferimento al commentario a Quinto Mucio di Pomponio; per tutti, SANIO, F.D., *Zur Geschichte der Römischen Rechtswissenschaft*. Napoli, 1981 (rist.: ed. orig. 1858), p. 50 e nt. 87, LENEL, O., *Palingenesia* I, cit. (nt. 39), p. 721 (l'*index Florentinus* non attesta l'esistenza dell'opera), BRASSLOFF, S., Herennius 31. In: *RE*, VIII.1, Stuttgart, 1912, p. 668-675, part. p. 670, SCHANZ, M. - HOSIUS, K. - KRÜGER, G., *Geschichte der Römischen Literatur bis zum Gesetzgebungswerk des Kaisers Justinian* III[3]. München, 1969 (rist.: ed. orig. 1922), p. 212, WIEACKER, F., *Römische Rechtsgeschichte*, cit. (nt. 15), p. 597 nt. 3 (il quale infatti nemmeno accenna al problema trattando di Modestino in WIEACKER, F., *Römische Rechtsgeschichte II. Die Jurisprudenz vom frühen Prinzipat bis zum Ausgang der Antike im weströmischen Reich und die oströmische Rechtswissenschaft bis zur Justinianischen Gesetzgebung*. München, 2006, p. 147 s.), nonché STOLFI, E., Quintus Mucius Scaevola, cit. (nt. 8), p. 108 nt. 16, p. 150 s., p. 314 s. e, con letteratura, nt. 674.

[84] PUGLIESE, G., Appunti sulla deditio, cit. (nt. 25), p. 27 nt. 50, sottolinea invece che, seppure si volesse sostenere la genuinità del brano (ciò che l'autore contesta: v. sopra § 3 e nt. 67), esso sarebbe comunque inattendibile, di fronte alla testimonianza contraria di Cic. *de orat*. 1.181.

e la comunità romana si rifiuta di riceverlo allora questi non riottiene la cittadinanza perduta a seguito della *deditio*: in termini poco chiari Modestino intende dire che, in tal caso, non opera il postliminio (il cui primo effetto è la ripresa della *civitas* e, nel caso, della *civitas libertasque*). Il postliminio del *deditus* è pertanto soggetto alla condizione sospensiva, negativa, della mancata contestazione da parte di chiunque vi abbia interesse. Tale contestazione dovrebbe intervenire, a pena di decadenza, entro un determinato termine, ma si può sensatamente dubitare che Modestino avesse visto tutti questi problemi, che invece scaturivano di necessità dalla sua fragile concettualizzazione.[85] Alla base di quest'ultima vi era la perdita della *civitas* a seguito della *deditio*, verso cui evidentemente Modestino propendeva. Perdita che non poteva però essere rimediata secondo Publio Mucio dal postliminio, al contrario di quanto, contraddittoriamente, sostiene Modestino, a causa delle sue difficoltà di comprensione della fattispecie, che lo porta a cercare un'improbabile conciliazione con la diversa tesi di Bruto – incentrata non a caso sullo *status civitatis*, verso cui si focalizza poi l'autore tardo severiano, in quanto non si faceva questione di postliminio –, conciliazione rappresentata dalla presenza o meno della *receptio* del *deditus* da parte di Roma.

5. La questione giuridica involta dal rientro di Mancino a Roma, come era complessa per i Romani, così è di ardua interpretazione nella letteratura secondaria.

In questa sede si è ritenuto di poterla seguire solamente a patto di scandirne l'argomentazione ricostruendo il pensiero al riguardo di Publio Mucio, di Bruto, il contenuto della legge votata su Mancino, e l'interpretazione retrospettiva della fattispecie proposta da Quinto Mucio, da Cicerone e da Modestino (questi ultimi tre sono infatti, direttamente o indirettamente, le fonti che consentono di ipotizzare le prese di posizione di Publio Mucio e Bruto, ragionevolmente assente un'autonoma riflessione di Pomponio sulla vicenda, in quanto è stato tramandato dai compilatori giustinianei).

Si è così passata in rassegna la vasta produzione scientifica sul caso di Mancino dando conto dei vari orientamenti relativi ai sei punti in esame.

Qui si è detto che il dibattito fu seduta stante scatenato dall'espulsione dal Senato che un tribuno ordinò nel 136 ai danni dell'ex console Mancino, sostenendo che il postliminio del *deditus* era consuetudinariamente nullo, alla pari di quello dell'*alieni iuris* venduto fuori dai confini della città dall'avente potestà e del *civis* parimenti alienato a titolo oneroso dalla comunità perché renitente alla leva.

Il senatore Bruto contestò la liceità dell'ordine appena dato del tribuno; Publio Mucio la difese.

Publio Mucio propose in particolare il parallelo con la situazione in cui si veniva a trovare l'*interdictus aqua et igni*, e precisò che la *deditio* era atto unilaterale, rispetto al quale l'accettazione o meno del *deditus* da parte dei nemici – che normalmente non avveniva – non rilevava: il *deditus*, accettato o meno, non godeva tradizionalmente del postliminio e aveva perso la cittadinanza a seguito della legge di *deditio* e della connessa uscita dai confini romani; se rientrato ciò non ostante in patria, il postliminio era nullo e la comunità era così libera di sanzionare il *reversus*, in quanto apolide, come meglio credeva (anche con la morte) e senza dovere osservare alcuna garanzia procedurale a tutela di quest'ultimo.

Bruto aveva invece immediatamente contestato al tribuno che il principio consuetudinario da lui invocato – che l'ex pretore non metteva peraltro in dubbio – non si applicava al caso di specie perché Mancino non era *deditus*, in quanto non accettato dai nemici. La *deditio* era cioè un atto bilaterale, che si perfezionava solamente con l'accettazione nemica, di modo che il soggetto *non acceptus* conservava la cittadinanza romana e, come *civis Romanus*, il suo rientro in patria non rappresentava un postliminio. Quest'ultimo sarebbe infatti seguito ad un rientro dopo un contatto con la popolazione straniera, che la mancata *receptio* aveva impedito.

La tesi di Bruto prevalse in Senato, grazie all'appoggio decisivo che venne per opera di Manilio e Caio Lelio, consolari presenti alla seduta nonché consiglieri del console in carica, Furio Filo.

Furono anzi proprio Manilio e Caio Lelio a suggerire la soluzione di compromesso di confermare l'interpretazione di Bruto con una legge, la quale non attribuisse *ex novo* bensì ribadisse la cittadinanza che Mancino non aveva mai perso (o che altrimenti stabiliva in astratto come i *dediti non recepti* conservassero la cittadinanza, principio generale di cui beneficiò Mancino?). Una presa di posizione ufficiale era peraltro in qualche modo necessitata dalla *lex* che aveva disposto la *deditio* di Mancino ai Numantini. Tale presa di posizione avvenne inevitabilmente nelle forme di una legge, quale era l'articolazione costituzionalmente necessaria quando si facesse questione di cittadinanza.

Quinto Mucio diede ovviamente conto della complessa vicenda nel *caput* sul postliminio del suo trattato civilistico, quale esempio, insieme ad altri, di fattispecie problematica, e senz'altro riportò l'opinione paterna (che comunque ricordava a memoria) e quella di Bruto, entrambe comunque disponibili nei *dialogi de iure civili* del pretore del 142, pubblicati tra il 135 e il 133.[86]

L'assenza di una prospettiva rigidamente esclusivistica nei rapporti con l'estero da parte di Quinto Mucio, che anzi ammise gli stranieri non alleati alla tutela giurisdizionale, lo portò a discostarsi dalla concezione paterna. Quest'ultima fu ricordata nominativamente da Pomponio proprio per la peculiarità che il giurista antonino – il quale altrimenti non menziona gli autori citati da Quinto Mucio – aveva riscontrato sul punto nell'opera commentata, il cui autore respingeva ivi l'opinione paterna.

Cicerone era a sua volta convinto – sia per convenienza professionale sia «scientificamente» – della correttezza della visione di Bruto, circa il carattere bilaterale della *deditio*. Il fatto però che a mano a mano che passava il tempo leggeva l'episodio solamente nel trattato muciano o in resoconti aneddotici dello

[85] Né si comprende quale argomento avesse fornito al giurista tardo il destro per discorrere del postliminio dei *dediti*. Nel libro 3 delle *regulae* egli sembra discutere di obbligazioni, come osserva LENEL, O., *Palingenesia*, cit. (nt. 39), I, p. 734 s.

[86] Per questa data v. BARBATI, S., *Manio Manilio*, cit. (nt. 19), p. 103-105, part. p. 104 i.f.

stesso, dove esso era trattato a proposito del postliminio, lo portava a confondersi, e a porre dapprima il problema astratto circa la liceità o meno del postliminio di Mancino, risolvendolo poi positivamente, mentre dalla conservazione dello *status civitatis* derivava *ipso iure* l'esclusione della rilevanza del postliminio.

Così, quasi alle soglie del 250, Modestino trovava difficoltà a comprendere le diverse *rationes iuris* dell'episodio, che egli aveva appreso dal commento di Pomponio non soltanto a Quinto Mucio, ma probabilmente altresì a Sabino, e che si trovava ragionevolmente ripreso pure nei commenti al compendio sabiniano dei severiani Paolo e Ulpiano.

Espungendo ogni riferimento al caso concreto (come peraltro il genere letterario scelto – quello dei *libri regularum* – gli imponeva di fare), dalla reintegrazione di Mancino tramite legge e dalle diverse posizioni assunte *antiquitus* al riguardo, egli trae l'inadeguata concezione che il *deditus* (soggetto fuori dalla realtà del III secolo), privato della cittadinanza a seguito della *deditio*, godeva in astratto del postliminio, eccettuate contestazioni. Contestazioni che non a caso il giurista tardo severiano riferisce alla disputa fra Bruto e Scevola e che avrebbero avuto ad oggetto la ripresa della cittadinanza, che Modestino nega. Il giurista non riesce a coordinare le differenti tesi di Publio Mucio e di Bruto relative al *deditus* non *receptus*, che egli aveva letto nella tradizione civilistica, dunque nei commenti a Quinto Mucio e a Sabino (da quest'ultimo filone doveva avere tratto la menzione di Bruto). Da un lato, egli interpreta l'avvenuta reintegrazione di Mancino (caso che egli non cita, come il genere letterario delle *regulae* gli imponeva di evitare) come concessione del postliminio (mentre essa scaturiva dal fatto che egli nemmeno necessitava dell'istituto, essendo sempre rimasto cittadino). Dall'altro, egli intende la tesi di Publio Mucio (verso cui forse propendeva) come negazione della ripresa dello *status civitatis*, mentre essa si concentrava sulla consuetudinaria nullità del postliminio del *deditus*, da cui discendeva la mancata ripresa della cittadinanza: Modestino discorre invece in proposito di mancata *receptio* da parte di Roma, concetto entro cui egli faceva rientrare le contestazioni al postliminio del *deditus*. Globalmente parrebbe perciò che Modestino ritenesse il postliminio del *deditus* sospensivamente condizionato alla mancata contestazione da parte di chiunque vi avesse interesse, senza probabilmente nemmeno proporre un termine entro cui quest'ultima avrebbe dovuto essere manifestata, a pena di decadenza. Se sollevate obiezioni (ma con successo, si dovrebbe logicamente concludere, pena una svalutazione troppo forte dell'intelligenza di Modestino), il postliminio restava definitivamente inefficace (a seguito dell'avveramento della condizione negativa cui esso era sospensivamente condizionato) e dunque il *deditus* non riotteneva la cittadinanza.

Annex:
XVII. Jahrestreffen der Jungen Romanisten

Introductory Remarks on the Essays of the Speakers of the XVIIth Young Scientists Meeting on Roman Law

*Radek Černoch**

Abstract

On April 13th and 14th 2023 Masaryk University in Brno (Czech Republic) hosted the XVIIth Young Scientists Meeting on Roman Law. The following introduction sums up topics and presentations of the Meeting. After the introductory remarks four speakers present their essays, based on their presentations at the Meeting.

Keywords: *Brno; Collegium Junger Romanisten; Jahrestreffen Junger Romanisten; Roman Law.*

The 17th Annual Meeting of Young Romanists from German-speaking countries (*Jahrestreffen Junger Romanisten*) took place on April 13th–14th 2023 at Masaryk University in Brno, Czech Republic. This traditional meeting of, Ph.D. students and young researchers in the field of Roman law, usually organized by German and Austrian universities, was held for the first time in a Slavic country. As is usual for this conference, the number of papers presented was relatively small, leaving room for 30-minute presentations, each followed by a 15-minute discussion, which continued during the subsequent breaks and included a number of other conference participants who did not present papers themselves. The programme was also enriched by a visit to Villa Tugendhat, a UNESCO World Heritage Site, and a guided tour of the city with commentary by Radek Černoch. Four of the papers presented (Repnow, Binder, Schmatzberger, Újvári) are published in this volume.[1]

The conference was opened by the head of the organising department Jaromír Tauchen and the main organiser Radek Černoch. This was followed by an introductory presentation by Balázs Komoróczy from the Institute of Archaeology of the Czech Academy of Sciences, who in his paper entitled *Römische militärische und politische Strategie gegenüber den Germanen in dem mittleren Donauraum während der Regierungszeit von Marcus Aurelius im Lichte archäologischer Quellen* focused on the lesser-known, but quite rich archaeological remains left by the Romans on the territory of Moravia.

Pavel Salák, from the organising department, who in his contribution *Beziehungen zwischen tschechischen und deutschen Romanisten in der Zwischenkriegszeit* presented the relations of Czech Romanists (especially Leopold Heyrovský and Otakar Sommer) with foreign countries, in particular with representatives of German and Italian legal scholarship, which, apart from the very

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1 Several papers presented at the 15th *Jahrestreffen Junger Romanisten* 2021 in Würzburg have also been published in this journal: EHMER, M. – VERRICO, F., Einleitende Bemerkungen zu den Beiträgen der Referentinnen und Referenten des XV. Jahrestreffens der Jungen Romanisten. In: *Journal on European History of Law*, Vol. 13, Nr. 1, 2022, p. 215-218; BAJÁNHÁZY, I., Urkundenfälschung im römischen Recht, Cicero als Schriftsachverständiger. In: *Journal on European History of Law*, Vol. 13, Nr. 1, 2022, p. 219-226; BINDER, M., Procedural Peculiarities of the Lex Publilia de sponsu. In: *Journal on European History of Law*, Vol. 13, Nr. 1, 2022, p. 227-232; HORN, J.-K., Gaius libro septimo decimo ad edictum provincial D. 29,5,25 – Betrachtungen zum SC Silanianum in Gaius' Kommentar ad edictum provincial. In: *Journal on European History of Law*, Vol. 13, Nr. 1, 2022, p. 233-243.

nature of these relations, also reflected the nationality of the conference participants, most of whom came from Germany and Italy. Elena Pezzato from Bologna followed with a paper entitled *Gedanken zum Studium des Syrisch-Römischen Rechtsbuches. Die adoptio in fratrem* which dealt with the issues of adoption in the Syro-Roman law book, which is (already due to the language of its writing) an often-neglected source.

The afternoon session was opened by Julia Katharina Horn from Münster with her paper *Betrachtungen zu den römischen Juristen - "Juristenrecht" als Rechtsquelle und die responsa prudentium*, in which she explored the question of the sources of law and the place of jurisprudence in their application, especially with regard to the so-called answers of jurists. Subsequently, Robin Repnow from Heidelberg in his paper *Konfiskationen und kaiserliche Freigiebigkeit zu Beginn des 4. Jahrhunderts* dealt with the legal aspects of expropriation at the beginning of the Dominate.

The second day began with two family law papers by colleagues from Vienna. Michael Binder's *Sonderprobleme zur Aktiv- und Passivlegitimation bei der Ehe mit einem Hauskind* (paper published in English) dealt with the procedural aspects of the marital relationship of children under paternal power, and Stefan Johannes Schmatzberger in his poetically titled paper Liebe und Diebe - Sachentwendung aus Anlass der Ehescheidung in D. 25. 2. 22 pr. dealt with the issue of theft in the context of divorce.

Benedict Walter from Bochum then dealt with the position of the creditor and his protection in the case of a pledge (*Materielle Gläubigergleichbehandlung - Das Verhältnis von pignus zum privilegium*). The morning programme was concluded by Norbert Pozsonyi from Szeged, whose paper *Das außergerichtliche vadimonium in der Praxis* also dealt with the issue of security, but not as a pledge, but as a personal guarantee that another person will appear in court.

Emese Újvári from Debrecen opened the afternoon session with an analysis of the property liability of the heirs of municipal officials (*Die Haftung der Erben der Munizipalmagistrate. Beispiele aus dem Bereich der magistratischen Vormundsbestellung*). The last paper was presented by Salvatore Marino from Naples: *Seine Gefängnisse und sein Richter. Silvio Pellico, Antonio Salvotti… und das römische Recht*, which was symbolically dedicated to the person of the famous Italian poet (and his judge) involuntarily associated with Brno.

At the end of the conference, the University of Padua was confirmed as the organiser of the next year's *Treffen Junger Romanisten*, which will take place on 30th and 31st May 2024.

The Capability to sue or be a Defendant in the Context of Matrimony with filii familias: An Analysis of D. 15.1.38.1 and D. 24.3.22.3*

*Michael Binder***

Abstract

In Roman law, it was not uncommon for a filius or a filia familias to get married. The capability of a filius or a filia familias to sue or be a defendant was restricted. During an intact marriage, such a restriction was often insignificant. However, in the case of a divorce, the recipient of the dowry (dos) was sometimes questionable. To settle conflict about the dos, it was important to know who could claim part or all of the dos and who was obligated to return part or all of it. Such a question was raised in D. 15.1.38.1 and in D. 24.3.22.3 where a filius/filia familias first married and later divorced. In this article, D. 15.1.38.1 and D. 24.3.22.3 are exegetically analysed.

Keywords: *Roman law; filii familias; dowry; actio rei uxoriae; dolo facit, qui petit quod redditurus est.*

1. Introduction

A child who was in the power of the *pater familias* (*filius* or *filia familias*) had the opportunity to marry and remain in the *patria potestas*. For a socially accepted marriage, the contribution of a *dos* was necessary; otherwise, cohabitation could have indicated a concubinage.[1] The contribution of a *dos* entailed specific rights and obligations for husband and wife. If the *dos* was promised[2] but not immediately transferred to the husband, the husband (*stipulator*) could sue the *promissor* and claim the *dos*. After the end of the marriage, the ex-wife could usually[3] demand the restitution of the *dos*.

Neither the *filius* nor the *filia familias* were allowed to own property.[4] The *filia familias* could not sue or get sued, the *filius familias* could not sue, but it was possible to sue him. However, a verdict against a *filius familias* was not executable while he remained in the power of his *pater familias*.[5] If a spouse was still in the power of the *pater familias,* it was unclear whether the *dos* could be reclaimed from (D. 15.1.38.1) or claimed by this spouse (D. 24.3.22.3).

2. *Filius familias*

2.1 General aspects of matrimony with a *filius familias*

This chapter explores the situation in which a woman who was not in the power of her father and a *filius familias* decided to marry. If a *dos* was provided and the marriage resulted in a divorce, a pertinent question was whether the *filius familias* or the *pater familias* could be sued by the ex-wife. This problem is discussed in the following source.

D. 24.3.53 (Tryphoninus *libro* 12 *disputationum*)

Si filio familias dos data est, ipse quidem dotis actione tenetur, pater autem eius de peculio: nec interest, in peculio rem vel pecuniam dotalem habeat nec ne. Sed quatenus facere potest, hic quoque condemnandus est: intellegitur autem peculio tenus facere posse, quod habet rei iudicandae tempore. Atquin si cum patre agatur, deduceretur ex peculio, quod patri vel subiectis ei personis filius debet: at si cum ipso filio agatur, alterius debiti non fiet detractio in computatione quantum facere possit filius.

If a dowry is given to a son-in-power, he himself will be liable to an action for dowry, but his father will be liable to one on the peculium.

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* The following paper is based on my presentation on April 14th, 2023, 'Sonderprobleme zur Aktiv- und Passivlegitimation bei der Ehe mit einem Hauskind', which took place at XVII. Tagung der jungen Romanisten in Brno. For his revision and feedback on this article I want to thank Prof. Dr. Philipp Scheibelreiter.

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1 KASER, M., *Das Römische Privatrecht I*, 2nd edn. München, 1971, p. 333.

2 For this option of providing a *dos,* see STAGL, J. F., *Favor dotis. Die Privilegierung der Mitgift im System des römischen Rechts*, Wien et al., 2009, p. 14-15.

3 STAGL, J. F., § 89 Klage auf Herausgabe des Frauenguts (*actio rei uxoriae*). In: BABUSIAUX, U. – BALDUS, C. – ERNST, W. – MEISSEL, F.-S. – PLATSCHEK, J. – RÜFNER, T. (ed.), *Handbuch des Römischen Privatrechts II*, Tübingen, 2023, p. 2519-2521.

4 BENKE, N. – MEISSEL, F.-S., *Roman Law of Property. Origins and Basic Concepts of Civil Law I. Translated by Caterina Maria Grasl*, Wien, 2018, p. 3.

5 KASER, *Privatrecht*, p. 343.

It makes no difference whether or not a person holds the property as peculium or as a dowry; he should have judgment given against him for as much as he can pay. But his ability to pay is understood to depend on the amount he has in the peculium at the time of judgment. But if an action is brought against the father, whatever the son owes the father or others in his power must be deducted from the peculium. If the action is brought against the son, no deduction can be made of any other debt in calculating the amount the son can pay.[6]

In the case discussed by Tryphoninus,[7] the *dos* was given to the *filius familias* (*filio familias dos data est*). After the end of the marriage, the ex-wife had the right to claim the *dos* back from the *filius familias* with the *actio rei uxoriae* (*ipse quidem dotis actione tenetur*). The *filius familias* was protected–he could only be forced to repay a sum within his means (*sed quatenus facere potest, hic quoque condemnandus est*).

However, the ex-wife could alternatively bring the *actio rei uxoriae* as an *actio de peculio* against the *pater familias* of her ex-husband (*pater autem eius de peculio*). The liability of the *pater familias* was limited; he was obligated to pay at most the value of the *peculium*.[8] Any debt the *filius familias* owed to the *pater familias* reduced the *peculium* and therefore the liability of the *pater familias*[9] (*deduceretur ex peculio, quod patri vel subiectis ei personis filius debet*).

For the ex-wife, the *actio de peculio* presented a serious disadvantage. Due to the limited liability of the *pater familias*, she risked not getting the entire *dos* back. However, this was not always the case. In the next source, the ex-wife could sue the *pater familias* of her ex-husband directly with the *actio rei uxoriae*.

D. 24.3.22.12 (Ulpianus *libro* 33 *ad edictum*)

Transgrediamur nunc ad hunc articulum, ut quaeramus, adversus quos competit de dote actio. Et adversus ipsum maritum competere palam est, sive ipsi dos data sit sive alii ex voluntate mariti vel subiecto iuri eius vel non subiecto. Sed si filius familias sit maritus et dos socero data sit, adversus socerum agetur. Plane si filio data sit, si quidem iussu soceri, adhuc absolute socer tenebitur: quod si filio data sit non iussu patris, Sabinus et Cassius responderunt nihilo minus cum patre agi oportere: videri enim ad eum pervenisse dotem, penes quem est peculium: sufficit autem ad id damnandum quod est in peculio vel si quid in rem patris versum est. Sin autem socero dotem dederit, cum marito non poterit experiri, nisi patri heres exstiterit.

Let us now pass on to another topic and ask against whom the action for dowry will lie. Clearly, it will lie against the husband himself whether the dowry was given to him or to someone else with his consent, whether the person was in his power or not. But if the husband is a son-in-power and the dowry is given to his father-in-law [sic!], the action must be brought against the father-in-law. Clearly, if it was given to the son or on the orders of the father-in-law, the father-in-law will still be absolutely liable. But if it is given to the son but not on the orders of the father, according to Sabinus and Cassius, an action could still be brought against the father because the dowry is held to have passed to the person who has the peculium. It will be sufficient, however, for judgment to be given against him for the amount of the peculium or as far as the father has taken benefit. But if the dowry has been given to the father-in-law, he cannot sue the husband unless he becomes his father's heir.[10]

Ulpianus[11] emphasised in his analysis that the *dos* could also be provided to the *pater familias* of the husband (*filius familias sit maritus et dos socero data sit*). In this case, after a divorce took place the ex-wife did not need an *actio de peculio*. She was able to reclaim the *dos* from the *pater familias* with the *actio rei uxoriae* (*adversus socerum agetur*). The same action against the *pater familias* was possible if he had ordered that the *dos* should be given to his *filius familias* (*si filio data sit, si quidem iussu soceri, adhuc absolute socer tenebitur*).

Overall, it can be asserted that a woman who married and later divorced a *filius familias* could try to get the *dos* back either from the *filius familias* or the *pater familias.* Since a verdict against her ex-husband (*filius familias*) was not enforceable while he remained in the *patria potestas*,[12] it was more advantageous for the ex-wife to sue the *pater familias*; against the *pater familias*, the *actio de peculio* (as *actio rei uxoriae*) and the *actio rei uxoriae* were considered. If the *dos* was given directly to the *pater familias* or—due to an order of the *pater familias*—to his *filius familias*, the ex-wife could hold an *actio rei uxoriae* against the *pater familias*, but not against the *filius familias*.[13] If the *dos* was provided to the *filius familias* without an order of the *pater familias*, the ex-wife could sue her ex-husband (*filius familias*) with the *actio rei uxoriae* or (if the requirements were met) the *pater familias* with an *actio de peculio*.[14]

2.2 D.15.1.38.1

Given these general observations on matrimony with a *filius familias*, it is now time to discuss D. 15.1.38.1. In this source, a divorce took place and the ex-wife wanted to reclaim the *dos*.

[6] Translation: MCLEOD, G. In: WATSON, A. (ed.), *The Digest of Justinian II*, 2nd edn. Philadelphia, 1998, p. 269.
[7] For further information about Tryphoninus, see KUNKEL, W., *Herkunft und soziale Stellung der römischen Juristen*, 2nd edn. Graz et al., 1967, p. 231-233.
[8] 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. 244-246.
[9] See also ZIMMERMANN, R., *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford, 1996, p. 9.
[10] Translation: MCLEOD, G. In: WATSON, A. (ed.), *The Digest of Justinian II*, 2nd edn. Philadelphia, 1998, p. 264.
[11] For further information about Ulpianus, see KUNKEL, *Herkunft*, p. 245-254.
[12] See chapter '1. Introduction'.
[13] See also STAGL, Klage, p. 2523.
[14] See also STAGL, Klage, p. 2523.

D. 15.1.38.1 (Africanus *libro octavo quaestionum*)

Si nuptura filio familias dotis nomine certam pecuniam promiserit et divortio facto agat de dote cum patre, utrumne tota promissione an deducto eo, quod patri filius debeat, liberari eam oporteret? Respondit tota promissione eam liberandam esse, cum certe et si ex promissione cum ea ageretur, exceptione doli mali tueri se posset.

A woman who promised a certain sum of money by way of dowry at a time when she was engaged to a son-in-power sues the father on the dowry after the marriage has ended in divorce; should she be freed from her promise in its entirety or only subject to a deduction of what the son owes the father? The reply given was that she should be freed from the whole promise, since if she were sued on it she could obviously raise the defense of fraud.[15]

Africanus[16] described a case in which a woman married a *filius familias*. A *dos* was provided by the woman herself in the form of a *stipulatio* (*si nuptura filio familias dotis nomine certam pecuniam promiserit*). After the divorce took place, the ex-wife decided to sue the *pater familias* of her ex-husband to reclaim the *dos* (*divortio facto agat de dote cum patre*).

First, it is necessary to examine to whom the *dos* was provided. The promise was clearly made to the *filius familias* and not his *pater familias*. Therefore, an *actio rei uxoriae*[17] against the *pater familias* would only be possible if he had ordered that the *dos* should be promised to his *filius familias*. There is no indication in the text that such an order was given. In fact, the opposite seems to be the case. Regarding the liability of the *pater familias*, Africanus questioned whether the amount that the *filius familias* owed the *pater familias* should be taken into consideration. Therefore, an *actio de peculio* must have been directed against the *pater familias*.

However, the question of whether the ex-wife could reclaim the *dos* and, if so, in what amount, was not addressed by Africanus. Apparently, the objective was to simplify. Rather than forcing the *pater familias* to sue the ex-wife for the promised *dos* and the ex-wife to reclaim the *dos*, Africanus debated whether the ex-wife should be freed[18] from her obligation.

If the wife was not freed entirely, the *pater familias* would have been able to sue her successfully. This outcome is best illustrated with an example. Let us assume that the ex-wife promised the *filius familias* 50, the value of the *peculium* was 50, and the *filius familias* owed the *pater familias* 10. On one hand, the *pater familias* could now claim 50 from the ex-wife;[19] on the other, the ex-wife could sue the *pater familias* for 40 with an *actio de peculio*.[20] Therefore, the ex-wife must have been relieved by a sum of 40. The remaining 10 could be claimed by the *pater familias*.

If the ex-wife brought an action against her ex-husband (*filius familias*), the situation would be different. The ex-wife could demand 50 from her ex-husband[21] with the *actio rei uxoriae*. However, as long as the ex-husband remained in the power of his *pater familias*, a verdict against him would not be enforceable.[22]

In D. 15.1.38.1, it seems likely that the *peculium* would have been sufficient to cover the promised *dos* only without the deduction (of what the *filius familias* owed to his *pater familias*) from the value of the *peculium* (*utrumne tota promissione an deducto eo, quod patri filius debeat, liberari eam oporteret*). Therefore, Iulianus' decision[23] (as mentioned by his student[24] Africanus) that the ex-wife should be freed from her obligation appears to be surprising. Iulianus justified this solution with the following argument: since the ex-wife would have had (if sued) an *exceptio doli* against the *pater familias*, she must be freed entirely.

Iulianus' answer did not address the question of why an *exceptio doli* against the *pater familias* was possible. It seems surprising that the ex-wife even had an *exceptio doli* against the *pater familias* if he would have only claimed the remaining difference[25] with the action from the *stipulatio*.

An *exceptio doli*[26] from the ex-wife against the *pater familias* could be explained with the legal maxim[27] *dolo facit, qui petit*

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[15] Translation: WEIR, T. In: WATSON, A. (ed.), *The Digest of Justinian I*, 2nd edn. Philadelphia, 1998, p. 446.

[16] For further information about Africanus, see KUNKEL, *Herkunft*, p. 172-173.

[17] For this action, an actual payment from the person who provided the *dos* to the husband or (if he was in the power of the *pater familias*) to the *pater familias* was not necessary. A promised *dos* was considered sufficient, see STAGL, J. F., *Favor dotis*, p. 190.

[18] The ex-wife could be discharged with an *acceptilatio*. For information about the *acceptilatio*, see WATSON, A., The Form and Nature of 'acceptilatio' in Classical Roman Law. In: *Revue Internationale des droits de l'antiquité*, vol. 8, 1961, p. 391-416.

[19] D. 45.1.45 pr. (Ulpianus *libro* 50 *ad Sabinum*): *Quodcumque stipulatur is, qui in alterius potestate est, pro eo habetur, ac si ipse esset stipulatus.*
Translation: HART, S. In: WATSON, A. (ed.), *The Digest of Justinian IV*, 2nd edn. Philadelphia, 1998, p. 171: *Whatever stipulation is made by a man who is in the power of another will be reckoned on behalf of that person as if he had made the stipulation himself.*
See also FINKENAUER, T., § 21 Stipulation (Verbalkontrakt). In: BABUSIAUX, U. – BALDUS, C. – ERNST, W. – MEISSEL, F.-S. – PLATSCHEK, J. – RÜFNER, T. (ed.), *Handbuch des Römischen Privatrechts I*, Tübingen, 2023, p. 575.

[20] The amount that the *filius familias* owed to his *pater familias* must have been deducted, see D. 24.3.53 (chapter '2.1 General aspects of matrimony with a *filius familias*').

[21] In this case, the sum the *filius familias* owed to his *pater familias* was not deductible, see D. 24.3.53 (chapter '2.1 General aspects of matrimony with a *filius familias*').

[22] See chapter '1. Introduction'.

[23] For further information about Iulianus, see KUNKEL, *Herkunft*, p. 157-166.

[24] KUNKEL, *Herkunft*, p. 173.

[25] In the given example, it was 10.

[26] For the term 'dolus present', see MACCORMACK, G., Dolus in the Law of the early classical period (Labeo – Celsus), *Studia et documenta historiae et iuris*, vol 52, 1986, p. 262-263.

[27] For information about legal maxims in general, see STEIN, P., *Regulae Iuris. From Juristic Rules to Legal Maxims*, Edinburgh, 1966.

quod redditurus est.[28] The ex-wife had promised a sum to her ex-husband that she could claim back from him after the divorce with the *actio rei uxoriae*.[29] Therefore, between the ex-husband and the ex-wife, the legal maxim *dolo facit, qui petit quod redditurus est* would in general be applicable. As the ex-husband still remained in the power of his *pater familias*, the *pater familias* could sue the ex-wife.[30] Since the legal maxim *dolo facit, qui petit quod redditurus est* would be relevant in a trial between the ex-wife and the ex-husband, it seems logical that the ex-wife must have received an *exceptio doli* (also) against the *pater familias* of her ex-husband, who could demand the sum which was promised to his *filius familias*.[31]

3. *Filia familias*

3.1 General aspects of matrimony with a *filia familias*

If the husband remained in the power of his *pater familias*, it was debatable whether the *dos* was provided to the *pater familias* or to the *filius familias*. Therefore, an ex-wife could sue either the *pater familias* or her ex-husband (*filius familias*).[32] In this chapter, cases in which the ex-wife stayed in the power of her *pater familias* are analysed. First, it seems necessary to discuss who could reclaim the *dos* from the ex-husband. This question is addressed in the following source.

D. 24.3.34 (Africanus *libro octavo quaestionum*)

Titia divortium a Seio fecit: hanc Titius in sua potestate esse dicit et dotem sibi reddi postulat: ipsa se matrem familias dicit et de dote agere vult: quaesitum est, quae partes iudicis sint. Respondi patri, nisi probet filiam non solum in sua potestate esse, sed etiam consentire sibi, denegandam actionem, sicuti denegaretur, etiamsi constaret eam in potestate esse.

Titia divorced Seius. Titius said she was in his power and demanded the dowry be returned to him while she said she was independent and wanted to sue for her dowry. What side should the judge take? I replied that he should refuse the father an action unless he could prove not only that his daughter was in his power but also that she had agreed to the action, just as he should refuse an action even though it is established that she is in his power.[33]

Titius had a daughter, Titia, who divorced Seius. Titius wanted to reclaim the *dos* from Seius (*Titia divortium a Seio fecit: hanc Titius in sua potestate esse dicit et dotem sibi reddi postulat*). Africanus demonstrated that Titius could only sue Seius successfully if Titia was in the *patria potestas* and gave her consent[34] to transfer the *dos* from Seius to Titius (*respondi patri, nisi probet filiam non solum in sua potestate esse, sed etiam consentire sibi*). Otherwise, the action from Titius against Seius had to be denied.

After the divorce took place, the ex-husband was only obliged to return the *dos* to the *pater familias* of his ex-wife if the ex-wife gave her consent.[35] In the next source, Iulianus debates whether, in the case of divorce, the ex-husband could demand the already transferred *dos* back from the *pater familias* of his ex-wife if he had made a payment and the ex-wife refused to give her consent.

D. 46.3.34.6 (Iulianus *libro* 54 *digestorum*)

Si gener socero, ignorante filia, dotem solvisset, non est liberatus, sed condicere socero potest, nisi ratum filia habuisset. Et propemodum similis est gener ei, qui absentis procuratori solveret, quia in causam dotis particeps et quasi socia obligationis patri filia esset.

Should a son-in-law, in the ignorance of the daughter [wife], pay back the dowry to his father-in-law, he will not be released; but he may bring a condictio against the father-in-law, unless the daughter ratifies the transaction. Indeed, the son-in-law is very similar to one who pays

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[28] WACKE, A., Zur Funktion und Gefahrtragung bei der römischen Mitgift. In: *Tijdschrift voor Rechtsgeschiedenis*, vol. 43/3-4, 1975, p. 242 refers in the context of D. 15.1.38.1 to *dolo facit, qui petit quod redditurus est*.
For information about *dolo facit, qui petit quod redditurus est*, see 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. 417-420, WACKE, A., Das Rechtssprichwort. Dolo facit, qui petit quod (statim) redditurus est. In: *Juristische Arbeitsblätter*, vol. 10, 1982, p. 477-479, and LAMBRINI, P., *Dolo generale e regole di correttezza*, Padova, 2010, p. 47.
D. 44.4.8 pr. (= D. 50.17.173.3)-1 (Paulus *libro sexto ad Plautium*): *Dolo facit, qui petit quod redditurus est. 1. Sic, si heres damnatus sit non petere a debitore, potest uti exceptione doli mali debitor et agere ex testamento.*
Translation: BEINART, B. In: WATSON, A. (ed.), *The Digest of Justinian IV*, 2nd edn. Philadelphia, 1998, p. 150: *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 based on the will.*
For information about D. 44.4.8.1, see BINDER, M., The Fraudulent Claim of One's Own Fundus (D. 21.2.73). In: TAUCHEN, J. – KOLUMBER, D. (ed.), *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.

[29] A verdict against a *filius familias* could not be enforced.

[30] See D. 45.1.45 pr.

[31] The legal position of the ex-wife should not deteriorate only because she decided to marry a *filius familias*.

[32] See chapter '2.1 General aspects of matrimony with a *filius familias*'.

[33] Translation: MCLEOD, G. In: WATSON, A. (ed.), *The Digest of Justinian II*, 2nd edn. Philadelphia, 1998, p. 267.

[34] If the ex-wife was not able to give her consent because she had already passed away, her father could successfully claim back the *dos*, see D. 46.8.25 pr. (Africanus *libro sexto quaestionum*): *Pater dotem a se datam absente filia petit et ratam rem habituram eam cavit: ea prius quam ratum haberet, mortua est. Negavit committi stipulationem, quia et si verum sit ratum eam non habuisse, nihil tamen mariti intersit dotem restitui, cum patri etiam mortua filia salva esse dos debeat.*
Translation: BEINART, B. In: WATSON, A. (ed.), *The Digest of Justinian IV*, 2nd edn. Philadelphia, 1998, p. 249: *A father, in the absence of his daughter, claims the dowry provided by himself and undertakes that she will ratify; she dies before she can ratify. [Julian] said that the stipulation is operative; for even though it is true that she does not ratify, nevertheless, the restoration of the dowry gives the husband no interest for the dowry should be kept intact for the father even with the daughter dead.*
See WOLFF, H. J., Zur Stellung der Frau im klassischen römischen Dotalrecht. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 53, 1933, p. 310.

[35] If the ex-wife was not available, the *pater familias* had the option to provide a *satisdatio*. After he had provided such a guarantee, he was able to successfully reclaim the *dos*, see D. 24.3.22.3 (chapter '3.2 D. 24.3.22.3'). For further information about the *satisdatio,* see KASER, M. – KNÜTEL, R. – LOHSSE, S., *Römisches Privatrecht*, 22nd edn. München, 2021, p. 102.

the procurator of an absent party because the daughter is a participant in the matter of dowry and, as it were, a partner with her father.[36]

A divorce occurred, and the *gener* (son-in-law) repaid the *dos* to his *socer* (father-in-law). Iulianus indicated that the *gener* could sue the *socer* with a *condictio* and reclaim his payment if the ex-wife refused to give her consent and ratify the transaction (*sed condicere socero potest, nisi ratum filia habuisset*). This outcome was necessary; otherwise, the *gener* would have been forced to pay back the *dos* twice. An ex-wife who did not ratify the payment from her ex-husband to her *pater familias* was able to sue her ex-husband with the *actio rei uxoriae* after she was no longer in the power of her father. However, there were also exceptions. Such an exception[37] is mentioned in the in the following source.

D. 24.3.4 (Pomponius *libro* 15 *ad Sabinum*)

Si pater sine consensu filiae dotem a viro exegisset et eandem alii viro eius filiae nomine dedisset et mortuo patre filia cum priore viro ageret, doli mali exceptione repellitur.

If a father collects a dowry from his daughter's husband without her consent and gives it to her second husband on her behalf, where the father dies and the daughter sues her first husband, she will be barred by the defense of fraud.[38]

The first husband had already paid the *dos* back to the *pater familias* of his ex-wife (*si pater sine consensu filiae dotem a viro*). The wife received the *dos* from her *pater familias* for a second marriage but did not ratify the payment from the first husband to her *pater familias*. Later, the *pater familias* died and the wife sued her first husband with the *actio rei uxoriae*. Pomponius[39] decided that the first husband had an *exceptio doli*[40] against the wife's *actio rei uxoriae*.[41]

From the analysed sources, one can conclude that an ex-wife who was in the *patria potestas* could ratify the transaction of the *dos* from her ex-husband to her *pater familias* after the end of the marriage. If she ratified the transaction, she was (after the lapse of the *patria potestas*) no longer able to sue her ex-husband with the *actio rei uxoriae*.[42] However, if she decided to refuse the ratification, the ex-husband had the right to claim the *dos* back from the *pater familias* with a *condictio*.

3.2 D. 24.3.22.3

In the next source, the ex-husband had already repaid the *dos* to the father of his ex-wife. The ex-wife tried to sue the ex-husband with the *actio rei uxoriae*. Ulpianus explained under which circumstances the ex-wife's *actio rei uxoriae* had to be denied.

D. 24.3.22.3 (Ulpianus *libro* 33 *ad edictum*)

Si pater filia absente de dote egerit, etsi omissa sit de rato satisdatio, filiae denegari debet actio, sive patri heres exstiterit, sive in legato tantum acceperit, quantum dotis satis esset. Et ita Iulianus pluribus locis scribit compensandum ei in dotem quod a patre datur lucroque eius cedit, si tantum ab eo consecuta sit, quantum ei dotis nomine debeatur a marito qui patri solvit.

Where a father in his daughter's absence sues for the dowry, even though he did not give security for the ratification of his act, the daughter will be refused an action whether she becomes his heir, or receives as a legacy an amount equal to her dowry. Julian says in several works that the property given to her by her father should be set off against her dowry, and it would be profitable for her if she received as much from him as was due from her husband as a dowry and which he paid to her father.[43]

After the end of the marriage, the *pater familias* of the ex-wife reclaimed the *dos* from the ex-husband (*si pater filia absente de dote egerit*). As the ex-wife was absent, a ratification was not possible. In this case, the ex-husband was only obliged to repay the *dos* if the *pater familias* provided him a *satisdatio*.[44] However, in D. 24.3.22.3, the ex-husband did not receive a *satisdatio* (*etsi omissa sit de rato satisdatio*).

After the lapse of the *patria potestas*, the ex-wife reclaimed the *dos* from the ex-husband with the *actio rei uxoriae*. According to Ulpianus, the action of the ex-wife had to be denied if she became her father's heir or obtained, in the form of a legacy, something with the same value as the *dos* (*filiae denegari debet actio, sive patri heres exstiterit, sive in legato tantum acceperit, quantum dotis satis esset*).

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[36] Translation: BEINART, B. In: WATSON, A. (ed.), *The Digest of Justinian IV*, 2nd edn. Philadelphia, 1998, p. 221.

[37] Another exception was given by Ulpianus, see D. 24.3.22.3 (chapter '3.2 D. 24.3.22.3').

[38] Translation: MCLEOD, G. In: WATSON, A. (ed.), *The Digest of Justinian II*, 2nd edn. Philadelphia, 1998, p. 259.

[39] For further information about Pomponius, see KUNKEL, *Herkunft*, p. 170-171.

[40] The *actio rei uxoriae* (most likely) belonged to the *bonae fidei iudicia*, see STAGL, Klage, p. 2517.
Therefore, an *exceptio doli* was not always necessary, see D. 24.3.21 (Ulpianus *libro tertio disputationum*): *Sed et si ideo maritus ex dote expendit, ut a latronibus redimeret necessarias mulieri personas vel ut mulier vinculis vindicet de necessariis suis aliquem, reputatur ei id quod expensum est sive pars dotis sit, pro ea parte, sive tota dos sit, actio dotis evanescit. Et multo magis idem dicendum est, si socer agat de dote, debere rationem haberi eius quod in ipsum impensum est, sive ipse maritus hoc fecit sive filiae ut faciat dedit: sed et si non pater experiretur, sed post mortem eius filia sola de dote ageret, idem erit dicendum: cum enim doli exceptio insit de dote actioni ut in ceteris bonae fidei iudiciis, potest dici, ut et Celso videtur, inesse hunc sumptum actioni de dote, maxime si ex voluntate filiae factus sit.*
Translation: MCLEOD, G. In: WATSON, A. (ed.), *The Digest of Justinian II*, 2nd edn. Philadelphia, 1998, p. 262-263: *Where a husband spends money from the dowry in order to ransom his wife's necessary slaves from robbers or so that his wife can release one of her necessary slaves from imprisonment, he will be compensated for what he has spent. If only part of the dowry is spent, he can recover it; but if the whole dowry is used up, the action for dowry lapses. The same applies with even greater force where a father-in-law brings an action for dowry, since an account must be rendered of what has been spent on his behalf, whether the husband has done this himself or given it to the daughter so that she can do it. But if the father does not sue, but on his death, the daughter alone brings an action for dowry, the same applies. For since the defense of fraud is part of the action for dowry as is the case with the other actions of good faith, this expense can be said to be included in an action for dowry, especially if it was incurred with the daughter's consent. Celsus also holds this view.*

[41] For further information about this decision, see MACCORMACK, G., Dolus in Decisions of the Mid-classical Jurists (Iulian – Marcellus). In: *Bullettino dell'Istituto di Diritto romano*, vol. 96-97, 1993-1994, p. 113.

[42] The same seemed to be the case if she received the *dos* from her father for a second marriage.

[43] Translation: MCLEOD, G. In: WATSON, A. (ed.), *The Digest of Justinian II*, 2nd edn. Philadelphia, 1998, p. 263.

[44] This security would become relevant if the ex-wife refused the ratification and sued the ex-husband with the *actio rei uxoriae*.

It is interesting that the *praetor* denied the ex-wife's action[45] and that, consequently, no *iudex* was required. Why did the *praetor* have to protect the ex-husband? In the literature, the ex-wife's action was qualified as malicious. Varvaro[46] mentions *bona fides non patitur, ut bis idem exigatur*.[47] Mader[48] refers to *dolo facit, qui petit quod redditurus est.*[49]

In my opinion, it is necessary to differentiate between the two variations in D. 24.3.22.3. In the first variation, in which the ex-wife became her father's heir, the denial of the *actio rei uxoriae* by the *praetor* can be explained with the legal maxim *dolo facit, qui petit quod redditurus est*. If the ex-wife were to sue the ex-husband with the *actio rei uxoriae*, she would clearly have no interest in ratifying the transaction made from the ex-husband to her father. Therefore, the ex-husband could reclaim the *dos* from the father with a *condictio*.[50] Since the father had already passed away, the *condictio* would be directed against the ex-wife (the father's heir). With the *actio rei uxoriae*, the ex-wife could claim something (namely, the *dos*) from the ex-husband that the ex-husband could reclaim with the *condictio*. To avoid two unnecessary lawsuits, the *praetor* could deny the *actio rei uxoriae* due to the legal maxim *dolo facit, qui petit quod redditurus est*.

However, Mader's reference to *dolo facit, qui petit quod redditurus est* seems problematic in the second variation. If the ex-wife obtained something of the same value as the *dos* from her father in the form of a legacy, her *actio rei uxoriae* against the ex-husband also had to be denied. With the *actio rei uxoriae*, the ex-wife could claim from the ex-husband what the ex-husband could claim from the father's heir. In such a constellation, the legal maxim *dolo facit, qui petit quod redditurus est* would (in general) not be applicable, because the ex-husband would receive the *dos* not from the plaintiff (i.e., the ex-wife), but from another person (the heir).[51] Only if the other person could sue the plaintiff the legal maxim *dolo facit, qui petit quod redditurus est* would become relevant.[52] In D. 24.3.22.3 (second variation), it is not indicated that the heir could claim the *dos* from the ex-wife. Therefore, the denial of the ex-wife's action should be explained with the legal maxim *bona fides non patitur, ut bis idem exigatur*.[53]

4. Conclusion

In this paper, I analysed cases in which a *filius* or *filia familias* was wed and later divorced. Specific problems occurred in the context of the *dos*. Since the *filius* and the *filia familias* could not own property, it seemed questionable who could claim (or reclaim) the *dos*. In the first source (D. 15.1.38.1), the *pater familias* of the ex-husband could not claim the promised *dos* from the ex-wife because the ex-wife could reclaim the *dos* with the *actio rei uxoriae*. Another case (D. 24.3.22.3, first variation) suggests that the ex-wife could not reclaim the *dos* with the *actio rei uxoriae* if the ex-husband had already made a payment to her father and she became her father's heir. Both cases (D. 15.1.38.1 and D. 24.3.22.3, first variation) can be explained with the legal maxim *dolo facit, qui petit quod redditurus est.*

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[45] Different ways to counter the *actio rei uxoriae* are mentioned in D. 24.3.4 and D. 24.3.21, see chapter '3.1 General aspects of matrimony with a *filia familias*'.

[46] VARVARO, M., *Studi sulla restituzione della dote. I. La formula dell'actio rei uxoriae*, Torino, 2006, p. 161.

[47] D. 50.17.57 (Gaius *libro* 18 *ad edictum provinciale*): *Bona fides non patitur, ut bis idem exigatur.*
Translation: CRAWFORD, M. In: WATSON, A. (ed.), *The Digest of Justinian IV*, 2nd edn. Philadelphia, 1998, p. 474: *Good faith does not allow the same thing to be claimed twice.*

[48] MADER, Dolo facit, p. 418-419.

[49] See chapter '2.2 D. 15.1.38.1'.

[50] See D. 46.3.34.6 (chapter '3.1 General aspects of matrimony with a *filia familias*').

[51] See 24.3.44.1 (Paulus *libro quinto quaestionum*): *Lucius Titius filiae suae nomine centum doti promisit Gaio Seio: inter Gaium Seium et Lucium Titium patrem mulieris convenit, ne dos a viro vivo Lucio Titio id est patre mulieris, peteretur: postea culpa mariti divortio facto solutum est matrimonium et pater mulieris decedens alios heredes instituit filia exheredata: quaero, an ab heredibus soceri maritus exigere dotem potest, cum eam mulieri redditurus est. Respondi: cum filia aliis a patre heredibus institutis actionem de dote sua reciperanda habere coeperit, necesse habebit maritus aut exactam dotem aut actiones ei praestare: nec ullam exceptionem habebunt soceri heredes adversus eum, cum absurde dicitur dolo videri eum facere, qui non ipsi quem convenit sed alii restituturus petit…*
Translation: MCLEOD, G. In: WATSON, A. (ed.), *The Digest of Justinian II*, 2nd edn. Philadelphia, 1998, p. 268: *Lucius Titius promised Gaius Seius one hundred gold pieces as a dowry for his daughter. It was agreed between Gaius Seius and Lucius Titius, the woman's father, that the dowry was not to be demanded of the husband during the lifetime of Lucius Titius, that is, the woman's father. The marriage was later dissolved by divorce for which the husband was to blame, and the woman's father died, having appointed other heirs and disinherited the daughter. Could the husband collect the dowry from his father-in-law's heirs, since he was obliged to restore it to the woman? I replied that since the daughter was entitled to an action for dowry, as other heirs had been appointed by her father, her husband either had to surrender the dowry or assign his rights of action to her, and the father-in-law's heirs would have no defense against him. For it would be absurd to say someone had committed fraud when he demands restoration of the money not to the person he sued but to someone else…*
For information about the phrase *cum absurde dicitur dolo videri eum facere, qui non ipsi quem convenit sed alii restituturus petit*, see RÜGER, D., *Die donatio mortis causa im klassischen römischen Recht*, Berlin, 2011, p. 187.

[52] In such a case, it would seem debatable whether a circuit of actions should be avoided or not. Iulianus wanted to prohibit such a circuit of actions with an *exceptio doli*, see D. 44.4.7.1 (Ulpianus *libro* 76 *ad edictum*): *Idem Iulianus ait, si ei, quem creditorem tuum putabas, iussu tuo pecuniam, quam me tibi debere existimabam, promisero, petentem doli mali exceptione summoveri debere, et amplius agendo cum stipulatore consequar, ut mihi acceptam faciat stipulationem. Et habet haec sententia Iuliani humanitatem, ut etiam adversus hunc utar exceptione et condictione, cui sum obligatus.*
Translation: BEINART, B. In: WATSON, A. (ed.), *The Digest of Justinian IV*, 2nd edn. Philadelphia, 1998, p. 150: *The same Julian stated that if on your instruction I promised to someone, whom you thought to be your creditor, money which I thought I owed to you, the person suing me ought to be barred by the defense of fraud, and, moreover, by suing the stipulator I may claim from him that he give a discharge of the stipulation. And this view of Julian contains humanity so that I may use the defense as well as a condictio against him to whom I became liable.*
For the problem associated with a circuit of actions, see WACKE, A., Der Erlaß oder Vergleich mit einem Gesamtschuldner. Zur Befreiung Mithaftender beim Regreßverlust durch Gläubigerhandeln. Mit einem Vorschlag anläßlich des Referentenentwurfs zur Änderung und Ergänzung schadensersatzrechtlicher Vorschriften vom Januar 1967. In: *Archiv für die civilistische Praxis,* vol. 170/1, 1970, p. 58 and BALBUSSO, S., *La solidarietŕ tra fideiussori*, Padova, 2013, p. 180.

[53] VARVARO, *Restituzione,* p. 161.

Der prozessuale Erwerb scheidungshalber entwendeter Sachen in D. 25.2.22 pr.*

(The Procedural Acquisition of Objects Stolen for the Sake of Divorce in D. 25.2.22 pr.)

*Stefan Schmatzberger***

Abstract

Die actio rerum amotarum greift in einem Spezialfall im Bereich des Diebstahls ein: der Sachentwendung unter Ehegatten anlässlich der Scheidung. In D. 25.2.22 pr., Iul. 19 dig. befasst sich der Hochklassiker Julian mit den Konsequenzen, welche die Verurteilung aus dieser Klage für das rechtliche Schicksal der entwendeten Sachen nach sich zieht. Die exegetische Untersuchung dieses Digestenfragments vor dem Hintergrund des, durch das Prinzip der condemnatio pecuniaria geprägten, Formularprozesses zeigt, dass es infolge der Geldverurteilung zum prozessualen Erwerb der herausverlangten Sache durch den Verurteilten kommt. Dieser erhält hinsichtlich der res litigiosa nämlich Rechtsschutz durch eine dingliche Klage und eine exceptio.

Keywords: *actio rerum amotarum; Sachentwendung; res amovere; matrimonium; divortium; divortii causa; Formularprozess; condemnatio pecuniaria; Enteignung; actio Publiciana; exceptio; Eigentum.*

1. Prozessrechtliche Ausgangslage

Die *condemnatio pecuniaria* des klassischen Formularprozesses[1] wirft bekanntlich bei Klagen, die auf Herausgabe von im Eigentum des Klägers stehenden Sachen gerichtet sind, die Frage auf, was mit den betroffenen *res litigiosae* geschieht, wenn keine dem *iussum de restituendo* entsprechende Restitution stattfindet und somit die Verurteilung in Geld erfolgt.[2] Gerade für den Fall des beklagten Sachbesitzers, der die Herausgabe aufgrund seiner *contumacia*[3] verweigert, ist in diesem Zusammenhang das Problem der dinglichen Sachzuordnung drängend.[4] Der Kläger wird mit der *litis aestimatio* schließlich in Geld abgefunden. Die Sache erlangt er durch das Urteil nicht, da das Verfahren *per formulas* die Sachkondemnation nicht gekannt hat.[5] Daher erwirbt der *condemnatus* die Streitsache im Rahmen der Verurteilung infolge einer Herausgabeklage. In der (deutschsprachigen)

* Dieser Beitrag ist die ausgebaute Schriftfassung des Vortrags, den ich beim XVII. Treffen der Jungen Romanistinnen und Romanisten 2023 in Brünn unter dem Titel „Liebe und Diebe – Sachentwendung aus Anlass der Ehescheidung in D. 25.2.22 *pr.*“ gehalten habe. Für die Ausrichtung und Durchführung einer gelungenen Tagung in hervorragendem Rahmen gilt mein Dank dem Organisator Radek Černoch (Ass.Prof. des Instituts für Staats- und Rechtsgeschichte der Masaryk-Universität Brünn). Für die Durchsicht des Manuskripts und die diesbezüglichen Anmerkungen danke ich außerdem meinem Lehrer Univ.Prof. Dr. Philipp Scheibelreiter.

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1 *Omnium autem formularum, quae condemnationem habent, ad pecuniariam aestimationem condemnatio concepta est. itaque si corpus aliquod petamus, velut fundum hominem vestem argentum, iudex non ipsam rem condemnat eum, cum quo actum est, sicut olim fieri solebat, sed aestimata re pecuniam eum condemnat.* (Gai. 4.48).

2 Vgl. für die *condemnatio pecuniaria* etwa: PENNITZ, M., *Der „Enteignungsfall“ im römischen Recht der Republik und des Prinzipats.* Wien – Köln – Weimar, 1991, S. 249-323; KASER, M. / HACKL, K., *Das Römische Zivilprozeßrecht.* 2. Auflage, München, 1996, S. 372-373 mwN; KLINGENBERG, G., § 13 – Formularprozess: Verhandlung apud iudicem. In: BABUSIAUX, U. / BALDUS, CH. / ERNST, W. / MEISSEL, F.-ST. / PLATSCHEK, J. / RÜFNER, TH. (Hrsg.), *Handbuch des Römischen Privatrechts I.* Tübingen, 2023, S. 452-456 (Rz 68-73) mit Literaturübersicht in Anm. 490; gegen die – ansonsten einhellig angenommene – ausschließliche Geldverurteilung des klassischen Formularprozesses nur DÜLL, R., Über Textkonjekturen zu Gaius Veronensis und zur Frage der Zwangsenteignung im römischen Formularprozeß. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 96, 1979, S. 290-302, der für eine Wahlmöglichkeit des Klägers zwischen Geldurteil und Naturalleistung plädiert; dagegen etwa BLANK, H., Condemnatio pecuniaria und Sachzugriff. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 99, 1982, S. 303-316.

3 Zum Begriff etwa KASER / HACKL, *Zivilprozeßrecht*, S. 339 Anm. 36; vgl. auch HEUMANN, H. G. / SECKEL, E., *Heumanns Handlexikon zu den Quellen des römischen Rechts.* 9. Auflage, Jena, 1907, Neudruck 1926, S. 106.

4 Ausführlich zu dieser Konstellation SCHMATZBERGER, ST., „Pyrrhussieg“ apud iudicem? – Sachverlust trotz erfolgreicher Klage. In: *Revue internationale des droits de l'antiquité*, vol. 70, 2023, (in Drucklegung).

5 Vgl. etwa KASER / HACKL, *Zivilprozeßrecht*, S. 372; KLINGENBERG, Formularprozess, S. 452-453 (Rz 68).

Literatur firmiert diese Thematik zuweilen unter dem plakativen Titel „Enteignung des Klägers im Formularprozess“.[6]

Mit diesem Topos der „Enteignungswirkung“ der *condemnatio pecuniaria* befasst sich unter anderem Julian im 19. Buch seiner Digesten:

> D. 25.2.22 *pr.*, Iul. 19 *dig.*
> *Si propter res amotas egero cum muliere et lis aestimata sit, an actio ei danda sit, si amiserit possessionem? movet me, quia dolo adquisiit possessionem. respondi: qui litis aestimationem suffert, emptoris loco habendus est. ideo si mulier, cum qua rerum amotarum actum est, aestimationem litis praestiterit, adversus vindicantem maritum vel heredem mariti exceptionem habet et, si amiserit possessionem, in rem actio ei danda est.*
> Wenn ich gegen meine [ehemalige] Ehefrau wegen entwendeter Sachen geklagt habe und der Wert der streitbefangenen Sachen geschätzt [und von ihr gezahlt] worden ist – muß ihr dann, wenn sie den Besitz [an diesen Sachen] verliert, eine Klage gegeben werden? Mir gibt zu denken, dass sie den Besitz arglistig erlangt hat. Ich habe gutachtlich entschieden: Wer den Schätzwert der streitbefangenen Sache leistet, ist wie ein Käufer anzusehen. Hat daher die Ehefrau, gegen die wegen entwendeter Sachen geklagt worden ist, den Schätzwert der Sachen geleistet, dann hat sie gegen den Ehemann oder den Erben des Ehemannes, wenn einer von ihnen die Sache vindiziert, eine Einrede, und wenn sie den Besitz verliert, ist ihr eine dingliche Klage zu gewähren.[7]

2. Kontext der Quellenstelle

Das Fragment – eingeordnet im 2. Buch des 25. Titels der Digesten (*De actione rerum amotarum*) – behandelt die *actio rerum amotarum*, die „Klage wegen entwendeter Sachen“.[8] Dabei handelt es sich um eine vom Prätor *in factum* konzipierte,[9] sachverfolgende[10] Deliktsklage, die in einer speziellen Konstellation des Diebstahls eingreift, und als offensives Pendant zur aus dem Dotalrecht stammenden *retentio propter res amotas* fungiert,[11] welche als vielleicht älteres Rechtsinstitut für die Konzeption der Entwendungsklage Pate gestanden sein könnte.[12]

Anwendungsfälle von *actio* bzw. *retentio* sind Sachentwendungen unter Ehegatten, die im Zusammenhang mit einer Scheidung stehen. Obwohl diese Konstellation dem *furtum* unterfallen müsste,[13] soll die *actio furti* hier nicht greifen, was auch der Grund für die Einführung der Entwendungsklage gewesen sei, wie Paulus ausführt: *quia non placuit cum ea furti agere posse* (D. 25.2.1, Paul. 7 *ad Sab.*).[14] Nach der – vermutlich älteren[15] – Auffassung, die etwa Nerva und Cassius vertreten, wäre ein *furtum* unter Gatten während bestehender Ehe aufgrund ihrer Lebensgemeinschaft überhaupt nicht denkbar. Nach der anderen Ansicht etwa von Sabinus und Proculus, die sich später durchgesetzt zu haben scheint, wie die Zustimmung durch

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[6] Diese Bezeichnung bereits bei LEVY, E., Die Enteignung des Klägers im Formularprozess. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 42, 1921, S. 476-514; vgl. auch CARRELLI, E., *L'acquisto della proprietà per „litis aestimatio“ nel processo civile romano.* Milano, 1934, S. 4; EHRHARDT, A., *Litis aestimatio im römischen Formularprozess. Eine Untersuchung der materiellrechtlichen Folgen der Geldverurteilung.* München – Berlin, 1934, S. 141-197; BESELER, G., Lucubrationes Balticae. In: *Studia et Documenta Historiae et Iuris*, vol. 3, 1937, S. 367-375; KINDLER, M., *Affectionis aestimatio. Vom Ursprung des Affektionsinteresses im römischen Recht und seiner Rezeption.* Berlin, 2012, S. 170; weitere Nachweise bei PENNITZ, *Enteignungsfall*, S. 252 Anm. 18.

[7] Übersetzung: BEHRENDS in KNÜTEL, R. / KUPISCH, B. / SEILER, H. H. / BEHRENDS, O. (Hrsg.), *Corpus Iuris Civilis. Text und Übersetzung IV: Digesten 21-27.* Heidelberg, 2005, S. 319.

[8] Grundlegend zur *actio rerum amotarum* deren monographische Behandlung bei WACKE, A., *Actio rerum amotarum*. Köln – Graz, 1963; vgl. auch KASER, M., *Das Römische Privatrecht I.* 2. Auflage, München, 1971, S. 618-619; GUARINO, A., *Pagine di diritto romano VII.* Napoli, 1995, S. 105-157; STAGL, J. F., § 35 – Ehegüterrecht. In: BABUSIAUX, U. / BALDUS, CH. / ERNST, W. / MEISSEL, F.-ST. / PLATSCHEK, J. / RÜFNER, TH. (Hrsg.), *Handbuch des Römischen Privatrechts I.* Tübingen, 2023, S. 904-905 (Rz 102-106); PENNITZ, M., Diebstahlsklage (actio furti). In: BABUSIAUX, U. / BALDUS, CH. / ERNST, W. / MEISSEL, F.-ST. / PLATSCHEK, J. / RÜFNER, TH. (Hrsg.), *Handbuch des Römischen Privatrechts II.* Tübingen, 2023, S. 2617-2619 (Rz 17); mit Blick auf Konkurrenzfragen insb. LIEBS, D., *Die Klagenkonkurrenz im römischen Recht. Zur Geschichte der Scheidung von Schadensersatz und Privatstrafe.* Göttingen, 1972, S. 146-154.

[9] Vgl. D. 25.2.1, Paul. 7 *ad Sab.* (*introductum est*); LEVY, E., *Privatstrafe und Schadensersatz im klassischen römischen Recht.* Berlin, 1915, S. 114 mit Anm. 3; LENEL, O., *Das edictum perpetuum. Ein Versuch zu seiner Wiederherstellung*. 3. Auflage, Leipzig, 1927, S. 308; WACKE, *Actio rerum amotarum*, S. 54-55 mit Anm. 1; MARRONE, M., Rezension: Andreas Wacke, Actio rerum amotarum. In: *Tijdschrift voor Rechtsgeschiedenis*, vol. 33, 1965, S. 463; LIEBS, *Klagenkonkurrenz*, S. 146; PENNITZ, Diebstahlsklage, S. 2617 (Rz 17).

[10] Vgl. D. 25.2.21.5, Paul. 37 *ad ed.*; LEVY, *Privatstrafe*, S. 115 mit Anm. 3; WACKE, *Actio rerum amotarum*, S. 115-121; WESENER, G., Rezension: Andreas Wacke, Actio rerum amotarum. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 81, 1964, S. 463-464; KASER, *Privatrecht I*, S. 618 mit Anm. 55; PENNITZ, *Enteignungsfall*, S. 308 Anm. 258; anders etwa BESELER, Lucrubationes, S. 372 und DÜLL, Textkonjekturen, S. 294; von einer „Zweigesichtigkeit der Klage“ – sachverfolgend und pönal – spricht LIEBS, *Klagenkonkurrenz*, S. 149.

[11] Die *retentio propter res amotas* ist – neben anderen Retentionen (vgl. die Aufzählung bei Ulp. *reg.* 6.9) – das Zurückbehaltungsrecht des Ehemannes gegen die *actio rei uxoriae*, mit dem er Entwendungen von Mitgiftgegenständen durch die Frau während aufrechter Ehe einwenden kann; vgl. zu dieser *retentio* etwa WACKE, *Actio rerum amotarum*, S. 3-30; SÖLLNER, A., *Zur Vorgeschichte und Funktion der actio rei uxoriae.* Köln – Wien, 1969, S. 149; STAGL, J. F., *Favor dotis. Die Privilegierung der Mitgift im System des römischen Rechts.* Wien – Köln – Weimar, 2009, S. 20; STAGL, Ehegüterrecht, S. 904-905 (Rz 102-106); FORGÓ-FELDNER, B., § 112 – Zurückbehaltungsrecht (retentio). In: BABUSIAUX, U. / BALDUS, CH. / ERNST, W. / MEISSEL, F.-ST. / PLATSCHEK, J. / RÜFNER, TH. (Hrsg.), *Handbuch des Römischen Privatrechts II.* Tübingen, 2023, S. 3050 (Rz 41).

[12] Diese Vermutung etwa bei WACKE, *Actio rerum amotarum*, S. 3-5 mit einigen Nachweisen zur älteren Literatur in Anm. 1; Zustimmung bei WESENER, Rez. Wacke, S. 461 und MARRONE, Rez. Wacke, S. 462.

[13] Vgl. etwa D. 25.2.15.1, Ulp. 34 *ad ed.* (*furtum facere possunt, furti autem non tenentur*); D. 25.2.21.6, Paul. 37 *ad ed.* (*pendet enim id ex furto*); D. 25.2.29, Tryph. 11 *disp.* (*nam veritate furtum fit*); siehe auch D. 25.2.28, Paul. 6 *quaest.*; anders jedoch Pedius in D. 25.2.21.1 (*cum mulier furtum non faciat*).

[14] *Rerum amotarum iudicium singulare introductum est adversus eam quae uxor fuit, quia non placuit cum ea furti agere posse: quibusdam existimantibus ne quidem furtum eam facere, ut Nerva Cassio, quia societas vitae quodammodo dominam eam faceret: aliis, ut Sabino et Proculo, furto quidem eam facere, sicut filia patri faciat, sed furti non esse actionem constituto iure, in qua sententia et Iulianus rectissime est.*

[15] WACKE, *Actio rerum amotarum*, S. 87 mit Anm. 45; KASER, *Privatrecht I*, S. 618 Anm. 53.

Julian und schließlich Paulus zeigt, sei das *furtum* zwar materiell erfüllt, aber dennoch keine *actio furti* möglich;[16] vielleicht, weil die pönale und infamierende[17] Diebstahlsklage nicht mit dem *honor matrimonii*, der Würde der römischen Ehe und der ihr zukommenden Achtung, kompatibel wäre.[18]

In diesem Spezialbereich der Entwendung unter Ehegatten scheidungshalber entspricht die *actio rerum amotarum* weitgehend der *condictio ex causa furtiva* und erfüllt deren Funktion.[19] Dies zeigt sich anschaulich an der *intentio* der Klageformel:

> *Si paret Numeriam Negidiam, quae Aulo Agerio nupta erat, rem qua de agitur Aulo Agerio divortii causa amovisse eamque rem Aulo Agerio redditam non esse, iudex, quanti ea res est, tantam pecuniam Numeriam Negidiam Aulo Agerio condemnato, si non paret absolvito.*[20]
> Wenn es sich erweist, dass die Beklagte, die mit dem Kläger verheiratet war, die Sache, um die Prozess geführt wird, dem Kläger wegen der Scheidung entwendet hat, und diese Sache dem Kläger nicht zurückgegeben worden ist, verurteile, Richter, die Beklagte zugunsten des Klägers in so viel Geld, wieviel diese Sache wert ist; wenn es sich nicht erweist, sprich frei.

Sachverhalte, die grundsätzlich unter das Diebstahlsrecht fielen, lösen eine Verantwortlichkeit aus der *actio rerum amotarum* aus, sofern sie all ihre Tatbestandsvoraussetzungen erfüllen; falls nicht, steht die *condictio* (*ex causa furtiva*)[21] zu.[22] Im Einzelnen muss (a) ein Ehepartner dem anderen (b) während einer aufrechten, gültigen Ehe (*iustum matrimonium*) (c) aus Anlass bzw. wegen der (bevorstehenden) Scheidung (*divortii causa*) (d) eine Sache entwenden und (e) die Ehe dann geschieden werden.[23] Im Folgenden soll der Tatbestand mithilfe einiger kurzer Bemerkungen zu dessen einzelnen Elementen erhellt werden:

a) Klage des Mannes gegen die Frau bzw. *vice versa*

Anfangs ist die *actio rerum amotarum* wohl nur dem Mann gegen seine (frühere) Gattin zugestanden. Die Klage dürfte also auf Konstellationen beschränkt gewesen sein, in denen die Entwendung vonseiten der Frau ausgeht.[24] Paulus berichtet jedenfalls: *Rerum amotarum iudicium singulare introductum est adversus eam quae uxor fuit* (D. 25.2.1, Paul. 7 *ad Sab.*). So bezeugen die Quellen in der Regel dann auch die Ehefrau als Beklagte.[25]

Mit der Zeit dürfte die *actio rerum amotarum* in ihrem Anwendungsbereich jedoch auch auf Sachentwendungen durch den Mann erweitert und der *uxor* die Aktivlegitimation zugestanden worden sein. In einigen Quellenstellen – freilich in der Unterzahl gegenüber jenen, die den Mann als Kläger nennen – tritt nämlich

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[16] Zu dieser (frühklassischen) Kontroverse eingehend WACKE, *Actio rerum amotarum*, S. 86-105; dazu MARRONE, Rez. Wacke, S. 464-466; vgl. bereits die umfängliche Auseinandersetzung bei LEVY, *Privatstrafe*, S. 117-134; LIEBS, *Klagenkonkurrenz*, S. 146-147; GUARINO, *Pagine VII*, S. 121-130; PENNITZ, Diebstahlsklage, S. 2617-2618 (Rz 17) mit Anm. 175-177; kurios ist jedenfalls, dass einerseits Nerva und Cassius (Schüler des Sabinus; vgl. D. 1.2.2.50-51, Pomp. *l. s. enchirid.* und D. 4.8.19.2, Paul. 13 *ad ed.*), andererseits Sabinus und Proculus (Schüler des Nerva; vgl. D. 1.2.2.52, Pomp. *l. s. enchirid.*) die Meinung teilen, also jeweils der Schüler dem Lehrer des anderen Juristen und Oberhaupt der gegnerischen Rechtsschule folgt.

[17] Gai. 4.182; D. 3.2.1, Iul. 1 *ad ed.*; I. 4.16.2; *Tab. Heracl.* Z. 110 (*Lex Iulia municipalis*) – siehe dazu bei Nicolet / Crawford, Roman Statutes I, 367; für das Phänomen der Infamie vgl. ferner KASER, *Privatrecht I*, S. 274-275; WOLF, J. G., Das Stigma ignominia. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 126, 2009, S. 55-113; SCHEIBELREITER, PH., Schande. In: *Reallexikon für Antike und Christentum*, vol. 29, 2019, S. 704-717; WILLEMS, C., § 28 – Verlust der Ehrenstellung (infamia). In: BABUSIAUX, U. / BALDUS, CH. / ERNST, W. / MEISSEL, F.-ST. / PLATSCHEK, J. / RÜFNER, TH. (Hrsg.), *Handbuch des Römischen Privatrechts I.* Tübingen, 2023, S. 731-740 (Rz 1-22); für weitere Literatur siehe die umfangreiche Zusammenstellung bei ATZERI, L., Il lessico dell'infamia nella legislazione imperiale tardoantica (secc. IV-V d.C.). In: PIRO, I. (Hrsg.), *Scritti per Alessandro Corbino 1.* Tricase, 2016, S. 123-124 Anm. 1.

[18] D. 25.2.2, Gai. *ad ed. praet. tit. de re iud.*; C. 5.21.2, Diocl./Maxim. (a. 290/293); dazu auch ZIMMERMANN, R., *The Law of Obligations. Roman Foundations of the Civilian Tradition.* Oxford, 1996, S. 943 Anm. 163; STAGL, Ehegüterrecht, S. 904 (Rz 103); PENNITZ, Diebstahlsklage, S. 2618 (Rz 17) mit Anm. 177; vgl. aber LEVY, *Privatstrafe*, S. 123-124; das Argument der zu vermeidenden Infamie lässt sich jedenfalls nur für die *actio furti* anbringen, nicht aber für die Kondiktion wegen Diebstahls (vgl. zu dieser sogleich noch unten mit Anm. 21 und 22), da zweitere keine infamierende Klage ist (D. 44.7.36, Ulp. 2 *ad ed.*); zur Frage, ob in klassischer Zeit auch andere pönale und infamierende Klagen ausgeschlossen sind, vgl. WACKE, *Actio rerum amotarum*, S. 78-86; siehe aber auch LIEBS, *Klagenkonkurrenz*, S. 147.

[19] D. 25.2.26, Gai. 4 *ad ed. prov.* (*Rerum amotarum actio condictio est*) ist wohl als Herausstellung der Parallelen dieser beiden Klagen zu verstehen, nicht jedoch dahingehend, dass die *actio rerum amotarum* mit der *condictio* ident sei. So ist die Entwendungsklage zwar ebenfalls auf *rei persecutio* gerichtet (vgl. oben Anm. 10) und führt wie die Diebstahlskondiktion auch dann zur Haftung, wenn die entwendeten Sachen bereits untergegangen sind (D. 25.2.17.2, Ulp. 30 *ad ed.*). Es gibt aber auch Unterschiede, etwa die Tatsache, dass der Schätzeid bei der *actio rerum amotarum* zusteht (siehe unten Anm. 53), bei der *condictio furtiva* jedoch nicht (vgl. unten Anm. 97) – zur Ähnlichkeit der beiden Klagen bereits SIBER, H., *Die Passivlegitimation bei der Rei vindicatio als Beitrag zur Lehre von der Aktionenkonkurrenz*. Leipzig, 1907, S. 181; LEVY, *Privatstrafe*, S. 114-116 und 120; LENEL, *Edictum perpetuum*, S. 308-309; WACKE, *Actio rerum amotarum*, S. 144-145; MARRONE, Rez. Wacke, S. 466-467; KASER, *Privatrecht I*, S. 618-619; PIKA, W., *Ex causa furtiva condicere im klassischen römischen Recht.* Berlin, 1988, S. 79-80; GUARINO, *Pagine VII*, S. 106-107; PENNITZ, Diebstahlsklage, S. 2618 (Rz 17).

[20] Formelrekonstruktion: WACKE, *Actio rerum amotarum*, S. 61; vgl. auch LENEL, *Edictum perpetuum*, S. 309-310.

[21] Explizit genannt in D. 25.2.3.2, Paul. 7 *ad Sab.*; ohne nähere Spezifizierung ist die Kondiktion auch belegt in: D. 13.1.19, Paul. 3 *ad Ner.*; D. 25.2.6.5, Paul. 7 *ad Sab.*; D. 25.2.24, Ulp. 5 *reg.*; D. 25.2.25, Marcian. 3 *reg.*; demgegenüber nimmt WACKE, *Actio rerum amotarum*, S. 105-113 an, im klassischen Recht sei grundsätzlich unter Ehegatten neben der *actio furti* auch die Diebstahlskondiktion ausgeschlossen, weshalb vielmehr die *condicito ex iniusta causa* zustehe; dagegen jedoch LIEBS, *Klagenkonkurrenz*, S. 150-151; vgl. weiters SIBER, *Passivlegitimation*, S. 181 Anm. 1; SCHWARZ, F., *Die Grundlage der Condictio im klassischen Römischen Recht.* Münster – Köln, 1952, S. 274-277; PIKA, *Ex causa furtiva condicere*, S. 83-86; GUARINO, *Pagine VII*, S. 130-134; HÄHNCHEN, S., Sab.-Ulp. D. 12,5,6 und die condictio ex iniusta causa. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 121, 2004, S. 385-395; PENNITZ, Diebstahlsklage, S. 2618 (Rz 17) mit Anm. 178.

[22] Die *actio rerum amotarum* steht zur Kondiktion also im Verhältnis der Spezialität; dazu auch SIBER, *Passivlegitimation*, S. 180-181; LIEBS, *Klagenkonkurrenz*, S. 150-151; PIKA, *Ex causa furtiva condicere*, S. 80-86; STAGL, Ehegüterrecht, S. 904 (Rz 104).

[23] STAGL, Ehegüterrecht, S. 904 (Rz 104); PENNITZ, Diebstahlsklage, S. 2617 (Rz 17); vgl. auch GUARINO, *Pagine VII*, S. 105.

[24] WACKE, *Actio rerum amotarum*, S. 65; MARRONE, Rez. Wacke, S. 464; KASER, *Privatrecht I*, S. 619; PENNITZ, Diebstahlsklage, S. 2617 (Rz 17) Anm. 171.

[25] Vgl. die Quellenübersicht bei WACKE, *Actio rerum amotarum*, S. 65 Anm. 1.

die Frau als Klägerin auf.[26] Der zeitlich früheste Gewährsmann für die *actio rerum amotarum* (auch) der Frau ist Marcellus,[27] wie dessen Zitat in D. 25.2.11 *pr.*, Ulp. 33 *ad ed.* zeigt.[28] Nach C. 5.21.2, Diocl./Maxim. (a. 290/293) ermöglicht das *edictum perpetuum* beiden Eheleuten die Erhebung der Entwendungsklage, was indiziert, dass dies schon seit der Zeit der Endredaktion des prätorischen Edikts geltende Rechtslage ist.[29]

b) *iustum matrimonium*

Die Entwendung muss während einer aufrechten, gültigen Ehe nach *ius civile* (*iustum matrimonium*) geschehen, damit die *actio rerum amotarum* greift.[30] Dieses Tatbestandselement verlangt das Vorliegen sowohl eines qualitativen als auch eines zeitlichen Aspekts. Die Partner müssen sich in einer gültigen Ehe befinden, wie D. 25.2.17 *pr.*, Ulp. 30/34[31] *ad ed.* belegt: Es greift nicht die *actio rerum amotarum*, sondern die *actio furti* ein, wenn eine Konkubine dem Mann eine Sache entwendet hat. Gleiches gilt bei Entwendungen im Rahmen eines ungültigen und damit nichtigen *matrimonium*, etwa der Ehe zwischen dem Vormund und seiner *pupilla* oder der entgegen einer kaiserlichen Dienstanweisung (*contra mandata*) geschlossenen Ehe.[32]

Die Sachentziehung muss außerdem während des Bestehens der Ehe erfolgen. Dementsprechend unterfallen Entwendungen nach der Scheidung einer (gültigen) Ehe wiederum der *actio furti* und nicht der Entwendungsklage.[33] Ebenso liegt ein regulärer Diebstahl vor, wenn sich die Entwendung bereits vor der Eheschließung ereignet, oder ein Dritter bestohlen wird, den der Ehepartner dann beerbt.[34]

c) Entwendung *divortii causa*

Die Ehescheidung hat der Grund für die Sachentwendung zu sein, diese muss in Hinblick auf die (bevorstehende) Scheidung erfolgen – *divortii causa*.[35] Zwischen dem *divortium* und der Setzung des Delikts ist demnach ein entsprechender Zusammenhang notwendig, wohl nicht nur in zeitlicher (*tempore divortii*: D. 25.2.3.3, Paul. 7 *ad Sab.*; D. 25.2.19, Ulp. 34 *ad ed.*), sondern auch in sachlicher Hinsicht.[36] Ein solcher Konnex besteht etwa sogar im Fall von D. 25.2.17.1, Ulp. 30 *ad ed.*, wenn die Gattin Sachen zunächst ohne Scheidungsgedanken beiseiteschafft und diese dann aber beim später erfolgten *divortium* vor dem Mann verbirgt bzw. verheimlicht (*celaverit*).[37]

Nicht in den Anwendungsbereich der *actio rerum amotarum* fallen hingegen Entwendungen wegen des Todes des Ehepartners (*mortis causa*), weder wenn dieser unmittelbar bevorsteht (D. 25.2.22.1, Iul. 19 *dig.*), noch wenn dieser bereits erfolgt und die Ehe dadurch geschieden worden ist (D. 25.2.6.4, Paul. 7 *ad ed.*). Der Erbe kann diesfalls die *hereditatis petitio* oder die *actio ad exhibendum* zur Rückerlangung der Sachen anstrengen.[38]

d) Sachentwendung (*res amovere*)

Res amovere ist die Tathandlung, welche der *actio rerum amotarum* zugrunde liegt. *Amovere* bedeutet: (etwas) entfernen, beiseiteschaffen, entwenden, wegnehmen.[39] Dieser Terminus bezeichnet somit Verhaltensweisen aus dem Kernbereich des Diebstahlsrechts. Anders als beim (weit gefassten)[40] *furtum*, dürfte eine bloße *contrectatio*, also jegliches unbefugte Anfassen bzw. Berühren einer fremden Sache zum Zweck der rechtswid-

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[26] D. 25.2.6.1, Paul. 7 *ad Sab.*; D. 25.2.7, Ulp. 36 *ad Sab.*; D. 25.2.11 *pr.*, Ulp. 33 *ad ed.*; D. 25.2.14, Paul. 18 *ad ed.*; D. 25.2.21.6, Paul. 37 *ad ed.*; ferner D. 23.3.9.3, Ulp. 31 *ad Sab.*; D. 42.1.52, Tryph. 12 *disp.*; C. 5.21.2, Diocl./Maxim. (a. 290/293); Ulp. epit. 7.2.

[27] Ulpius Marcellus hat Mitte des zweiten nachchristlichen Jahrhunderts gewirkt – vgl. KUNKEL, W., *Herkunft und soziale Stellung der römischen Juristen.* 2. Auflage, Graz – Wien – Köln, 1967, Neudruck 2001, S. 213-214.

[28] *Marcellus libro octavo digestorum scribit, sive vir uxorem sive uxor virum domo expulit et res amoverunt, rerum amotarum teneri.* Nach LENEL, O., *Palingenesia Iuris Civilis I.* Leipzig, 1889, S. 605 (Marcellus – Fragment 96) Anm. 2 stamme das Zitat des Marcellus nicht aus dem achten, sondern aus dem siebenten Buch seiner Digesten.

[29] Vgl. auch WACKE, *Actio rerum amotarum*, S. 76; WESENER, Rez. Wacke, S. 462.

[30] WACKE, *Actio rerum amotarum*, S. 39-42.

[31] Nach LENEL, O., *Palingenesia Iuris Civilis II.* Leipzig, 1889, S. 648 (Ulpian – Fragment 977) nicht im 30., sondern im 34. Buch des ulpianischen Ediktskommentars (*De rebus amotis*) einzuordnen, was aufgrund des Zusammenhangs mit der Entwendungsklage schlüssig scheint.

[32] Die Ehe zwischen *tutor* und *pupilla* ist durch ein unter Marc Aurel und Commodus ergangenes *Senatus Consultum* untersagt (D. 23.2.59, Paul. *l. s. de adsign. libert.*; D. 23.2.60, Paul. *l. s. ad or. Ant. et Comm.*). Aufgrund kaiserlicher Mandate ist es in den Provinzen tätigen Offizieren und Beamten verboten, eine Ehe mit einer aus derselben Provinz stammenden Frau einzugehen (D. 23.2.38 *pr.*, Paul. 2 *sent.*; D. 23.2.63, Pap. 1 *def.*; D. 24.1.3.1, Ulp. 32 *ad Sab.*). Vgl. zu diesen Eheverboten etwa HALBWACHS, V., § 33 – Ehe und andere Formen der Lebensgemeinschaft. In: BABUSIAUX, U. / BALDUS, CH. / ERNST, W. / MEISSEL, F.-ST. / PLATSCHEK, J. / RÜFNER, TH. (Hrsg.), *Handbuch des Römischen Privatrechts I.* Tübingen, 2023, S. 836-837 (Rz 31-32) mwN.

[33] D. 25.2.3 *pr.*, Paul. 7 *ad Sab.*

[34] D. 25.2.3.2, Paul. 7 *ad Sab.*; zur Frage, ob in diesem Fall neben der Diebstahlskondiktion auch die *actio furti* zusteht oder diese, wie der Text sagt, *propter reverentiam* ausgeschlossen sein soll, vgl. WACKE, *Actio rerum amotarum*, S. 42; siehe aber LIEBS, *Klagenkonkurrenz*, S. 150; weiters PENNITZ, Diebstahlsklage, S. 2617-2618 (Rz 17) insb. mit Anm. 178.

[35] Vgl. etwa D. 25.2.6 *pr.*, Paul. 7 *ad Sab.*; D. 25.2.11.1, Ulp. 33 *ad ed.*; D. 25.2.20, Marcell. 7 *dig.*; D. 25.2.23, Afr. 8 *quaest.*; C. 5.21.1, Alex. (a. 229); C. 5.21.3, Diocl./Maxim. (a. 293); in ähnlicher Weise spricht von einer Entwendung *divortii consilio* D. 25.2.25, Marcian. 3 *reg*.

[36] So WACKE, *Actio rerum amotarum*, S. 46.

[37] Vgl. zu den möglichen Bedeutungen von *celare* bei HEUMANN / SECKEL, *Handlexikon*, S. 63.

[38] Im Sonderfall von D. 25.2.21 *pr.*, Paul. 37 *ad ed.*, wo die Gattin sich vom im Sterben liegenden Ehemann – in der Überzeugung, er werde nicht überleben – zunächst scheiden lässt und ihm dabei noch Sachen entwendet, der Mann später jedoch wieder gesundet, wird die *actio rerum amotarum utilis* gewährt. Vgl. zu dem Fragment auch WACKE, *Actio rerum amotarum*, S. 47-48; GUARINO, *Pagine VII*, S. 132 Anm. 120.

[39] HEUMANN / SECKEL, *Handlexikon*, S. 31; es geht vor allem um die heimliche Entwendung im Gegensatz zur gewaltsamen Sachwegnahme beim Raub, vgl. etwa I. 4.2 *pr.*

[40] In klassischer Zeit umfasst das *furtum* auch Handlungen, die aus moderner Sicht anderen Deliktstatbeständen zu subsumieren wären, wie etwa Unterschlagung, Veruntreuung oder auch der bloß unbefugte Gebrauch einer fremden Sache (*furtum usus*). Vgl. zum weiten *furtum*-Tatbestand etwa ZIMMERMANN, *Law of Obligations*, S. 922-930; KASER, M. / KNÜTEL, R. / LOHSSE, S., *Römisches Privatrecht.* 22. Auflage, München, 2021, S. 363-364 mwN; PENNITZ, Diebstahlsklage, S. 2599 (Rz 4) und 2611-2612 (Rz 12) mwN.

rigen Zueignung,[41] noch nicht ausreichen. *Res amovere* ist wohl enger zu verstehen, nämlich im Sinne einer tatsächlichen Sachwegnahme unter Bruch fremden Gewahrsams.[42] Dieses Kriterium der wirklichen Sachentziehung wird auch durch jeglichen Verbrauch von Sachen des Ehepartners, z. B. durch Verkaufen, Verschenken oder Verzehren, erfüllt sein (D. 25.2.3.3, Paul. 7 *ad Sab.*). Schließlich zeigt sich ebenfalls an der Formel der *actio rerum amotarum*, dass es auf eine Besitzentziehung ankommen muss. Denn eine Verurteilung soll bloß dann erfolgen, wenn die entwendete Sache dem Kläger nicht zurückgegeben worden ist (*eamque rem Aulo Agerio redditam non esse*). Die Rückgabe einer – nicht freiwillig aus der Hand gegebenen – Sache verlangt aber grundsätzlich deren vorherige Entziehung.[43]

Nicht erforderlich ist, dass die Sachwegnahme in eigener Person ausgeführt wird. So haftet die Frau auch dann aus der *actio rerum amotarum*, wenn ihr Sklave auf ihren Befehl hin dem Ehemann Sachen scheidungshalber entwendet.[44] Entsprechendes gilt für den Fall, dass die Gattin (gewaltfreien) Dieben Zugang zum Haus des Mannes verschafft und ihnen dadurch Hilfe bei der Tatausführung leistet.[45] Jeweils trifft sie wegen der Beteiligung eine Verantwortlichkeit, obwohl sie nicht unmittelbar selbst die Sachentziehung vorgenommen hat.[46]

Als Tatobjekte sind von der Entwendungsklage jegliche Sachen erfasst, die dem anderen Ehepartner *divortii causa* entwendet werden; sowohl Dotalsachen als auch sonstige Vermögensgegenstände.[47] Auf das Eigentum des Partners kommt es nach der Klageformel jedoch nicht an, weshalb auch der Pfandgläubiger (D. 25.2.17.3, Ulp. 30 *ad ed.*) oder der *bonae fidei possessor* (D. 25.2.20, Marcell. 7 *dig.*) aktivlegitimiert sein kann.

e) Scheidung der Ehe

Voraussetzung für die Anwendbarkeit der *actio rerum amotarum* ist schließlich, dass die Ehe tatsächlich geschieden wird. Denn die Klage kann erst nach erfolgter Scheidung erhoben werden.[48] Bleibt das *divortium* aus und die Ehe aufrecht, greift wegen Sachentwendungen dagegen die *condictio.*[49] Ferner besteht ein Hindernis für die Entwendungsklage, wenn es zunächst zwar zur Trennung kommt, später aber die Lebensgemeinschaft der Ehegatten wiederhergestellt wird. Diese Erneuerung der ehelichen Gemeinschaft führt sogar zur Aufhebung eines bereits laufenden Prozesses (D. 25.2.30, Pap. 11 *quaest.*).[50]

3. Exegese zu D. 25.2.22 *pr.*, Iul. 19 *dig.*

Der zugrundeliegende Sachverhalt stellt sich wie folgt dar: Die Ehefrau F hat ihrem Gatten M während aufrechter Ehe *divortii causa* Sachen entwendet. Nach erfolgter Scheidung hat M erfolgreich auf Herausgabe der *res amotae* geklagt. F ist infolge der *actio rerum amotarum* in den Schätzwert verurteilt worden. Sie hat die Sachen nicht freiwillig herausgegeben, da sie ansonsten entsprechend der *reddere*-Klausel[51] (*eamque rem redditam non esse*)[52] die *absolutio* erlangt hätte. Wegen der *contumacia* der F könnte die Streitschätzung dabei mittels klägerischem *iusiurandum in litem* erfolgt sein, welches für die *actio rerum amotarum* belegt ist.[53] F darf die Sachen zunächst behalten, verliert später aber den Besitz

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41 Vgl. etwa HEUMANN / SECKEL, *Handlexikon*, S. 105; WESENER, Rez. Wacke, S. 461; KASER, *Privatrecht I*, S. 615 mwN.

42 WACKE, *Actio rerum amotarum*, S. 31-36; vgl. auch MARRONE, Rez. Wacke, S. 463; GUARINO, *Pagine VII*, S. 106 Anm. 12; Gai. 3.195 (= I. 4.1.6) stellt die Begriffe (*res*) *amovere* und *contrectare* einander gegenüber.

43 So WACKE, *Actio rerum amotarum*, S. 33-34; zustimmend WESENER, Rez. Wacke, S. 461.

44 D. 25.2.21.1, Paul. 37 *ad ed.*

45 D. 25.2.19, Ulp. 34 *ad ed.*

46 Zu den Stellen WACKE, *Actio rerum amotarum*, S. 36-39.

47 Vgl. D. 25.2.24, Ulp. 5 *reg.*; siehe auch D. 25.2.8 *pr.*, Pomp. 16 *ad Sab.*; LEVY, *Privatstrafe*, 127 Anm. 1; KASER, *Privatrecht I*, S. 619 mit Anm. 58; GUARINO, *Pagine VII*, S. 115-118; HARKE, J. D., *Argumenta Pomponiana.* Berlin, 2014, S. 41; nach WACKE, *Actio rerum amotarum*, S. 52-54 sei die Entwendung nicht zur *dos* gehöriger Sachen sogar der Hauptanwendungsfall der *actio rerum amotarum*; beipflichtend MARRONE, Rez. Wacke, S. 463; demgegenüber nimmt STAGL, Ehegüterrecht, S. 904-905 (Rz 102-106) einen starken Konnex zwischen der Entwendungsklage und dem Dotalrecht an.

48 D. 25.2.1, Paul. 7 *ad Sab.* (*adversus eam quae uxor fuit*); D. 25.2.25, Marcian. 3 *reg.* (*secutum divortium fuerit*); vgl. auch D. 25.2.11 *pr.*, Ulp. 33 *ad ed.*

49 STAGL, Ehegüterrecht, S. 904; D. 25.2.24, Ulp. 5 *reg.* wird von Entwendungen bei aufrechter Ehe handeln, vgl. WACKE, *Actio rerum amotarum*, S. 54; zustimmend PIKA, *Ex causa furtiva condicere*, S. 83-84.

50 Genauer zu dieser Quellenstelle etwa WACKE, *Actio rerum amotarum*, S. 44; vgl. auch GUARINO, *Pagine VII*, S. 113-114 Anm. 39; STAGL, Ehegüterrecht, S. 905 (Rz 7).

51 Zur *reddere*-Klausel der *actio rerum amotarum* und deren Vereinbarkeit mit dem *iusiurandum in litem* ausführlich WACKE, *Actio rerum amotarum*, S. 54-58; vgl. auch LEVY, E., Zur Lehre von den sog. actiones arbitrariae. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 36, 1915, S. 76-77; PROVERA, G., *Contributi allo studio del iusiurandum in litem.* Torino, 1953, S. 46-48.

52 Vgl. das *non reddat* in D. 25.2.8.1, Pomp. 6 *ad Sab.*; vgl. auch LENEL, *Edictum perpetuum*, S. 309; dass Tryphonin in D. 25.2.29, Tryph. 11 *disp.* von *non restituuntur* spricht, lässt sich – mit LEVY, Actiones arbitrariae, S. 72-76 – durch die, über den Lauf der Zeit erfolgte, Bedeutungsangleichung des *reddere* an *restituere* erklären, und muss daher keine Einordnung unter die Arbiträrklagen nahelegen; vgl. auch CARRELLI, *Acquisto*, S. 5 Anm. 4; WACKE, *Actio rerum amotarum*, S. 58 mit Anm. 11; PENNITZ, *Enteignungsfall*, S. 308 mit Anm. 259.

53 D. 25.2.8.1, Pomp. 16 *ad Sab.*; die Zulässigkeit des Schätzeides wird in D. 25.2.9, Paul. 37 *ad ed.* damit begründet, dass der Kläger nicht unfreiwillig wegen der Geldverurteilung seine Sache nur gegen den bloßen Sachwert „verkaufen" müssen soll (*non enim aequum est invitum suo pretio res suas vendere*); vgl. etwa LEVY, Actiones arbitrariae, S. 76; HARKE, *Argumenta Pomponiana*, S. 159 mit Anm. 3; allgemein zum Schätzeid des Klägers, insbesondere dessen Anwendungsbereich und Voraussetzungen: PROVERA, *Iusiurandum*, S. 5-114; KASER / HACKL, *Zivilprozeßrecht*, S. 339-340 mwN; HARKE, J. D., *Der Eid im klassischen römischen Privat- und Zivilprozessrecht.* Berlin, 2013, S. 152-186; KLINGENBERG, Formularprozess, S. 448 (Rz 60) mwN; Beschränkung des Schätzeides auf die Arbiträrklagen, allerdings unter weitreichenden Interpolationsannahmen, bei CHIAZZESE, L., *Jusiurandum in litem.* Milano, 1958, passim (insb. S. 147-312) – ablehnend jedoch BROGGINI, G., Rezension: Lauro Chiazzese, Jusiurandum in litem. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 76, 1959, S. 601.

an ihnen.[54] Die Frage ist nun, ob ihr – obgleich sie ursprünglich durch deliktisches Verhalten an den Besitz gelangt ist[55] – zur Rückerlangung der Sachen eine Klage zur Verfügung steht.

Julian beantwortet dies in positiver Weise. Der Frau sei eine dingliche Klage zu gewähren. Außerdem habe sie, als Mittel zur Verteidigung ihres Sachbesitzes, eine *exceptio*. Der Jurist beschäftigt sich mit dem Fall also in zweifacher Hinsicht. Einerseits findet der Grundsachverhalt, der spätere Besitzverlust durch die Frau, Behandlung. Andererseits geht Julian auch auf die – nicht direkt in Frage stehende – Variante ein, dass F die Sachen noch hat und von M oder dessen Erben in einem (fiktiven) Zweitprozess mit der *rei vindicatio* belangt wird.

3.1 Grundsachverhalt: Besitzverlust durch die verurteilte Frau

Die Rechtsfrage des Ausgangsfalles ist, ob die verurteilte F eine Klage hinsichtlich der (ehemaligen) Streitsachen habe, wenn sie ihr später abhandenkommen. Julian hält fest, dass ihr eine dingliche Klage zustehen soll (*in rem actio ei danda est*).[56] Mit dieser kann F auf Herausgabe der Sachen klagen und so deren Rückerlangung betreiben.

Die Gewährung der *actio in rem* begründet Julian damit, dass ein Beklagter, der auf den Wert der *res litigiosa* verurteilt wird und diesen zahlt, mit einem Käufer der Streitsache zu vergleichen ist (*qui litis aestimationem suffert, emptoris loco habendus est*).[57] Damit zieht er eine Analogie zum Kaufvertrag, die auch in zahlreichen anderen Quellenstellen, die sich mitunter auf Julian berufen,[58] belegt ist.[59] Diese Regel lässt sich treffend ausdrükken mit der prägnanten Formulierung Ulpians: *Litis aestimatio similis est emptioni* (D. 41.4.3, Ulp. 75 *ad ed*.). Aufgrund dieses Vergleichs zur *emptio venditio* erwirbt ein in Geld Verurteilter die herausverlangte Sache – es kommt zur „Enteignung" des Klägers.[60] Abgesichert wird die Stellung des *condemnatus* durch den entsprechenden (dinglichen) Rechtsschutz. Fraglich ist nun, welche dingliche Klage der F konkret zusteht, da sie im hier untersuchten Fragment nicht spezifisch benannt ist.

Es ist jedenfalls nicht die *rei vindicatio*. Diese wird in der Variante (dazu unten im Abschnitt 3.2) vom ehemaligen Kläger M angestrengt und scheitert an einer *exceptio* der F. Da es zur Abwehr der Eigentumsklage die Einrede benötigt, muss der frühere Kläger M immer noch die Aktivlegitimation und damit das zivile Eigentum haben. Insofern kann die Vindikation nicht der F zustehen.[61]

Die Frage nach der zuständigen *actio* beantwortet Julian (zitiert von Ulpian) an anderer Stelle selbst, indem er – für die einschlägige Konstellation der Verurteilung aufgrund einer Herausgabeklage, konkret wohl der *rei vindicatio*[62] – in D. 6.2.7.1, Ulp. 16 *ad ed.* dem Beklagten explizit die *actio Publiciana* zuspricht ([…] *si optulit reus aestimationem litis, Publicianam competere.*).[63] Mit Blick auf die Klageformel[64] lässt sich die Zuständigkeit der publizianischen Klage auch durchaus argumentieren. Denn die

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[54] Der Besitzverlust ist erst nach Prozessabschluss erfolgt: LEVY, Enteignung, S. 499 Anm. 1; CARRELLI, *Acquisto*, S. 38; EHRHARDT, *Litis aestimatio*, S. 145; BUND, E., *Untersuchungen zur Methode Julians.* Köln – Graz, 1965, S. 158; PENNITZ, *Enteignungsfall*, S. 308; WACKE, J. U., *Actiones suas praestare debet. Die Last zur Klagenabtretung an den Ersatzpflichtigen und dessen Eigentumserwerb – Römischrechtliche Grundlagen des Zessionsregresses nach § 255 (1. Fall) BGB.* Berlin, 2010, S. 276 mit Anm. 1014.

[55] Das *„movet me, quia dolo adquisiit possessionem"* zeugt von einem gewissen Unbehagen.

[56] Die Lösung des Grundsachverhalts leitet Julian ein, indem er zunächst eine Fallvariante bildet (zu dieser unten bei 3.2.)

[57] Julian spricht davon, dass der Beklagte *litis aestimationem suffert* bzw. die Frau *litis aestimationem praesiterit*. *Litis aestimationem praestare/sufferre* bedeutet nach HEUMANN / SECKEL, *Handlexikon*, S. 452-453 bzw. 566 „die Streitsumme leisten oder zahlen". Demnach soll es für die Kaufanalogie scheinbar auf die tatsächliche Leistung der Urteilssumme ankommen. Allerdings finden sich in den übrigen Quellen, in denen der Vergleich der Geldverurteilung mit der *emptio venditio* thematisiert wird, neben *sufferre* und *praestare* auch *consequi*, *percipere*, *accipere*, *suscipere*, aber auch *offerre*, was lediglich auf das Anbieten des Schätzbetrags abstellen könnte, *damnare*, womit die Verurteilung auf die *litis aestimatio* angesprochen ist, *subire*, das Unterwerfen unter die Schätzung, oder überhaupt nur lapidar *lis aestimata*, also die Ermittlung des Streitwertes. Vgl. für die Frage des maßgeblichen Ansatzpunktes etwa LEVY, Enteignung, S. 411-414 mit Quellen; CARRELLI, *Acquisto*, S. 125-126; PENNITZ, *Enteignungsfall*, S. 309-310 Anm. 267 und 313 Anm. 281; KINDLER, *Affectionis aestimatio*, S. 172; KLINGENBERG, Formularprozess, S. 456 (Rz 73) mit Anm. 527-530; SCHMATZBERGER, Pyrrhussieg, bei Anm. 43 mwN.

[58] Vermutlich ist Julian der Urheber dieser Regelung – vgl. SIBER, H., Vorbereitung - und Ersatzzweck der Besitzinterdikte. In: *Scritti in onore di Contardo Ferrini. Pubblicati in occasione della sua beatificazione IV.* Milano, 1949, S. 117; CHIAZZESE, *Jusiurandum*, S. 54; BUND, *Untersuchungen*, S. 159; WACKE, *Actiones praestare*, S. 227-228 mit Anm. 1020; KINDLER, *Affectionis aestimatio*, S. 170; SCHEIBELREITER, PH. / RAFETSEDER, N., Neue Überlegungen zu Rechtsquellen der Provinz Noricum: Eine rechtshistorische Perspektive auf die Gesetzesfragmente aus Lauriacum. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 138, 2021, S. 63.

[59] D. 6.2.7.1, Ulp. 16 *ad ed.*; Julian bei D. 21.2.21.2, Ulp. 29 *ad Sab.*; D. 41.4.1, Gai. 6 *ad ed. prov.*; D. 41.4.3, Ulp. 75 *ad ed.*; D. 42.4.15, Ulp. 6 *fideicomm.*; in D. 27.9.3.2, Ulp. 35 *ad ed.* ist von *alienatio* die Rede.

[60] Vgl. oben in Anm. 6.

[61] In den übrigen, die „Enteignungsproblematik" betreffenden Quellenstellen ist außerdem durchgängig die Ersitzung (*pro emptore*) und die *actio Publiciana* thematisiert – vgl. SCHMATZBERGER, Pyrrhussieg, bei Anm. 139 mwN.

[62] LEVY, Enteignung, S. 488; WACKE, *Actiones praestare*, S. 283; anders PENNITZ, *Enteignungsfall*, S. 309 mit Anm. 263, der mit dem Argument der Palingenesie – das Julianzitat stammt aus dem 22. Buch seiner Digesten und wird von LENEL, *Palingenesia I*, S. 377 (Julian – Fragment 349) unter *„de condictione furtiva"* eingeordnet – annimmt, die Verurteilung sei nicht aus der Eigentumsklage, sondern aus der Diebstahlskondiktion erfolgt.

[63] Hier stellt Julian scheinbar auf ein (bloßes) Anbot der *litis aestimatio* ab (*optulit*), vgl. dazu schon oben Anm. 57. Zu den möglichen Bedeutungen von *offerre* siehe bei HEUMANN / SECKEL, *Handlexikon*, S. 387-388.

[64] *C. Aquilius iudex esto. Si quem hominem A. Agerius (bona fide) emit et is ei traditus est, anno possedisset, tum si eum hominem, de quo agitur, eius ex iure Quiritium esse oporteret, qua de re agitur, si ea res (arbitrio iudicis) A. Agerio non restituetur, quanti ea res erit, tantam pecuniam iudex N. Negidium A. Agerio condemnato, si non paret absolvito.* Formel nach LENEL, *Edictum perpetuum*, S. 169-173; vgl. weiters MANTOVANI, D., *Le formule del processo private romano. Per la didattica delle Istituzioni di diritto romano.* 2. Auflage, Padova, 1999, S. 46 (Nr. 14); zur Rekonstruktion der Formel und den damit zusammenhängenden Problemen instruktiv PLATSCHEK, J., § 63 – Herausgabeklage des redlichen Erwerbers (actio Publiciana). In: BABUSIAUX, U. / BALDUS, CH. / ERNST, W. / MEISSEL, F.-ST. / PLATSCHEK, J. / RÜFNER, TH. (Hrsg.), *Handbuch des Römischen Privatrechts II.* Tübingen, 2023, S. 1740-1744 (Rz 17-24) mwN; hinsichtlich der von Lenel vorgenommenen Ergänzung von *bona fide* vgl. etwa auch KASER, *Privatrecht I*, S. 439 Anm. 7 mwN; für die Frage der Nennung des *arbitrium iudicis* in der Formel siehe ferner die Literaturnachweise bei KASER / HACKL, *Zivilprozeßrecht*, S. 336 Anm. 12.

Voraussetzungen der *intentio*, wie sie Gaius in Gai. 4.36 schildert, können auf den Sacherwerb durch Geldverurteilung umgelegt werden. Notwendig ist, dass dem Erwerber die Sache verkauft und übergeben worden ist (*emit <et>*[65] *is ei traditus est*), also das Vorliegen einer *iusta causa* und einer *traditio*. Die *litis aestimatio* bildet, aufgrund der Analogie zum Kaufvertrag, den entsprechenden Erwerbstitel.[66] Mit Beendigung des Verfahrens kommt es dann zur *traditio* an den verurteilten Sachbesitzer – da dieser die Sache bereits hat und eine tatsächliche Übergabe nicht stattfindet, wohl in Form einer *traditio brevi manu*.[67] Somit ist die Geldverurteilung des Sachbesitzers plausibel dem Tatbestand der publizianischen Klage subsumierbar.[68] Bei der dinglichen Klage, die F im Grundfall von D. 25.2.22 *pr.* aufgrund ihrer Kondemnation erhält, wird es sich folglich um die *actio Publiciana* handeln.

3.2 Variante: spätere Eigentumsklage gegen die besitzende Frau

Julian befasst sich in seiner Erörterung nicht nur mit der gestellten Rechtsfrage nach der Klagemöglichkeit der verurteilten Gattin für den Fall, dass sie den Besitz an den Sachen verliert. Er bewegt sich zunächst von diesem Ausgangsfall weg, indem er die Beantwortung der Frage nach der *actio* mit dem Gegenfall vorbereitet und den defensiven Rechtsschutz der F thematisiert: Würde sie in einem (hypothetischen) Zweitprozess vom früheren Ehemann und Kläger des Erstprozesses M bzw. dessen Erben mit der *rei vindicatio* geklagt, stünde ihr eine *exceptio* zu. Ebensowenig wie die Klage im Grundfall bezeichnet Julian die Einrede explizit, weshalb es der Klärung bedarf, welche *exceptio* konkret gemeint ist. Aufgrund des Sachverhalts kämen mehrere – in der Literatur erwogene – Möglichkeiten in Betracht.[69]

3.2.1 exceptio rei iudicatae vel in iudicium deductae?

Da die Herausgabe der entwendeten Sachen bereits Thema des abgeschlossenen Verfahrens um die *actio rerum amotarum* war, könnte sich im nachfolgenden Vindikationsprozess die Frage stellen, ob die Eigentumsklage nicht wegen entschiedener Sache (*res iudicata*) scheitern müsste. Denn die ebenfalls auf Sachverfolgung gerichtete Entwendungsklage steht zu den dinglichen Klagen grundsätzlich in elektiver Konkurrenz,[70] weshalb ein Ausschluss der *rei vindicatio* naheliegt. Bei der Einrede könnte es sich also um die *exceptio rei iudicatae vel in iudicium deductae*[71] handeln.[72]

Jedoch scheint es in D. 25.2.22 *pr.* für den Rechtsschutz der kondemnierten *uxor* auf die tatsächliche Zahlung der *litis aestimatio* anzukommen, nicht allein auf das Urteil.[73] Außerdem wäre die Rechtskrafteinrede für die Regelung des Verhältnisses von *actio rerum amotarum* und *rei vindicatio* insbesondere dann nicht passend, wenn es im Erstprozess zur *absolutio* des Beklagten käme, da beide Klagen nicht notwendigerweise die gleichen Fälle abdecken;[74] etwa wenn die herauszugebende, entwendete Sache nicht im Eigentum des Ehemannes steht.[75] Es liegt also nicht unbedingt *eadem res* vor.

Ein weiterer Umstand, der gegen die *exceptio rei iudicatae vel in iudicium deductae* spricht, ist deren Nichterwähnung in D. 47.2.9.1, Pomp. 6 *ad Sab.* zweiter Fall.[76] Pomponius befasst sich in diesem Fragment mit dem Konkurrenzverhältnis zwi-

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[65] Ergänzung des bei Gaius fehlenden *et* durch LENEL, *Edictum perpetuum*, S. 171 mit Anm. 5; abweichend kommt nach PLATSCHEK, Actio Publiciana, S. 1742 (Rz 21) „insbesondere die Konjunktion *postquam* in Betracht."

[66] Vgl. D. 41.3.27, Ulp. 31 *ad Sab.*, wo der von Ulpian zitierte Celsus unter anderem die *litis aestimatio* als *causa* bezeichnet.

[67] So bereits SIBER, Besitzinterdikte, S. 117; WIMMER, M., *Besitz und Haftung des Vindikationsbeklagten.* Köln – Weimar – Wien, 1995, S. 114; HACKL, K., Rezension: Markus Wimmer, Besitz und Haftung des Vindikationsbeklagten. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 115, 1998, S. 569; WACKE, *Actiones praestare*, S. 279.

[68] Vgl. dazu PENNITZ, *Enteignungsfall*, S. 309-310 Anm. 267; WACKE, *Actiones praestare*, S. 278-279 und 284-286; SCHMATZBERGER, Pyrrhussieg, bei Anm. 29-41; für die Zuständigkeit der *actio Publiciana* etwa auch CARRELLI, *Acquisto*, S. 39-40; SCHEIBELREITER / RAFETSEDER, Neue Überlegungen, S. 61-62; KLINGENBERG, Formularprozess, S. 455-456 (Rz 73); abweichend sieht LEVY, Enteignung, S. 484-485 und 498-500 im Vorgang der Verurteilung keine *traditio* im Sinne der Formel verwirklicht, und plädiert daher unter Berufung auf *quasi Publicianam* in D. 6.1.70, Pomp. 29 *ad Sab.* für eine (nur) analoge *actio quasi Publiciana*; für eine solche auch OERTMANN, P., *Die Vorteilsausgleichung beim Schadensersatzanspruch im römischen und deutschen bürgerlichen Recht.* Berlin, 1901, S. 259-260; CHIAZZESE, *Jusiurandum*, S. 52-54; BUND, *Untersuchungen*, S. 158; da die Bezeichnung *quasi Publiciana* singulär ist und von Pomponius nur im Zusammenhang mit der Ablehnung einer dinglichen Klage verwendet wird (vgl. WESENER, G., Zur Denkform des „quasi" in der römischen Jurisprudenz. In: *Studi in memoria di Guido Donatuti III.* Milano, 1973, S. 1407), ist die tatsächliche Existenz dieser Klage zweifelhaft; ebenfalls skeptisch PENNITZ, *Enteignungsfall*, S. 312 Anm. 275 und WACKE, *Actiones praestare*, S. 280 und 306-307; vgl. auch HARKE, *Argumenta Pomponiana*, S. 158-159; BALDUS, CH., § 59 – Herausgabeklage des Eigentümers (rei vindicatio). In: BABUSIAUX, U. / BALDUS, CH. / ERNST, W. / MEISSEL, F.-ST. / PLATSCHEK, J. / RÜFNER, TH. (Hrsg.), *Handbuch des Römischen Privatrechts II.* Tübingen, 2023, S. 1585 (Rz 224).

[69] Vgl. die Meinungsübersicht bei SCHMATZBERGER, Pyrrhussieg, Anm. 23.

[70] LEVY, E., *Nachträge zur Konkurrenz der Aktionen und Personen.* Weimar, 1962, S. 56; PENNITZ, Diebstahlsklage, S. 2618 (Rz 17) mit Anm. 182.

[71] Beschrieben bei Gai. 4.106 und 7; vgl. zur *exceptio rei iudicatae vel in iudicium deductae* allgemein KASER / HACKL, *Zivilprozeßrecht*, S. 302-303 (mit zahlreichen Nachweisen in Anm. 6); siehe auch KLINGENBERG, Formularprozess, S. 464-467 (Rz 90-94) mwN.

[72] So etwa PENNITZ, *Enteignungsfall*, S. 308; ferner PENNITZ, Diebstahlsklage, S. 2618 (Rz 17) mit Anm. 182.

[73] Vgl. oben Anm. 57.

[74] Diese Argumentation gegen die Einrede wegen entschiedener Sache bei LIEBS, *Klagenkonkurrenz*, S. 149.

[75] Auf das Eigentum des Mannes kommt es bei der Entwendungsklage nicht notwendig an – vgl. D. 25.2.17.3, Ulp. 30 *ad ed.*; D. 25.2.20, Marcell. 7 *dig.*; WACKE, *Actio rerum amotarum*, S. 52-53 Anm. 61; GUARINO, *Pagine VII*, S. 105 Anm. 4.

[76] *Sed si eam a fure vindicassem, condictio mihi manebit. sed potest dici officio iudicis, qui de proprietate cognoscit, contineri, ut non aliter iubeat restitui, quam si condictionem petitor remitteret: quod si ex condictione ante damnatus reus litis aestimationem sustulerit, ut aut omnimodo absolvat reum aut (quod magis placet), si paratus esset petitor aestimationem restituere nec restituetur ei homo, quanti in litem iurasset, damnaretur ei possessor.*
Wenn ich aber gegen den Dieb die Eigentumsklage erhoben habe, so wird mir die Kondiktion verbleiben. Doch lässt sich behaupten, dass es im Kreise der Amtspflicht des Richters liege, der über die Eigentums[frage] zu erkennen hat, die Herausgabe nur unter der Bedingung zu verfügen, wenn der Kläger die Kondiktion erlasse; hat aber der schon vorher durch die Kondiktion verurteilte Beklagte die *litis aestimatio* erlegt, denselben entweder ganz und gar freizusprechen, oder, was angemessener scheint, wenn der Kläger zur Rückerstattung der *litis aestimatio* bereit ist, und der [gestohlene] Sklave [z. B.] nicht herausgegeben wird, den Besitzer zu so viel zu verurteilen, wie jener im Prozess beschworen hat. (Übersetzung orientiert an OTTO, C. / SCHILLING, B. / SINTENIS, C. F. F. (Hrsg.), *Das Corpus Juris Civilis ins Deutsche übersetzt von einem Vereine Rechtsgelehrter IV.* Leipzig, 1832, S. 817).

schen *rei vindicatio* und (ebenfalls sachverfolgender)[77] *condictio ex causa furtiva*, wobei im Ergebnis immer die Eigentumsklage Vorrang genießen soll.[78] Im ersten Fall klagt der Eigentümer den Dieb zunächst erfolgreich mit der *rei vindicatio*. Noch im Vindikationsverfahren wird der Kläger zum Erlass der *condictio* angehalten. Der Richter soll nämlich den Ausspruch des Restitutionsbefehls an den Beklagten davon abhängig machen, dass der Kläger auf die spätere Geltendmachung seiner Diebstahlskondiktion verzichtet. Analog zur (hypothetischen) Variante in D. 25.2.22 *pr*. ist der zweite Fall gelagert: Der Eigentümer klagt zuerst mit der *condictio furtiva* und erhält vom verurteilten *fur* die *litis aestimatio* gezahlt. Danach erhebt er die *rei vindicatio* gegen den Dieb. Der *iudex* hat nun zwei Alternativen im Zweitprozess. Er kann entweder kraft seines *officium iudicis* den Dieb freisprechen, weil dieser bereits infolge der Diebstahlskondiktion den Schätzwert geleistet und damit das Sachverfolgungsinteresse des Klägers befriedigt hat – eine Einrede wird nicht problematisiert.[79] Oder er ermöglicht die „Beseitigung" des Kondiktionsprozesses: Wenn der Kläger die Rückzahlung der *litis aestimatio* des Erstverfahrens anbietet, kann die Vindikation ihren gewohnten Gang gehen. Restituiert der Beklagte die Sache dann nicht freiwillig, wird er wegen seiner Herausgabeweigerung in die vom Eigentümer mittels *iusiurandum in litem* beschworene Summe verurteilt. Pomponius scheint diesen zweiten Weg zu bevorzugen (*quod magis placet*).[80] Sowohl in der Variante von D. 25.2.22 *pr.* als auch in D. 47.2.9.1 zweiter Fall erhebt der Eigentümer zunächst eine sachverfolgende Deliktsklage wegen einer Sachentwendung und anschließend die *rei vindicatio*. Das Ergebnis ist dennoch unterschiedlich: In D. 25.2.22 *pr*. scheitert die Eigentumsklage jedenfalls an der *exceptio* der F. In D. 47.2.9.1 zweiter Fall hingegen erfolgt die *absolutio* des Diebes aufgrund des richterlichen *officium*, sofern dem Kläger nicht sogar der Prozesserfolg unter Rückerstattung der bereits erlangten Urteilssumme ermöglicht wird.[81] Wäre die Rechtskraft der Grund, welcher dem Erfolg der *rei vindicatio* entgegenstünde, hätte man jedoch gleichermaßen eine entsprechende *exceptio* (*rei iudicatae vel in iudicium deductae*) zu erwarten.

3.2.2 exceptio doli?

Eine andere Möglichkeit für den defensiven Rechtsschutz der F könnte die *exceptio doli* sein.[82] Der *dolus* des im Zweitprozess vindizierenden M bzw. dessen Erben wäre vielleicht darin zu sehen, dass er erneut auf Herausgabe der Sachen klagt, obwohl er bereits mit der *litis aestimatio* des Erstverfahrens abgefunden worden ist. Die Vorwerfbarkeit läge somit in der Anstrengung des Verfahrens selbst. Treuwidrige Prozessführung im Sinne eines solchen *dolus praesentis vel generalis*[83] ist ein typischer Anwendungsbereich der *exceptio doli*.[84]

Gegen die Arglisteinrede könnte aber – wie schon gegen die *exceptio rei iudicatae vel in iudicium deductae* – wiederum D. 47.2.9.1 zweiter Fall ins Feld geführt werden.[85] Dort ist keinerlei Einrede belegt, auch nicht wegen *dolus*. Wenn es um eine solche in D. 25.2.22 *pr.* ginge, müsste man sie aber auch in diesem Vergleichsfall erwarten. Immerhin wäre es in beiden Konstellationen gleichermaßen dolos, wenn der Eigentümer nochmals mit der *rei vindicatio* vorgeht, obwohl er bereits die *litis aestimatio* aus dem ersten Prozess erhalten hat. Er ist bereits im Rahmen der erfolgreichen Geltendmachung der Deliktsklage abgefunden worden, sei es infolge der *actio rerum amotarum*, sei es infolge der *condictio ex causa furtiva*.

Im Gegensatz zur *actio de dolo*, welche lediglich subsidiär eingreift,[86] steht die *exceptio doli* neben anderen Einreden wohl

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[77] Gai. 4.8; vgl. etwa auch D. 11.3.11.2, Ulp. 23 *ad ed*. (am Ende); D. 13.1.10 *pr*., Ulp. 30 *ad ed*.; KASER, *Privatrecht I*, S. 618; PIKA, *Ex causa furtiva condicere*, S. 26 und 28-30; PENNITZ, Diebstahlsklage, S. 2615 (Rz 15).

[78] Vgl. zu diesem Fragment SCHMATZBERGER, Pyrrhussieg, bei Anm. 110-125.

[79] PENNITZ, *Enteignungsfall*, S. 309 Anm. 265 nimmt eine durch den Prätor gewährte *exceptio rei iudicatae* an, wofür es jedoch keine Anhaltspunkte gibt. Mit dem *officium iudicis* ist die Klärung durch den Richter im Verfahrensabschnitt *apud iudicem* angesprochen und gerade nicht ein Eingreifen des Prätors *in iure*.

[80] Zur Begründung siehe unten Anm. 97.

[81] Das Urteil aus der *condictio furtiva* scheint demnach, im Gegensatz zu jenem aus der *actio rerum amotarum*, nicht zur „Enteignung" des Klägers zu führen (vgl. unten bei Anm. 93-97), der prozessuale Sacherwerb allenfalls im Zuge des nachfolgenden Vindikationsprozesses stattzufinden, so LEVY, Enteignung, S. 488-492; anders PENNITZ, *Enteignungsfall*, S. 308-309; vgl. dazu auch WACKE, *Actiones praestare*, S. 281-283; vielleicht erwirbt der verurteilte Kondiktionsschuldner wenigstens (bloßen) Ersitzungsbesitz – SCHMATZBERGER, Pyrrhussieg, bei Anm. 125.

[82] So etwa CHIAZZESE, *Jusiurandum*, S. 240, allerdings unter der Annahme einer kompilatorischen Verfälschung sowohl von D. 25.2.8.1 als auch D. 47.2.9.1; gegen die Interpolationsvermutung bei D. 25.2.8.1 etwa WACKE, *Actio rerum amotarum*, S. 57 Anm. 10; gegen die Interpolationsvermutung bei D. 47.2.9.1 etwa LEVY, Enteignung, S. 489-490; ihm folgend WACKE, *Actiones praestare*, S. 120.

[83] Ein präsentischer *dolus* läge z. B. in der Erhebung einer *actio*, wenn der Kläger damit im Widerspruch zu seinem eigenen, früheren Verhalten handelte und dadurch den von ihm geschaffenen Vertrauenstatbestand verletzte (*venire contra factum proprium*), vgl. KASER, *Privatrecht I*, S. 488 mit Anm. 40; BALDUS, Rei vindicatio, S. 1591 (Rz 252) mit Anm. 437; allgemein zum Verbot des *venire contra factum proprium* etwa ISOLA, L., *Venire contra factum proprium. Herkunft und Grundlagen eines sprichwörtlichen Rechtsprinzips*. Frankfurt am Main, 2017.

[84] KASER / HACKL, *Zivilprozeßrecht*, S. 261-262; KASER / KNÜTEL / LOHSSE, *Privatrecht*, S. 253-254; ausführlich zur *exceptio doli praesentis vel generalis* und mit Beispielen zur reichen Kasuistik DALLA MASSARA, T., § 108 – Arglisteinrede (exceptio doli). In: BABUSIAUX, U. / BALDUS, CH. / ERNST, W. / MEISSEL, F.-ST. / PLATSCHEK, J. / RÜFNER, TH. (Hrsg.), *Handbuch des Römischen Privatrechts II.* Tübingen, 2023, S. 2924-2925 (Rz 40-49).

[85] Vgl. zum Fragment ausführlich oben im Abschnitt 3.2.1.

[86] D. 4.3.1.4, Ulp. 11 *ad ed*. (*si de his rebus alia actio non erit*); vgl. aus der Literatur etwa: KASER, *Privatrecht I*, S. 627 mwN; KUPISCH, B., „Actio famosa". Zur Subsidiarität der „actio de dolo" bei „dolus" im Prozess. In: *Beiträge zur Rechtswissenschaft. Festschrift für W. Stree und J. Wessels zum 70. Geburtstag.* Heidelberg, 1993, S. 1187-1203; LAMBRINI, P., *Dolo generale e regole di correttezza.* Milano, 2010, S. 73-76; SCHEIBELREITER, PH., De eo, qui sciens comodasset pondera. Zum Verleihen und Gebrauchen falscher Gewichte bei Trebaz und Paulus. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 134, 2017, S. 198 mwN; HARKE, J. D., *Actio de dolo. Arglistklage im römischen Recht.* Berlin, 2020, S. 12-22; DALLA MASSARA, T., § 94 – Klage wegen Arglist (actio de dolo). In: BABUSIAUX, U. / BALDUS, CH. / ERNST, W. / MEISSEL, F.-ST. / PLATSCHEK, J. / RÜFNER, TH. (Hrsg.), *Handbuch des Römischen Privatrechts II.* Tübingen, 2023, S. 2632-2634 (Rz 40-48) mwN.

gleichberechtigt zur Verfügung und konkurriert mit diesen. In der Literatur wird die Arglisteinrede aber teilweise ebenfalls als subsidiärer Behelf angenommen.[87] Jedenfalls kommt ihr die Funktion eines Auffangtatbestands zu, falls sich Konstellationen ergeben, welche zwar der Formel einer anderen *exceptio* nicht subsumiert werden können, aber in den Anwendungsbereich der *exceptio doli* fallen.[88] Das ist etwa der Fall, wenn eine *res mancipi* vom zivilen Eigentümer nicht infolge einer *emptio venditio*, sondern aufgrund einer anderen auf Eigentumserwerb gerichteten *causa* (z. B. einer Schenkung) formlos übergeben worden ist. Wird der bonitarische Eigentümer dann vom Veräußerer mit der *rei vindicatio* geklagt, hat er mangels Kaufvertrags keine *exceptio rei venditae et traditae*, sondern eine *exceptio doli*.[89] Aufgrund der Regel *„Litis aestimatio similis est emptioni"* bei der Geldverurteilung infolge einer Herausgabeklage kommt in der Konstellation von D. 25.2.22 *pr.* ein zumindest dem Kaufvertrag analoger Erwerbstitel zustande.[90] Insofern könnte die Einrede wegen verkaufter und übergebener Sache zustehen und die *exceptio doli* damit gar nicht notwendig sein.

3.2.3 exceptio rei venditae et traditae?

Denn die Frage nach der einschlägigen *exceptio* lässt sich mit einem unbefangenen Blick auf die Begründung Julians hinsichtlich des Rechtsschutzes der verurteilten F problemlos beantworten: Die Frau hat die Urteilssumme geleistet und steht daher *emptoris loco*, die Litisästimation bildet aufgrund der Kaufanalogie einen Erwerbstitel für die *res litigiosae*. Da F bei ihrer Verurteilung die Sache noch hat, erfolgt mit der Beendigung des Verfahrens eine *traditio* (*brevi manu*). Dementsprechend erhält F für den Fall des späteren Sachverlusts die *actio Publiciana* (Grundfall: oben Abschnitt 3.1).

Das defensive Gegenstück der publizianischen Klage ist die *exceptio rei venditae et traditae*. Deren Formel[91] verlangt dementsprechend ebenfalls, dass es zum Verkauf und zur (formlosen) Übergabe der Sache an den Erwerber gekommen ist.[92] Nachdem diese Voraussetzungen gegeben sind, liegt nahe, dass es diese Einrede ist, mit der sich F im späteren Vindikationsprozess zur Wehr setzen kann.[93] Die *exceptio rei venditae et traditae* ist das Verteidigungsmittel des bonitarischen Eigentümers gegen den quiritischen *dominus*. Damit passt D. 25.2.22 *pr*. in das Gesamtbild, welches die Quellenlage im Bereich des prozessualen Sacherwerbs durch Geldurteil bzw. der „Enteignungswirkung" des Formularprozesses zeichnet: Der Beklagte, der infolge einer Herausgabeklage verurteilt wird, erwirbt – aufgrund der Gleichhaltung der Streitschätzung mit dem Kaufvertrag – das prätorische Eigentum an der Streitsache,[94] vermittelt über den prozessualen Schutz durch *actio Publiciana* und *exceptio rei venditae et traditae*.[95] Voraussetzung ist dabei, analog dem regulären Fall des prätorischen Eigentumserwerbs (formlose Übergabe einer *res mancipi* auf Basis einer *iusta causa*), dass auf Klägerseite der zivile Eigentümer auftritt.[96]

Der Erwerb prätorischen Eigentums in D. 25.2.22 *pr.* erklärt auch, warum in D. 47.2.9.1 zweiter Fall keine Einrede des aus der Diebstahlskondiktion Verurteilten genannt ist.

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[87] Die ältere Literatur nimmt teilweise noch Subsidiarität der Arglisteinrede an, z. B. gegenüber der *exceptio pacti*; so etwa KOSCHAKER, P., Bedingte Novation und pactum im Römischen Recht. In: *Abhandlungen zur Antiken Rechtsgeschichte. Festschrift für Gustav Hanausek zu seinem siebzigsten Geburtstage am 4. September 1925.* Graz, 1925, S. 144-145 und 150; FREZZA, P., *Le garanzie delle obbligazioni. Corso di diritto romano I: Le garanzie personali.* Padova, 1962, S. 114; KNÜTEL, R., Die Inhärenz der exceptio pacti im bonae fidei iudicium. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 84, 1967, S. 155-157. Der Quellenbefund deutet allerdings eher darauf hin, dass die beiden Einreden sich nicht gegenseitig ausschließen, sondern nebeneinander bestehen und der Auswahl des Beklagten unterliegen, vgl. WACKE, A., Zur Lehre vom pactum tacitum und zur Aushilfsfunktion der exceptio doli. Stillschweigender Verzicht und Verwirkung nach klassischem Recht. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 90, 1973, S. 227-249; beipflichtend FINKENAUER, TH., Drittwirkende pacta im klassischen Recht. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 135, 2018, S. 206-207; GRÖSCHLER, P., § 107 – Einrede kraft Vereinbarung (exceptio pacti). In: BABUSIAUX, U. / BALDUS, CH. / ERNST, W. / MEISSEL, F.-ST. / PLATSCHEK, J. / RÜFNER, TH. (Hrsg.), *Handbuch des Römischen Privatrechts II*. Tübingen, 2023, S. 2913-2914 (Rz 31) mit zahlreichen Nachweisen zu Literatur und Quellen.

[88] Ein Beispiel gibt D. 21.2.17, Ulp. 29 *ad Sab.*; WACKE, Pactum tacitum, S. 230-231; vgl. auch FINKENAUER, Drittwirkende pacta, S. 206.

[89] KASER / KNÜTEL / LOHSSE, *Privatrecht*, S. 216-217; DALLA MASSARA, Arglisteinrede, S. 2925 (Rz 48); zum Verhältnis von *exceptio rei venditae et traditae* und *exceptio doli* vgl. etwa KNÜTEL, R., *Stipulatio poenae. Studien zur römischen Vertragsstrafe.* Köln – Wien, 1976, S. 302-303 Anm. 4.

[90] Vgl. oben bei Anm. 57-60 und 66.

[91] Formel: *si non A. Agerius fundum quo de agitur N. Negidio vendidit et tradidit*; vgl. LENEL, *Edictum perpetuum*, S. 511; MANTOVANI, *Formule*, S. 99 (Nr. 168).

[92] Vgl. zu dieser Einrede D. 21.3; KASER, *Privatrecht I*, S. 439 mwN in Anm. 10.

[93] Für die *exceptio rei venditae et traditae* daher auch: CARRELLI, *Acquisto*, S. 39; HARKE, *Eid*, S. 181; für eine *exceptio rei quasi venditae et traditae* konsequenterweise LEVY, Enteignung, S. 498-499, da er in der Verurteilung keine echte *traditio* sieht und deswegen schon bei der Frage der zustehenden Klage für eine analoge *actio quasi Publiciana* eintritt; vgl. weiters WACKE, *Actiones praestare*, S. 277 mit Anm. 1017.

[94] Vgl. die in den einschlägigen Quellen teilweise verwendete Eigentumsterminologie: D. 6.1.46, Paul. 10 *ad Sab.*; D. 13.6.5.1, Ulp. 28 *ad ed.*; D. 16.3.30, Ner. 1 *resp.*; begrifflich kann damit durchwegs das bonitarische Eigentum gemeint sein – LEVY, Enteignung, S. 484 Anm. 1; CARRELLI, *Acquisto*, S. 9; PENNITZ, *Enteignungsfall*, S. 314 Anm. 285; WEIMAR, P., Zum Eigentumsübergang beim Pfandverkauf im klassischen römischen Recht. In: *Mélanges Felix Wubbe offerts par ses collègues et ses amis à l'occasion de son soixante-dixième anniversaire.* Freiburg (Schweiz), 1993, S. 556-557; SCHEIBELREITER / RAFETSEDER, Neue Überlegungen, S. 65 Anm. 346 mwN.

[95] Vgl. für den Sacherwerb durch Geldverurteilung etwa LEVY, Enteignung, S. 476-514; CARRELLI, *Acquisto*; EHRHARDT, *Litis aestimatio*, S. 141-197; PENNITZ, *Enteignungsfall*, S. 306-319; WIMMER, *Besitz und Haftung*, S. 113-121; WACKE, *Actiones praestare*, S. 268-320; SCHEIBELREITER / RAFETSEDER, Neue Überlegungen, S. 59-67; mit Fokus auf der Verurteilung des Sachbesitzers auch SCHMATZBERGER, Pyrrhussieg, (in Drucklegung); seit langem streitig ist die dingliche Rechtsposition, die der kondemnierte Sachinhaber erlangt, wobei neben zivilem oder bonitarischem Eigentum, bloßem Ersitzungbesitz und überhaupt keiner dinglichen Stellung auch zahlreiche differenzierende Auffassungen vertreten worden sind – vgl. die Meinungsübersichten bei STURM, F., *Stipulatio Aquiliana. Textgestalt und Tragweite der Aquilianischen Ausgleichsquittung im Klassischen Römischen Recht.* München, 1972, S. 354-355, WACKE, *Actiones praestare*, S. 270-272 und SCHMATZBERGER, Pyrrhussieg, bei Anm. 46-52.

[96] KASER, *Privatrecht I*, S. 437 mit Anm. 54; PENNITZ, *Enteignungsfall*, S. 314-315 und 317; WACKE, *Actiones praestare*, S. 270.

Wäre die Rechtskraft infolge des Erstverfahrens oder die treuwidrige Prozessführung des Eigentümers Grund für den Exzeptionsschutz, müsste man erwarten, dass Pomponius ebenfalls eine *exceptio* (*rei iudicatae vel in iudicium deductae* bzw. *doli*) thematisiert. Er tut dies jedoch nicht. Im Rahmen der Diebstahlskondiktion kommt es (noch) nicht zum Sacherwerb durch den Verurteilten, bei der *actio rerum amotarum* hingegen schon. Darin liegt der wesentliche Unterschied der, ansonsten weitgehend gleichen, Konstellationen dieser beiden Fragmente.[97] Deshalb hat die F in D. 25.2.22 *pr*. nach dem Erstprozess die Einrede der prätorischen Eigentümerin, während dem verurteilten Dieb in D. 47.2.9.1 keine *exceptio* zukommt, weshalb er sich gegebenenfalls einer erfolgreichen Vindikation ausgesetzt sieht.

4. Fazit

Die *actio rerum amotarum* ist als spezielle Deliktsklage, an Stelle der Diebstahlskondiktion, für die Sachverfolgung zuständig, wenn ein Ehepartner dem anderen *divortii causa* Sachen entwendet, und es dann zur Scheidung kommt. In diesem Kontext thematisiert Julian den durch die Verurteilung erlangten Rechtsschutz; sowohl den offensiven im Rahmen des zugrunde liegenden Ausgangssachverhaltes als auch den defensiven durch Variierung des Falles. Damit ist D. 25.2.22 *pr.* hinsichtlich des Phänomens der „Enteignungswirkung" der *condemnatio pecuniaria* äußerst aufschlussreich.

Sollte die Ehefrau, die ihrem Gatten wegen der Scheidung Sachen entzogen hat und infolge dieser Entwendung in Geld verurteilt worden ist, später den Besitz an den *res amotae* verlieren, kommt ihr zu deren Wiedererlangung die *actio Publiciana* zu.[98] Denn sie wird aufgrund der *litis aestimatio* als Käuferin der Sachen behandelt. Die Eigentumsklage verbleibt hingegen dem Gatten (Grundfall).

Falls der Frau die Sachen nicht abhandenkommen, sie aber vom Ehemann oder dessen Erben, der immer noch ziviler Eigentümer ist, nun in einem Zweitprozess mit der *rei vindicatio* geklagt wird, hat sie eine *exceptio* (Variante). Bei der, nicht ausdrücklich bezeichneten, Einrede wird es sich um die *exceptio rei venditae et traditae* handeln, deren Voraussetzungen der Vorgang der Geldverurteilung ebenso erfüllt, wie jene der publizianischen Klage. Hingegen wird weder die *exceptio rei iudicatae vel in iudicium deductae* noch die *exceptio doli* angesprochen sein. Das lässt sich insbesondere aus D. 47.2.9.1 zweiter Fall ableiten, wo in einer weitgehend analogen Konstellation eine *exceptio* nicht erwähnt wird. Der maßgebliche Unterschied zu D. 25.2.22 *pr.* liegt eben nur in der Frage des prozessualen Sacherwerbs und nicht in der Rechtskraft oder dem *dolus* des Klägers.

Die untersuchte Quellenstelle erhellt das rechtliche Schicksal einer vom Eigentümer mit Herausgabeklage beanspruchten Sache, wenn der Besitzer in Geld verurteilt wird. Der Kläger bleibt formal quiritischer Eigentümer und wird in Folge der *condemnatio* pekuniär abgefunden. Der *condemnatus* erwirbt das bonitarische Eigentum an der *res litigiosa*. Er kann diese, wenn sie ihm verloren geht, künftig mit der *actio Publiciana* herausverlangen und sich gegen eine etwaige Eigentumsklage mit der *exceptio rei venditae et traditae* zur Wehr setzen.

[97] Der Grund dürfte darin liegen, dass dem Kläger die eidliche Schätzung ermöglicht werden soll, welche bei der *condictio ex causa furtiva* im ersten Prozess nicht möglich gewesen ist, vgl. LEVY, *Nachträge*, S. 56-57; HARKE, *Eid*, S. 163; SCHMATZBERGER, Pyrrhussieg, mwN in Anm. 107-108. Denn bei Kondiktionen ist das *iusiurandum in litem* grundsätzlich nicht am Platz – D. 23.3.5.4, Marcian. 4 *reg.*; D. 12.3.6, Paul. 26 *ad ed.*; LEVY, Enteignung, S. 488; KLINGENBERG, Formularprozess, S. 448 (Rz 60).

[98] Vielleicht nur als analoge Klage, vgl. oben Anm. 68.

Die Rückgabe konfiszierter Güter in einem Kaiseredikt aus dem frühen 4. Jh.

(Restitution of Confiscated Property in an Imperial Edict from the Early 4th Century)

*Robin Repnow**

Abstract

Eine durch eine Inschrift auf Kreta überlieferte Kaiserkonstitution aus dem frühen 4. Jh. (CIL III, 12044 = CIL III, 13569 = ICret I, 18, 189) enthält ausführliche Regeln über die Rückgabe konfiszierter Güter an ihre früheren Eigentümer. Da der Text, der in der Literatur zuweilen als edictum de bonis restituendis oder als Second Caesariani Decree bezeichnet wird, sehr lückenhaft erhalten ist, ist sein Inhalt nur schwer verständlich. Dennoch handelt es sich um eine bedeutende Quelle sowohl für das römische Fiskalrecht als auch die von den Kaisern zu Beginn der Spätantike angewandte legislative Technik. Zu datieren ist die Konstitution möglicherweise in die Zeit kurz nach dem Herrschaftsantritt von Kaiser Galerius (305/306). Der in der Literatur oft vermutete Zusammenhang zu anderen inschriftlich überlieferten Kaiserkonstitutionen aus derselben Zeit wie etwa dem edictum de accusationibus ist jedoch weniger eng als teils angenommen.

Keywords: *Konfiskationen; Schenkungen; Rückerstattung; Fiskalrecht; Indulgenz; Caesariani; Publikation von Kaiserkonstitutionen; edictum de accusationibus; Galerius.*

1. Einleitung

Die Kaiser des römischen Reiches waren nicht nur Herrscher, sondern auch Großgrundbesitzer: In der Spätantike war in einzelnen Provinzen bis zu einem Fünftel des Bodens in kaiserlicher Hand.[1] Die betreffenden Grundstücke stammten nicht zuletzt aus Konfiskationen. Der Einziehung zugunsten der kaiserlichen *res privata*[2] unterlagen insbesondere Nachlässe, die ohne Erbe geblieben waren (*bona vacantia*) oder für die kein tauglicher Erbe existierte (*bona caduca*), sowie die Güter von Straftätern, die zu schweren Strafen verurteilt worden waren (*bona damnatorum*),[3] wobei diese Fallgruppen jedoch nicht immer trennscharf unterschieden wurden.[4]

In der Spätantike kam es oft vor, dass eingezogene Güter nicht dauerhaft im *fiscus* verblieben. Verurteilte Straftäter wurden zum Beispiel regelmäßig begnadigt, wobei sie auch ihr Vermögen zurückerhalten konnten.[5] In anderen Fällen gab der Kaiser die eingezogenen Güter an andere Privatleute (etwa Personen, die er für ihre Dienste belohnen oder deren Loyalität er sich versichern wollte) weiter. Im Codex Theodosianus, insbesondere in den Titeln CTh. 10.8-14, finden sich zahlreiche Gesetze über die näheren Modalitäten solcher kaiserlicher Zu-

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1 JONES, A.H.M., *The Later Roman Empire 284-602. A social economic and administrative Survey. Volume I.* Oxford, 1964, S. 415f.; DEMANDT, A., *Die Spätantike. Römische Geschichte von Diocletian bis Justinian. 284 – 565 n. Chr.* 2. Aufl., München, 2007, S. 286.

2 JONES, *Later Roman Empire I*, S. 415; DELMAIRE, R., *Largesses sacrées et res privata. L'aerarium impérial et son administration du IVe au VIe siècle*, Roma, 1989, S. 597-620; SPAGNUOLO VIGORITA, T., Konfiskation. In: *Reallexikon für Antike und Christentum, vol. 21*, Stuttgart, 2006, Sp. 360. Soweit im Folgenden vom *fiscus* die Rede ist, wird dieses Wort in Anlehnung an den in den Quellen häufig zu beobachtenden Sprachgebrauch als Oberbegriff verwendet. Allgemein zum teils uneinheitlichen Sprachgebrauch der spätantiken Quellen in Bezug auf die kaiserlichen Kassen, vgl. DELMAIRE, aaO., S. 4-17. – Der für die klassische Zeit geführte Streit, wann und wie die Zuständigkeit für Einziehungen vom *aerarium* auf den *fiscus* überging, spielt für das 4. Jh. keine Rolle mehr.

3 JONES, *Later Roman Empire I*, S. 415, 420-422; KASER, M., *Das Römische Privatrecht. Zweiter Abschnitt. Die nachklassischen Entwicklungen*. 2. Aufl., München, 1975, S. 533f.; DELMAIRE, *Largesses sacrées*, S. 597-620; DEMANDT, *Spätantike*, S. 286.

4 Zum Sprachgebrauch vgl. etwa KASER, *Römisches Privatrecht II*, S. 533f.; GAUDEMET, J., Droits individuels et toute puissance impériale aux derniers jours de l'Empire en Occident. La nouvelle III, de bonis vacantibus, d'Anthemius. In: *Études offertes à Jean Macqueron*, Aix-en-Provence, 1970, S. 343-345. Charakteristisch für spätantike Kaiserkonstitutionen ist die Verwendung von Begriffskombinationen wie *bona vacantia et caduca*, teils ergänzt um weitere Zusätze.

5 Vgl. CARELLI, E., La restitutio indulgentia principis. In: *Studi in onore di Michele Barillari. Volume primo*. Bari, 1937, S. 73-76; JONES, *Later Roman Empire I*, S. 421; DELMAIRE, *Largesses sacrées*, S. 620f.; DI MAURO TODINI, A., *Indulgentia principis in età tardoantica. Materiali e prospettive di ricerca*. Napoli, 1996, S. 58f., 77-89, 115-122 und 139-153; RIEDLBERGER, P., *Prolegomena zu den spätantiken Konstitutionen. Nebst einer Analyse der erbrechtlichen und verwandten Sanktionen gegen Heterodoxe*. Stuttgart, 2020, S. 333-335, 340f.

wendungen, die oftmals auf einen formellen Antrag (*petitio*) hin erfolgten.[6]

Probleme stellten sich dann, wenn der Kaiser entschied, konfiszierte Güter an ihre ursprünglichen Eigentümer zurückzugeben, aber sie in der Zwischenzeit bereits anderweitig zugewiesen hatte. In derartigen Fällen fanden die Kaiser sehr unterschiedliche Lösungen. So verfügte etwa Kaiser Licinius im Jahr 313, dass Kircheneigentum, welches im Zuge der Christenverfolgungen konfisziert und im Anschluss verschenkt oder verkauft worden war, an die Kirchen zurückgegeben werden, aber dass der *fiscus* die Erwerber entschädigen solle.[7] Elf Jahre später erließ Konstantin ein weiterreichendes Gesetz über die Rückgabe von im Zuge der Christenverfolgungen konfiszierten Besitztümern, das alle Privatleute, die sich im Besitz derartiger Güter befanden, zur entschädigungslosen Rückgabe derselben verpflichtete und ihnen nur die gezogenen Nutzungen beließ.[8] Wiederum zwei Jahre später bestimmte Konstantin allerdings (mutmaßlich ohne Bezug zu Christenverfolgungen), dass die Empfänger kaiserlicher Schenkungen die ihnen zugewiesenen Güter *sine molestia litis* behalten durften und dass Personen, denen die betreffenden Güter zuvor unrechtmäßig entzogen worden waren, vom *fiscus* zu entschädigen seien.[9]

Ähnliche Themen werden auch von einer inschriftlich überlieferten Kaiserkonstitution behandelt, die Mitte oder Ende der 1880er Jahre von Federico Halbherr in Lyttos auf Kreta entdeckt und Anfang des 20. Jh. von Mommsen im *Corpus Inscriptionum Latinarum* publiziert wurde (CIL III, 12044, verbesserte Edition in CIL III, 13569). Halbherrs Schülerin Margherita Guarducci legte 1935 im Rahmen der *Inscriptiones Creticae* eine Neuedition vor (ICret I, 18, 189), bei der sie einige Lücken des CIL-Textes schließen konnte; davon abgesehen bestehen keine großen Abweichungen zwischen den Editionen. Im Jahr 1958 schließlich wurde in Ephesos ein kurzes, sehr lückenhaftes Fragment derselben Konstitution entdeckt und von Denis Feissel 1998 identifiziert.[10] Es gibt Teile des Schlusses (Z. 35-46 der Kopie aus Lyttos wieder).[11] Eine Publikation durch Feissel steht bevor. Da der Text aus Lyttos im fraglichen Bereich vergleichsweise vollständig erhalten ist, wird das Fragment unsere Kenntnis der Konstitution jedoch wohl nicht entscheidend verbessern können.

Der Text, der in der Literatur zuweilen als *edictum de bonis restituendis* oder *Second Caesariani Decree* bezeichnet wird, ist nicht nur eine bedeutende Quelle für das römische Fiskalrecht, sondern kann auch Aufschluss über die von den Kaisern zu Beginn der Spätantike angewandte legislative Technik geben. Zudem bestehen möglicherweise intertextuelle Bezüge zu anderen inschriftlich überlieferten Kaiserkonstitutionen, wie etwa dem berühmten *edictum de accusationibus*. Leider ist die Konstitution aber sehr schwer zu verstehen, da sie äußerst unvollständig überliefert ist.

Der in Lyttos erhaltene Text lautet (nach ICret I, 18, 189):[12]

[e]orumdem sint liveri vel proximi pertinere. Sed et mancipia si qua in-
tra supra dictum diem bel ad fab[ri]cas diversas tra[------]o[---]s naec
deputata vel ad quascumque artes tradita sunt sive don[o] de liverali[tate]
nostra data v[e]l ex <q>uocumque officio distracta sunt minime conveniet
hoc statuto nostro revocari adque restitui, cum etiam possessiones vet[e]r[es] (5)
quascmque ex munific{i}entia nostra vel [-]u[-] [c]ondicionis alienata<s> esse const[a]-
bit, in eodem statu oportea[t] permanere [--]mad [--------]un[-----]ictuseilbi[--]
iusserimus quae in diem huius edicti nostri [-] iure [------] acris [-]qu[----------]
c[-]uss[---] huius aut [-----]n[-]l[------------] ut [-------]s[---]arius la [------]
tine[--]s quarum bona ex [-------]nuari [-----]q[-----] quae ab eo vindicata [-]ocel[-] (10)
[--]d[-]ificil[--]ggores [----]o quae ex [---]r[--] amiser[a]nt [---]ortasis inprova
procuratorum adque etiam Caesarianoru[m] temeritas n[o]n [c]ontempta mop[--][13]

[6] Diesem Thema ist das Dissertationsprojekt des Verfassers gewidmet. Aus der neueren Literatur vgl. insbesondere DELMAIRE, *Largesses sacrées*, S. 621-639; WIELING, H., Constantinische Schenkungen. In: *Atti dell'Accademia Romanistica Costantiniana*, vol. 9, 1993, S. 267-298; MERCOGLIANO, F., Die Petitores in der Fiskalgesetzgebung. Ein Überblick. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 111, 1994, S. 449-457; DERS., La petitio fiscale nell'organizzazione finanziaria da Costantino a Teodosio II, in: *Atti dell'Accademia Romanistica Costantiniana*, vol. 12, 1998, S. 405-412; FASOLINO, F., La petitio di beni fiscali nella legislazione di Teodosio II e Valentiniano III. In: *Teoria e Storia del Diritto Privato*, vol. 9, 2016, S. 1-43; DERS., Strumenti dell'amministrazione finanziaria nel V sec. d.C.: la petitio di beni fiscali. In: *Ravenna Capitale. Dopo il Teodosiano. Il diritto pubblico in Occidente nei secoli V-VIII*. Santarcangelo di Romagna, 2017, S. 273-295.

[7] Lact. mort. pers, 48,7-9; Euseb. HE 10,5,9-11.

[8] Euseb. VC 2,37 und 41.

[9] CTh. 10.8.3. – Allgemein zu dem in diesem Abschnitt angesprochenen Problemkreis sowie zu weiteren Fällen und Quellen DELMAIRE, *Largesses sacrées*, S. 620f.

[10] Erstmals erwähnt in FEISSEL, D., Spätrömische und byzantinische Inschriften. In: *Österreichisches archäologisches Institut. Jahresbericht 1998 (Beiblatt zu ÖJh vol. 68, 1999)*. Baden bei Wien, 1999, S. 34.

[11] Vgl. CORCORAN, Galerius's Jigsaw Puzzle: The Caesariani Dossier. In: *Antiquité Tardive. Revue Internationale d'Histoire et d'Archéologie (IVe-VIIe siècle)*, vol. 15, 2007, S. 234, dem Feissel Einblick in seine Arbeiten gewährte.

[12] Der von CORCORAN, Galerius's Jigsaw Puzzle, S. 250 wiedergegebene Text enthält einige Ungenauigkeiten, so etwa *possessionem* statt *possessionum* in Z. 38 und *praecipimus* statt *praecepimus* in Z. 44. CASELLA, M., *Galerio. Il tetrarca infine tollerante*. Roma, 2017, S. 149-151 scheint den Text Corcorans übernommen zu haben.

[13] Vielleicht: *non contenta his quae* (SPAGNUOLO VIGORITA, T., Prohibitae delationes. Il divieto della delazione fiscale nel panegirico del 313. In: *Hestíasis. Studi di tarda antichità offerti a Salvatore Calderone III*. Messina, 1991, S. 363 Fn. 81).

merito ad fiscum pertinebant [in]prove manus suas ad mulierum quoque sub-
st[anti]am te<t>endisset [-]t[-]ne[-]a[-]uen[--]d[---]m [--]ue[-]ca aliis manifestis nexi-
[b]us sive contractibus cuiusquam p[-]sse [---]elu[-]mus[--] ve[-]a [---]pia vindicata fu- (15)
erant adquae incorporata iure fiscali de [----]neu capta eadem si<nt>, at cuius
[p]ropriaetatem pertinuis[s]e videba[n]tur, inrevo[-]tum [--]nisacat eidem restitu-
antur vel si eodem nunc [---]tenti liveri vel ceteri{s} supra conpra[e]n-
si ex [b]eneficio nostri sta[t]uti ad quaestionem accesserint n[-]m[-----]
[b]enibolentia nostra eam [--] deneget [---]otanteame[--] sub ea condicione sub (20)
indulge[nt]ia nostra m[-]c[-]t[--]e[-][14] ut m[---]f[--]t[--] debitis propter [--] inqua[--]
[--]io fiscali [----------][15] [s]atisfacia[n]t. Quo magis autem lenior indulgen[ti]-
[a nostra ad sin]gulos unibersosquae posset pervenire illud quoque credidi-
mus <s>anci[e]ndum ut non solum quae tenentur a fisco [e]is restituantur qui-
bus reddenda te[n]uimus, verum etiam si intra [------]u[--]a[---]ntra c[----]m[16] (25)
[in] officio rationa[l]is et private magistri vel etiam procuratorum [u]trius-
quae of[f]icii super possessionibus sive mancipiis lis inchoata per o[c]cupationes
iudicantis vel astutia officialium vel quoquo alio genere finita non est
ad execution[e]s co[-]aineff[-]tis o[f]ficium in quo causa agenda fuerat, con-
quiescat; mane[n]te tamen con[sili]o ne ut [--] [o]b debitum manifestum in qui- (30)
etuio fiscali se [--]titura[17] titulo sat[i]sfaciendum sciat is qui statu[ti no]stri
beneficium conseque[tu]r. Ho[rt]amur itaque singulos quoque ad quos iuxta
id quod sanx[im]us huius benivolentiae nostrae statuta pertinent u[t] adean-
t ad officium in quo supra dicta quae ad se pertinent <retinent>ur, adque [ea]dem redd[i]
sibi postulent. In quibus reciperandis ne qu[id] per officialium Caesa[ria]norum (35)
sive pr[oc]urator<u>m abaritiam subtrahatur sciant sin[g]uli [qui]que praesidibu[s]
provinciarum a no[bi]s significatum esse ut si quis vel mancipium vel pec{t}ora
vel quid aliut ex enthecis possessionum sibe fructus quos in diem statuti nostri
in possessionibus esse debuisse constavit ablat<o>s esse per<s>pexerit interpellato
rectore provinciae ad indemnitatem sui conservandam contr[a] eos qui fra[u]- (40)
dem commiserint ultione quoque conpetente data remedium conse[qu]-
atur. Eten<i>m ut tum[18] et is univer<s>isque palam fieret quid super omnibus tam
[p]raefectis nostris quam etiam {etiam} praesidibus provinciarum rationa-
li quoque et pribate magistro scripserimus exempla subesse praecepimus
ut isdem quoque omnibus cognitis provinciales nostri per benivolen- (45)
tia<m> nostram consultum sibi esse laetentur.

Der überlieferte Text setzt mitten im Satz ein. Die Steintafel, auf die er geschrieben ist, ist jedoch oben nicht abgebrochen. Der Text muss also auf einem anderen Stein begonnen haben und war daher ursprünglich wohl deutlich länger.[19] Über den Inhalt des nicht erhaltenen Teils sind nur Mutmaßungen möglich und auch im erhaltenen Teil weist der Text zahlreiche Lücken und unsichere Lesungen auf (letztere sind in der obigen Wiedergabe nicht kenntlich gemacht). Zusätzlich erschwert wird das Verständnis des Textes dadurch, dass er zahlreiche Schreibfehler und orthographische Varianten enthält.[20]

Was genau in der Konstitution angeordnet wird, ist daher in vielen Punkten unklar.[21] Ebenso unklar ist es, welcher Kaiser sie wann erlassen hat. Allgemein datiert die Wissenschaft den Text jedoch ins frühe 4. Jh. (näher unter 4.). Da die Konstitution sich autoreferenziell als Edikt bezeichnet (Z. 8: *huius edicti nostri*), steht zudem zumindest die Textgattung fest. Mit Edikten wandten sich Kaiser direkt an die Bevölkerung.[22] Sie wurden wohl für besonders wichtige oder grundsätzliche Regelungen verwendet.[23]

Im Folgenden soll versucht werden, weiteres Licht ins Dunkel zu bringen. Dazu soll zunächst der Inhalt des Edikts ge-

[14] Vielleicht: *sub ea condicione sub indulgentia nostra mansuris* oder *sub ea condiciocione {sub} indulgentia nostra manente* (SPAGNUOLO VIGORITA, Prohibitae delationes, S. 363 Fn. 81).
[15] Vielleicht: *manifestis debitis propter quae inquietudo fiscali mota fuerat* (SPAGNUOLO VIGORITA, Prohibitae delationes, S. 363 Fn. 81).
[16] Vielleicht: *si intra anni tempus contra fiscum* (SPAGNUOLO VIGORITA, Prohibitae delationes, S. 363 Fn. 81).
[17] Vielleicht: *manente tamen condicione ut ne ob debitum manifestum inquietudo fiscalis sit exstitura* (SPAGNUOLO VIGORITA, Prohibitae delationes, S. 363f. Fn. 81).
[18] MOMMSEN, CIL III, 13569: *‚tum' vix ferri potest*.
[19] CORCORAN, Galerius's Jigsaw Puzzle, S. 234.
[20] Insbesondere B und V sowie E und AE werden häufig verwechselt.
[21] CORCORAN, Galerius's Jigsaw Puzzle, 234.
[22] RIEDLBERGER, *Prolegomena*, S. 43.
[23] RIEDLBERGER, *Prolegomena*, S. 62.

klärt werden, soweit dies bei der Überlieferungslage möglich ist (2.). Im Anschluss wird erörtert, ob aus dem Schlusssatz der Konstitution etwas über ihr Verhältnis zu anderen Texten gefolgert werden kann (3.) und in welchen historischen Kontext das Edikt einzuordnen ist (4.).

2. Modalitäten der Restitution

Das zentrale Thema der Konstitution scheint darin zu bestehen, dass die Rückgabe von konfiszierten Gütern an ihre früheren Eigentümer angeordnet wird. Besonders klar kommt dies in Z. 15-18 zum Ausdruck, wo es heißt: *vindicata fuerant adquae incorporata iure fiscali […] at cuius [p]ropriaetatem pertinuis[s]e videba[n]tur, […] eidem restituantur*. Auch in Z. 24f. (*quae tenentur a fisco [e]is restituantur quibus reddenda te[n]uimus*), Z. 33-35 (*u[t] adeant ad officium in quo supra dicta quae ad se pertinent <retinent>ur, adque [ea]dem redd[i] sibi postulent. In quibus reciperandis […]*) und Z. 5 (*restitui*) wird deutlich, dass es um die Rückerstattung von Vermögen durch den *fiscus* geht. Die Einzelheiten scheinen jedoch recht kompliziert zu sein und können aufgrund der Unvollständigkeit des Textes nur partiell nachvollzogen werden.[24]

2.1 Festsetzung eines Stichtages

Von Bedeutung für die Rückgabe ist anscheinend ein Stichtag (oder mehrere Stichtage?), auf den (bzw. die) im Text mehrfach Bezug genommen wird. So wird in Z. 38f. für den Umfang der geschuldeten Rückgabe auf einen bestimmten Tag abgestellt (*quos in diem statuti nostri in possessionibus esse debuisse constavit*). Derselbe Tag dürfte in Z. 8 in Bezug genommen werden (*in diem huius edicti nostri*), auch wenn sich dort die getroffene Regelung nicht mehr nachvollziehen lässt. In Z. 1f. ist dagegen von einem vorbezeichneten Tag (*supra dictum diem*) die Rede;[25] Güter, die vor diesem Tag vom *fiscus* weiterveräußert wurden, sind von der Rückgabe ausgeschlossen (näher sogleich). Ob der *supra dictus dies* mit dem *dies edicti/statuti nostri* gleichgesetzt werden kann, ist unklar. Fraglich ist auch, ob der *dies edicti/statuti* sich auf einen im Edikt bezeichneten Tag bezieht oder auf den Tag, an dem das Edikt erlassen wurde. Deutlich wahrscheinlicher ist Ersteres, denn der genaue Erlasszeitpunkt scheint bei Kaiserkonstitutionen oftmals gar nicht dokumentiert worden zu sein[26] und er ist auch der inschriftlich überlieferten Fassung nicht zu entnehmen.[27]

Welchen Tag oder welche Tage der Kaiser konkret in Bezug nahm, lässt sich auf Grundlage des überlieferten Textes nicht ermitteln. Es hat aber den Anschein, als lägen die Daten zeitlich vor dem Erlass des Edikts, denn es ist in der Vergangenheitsform von ihnen die Rede (Z. 3f.: *tradita sunt sive […] data v[e]l […] distracta sunt*; Z. 39: *in possessionibus esse debuisse constavit*).

2.2 Weiterveräußerte Güter

Aus juristischer Sicht besonders interessant sind die ersten Zeilen[29] der Inschrift, in denen es um den Fall geht, dass die zu restituierenden Güter sich nicht mehr im Besitz des *fiscus* befinden (Z. 1-7). Konkret ist zunächst von Sklaven (*mancipia*) die Rede. In Bezug auf diese wird zwischen verschiedenen Konstellationen unterschieden: Es wird der Fall bedacht, dass die Sklaven vor dem Stichtag (*intra supra dictum diem*) zum Einsatz in Werkstätten (Z. 2: *ad fab[ri]cas diversas*) oder bei anderen handwerklichen Tätigkeiten (Z. 3: *ad quascumque artes*) bestimmt wurden; wahrscheinlich ist jeweils an den Einsatz in Betrieben unter der Kontrolle der Verwaltung gedacht.[29] Weiterhin wird der Fall der kaiserlichen Schenkung (Z. 3f.: *don[o] de liverali[tate] nostra data*) und des Verkaufs (Z. 4: *ex <q>uocumque officio distracta sunt*) berücksichtigt. In allen diesen Konstellationen lautet die kaiserliche Entscheidung: *minime conveniet […] revocari adque restitui* (Z. 4f.). Das heißt: Die kaiserliche Zuwendung wird nicht widerrufen und die Sklaven ihren alten Herren nicht zurückgegeben.[30]

Dass eine Regelung speziell für Sklaven getroffen wird, könnte daran liegen, dass diese einerseits wertvoll sind und andererseits Unterhalt kosten, sodass dem *fiscus* ein Verlust droht, wenn er sie nicht alsbald wirtschaftlich nutzbar macht (durch Einsatz in Werkstätten) oder sich ihrer entledigt (durch Verkauf oder Schenkung). Die Situation ist eine signifikant andere als etwa bei Grundstücken, die der *fiscus* selbst bewirtschaften oder in einem Miet- bzw. Pachtverhältnis vergeben kann. Die Einleitung mit *sed et* deutet allerdings darauf hin, dass vor der Regelung über Sklaven eine Anordnung zum Schicksal anderer Sachen stand, die vom *fiscus* weitergegeben wurden.[31] Es wäre möglich, dass es eine allgemeine Regel gab und dass anschließend die Sklaven als

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[24] CORCORAN, Galerius's Jigsaw Puzzle, 234: „The terms would appear to be quite complex".

[25] Möglicherweise wird auf diesen Tag auch in Z. 25 Bezug genommen; so CORCORAN, Galerius's Jigsaw Puzzle, S. 234; anders die Konjektur von SPAGNUOLO VIGORITA, Prohibitae Delationes, S. 363 Fn. 81.

[26] RIEDLBERGER, *Prolegomena*, S. 247f. mit Fn. 373 und 374.

[27] Eine solche Angabe könnte sich freilich im nicht erhaltenen Teil des Edikts befunden haben, aber in der Regel stehen Datumsangaben am Ende einer Konstitution und der Schluss ist vorliegend erhalten.

[28] Die Bedeutung der ersten Worte der ersten Zeile (*[e]orumdem sint liveri vel proximi pertinere)* lässt sich nicht zweifelsfrei ermitteln. CORCORAN, Galerius's Jigsaw Puzzle, S. 234 Fn. 112 vermutet, *liberi* und *proximi* könnten, anders als Sklaven, aus *fabricae* befreit worden sein; es wäre allerdings zu fragen, wie diese überhaupt dort hineingeraten sein sollen. Plausibler erscheint die Annahme, dass an Fälle gedacht ist, in denen die ursprünglichen Eigentümer der konfiszierten Güter verstorben sind, sodass eine Rückerstattung zugunsten ihrer Kinder und Angehörigen in Rede steht (ähnlich vielleicht Z. 18). Dies erschien bereits für MOMMSEN, CIL III, 13569 die nächstliegende Erklärung, der als mögliche Rekonstruktion des Satzes vorschlägt: *[Volumus itaque bona quae a die… ad diem… fisco nostro incorporata sunt ad eos, quibus ablata sunt, vel ipsis defunctis ad eos, qui e]orumdem sint liveri vel proximi, pertinere*.

[29] Der Begriff *fabricae* bezeichnet insbesondere Einrichtungen zur Herstellung der vom Heer benötigten Waffen, vgl. DEMANDT, *Spätantike*, S. 280. Die Verwaltung betrieb aber zahlreiche weitere Werkstätten, etwa zur Produktion von Textilien, vgl. JONES, A.H.M., *The Later Roman Empire 284-602. A social economic and administrative Survey. Volume II*. Oxford, 1964, S. 839f.; DELMAIRE, *Largesses sacrées*, S. 421-528; DEMANDT, aaO., S. 284f., 408f.

[30] Vgl. DELMAIRE, *Largesses sacrées*, S. 630.

[31] Der Sinn der ersten erhaltenen Worte ist unklar, vgl. oben. Fn. 28.

Sonderfall noch einmal gesondert erwähnt wurden, oder dass zwischen verschiedenen Arten von Gütern differenziert wurde, also etwa dass vor der Regel über Sklaven eine Regel über Grundstücke stand. In jedem Fall deutet das einleitende *et* darauf hin, dass auch andere weitergegebene Sachen nicht zurückerstattet wurden; andernfalls würde man kein eine Übereinstimmung ausdrückendes Wort wie *et*, sondern vielmehr eine Formulierung erwarten, die auf einen Gegensatz schließen lässt.

Der auf die Anordnung zu Sklaven folgende, begründende Nebensatz *cum etiam possessiones veteres […] in eodem statu oporteat permanere* (Z. 5-7) könnte sich auf eine derartige vorangegangene Regel zurückbeziehen. *Possessiones* dürfte hier so viel wie „Grundstücke" bedeuten (textnähere Übersetzungen wären „Besitzungen" oder „Besitztümer").[32] Dies könnte dafür sprechen, dass die Regel, die vor der über Sklaven stand, sich speziell auf Grundstücke bezog. Vielleicht ist aber auch ein anderer, in der Vergangenheit liegender Sachverhalt gemeint; entscheidend dürfte das Verständnis von *veteres* sein. In jedem Fall begegnet das Nebeneinander von Sklaven und Grundstücken auch im weiteren Fortgang des Edikts (Z. 27: *super possessionibus sive mancipiis*). Insgesamt ist dieser Passage des Edikts das Bestreben zu entnehmen, keine Regelung zu treffen, die private Eigentümer schädigt[33] oder die Produktivität der öffentlichen *fabricae* mindert. Daneben mag der Wunsch eine Rolle gespielt haben, nicht durch den Widerruf kaiserlicher Schenkungen die kaiserliche Autorität zu untergraben.

Es folgt eine längere Lücke (Z. 7-18), in welcher der Ediktstext so fragmentarisch überliefert ist, dass sich kaum Aussagen über seine Bedeutung treffen lassen.[34] Es wäre vorstellbar, dass auf die Anordnung, wonach kaiserliche Verfügungen über eingezogene Güter bestandskräftig sein sollen, ähnlich wie in der einleitend erwähnten konstantinischen Konstitution CTh. 10.8.3 eine Entschädigungsregel zugunsten der früheren Eigentümer folgte, doch dabei handelt es sich nur um eine Spekulation.

2.3 Vorwürfe gegen *Caesariani* und *procuratores*

Ansatzweise lesbar sind innerhalb der beschriebenen Lücke lediglich die Zeilen 11-14, in denen anscheinend Vorwürfe gegen *Caesariani* und *procuratores* erhoben werden. Der Begriff *Caesariani* bezeichnete während des Prinzipats allgemein Mitglieder der *familia Caesaris*, aber begegnet in Texten aus der zweiten Hälfte des 3. und des frühen 4. Jh. in einem engeren Sinn und bezieht sich speziell auf Funktionäre der Fiskalverwaltung, insbesondere der *res privata*, die mit der Verwaltung von kaiserlichem Eigentum betraut waren.[35] Anders als ihre Namensvettern aus dem Prinzipat waren diese *Caesariani* wohl (mindestens überwiegend) freigeboren.[36] Etwas weniger klar ist, welche *procuratores* gemeint sind. Der Begriff könnte sich zum einen auf hohe fiskalische Funktionsträger beziehen, die für einzelne oder mehrere Provinzen zuständig waren.[37] Bei den *procuratores rei privatae* handelte es sich um die Vorgesetzten der *Caesariani*.[38] Es gab aber auch *procuratores*, die auf lokaler Ebene für die Verwaltung einzelner Wirtschaftseinheiten zuständig waren.[39] Bei diesen läge es möglicherweise näher, sie in einem Atemzug mit den *Caesariani* zu nennen.[40]

Soweit Kaisergesetze die *Caesariani* erwähnen, erscheinen diese in der Regel in einem sehr negativen Licht: In mehreren Konstitutionen wird unterstellt, dass sie gierig und korrupt seien und stets bestrebt, sich auf Kosten der Untertanen oder des *fiscus* zu bereichern.[41] Die Kaiser gerierten sich als Verteidiger ihrer Untertanen gegen diese Umtriebe: So erlaubte Diokletian es etwa, den *Caesariani* gewaltsam Widerstand zu leisten, wenn diese ohne taugliche kaiserliche Ermächtigung Güter in Beschlag nehmen wollten.[42]

In dieses Bild fügt sich auch die betreffende Ediktspassage ein: *Caesariani* und *procuratores* wird *temeritas* vorgeworfen (Z. 12; vgl. auch in Z. 36 *avaritia*). Konkret scheint es darum zu gehen, dass die *Caesariani* nicht nur Güter konfiszieren, die *merito ad fiscum pertinebant* (Z. 13), sondern darüber hinaus auch versuchen, zu Unrecht auf das Vermögen von Frauen zuzugreifen (Z. 13f.: *[in]prove manus suas ad mulierum quoque subst[anti]am te<t>endisset*). Gedacht ist vermutlich an eine Konstellation, in der (nur) das Vermögen der Ehemänner der Konfiskation unterlag,[43] vielleicht weil es sich bei diesem um verurteilte Straftäter handelte.[44]

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[32] Zu dieser in der Spätantike häufigen Bedeutung vgl. HEUMANN, H.G./Seckel, E., *Handlexikon zu den Quellen des römischen Rechts*. 11. Aufl., Jena, 1926, *possidere* e), S. 441; CANNATA, C.A., *'Possessio' 'Possessor' 'Possidere' nelle fonti giuridiche del basso impero romano. Contributo allo studio del sistema dei rapporti reali nell'epoca postclassica*. Milano, 1962, S. 9-24; VANDENDRIESSCHE, S., *Possessio und Dominium im postklassischen römischen Recht. Eine Überprüfung von Levy's Vulgarrechtstheorie anhand der Quellen des Codex Theodosianus und der Posttheodosianischen Novellen*, Hamburg, 2006, S. 45f. mit Fn. 210. So auch in Z. 39f. (*quid aliut ex enthecis possessionum sibe fructus quos […] in possessionibus esse debuisse constavit*); vgl. weiterhin Z. 27 (*super possessionibus sive mancipiis*).

[33] Vgl. CORCORAN, Galerius's Jigsaw Puzzle, S. 235: „[T]he complex rules defining which property might or might not be excluded from the terms of the indulgence seem to be intended to protect current private owners."

[34] SPAGNUOLO VIGORITA, Prohibitae delationes, S. 363 Fn. 81: „Le ll. 7-18 dovevano regolare ipotesi particolari".

[35] JONES, *Later Roman Empire II*, S. 566, 600; DELMAIRE, *Largesses sacrées*, S. 215; CORCORAN, Galerius's Jigsaw Puzzle, S. 235.

[36] DELMAIRE, *Largesses sacrées*, S. 215; CORCORAN, S., Emperors and Caesariani inside and outside the Code. In: CROGIEZ-PETREQUIN, S./JAILLETTE, P. (Hrsg.), *Société, économie, administration dans le Code Théodosien*. Villeneuve d'Ascq, 2012, S. 267f.

[37] DELMAIRE, *Largesses sacrées*, S. 207-215; DEMANDT, *Spätantike*, S. 287. So dürfte er zumindest in Z. 26f. *([in] officio rationa[l]is et private magistri vel etiam procuratorum [u]triusquae of[f]icii*) verwendet werden, vgl. DELMAIRE, *Largesses sacrées*, S. 207.

[38] JONES, *Later Roman Empire I*, S. 413f.; DELMAIRE, *Largesses sacrées*, S. 215.

[39] JONES, *Later Roman Empire I*, S. 413f.; DELMAIRE, *Largesses sacrées*, S. 209, 216f.

[40] Andere Gesetze aus etwa derselben Zeit, die Vorwürfe gegen *procuratores* erheben, sind CTh. 1.32.1 und CTh. 10.4.1.

[41] Überblick bei CORCORAN, Emperors and Caesariani, S. 268f. (Texte aus den Codices) und 270 (epigraphisch überlieferte Quellen); vgl. auch JONES, *Later Roman Empire II*, S. 600.

[42] C. 10.1.5.

[43] CORCORAN, Galerius's Jigsaw Puzzle, S. 235.

[44] SPAGNUOLO VIGORITA, Prohibitae delationes, S. 365 Fn. 81.

2.4 Angehörige und laufende Verfahren

Nach der Lücke scheint in Z. 18-22 den Angehörigen der ursprünglichen Eigentümer (Z. 18f.: *liveri vel ceteri{s} supra conpra[e]nsi*) die Möglichkeit eingeräumt zu werden, anstelle der ursprünglich Berechtigten die Rückgabe zu verlangen, möglicherweise unter der Bedingung, dass sie deren Schulden beim Fiskus tilgen (Z. 20-22: *sub ea condicione […] ut […] debitis […] satisfaciant*).

Im Anschluss (Z. 22-32) dürfte es um laufende Gerichtsverfahren gehen (Z. 27f.: *super possessionibus sive mancipiis lis inchoata […] finita non est*). Dass die Gerichtsverfahren noch nicht abgeschlossen wurden, wird auf Arbeitsüberlastung der Richter oder Intrigen ihrer *officiales* zurückgeführt (Z. 27f.: *per o[c]cupationes iudicantis vel astutia officialium*).[45] Bei der überlangen Dauer von Gerichtsverfahren handelt es sich um einen Missstand, der in spätantiken Kaiserkonstitutionen häufig angesprochen wird und dem die Kaiser durch vielfältige Maßnahmen abzuhelfen suchten.[46]

Es ist nicht ganz klar, ob das Edikt sich hier auf gegen den *fiscus* gerichtete Klagen bezieht oder auf Klagen, die wegen fiskalischer Ansprüche gegen Private angestellt wurden (oder auf beides).[47] Die Passage wird aber mit der Erklärung eingeleitet, zur Steigerung der Effektivität der kaiserlichen Maßnahmen (Z. 22f.: *Quo magis autem lenior indulgen[tia nostra ad sin]gulos unibersosquae posset pervenire*) dürften diese sich nicht auf die Restitution von Gütern beschränken, deren Konfiskation bereits abgeschlossen ist (Z. 24: *non solum quae tenentur a fisco [e]is restituantur*), sondern müssten sich auch auf Rechtsstreite beziehen. Dies spricht dafür, dass es nunmehr um Konfiskationen geht, die noch nicht abgeschlossen sind, über die also ein Prozess anhängig ist, in dem ihre Herausgabe an den *fiscus* verlangt wird.

Unklar ist weiterhin, was genau in Bezug auf diese Prozesse bestimmt wird. Nach dem Aufgreifen des Topos der in die Länge gezogenen Prozesse läge aber eine Anordnung dazu nahe, die Prozesse zügig zu Ende zu führen oder sie (ggf. bei Überschreiten einer gewissen Dauer) direkt einzustellen (auf Letzteres könnte *conquiescat* in Z. 29f.) hindeuten. Die Untertanen dürften hier also vor fiskalischen Klagen geschützt werden.[48]

2.5 Rückgabeverlangen und Unterschlagungen

Im folgenden Abschnitt (Z. 32-42) werden die von der kaiserlichen Anordnung erfassten Personen (Z. 32f.: *singulos quoque ad quos iuxta id quod sanx[im]us huius benivolentiae nostrae statuta pertinent*) dazu aufgefordert, sich an das zuständige *officium* zu wenden und dort die Rückgabe der ihnen gehörenden Gegenstände zu verlangen.[49] Dabei wird auch die Möglichkeit bedacht, dass die bereits erwähnten *Caesariani* und *procuratores* die kaiserlich angeordnete Rückgabe hintertreiben, indem sie einen Teil der zurückzugebenden Güter unterschlagen (Z. 35f.: *qu[id] per officialium Caesa[ria]norum sive pr[oc]urator<u>m abaritiam subtrahatur*). Dies kann sich auf Sklaven oder Vieh sowie auf Zubehör von Grundstücken oder von diesen hervorgebrachte Früchte beziehen (Z. 37f.: *vel mancipium vel pec{t}ora vel quid aliut ex enthecis possessionum sibe fructus […] ablat<o>s esse*).

In derartigen Fällen sollen die von dem kaiserlichen Erlass Begünstigten – hier als *singuli* bezeichnet (Z. 32 und 36) – sich an den Provinzstatthalter wenden. Diesen hat der Kaiser angewiesen (Z. 37: *a nobis significatum esse*), den Untertanen zu ihrem Recht zu verhelfen (Z. 40: *ad indemnitatem sui conservandam*) und die Schuldigen zu bestrafen (Z. 40f.: *contr[a] eos qui fra[u] dem commiserint ultione quoque conpetente data*). Der anschließende Schlusssatz (Z. 42-46), in dem davon die Rede ist, dass der Kaiser an diverse Amtsträger geschrieben habe und dass der Inhalt dieser Briefe bekannt gemacht werden solle, wird unter 2. vertieft behandelt.

2.6 Welche Güter werden zurückerstattet?

Aufgrund der Unvollständigkeit des Textes bleibt insgesamt unklar, welche Güter genau zurückerstattet werden sollten bzw., anders formuliert, welche Voraussetzungen erfüllt sein mussten, damit jemand die Rückgabe seiner konfiszierten Besitztümer verlangen konnte. Waren es schlichtweg *alle* Güter, die in einem bestimmten Zeitraum eingezogen worden waren?[50] Dies hätte wohl einen sehr großen Verlust für den *fiscus* bedeutet und außerdem mag es Fälle gegeben haben, in denen der Kaiser lieber keine Rückgabe vornehmen wollte (etwa die Güter von Personen, die wegen schwerer Straftaten verurteilt worden waren). Oder sollten nur solche Güter zurückerstattet werden, die *zu Unrecht* konfisziert wurden? In diesem Fall hätte die Konstitution möglicherweise gar keine besondere Bedeutung gehabt, sondern wäre in erster Linie deklaratorisch gewesen, denn es ist anzunehmen, dass in solchen Fällen zumindest grundsätzlich ohnehin Klagen gegen den *fiscus* möglich waren.[51]

Am wahrscheinlichsten dürfte es sein, dass in den nicht enthaltenen Teilen des Edikts konkrete Kriterien dafür aufgestellt wurden, welche Güter von der Restitution betroffen sein soll-

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[45] Vgl. HEUMANN/SECKEL, *Handlexikon*, *occupatio*, S. 386: „Beschäftigung, die jemandes Tätigkeit in Anspruch nimmt und ihn an anderen Geschäften verhindert".

[46] Monographisch zur Verfahrensverzögerung durch Richter und *officiales* in der Spätantike LENEIS, A.T., *Anspruch und Wirklichkeit. Probleme spätantiker Richteraktivität im Spiegel des Codex Theodosianus*. Berlin, 2020.

[47] Klagen auf Herausgabe einziehbarer Güter an den *fiscus* konnten ab dem 3. Jh. sowohl vom *advocatus fisci* als auch von privaten *delatores* angestrengt werden (PROVERA, G., *La vindicatio caducorum. Contributo allo studio del processo fiscale romano*. Torino, 1964, S. 127-134), bis im 4. Jh. die private Klägerschaft in der *vindicatio caducorum* abgeschafft wurde (PROVERA, aaO., S. 163-169).

[48] Ebenso CORCORAN, Galerius's Jigsaw Puzzle, 234: „In addition to the general restoration of property, it also provides for the quashing of claims still making their way through the legal process […]." Möglicherweise war aber auch hier die Begleichung fiskalischer Schulden eine Voraussetzung, vgl. SPAGNUOLO VIGORITA, Prohibitae delationes, S. 363f. Fn. 81.

[49] Vgl. SPAGNUOLO VIGORITA, Prohibitae delationes, S. 364 Fn. 81.

[50] Dies annehmend MOMMSEN, CIL III, 13569: *et ita quidem, ut beneficium non ad certas quasdam personas pertineat, sed incorporationes fiscales complectatur factas a die certo ad diem certum alium […].*

[51] Vgl. etwa CTh. 10.1.1: *ii, qui putant iniuste res proprias a fisco esse comparatas, contra eundem agere contendant*.

ten. Diese lassen sich aber nicht mehr nachvollziehen. Möglich wäre zum Beispiel, dass die Restitution begleitend zu einem allgemeinen Straferlass erfolgte, sodass die begnadigten Straftäter zusätzlich zur Rückkehr aus der Verbannung oder dem Bergwerk auch die Rückgabe ihres eingezogenen Vermögens erhielten. Konkrete Anhaltspunkte gibt es dafür in den erhaltenen Teilen des Edikts jedoch nicht. Es lässt sich auch nicht ausschließen, dass es einen konkreten, technisch-juristischen Grund für die Rückerstattung und die komplizierten über sie erlassenen Regeln gab, zum Beispiel einen Zusammenhang mit einer Reform der Fiskalverwaltung.

3. Der Schlusssatz und das sog. *Caesariani Dossier*

Besondere Beachtung verdient der letzte Satz des Edikts (Z. 42-46), weil er Aufschlüsse über die angewandte Gesetzgebungstechnik sowie möglicherweise auch den Zusammenhang mit anderen Gesetzen geben kann.

3.1 Briefe an Amtsträger

Wie bereits erwähnt, geht es im Schlusssatz um kaiserliche Briefe an verschiedene Amtsträger und um deren Bekanntmachung. Der Schlusssatz knüpft damit an die bereits im Satz zuvor erwähnte Anordnung an die Provinzstatthalter an, wonach diese den vom Edikt Begünstigten zu ihrem Recht verhelfen und Unterschlagungen bestrafen sollen: Die erwähnten Personen (Z. 42: *is*, gemeint wohl *iis*), die neben der Allgemeinheit (*universisque*) vom Inhalt der kaiserlichen Briefe erfahren sollen, sind die im Satz zuvor erwähnten *singuli*, die sich bei Unterschlagungen an die Provinzstatthalter wenden können.[52] Neben der Anordnung an die Provinzstatthalter werden noch Briefe an weitere Amtsträger erwähnt, nämlich an die *praefecti*, den *rationalis* und den *magister privatae*.

Mit *praefecti* sind jedenfalls die Prätoriumspräfekten gemeint. Bei diesen handelte es sich in der Spätantike um die ranghöchsten Zivilbeamten, die auch wichtige Rechtsprechungsbefugnisse ausübten. Bevor sich im Laufe der konstantinischen Zeit die für die nächsten Jahrhunderte typischen Regionalpräfekturen herausbildeten,[53] scheint im Regelfall jedem Kaiser nur ein Prätoriumspräfekt unterstanden zu haben.[54] Es mag Ausnahmen gegeben haben, eine solche ist zur Erklärung des Plurals aber nicht nötig, denn die Prätoriumspräfekten agierten – ebenso wie die Kaiser – grundsätzlich als Kollegium.[55] Der Gedanke liegt daher nahe, dass sie auch als Kollegium angesprochen werden.

Potentiell könnte in den *praefecti* weiterhin der Stadtpräfekt von Rom inbegriffen sein (ein Stadtpräfekt von Konstantinopel ist erst ab Constantius II. nachweisbar[56]).[57] Da Kaiser in der Regel nur an Amtsträger ihres eigenen Herrschaftsbereiches schrieben, würde dies allerdings wohl voraussetzen, dass der handelnde Kaiser zum Zeitpunkt des Erlasses die Stadt Rom kontrollierte. Da das Edikt auf Kreta und in Ephesos, also in der östlichen Reichshälfte, gefunden wurde, ist davon eher nicht auszugehen (näher zur Urheberschaft unter 4.).

Der *rationalis* – ausführlich *rationalis summae (rei)* und im Prinzipat *(procurator) a rationibus* genannt – war der Vorsteher des kaiserlichen *fiscus*, der *magister (rei) privatae* dagegen der der kaiserlichen *res privata*. Zu einem unbekannten Zeitpunkt vor 326 wurde der *rationalis summae* durch den *comes sacrarum largitionum* und wohl etwas später der *magister rei privatae* und den *comes rerum privatarum* ersetzt.[58] Vorliegend werden noch die alten Bezeichnungen verwendet. Insgesamt scheinen die Amtsträger grundsätzlich in der Reihenfolge ihres Ranges genannt zu werden.[59]

Dass wegen ein- und derselben Angelegenheit Briefe an verschiedene Amtsträger gesandt wurden, ist ein bekanntes Phänomen; in einigen Fällen kann dies durch „Verteilerlisten" am Ende von Gesetzen nachvollzogen werden, die (wohl versehentlich) in den CTh. mitaufgenommen wurden.[60] Wahrscheinlich waren die unterschiedlichen Ausfertigungen inhaltlich an die dem Empfänger obliegenden Aufgaben und stilistisch an die ihm zukommende Würdenstellung angepasst.[61] Auch das Nebeneinander von einem Edikt und Briefen an Amtsträger, wie es hier vorkommt, ist anderweitig belegt.[62] In einem solchen Fall enthielt vermutlich das an das Volk gerichtete Edikt die wichtigsten Eckpunkte der vom Kaiser intendierten Regelung, die Briefe dagegen zusätzliche Details, die vor allem für die Verwaltung von Interesse waren.[63] Möglicherweise handelte es sich auch bei den Konstitutionen, deren Inskription im CTh. die Worte *ad edictum* enthält und die der Wissenschaft seit jeher

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52 Vgl. RIEDLBERGER, *Prolegomena*, S. 75. Eine ähnliche Formulierung findet sich in Z. 23: *[ad sin]gulos unibersosquae*.

53 GUTSFELD, A., Überlegungen zum Beginn der spätantiken Prätorianerpräfektur (284-337). In: *Das Zeitalter Diokletians und Konstantins. Bilanz und Perspektiven der Forschung. Festschrift für Alexander Demandt*. Wien/Köln, 2022, S. 165f.

54 So bereits SEECK, O., *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr. Vorarbeit zu einer Prosopographie der christlichen Kaiserzeit*. Stuttgart, 1919, S. 141-143; aus neuerer Zeit GUTSFELD, Überlegungen, S. 159 und 161; zu den Prätoriumspräfekten der fraglichen Zeit vgl. auch BARNES, T., *The New Empire of Diocletian and Constantine*. Cambridge (Mass.)/London, 1982, S. 123-139.

55 GUTSFELD, Überlegungen, S. 158f., 165f.; RIEDLBERGER, *Prolegomena*, S. 113.

56 DEMANDT, *Spätantike*, S. 446.

57 *Praefectus* scheint also ein Oberbegriff gewesen zu sein, der sowohl Prätoriums- als auch Stadtpräfekten umfassen konnte, vgl. C. 1.51.11; C. 10.32.64.3; C. 12.59.10.4 sowie die Rubriken der Titel C. 12.4 und CTh. 6.7.

58 DELMAIRE, *Largesses sacrées*, S. 26-38.

59 Die zuerst genannten Prätoriumspräfekten waren die ranghöchsten zivilen Funktionsträger des Reiches und die *notitia dignitatum* nennt den *comes sacrarum largitionum* (Nachfolger des *rationalis*) vor dem *comes rerum privatarum* (Nachfolger des *magister privatae*).

60 Zu diesem Phänomen RIEDLBERGER, *Prolegomena*, S. 69-75.

61 Bereits SEECK, *Regesten*, S. 4f.; ebenso HABICHT, C./Kussmaul, P., Ein neues Fragment des Edictum de Accusationibus. In: *Museum Helveticum*, vol. 43, S. 144; vgl. auch RIEDLBERGER, *Prolegomena*, S. 64-69.

62 Besonders deutlich CTh. 11.28.9 (zu dieser Verteilerliste RIEDLBERGER, *Prolegomena*, S. 71f.) und das sog. *edictum de accusationibus* (zu diesem sogleich im Haupttext). Vgl. weiterhin CTh. 6.35.5 und CTh. 7.20.8.

63 HABICHT/KUSSMAUL, Ein neues Fragment, S. 140.

Rätsel aufgeben, ursprünglich um Briefe, die ergänzend zu einem kaiserlichen Edikt ergingen.[64]

3.2 Die Publikation der Briefe

Im Edikt erklärt der Kaiser, auch der Inhalt der an die Amtsträger gesandten Briefe solle allen bekannt werden (Z. 42: *is universisque palam fieret*), damit sich die Untertanen über das darin zum Ausdruck kommende kaiserliche Wohlwollen freuen mögen (Z. 45f.: *provinciales nostri per benivolentia<m> nostram consultum sibi esse laetentur*). Aus diesem Grund hat der Kaiser bestimmt, dass *exempla* beigefügt werden (*subesse*) sollen (Z. 44). Das Wort *exemplum* lässt sich mit „Abschrift" oder auch mit „Wortlaut" übersetzen. Die Verwendung des Plurals könnte darauf hindeuten, dass die an die verschiedenen Funktionsträger gerichteten Schreiben in ihren Formulierungen an den jeweiligen Adressaten angepasst waren, dass sie also einen unterschiedlichen Wortlaut hatten.[65] Mit *subesse* (wörtlich: dahinter oder darunter sein, dabei sein, vorliegen) ist wohl gemeint, dass Abschriften der Briefe als Anhang zu dem Edikt publiziert werden sollten.

Der (jedenfalls in späterer Zeit zu beobachtende) Normalfall bei der Publikation von kaiserlichen Gesetzen bestand eigentlich eher darin, dass der Kaiser einen Brief an einen Amtsträger richtete und der Empfänger diesen publizierte, wobei er ihm ein kurzes eigenes Edikt beifügte.[66] Vorliegend scheint dagegen ein *kaiserliches* Edikt gewissermaßen die Funktion dieses Publikationsediktes übernommen zu haben. Der Grund für dieses abweichende Vorgehen ist unklar.[67] Möglicherweise legte der Kaiser Wert darauf, dass die Briefe in Zusammenhang mit seinem ans Volk gerichteten Edikt veröffentlicht wurden. Vielleicht spielte auch ein gewisses Streben nach Effizienz und Einheitlichkeit bei der Veröffentlichung eine Rolle, oder der Wunsch, die Möglichkeit der Kenntnisnahme durch die Untertanen in jedem Fall sicherzustellen. Da aus dem späten 3. und frühen 4. Jh. nur wenige vollständige Gesetze überliefert sind, kann nicht abschließend beurteilt werden, ob es sich um ein singuläres Phänomen oder um eine in dieser Zeit übliche legislative Technik handelte.

Der Inhalt der Briefe kann zumindest teilweise aus dem Edikt erschlossen werden, denn der Kaiser erklärt ausdrücklich, er habe die Provinzstatthalter dazu aufgefordert, gegen Unterschlagungen der zurückzugebenden Güter einzuschreiten (Z. 36f.: *praesidibu[s] provinciarum a no[bi]s significatum esse…*).[68] Darin dürfte sich der Inhalt der Briefe freilich nicht erschöpft haben, zumal sie ja neben den Provinzstatthaltern an weitere Amtsträger ergingen. Generell scheinen die Briefe vielmehr alle die im Edikt geregelten Angelegenheiten zu betreffen (Z. 42: *super omnibus*).

3.3 Der Zusammenhang mit dem *First Caesariani Decree*

Simon Corcoran stellte die These auf, die an die Amtsträger gesandten Briefe seien mit einer anderen epigraphisch überlieferten Kaiserkonstitution (von ihm *First Caesariani Decree* genannt, während er das vorliegend behandelte Edikt als *Second Caesariani Decree* bezeichnet) zu identifizieren, von der fragmentarische Kopien in Athen (griechische Übersetzung),[69] Ephesos[70] und Tlos[71] gefunden wurden.[72] Die früher herrschende Ansicht hatte in diesem Text ein Edikt gesehen, doch Corcoran nimmt mit guten Argumenten an, dass es sich vielmehr um einen Brief handelt.[73] Der Anfang der Konstitution ist nicht erhalten[74] und nicht alle ihre Details sind verständlich, doch es scheint um Dokumente (*adnotationes*) zu gehen, die für den korrekten Ablauf von Konfiskationen erforderlich sind. Insoweit scheint es zu Missbräuchen gekommen zu sein, weswegen angeordnet wird, dass Konfiskationen, die bis zu einem Stichtag erfolgt sind, als unwirksam angesehen, in laufenden Verfahren

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64 So HABICHT/KUSSMAUL, Ein neues Fragment, S. 142f.; allgemein zu dem Phänomen der Konstitutionen *ad edictum* vgl. RIEDLBERGER, *Prolegomena*, S. 46f.

65 HABICHT/KUSSMAUL, Ein neues Fragment, S. 144.

66 Vgl. bereits MOMMSEN, CIL III, 12044: *[…] neque promulgatio cogitari potest sine edicto; sed edictum id is qui epistulam accipit ipse addit ita, ut epistulam imperatoris plerumque praecedat, aliquoties subsequatur […].* Aus neuerer Zeit vgl. HABICHT/KUSSMAUL, Ein neues Fragment, S. 142; RIEDLBERGER, *Prolegomena*, S. 53-63.

67 Bereits MOMMSEN, CIL III, 12044 konnte sich hierauf keinen Reim machen und drückte seine Verwunderung aus.

68 Vgl. HABICHT/KUSSMAUL, Ein neues Fragment, S. 141 mit Fn. 30.

69 IG II/III² 1, 2, 1121 = IG II/III², 5, 13249.

70 Vier Fragmente derselben Inschrift, die sukzessive zwischen 1898 und 1987 gefunden wurden, zusammenhängend beschrieben und ediert von FEISSEL, D., Deux constitutions tétrarchiques inscrites à Éphèse. In: *Antiquité Tardive. Revue Internationale d'Histoire et d'Archéologie (IVe-VIIe siècle)*, vol. 4, 1996, S. 274-277 (dort auch Nachweise zu früheren Beschreibungen und Editionen der einzelnen Fragmente).

71 CIL III, 12134.

72 CORCORAN, Galerius's Jigsaw Puzzle, S. 241; DERS., Emperors and Caesariani, S. 273; zustimmend CASELLA, *Galerio*, S. 153.

73 CORCORAN, Galerius's Jigsaw Puzzle, S. 227-229. Von einem Edikt ausgehend dagegen etwa SPAGNUOLO VIGORITA, Prohibitae delationes, S. 355; FEISSEL, D., Les constitutions des Tétrarques connues par l'épigraphie : inventaire et notes critiques. In: *Antiquité Tardive. Revue Internationale d'Histoire et d'Archéologie (IVe-VIIe siècle)*, vol. 3, 1995, S. 36 und 51; DERS., Deux constitutions, S. 285-287.

74 Möglicherweise kann ein anderer inschriftlich überlieferter Text mit dem verlorenen Anfang dieser Konstitution identifiziert werden: Es handelt sich um ein nur wenige Zeilen umfassendes Fragment, in dem der Kaiser ankündigt, im Interesse der Sicherheit seiner Untertanen gegen die *Caesarianorum desperatio* vorgehen zu wollen. Es wurde an insgesamt drei Orten gefunden, nämlich Padua (CIL V, 2781; unmittelbar auf das *edictum de accusationibus* folgend), Ephesos (IK IV, 1328) und Lappa auf Kreta (ICret II, 16, 34; im Jahr 2000 von CORCORAN, S., A Fragment of a Tetrarchic Constitution from Crete. In: *Zeitschrift für Papyrologie und Epigraphik*, vol. 133, 2000, S. 251-255 als Teil der Konstitution identifiziert). FEISSEL, Les constitutions des Tétrarques, S. 53; DERS., Deux constitutions, S. 274-277 vertrat (eine Vermutung von MOMMSEN, CIL III, 12134 aufgreifend) die These, es handle sich um den fehlenden Beginn des *First Caesariani Decree*; zustimmend CORCORAN, Galerius's Jigsaw Puzzle, S. 228. – SPAGNUOLO VIGORITA, Prohibitae delationes, S. 358 Fn. 63 glaubte dagegen, es handle sich um den Beginn des im vorliegenden Aufsatz behandelten Restitutionsedikts; diese Möglichkeit verwerfend FEISSEL, Les constitutions des Tétrarques, S. 53.

die *adnotationes* vom kaiserlichen Hof überprüft und in Zukunft nur noch korrekt erstellte *adnotationes* genutzt werden.[75] Wer einen Schaden erlitten hat, kann sich an den Provinzstatthalter oder den Prätoriumspräfekten wenden, um eine Entschädigung und eine Bestrafung der Schuldigen zu erreichen. Für die zu behebenden Missstände werden die *Caesariani* verantwortlich gemacht.

Sofern es sich, wie Corcoran meint, bei dem Text um einen kaiserlichen Brief handelt, ist die Identifikation mit den im Restitutionsedikt erwähnten Schreiben jedenfalls möglich. Für diese These spricht, dass der *First Caesariani Decree* ebenso wie das Edikt einen fiskalrechtlichen Inhalt hat, dass für beide Texte ein Stichtag von Bedeutung ist und dass in beiden Texten Vorwürfe gegen die *Caesariani* erhoben werden. Dabei verwenden sie teilweise auch ähnliches Vokabular (im *First Caesariani Decree* ist ebenfalls von zu bekämpfender *temeritas* und von kaiserlichen *beneficia* die Rede). Zudem scheinen die Texte in einem Überlieferungszusammenhang zu stehen: Das (unpublizierte) Ediktsfragment aus Ephesos wurde am gleichen Ort gefunden wie eine der Kopien des *First Caesariani Decree*; die Inschriften ähneln sich zudem im Schriftbild und im verwendeten Material.[76]

Zweifel bestehen aber deshalb, weil der *First Caesariani Decree* jedenfalls in seinen erhaltenen Teilen[77] nicht die nach dem Inhalt des Edikts zu erwartende Aufforderung an die Provinzstatthalter enthält, gegen Unterschlagungen bei der Rückgabe konfiszierter Güter vorzugehen (zwar sieht auch der *First Caesariani Decree* die Möglichkeit vor, sich an Statthalter oder Prätoriumspräfekten zu wenden, doch dies dient dort einem anderen Zweck). Weiterhin ist daran zu erinnern, dass die im Edikt erwähnten Briefe mutmaßlich einen jeweils unterschiedlichen Wortlaut hatten und dass der Plural *exempla* auf eine Veröffentlichung *aller* Fassungen hindeutet; bei dem *First Caesariani Decree* handelt es sich aber nur um *einen* Text. Führt man sich den Aufwand vor Augen, der zur Veröffentlichung von mehreren Kaiserbriefen erforderlich war, dann erscheint es gut möglich, dass die das Edikt ergänzenden Briefe gar nicht in Stein gemeißelt, sondern auf eine wenige kostspielige Art veröffentlicht wurden.[78] Diese Erwägung spricht für die Annahme, dass die Briefe nicht erhalten sind. Im Ergebnis muss die Frage daher offen bleiben. Die von Corcoran vorgeschlagene Identifikation erscheint möglich, aber es ist ebenso möglich, dass es sich bei dem *First Caesariani Decree* um eine zwar in einem gewissen zeitlichen und inhaltlichen Zusammenhang zum Edikt stehende, aber eigenständige Maßnahme handelt.

3.4 Der Zusammenhang mit dem *edictum de accusationibus*

Ein weiterer Text, der in einem Überlieferungszusammenhang zu dem Edikt zu stehen scheint, ist das sogenannte *edictum de accusationibus*[79], ein Kaiseredikt, das in insgesamt sechs oder sieben inschriftlichen Kopien[80] und zudem auszugsweise in den Codices (CTh. 9.5.1 und C. 9.8.3) überliefert ist. Eine Steinplatte mit dem *edictum de accusationibus* wurde in Lyttos direkt neben dem Restitutionsedikt entdeckt; die beiden Inschriften weisen dasselbe Schriftbild auf und wurden auf demselben Material ausgeführt.[81] Darüber hinaus wurde ein Exemplar des *edictum de accusationibus* in Ephesos am selben Ort gefunden wie die noch unpublizierte Kopie des Restitutionsedikts (und wie der *First Caesariani Decree*).

Ins Auge fällt, dass das *edictum de accusationibus* und das Restitutionsedikt sehr ähnliche Schlussformeln aufweisen. Das *edictum de accusationibus* endet mit den Worten:

Super his itaque omnibus tam ad praefectos nostros quam etiam ad praesides et rationalem et magistrum privatae scripta direximus. Quorum exempla alio edicto nostro subdita cuiusmodi legem statutumque contineant, plenissime declaratur.

Ebenso wie im Restitutionsedikt ist im *edictum de accusationibus* also die Rede davon, dass der Kaiser an Amtsträger geschrieben habe. Genannt werden die gleichen Amtsträger und zwar in der gleichen Reihenfolge und mit sehr ähnlichen For-

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[75] Zum Inhalt der Konstitution: AMELOTTI, M., Da Diocleziano a Costantino. Note in tema di costituzioni imperiali. In: *Studia et Documenta Historiae et Iuris*, vol. 27, 1961, S. 249-252; STEINWENTER, A., Eine vergessene Kaiserkonstitution. In: *Studi in onore di Emilio Betti. Volume Quarto*. Milano, 1962, S. 137-144; SPAGNUOLO VIGORITA, Prohibitae delationes, S. 355-360; FEISSEL, Deux constitutions, S. 285-287; CORCORAN, Galerius's Jigsaw Puzzle, S. 227.

[76] CORCORAN, Galerius's Jigsaw Puzzle, S. 234. Am gleichen Ort wurde auch eines der Exemplare des Textes gefunden, bei dem es sich möglicherweise um den Beginn des *First Caesariani Decree* handelt (vgl. oben Fn. 74).

[77] Wie viel fehlt, ist schwer zu beurteilen; vgl. zu dieser Frage FEISSEL, Deux constitutions, S. 286.

[78] Vgl. HABICHT/KUSSMAUL, Ein neues Fragment, S. 141.

[79] Eine monographische Arbeit des Verfassers über das *edictum de accusationibus*, die auch eine neue Textrekonstruktion beinhalten soll, ist in Vorbereitung. Bisherige Textrekonstruktionen: BRUNS, C.G., *Fontes iuris Romani antiqui. Pars prior. Leges et negotia*. 7. Aufl., Tübingen, 1909, 94, S. 265-267; RICCOBONO, S., *Fontes iuris Romani antejustiniani. Pars prima. Leges*. 2. Aufl., Firenze, 1941, 94, S. 458-461; HEICHELHEIM, F.M./SCHWARZENBERGER, G., An Edict of Constantine the Great. A Contribution to the Study of Interpolations, in: *Symbolae Osloenses*, vol. 25, 1947, S. 1-19. Aus der neueren Literatur vgl. insbesondere MATTHEWS, J.F., *Laying Down the Law. A Study of the Theodosian Code*. New Haven/London, 2000, S. 254-270; GIGLIO, S., PS. 5.13-15, edictum de accusationibus e giurisdizione criminale nel tardo impero Romano. In: *Studia et Documenta Historiae et Iuris*, vol. 68, 2002, S. 205-263; RIVIÈRE, Y., *Les délateurs sous l'Empire romain*. Roma, 2002, S. 131-137; CORCORAN, Galerius's Jigsaw Puzzle, S. 229-249; RUSSO RUGGERI, C., L„edictum de accusationibus" di Costantino e i delatori. In: *Studi in onore di Antonino Metro. Tomo V*. Milano, 2010, S. 425-453; BANFI, A., *Acerrima indago. Considerazioni sul procedimento criminale romano nel IV sec. d.C.* 2. Aufl., Torino, 2016, S. 69-89; RIVIÈRE, Y., *Histoire du droit pénal Romain de Romulus à Justinien. Textes introduits, traduits et commentés*, 2. Aufl., Paris, 2022, S. 391-397.

[80] Exemplare wurden gefunden in Padua (CIL V, 2781; dazu SupplIt 28, S 112-115; ursprüngliche Herkunft unsicher), Lyttos (CIL III, 12043 = ICret I, 18, 188), Tlos (CIL III, 12133), Sinope (MOREAU, J., Fragment, découvert à Sinope, de l'édit de Constantin de accusationibus. In: *Historia. Zeitschrift für Alte Geschichte*, vol. 5, 1956, S. 254-256 = IK 64, 95 und 96), Pergamon (HABICHT/KUSSMAUL, Ein neues Fragment, S. 135-138), Ephesos (IK 15, 1894; dazu FEISSEL, Deux constitutions, S. 287-289) und Korkyra (CIL III, 578 = IG IX 1^2, 4, 797; Identifikation unsicher; dazu CORCORAN, S., A Tetrarchic Inscription from Corcyra and the Edictum de Accusationibus. In: *Zeitschrift für Papyrologie und Epigraphik*, vol. 141, 2002, S. 221-230).

[81] SPAGNUOLO VIGORITA, Prohibitae delationes, S. 358f. Fn. 63; CORCORAN, Galerius's Jigsaw Puzzle, S. 237.

mulierungen. Weiterhin wird sowohl im *edictum de accusationibus* als auch im Restitutionsedikt angeordnet, dass die *exempla* der Briefe beigefügt werden sollen – im Restitutionsedikt sollen sie augenscheinlich dem Edikt selbst beigegeben werden; im *edictum de accusationibus* ist davon die Rede, dass die Briefe einem *anderen* Edikt beigefügt werden sollten (*alio edicto nostro subdita*). Dies führte zu der Vermutung, bei dem Restitutionsedikt handle es sich um das im *edictum de accusationibus* in Bezug genommene andere Edikt und folglich seien die erwähnten Briefe dieselben.[82] Corcoran bezeichnet den *First Caesariani Decree*, das Restitutionsedikt (von ihm *Second Caesariani Decree* genannt) und das *edictum de accusationibus* daher insgesamt als das *Caesariani Dossier*.[83]

Gerade dass der Inhalt der Briefe in beiden Edikten mit nahezu identischen Worten beschrieben wird, spricht allerdings bei näherer Betrachtung eher gegen die Identifikationsthese: Im Restitutionsedikt heißt es, die Briefe seien *super omnibus*, im *edictum de accusationibus* heißt es, sie seien *super his omnibus* geschrieben worden. Das heißt: Die Briefe beziehen sich jeweils auf alle im jeweiligen Edikt geregelten Angelegenheiten. Die beiden Edikte behandeln aber durchaus unterschiedliche Themen:

Im Restitutionsedikt geht es, wie unter 2. ausgeführt, um die Rückgabe konfiszierter Güter; also müssen auch die dazugehörigen Briefe einen entsprechenden Inhalt haben (wobei die Verpflichtung der Provinzstatthalter, gegen Unterschlagung der zurückzugebenden Güter vorzugehen, als Inhalt der Briefe gesondert erwähnt wird). Das *edictum de accusationibus* enthält dagegen in seinem ersten Absatz Regeln zum Verfahren bei strafrechtlichen Anklagen (insbesondere solchen wegen *crimen maiestatis*) und zur Bestrafung der *calumnia*. Der zweite Absatz weist auf das Verbot der Tätigkeit von *delatores* hin. In seinem dritten Absatz wird Sklaven und Freigelassenen, die sich als *accusatores* oder *delatores* ihrer Herren bzw. Patrone betätigen, die Kreuzigung angedroht. Und in seinem vierten Absatz wird verordnet, dass anonyme Schmähschriften (*libelli famosi*) vor Gericht keine Beachtung finden dürfen, sondern deren Urheber zu bestrafen sind. – *Diese* Regeln sind also der Bezugspunkt der Worte *super his omnibus* im Schlusssatz des *edictum de accusationibus*. Von der Rückerstattung konfiszierter Güter und der Hilfe der Statthalter dabei ist darin keine Rede (ebenso wenig von den Modalitäten der Einziehung, wie sie im *First Caesariani Decree* geregelt werden).

Ein gewisser Berührungspunkt[84] besteht zwar darin, dass das *edictum de accusationibus* den Begriff *delator* (nach vorzugswürdiger, wenn auch nicht unumstrittener Ansicht) in einem fiskalischen Sinne verwendet[85] und somit ebenfalls Regeln zum Fiskalrecht enthält. Dabei handelt es sich aber nur um einen kleinen, eher untergeordneten Teil der darin behandelten Themen: Der zweite Absatz des *edictum de accusationibus* spricht kein neues Verbot von *delatores* aus, sondern erinnert nur an frühere, bereits bestehende Verbote.[86] Er scheint in erster Linie als eine Art Vorbereitung für die in dessen drittem Absatz folgende Spezialbestimmung zur *accusatio* und *delatio* von Herren/Patronen durch ihre Sklaven/Freigelassenen zu dienen. Ein Bezug zu den Themen des Restitutionsedikts lässt sich in keinem Fall erkennen.

Dass in beiden Edikten dieselben Amtsträger als Adressaten der Kaiserbriefe genannt werden, könnte sich dadurch erklären, dass es sich um einen Standard-Verteiler handelte – immerhin waren die betreffenden Amtsträger bedeutende Personen, bei denen es nahe lag, ihnen neue Maßnahmen mitzuteilen. Die Reihenfolge ihrer Nennung ergibt sich zudem, wie gesehen, zwanglos aus ihrer Rangstellung. Die Ähnlichkeit der Formulierungen bleibt gleichwohl auffällig. Doch es sind zu wenige vollständige Konstitutionen aus der mutmaßlichen Entstehungszeit des Edikts bekannt, um beurteilen zu können, ob es sich vielleicht um eine häufige Floskel handelte, die so oder ähnlich in vielen Konstitutionen aus der betreffenden Zeit verwendet wurde.

Alles in allem spricht also mehr dafür, dass das im *edictum de accusationibus* erwähnte andere Edikt nicht überliefert ist. Da die Gesetzgebung des frühen 4. Jh. nur zu einem Bruchteil bekannt ist,[87] wäre dies nicht weiter erklärungsbedürftig. Vielleicht lässt sich die eigentümliche Technik, die Briefe nicht im Anhang an das eigentliche Edikt, sondern im Anhang an ein anderes Edikt publizieren zu lassen, sogar dadurch erklären, dass für das andere Edikt und für die *scripta* eine weniger kostspielige Publikationsform als die Veröffentlichung auf Steintafeln vorgesehen war – die dann auch weniger dauerhaft gewesen wäre. Dies muss freilich nicht ausschließen, dass zwischen den Texten gleichwohl ein chronologischer und inhaltlicher Zusammenhang besteht, der den Überlieferungszusammenhang erklärt.

4. Urheberschaft und Kontext

Dem erhaltenen Ediktstext sind keine Angaben dazu zu entnehmen, welcher Kaiser es wann erlassen hat. Ebenso wenig enthält es konkrete Hinweise dazu, in welchem Kontext und mit welcher Zielsetzung es entstanden ist, also *warum* der Kaiser die Restitution anordnete.

Einige Anhaltspunkte für die Datierung bestehen dennoch. Wie bereits ausgeführt, stammen die übrigen Quellen, in denen *Caesariani* als Funktionäre der Fiskalverwaltung begegnen, aus

[82] In diesem Sinne SPAGNUOLO VIGORITA, Prohibitae delationes, S. 358 Fn. 63; FEISSEL, Deux constitutions, S. 289; CORCORAN, Galerius's Jigsaw Puzzle, S. 240f.; CASELLA, *Galerio*, S. 153.

[83] CORCORAN, Galerius's Jigsaw Puzzle, S. 221-250; ihm folgend CASELLA, *Galerio*, S. 153f.

[84] Vgl. SPAGNUOLO VIGORITA, Prohibitae delationes, S. 363.

[85] In diesem Sinne etwa PROVERA, *Vindicatio caducorum*, S. 165f.; SPAGNUOLO VIGORITA, T., *Exsecranda pernicies. Delatori e fisco nell'età di Costantino*, Napoli, 1984, S. 68f.; RIVIÈRE, *Délateurs*, S. 131-137; DELMAIRE, *Largesses sacrées*, S. 617; GIGLIO, PS. 5.13-15, S. 207-215; BANFI, *Acerrima indago*, S. 71 und 87. Für die Gegenansicht, wonach die strafrechtliche Delation gemeint ist, etwa MOMMSEN, *Römisches Strafrecht*, Leipzig, 1899, S. 346 Fn. 2, S. 383 Fn. 2; PIETRINI, S., Delazione criminale o fiscale in alcune costituzioni di Costantino? In: *Atti dell'Accademia Romanistica Costantiniana*, vol. 11, 1997, S. 176-178; CENTOLA, D.A., *Il crimen calumniae. Contributo allo studio del processo criminale romano*, Napoli, 1999, S. 125-127; RUSSO RUGGERI, Edictum de accusationibus, S. 431-446.

[86] *Delatoribus autem quot adeundi quoque iudicis tam statutis parentum nostrorum quam etiam nostris sanctionibus interclusa sit facultas, omnibus cognitum est […].*

[87] Zur Überlieferungslage CORCORAN, Emperors and Caesariani, S. 269f.

dem späten 3. oder frühen 4. Jh.; dies spricht dafür, das vorliegende Edikt in derselben Zeit zu verorten. Einen weiteren Hinweis gibt die Verwendung der Bezeichnungen *rationalis* und *magister privatae*, da das erstgenannte Amt vor 326 durch den *comes sacrarum largitionum* und wohl etwas später der *magister privatae* und den *comes rerum privatarum* ersetzt wurde. Zudem existierte zu Beginn des 4. Jh. – mutmaßlich beginnend mit dem diokletianischen Höchstpreisedikt von 301 – im griechisch-kleinasiatischen Raum wohl der *epigraphic habit*, Kaiserkonstitutionen auf Latein in Stein zu meißeln, und zwar oft in mehreren Exemplaren.[88]

In diesen Kontext gehört auch das mit dem Restitutionsedikt anscheinend in einem Überlieferungszusammenhang stehende *edictum de accusationibus*. Dieses wird in CTh. 9.5.1 Konstantin zugeschrieben und ins Jahr 314 datiert. Traditionell korrigierte die Wissenschaft dieses Datum zu 320.[89] In den 70ern vertrat dagegen Timothy Barnes die These, das im Codex Theodosianus genannte Datum sei korrekt, aber das Gesetz sei nicht von Konstantin, sondern von dessen Rivalen Licinius erlassen worden.[90] In jüngerer Zeit hat Corcoran aufgrund verschiedener epigraphischer Indizien einen Erlass im Jahr 305 vorgeschlagen.[91]

Zu seinen wichtigsten Argumenten[92] gehört der Überlieferungszusammenhang zwischen dem *edictum de accusationibus* und dem *First Caesariani Decree*. Letzterer nennt nämlich als Stichtag für das rechtliche Schicksal von Konfiskationen den 19. September im fünften Konsulat von Constantius und Galerius (*in diem XIII kal. Octobres consulatus scilicet nostri Constanti et Maximiani Augg. V.*); dies entspricht dem Jahr 305.[93] Unabhängig davon, ob dieser Tag bei Erlass der Maßnahme in der Zukunft oder in der Vergangenheit lag,[94] liegt ein Erlass des Gesetzes in einer gewissen zeitlichen Nähe zu dem Datum nahe.[95] Da Constantius und Galerius als *Augusti* bezeichnet werden, muss der Erlass jedenfalls nach Mai 305 erfolgt sein, als Diokletian und Maximian abdankten und die bisherigen Unterkaiser zu *Augusti* aufstiegen. Dass Constantius nicht das Attribut *divus* trägt, spricht weiterhin dafür, dass er zum Zeitpunkt des Erlasses noch lebte oder dass Galerius zumindest noch nicht über den Tod seines Mitkaisers informiert worden war, mithin für einen Erlass vor dem Hochsommer 306. Da, wie gesehen, ein chronologischer Zusammenhang auch zwischen dem Restitutionsedikt und dem *First Caesariani Decree* plausibel ist, spricht dies dafür, das Restitutionsedikt ebenfalls in die Jahre 305 oder 306 zu datieren. In diesem Fall wäre wohl Galerius der Urheber der Konstitutionen: Zwar war Constantius nominell der *senior Augustus*, doch er herrschte über den Westen des Reiches, während der Ostteil, wo die Inschriften der betreffenden Texte gefunden wurden, unter der Kontrolle des Galerius stand.[96]

Trifft die Datierung in die Jahre 305/306 zu, dann könnte das Restitutionsedikt mit dem Herrschaftsantritt des Galerius zusammenhängen.[97] Es wäre nicht überraschend, dass ein neuer Herrscher sich zu Beginn seiner Herrschaft als mildtätig und um das Wohl seiner Untertanen besorgt inszenieren möchte. Bei dem Edikt könnte es sich um eine außerordentliche fiskalische Indulgenz aus Anlass der Thronbesteigung handeln. Dazu passt, dass in dem Edikt wiederholt die Begriffe *indulgentia* (Z. 21, 22f.), *benevolentia* (Z. 20, 33, 45f.) und *beneficium* (Z. 19, 31f.) verwendet werden.

Dagegen könnte auf den ersten Blick sprechen, dass, wie gesehen, an mehreren Stellen des Edikts von Missständen in der Fiskalverwaltung die Rede ist, die bekämpft werden sollten. Allerdings spricht viel dafür, dass die entsprechenden Passagen zum Teil topisch sind. Und selbst wenn das Edikt sich gegen reale Missstände wenden sollte, könnte die Entscheidung, ihnen abzuhelfen, sich immer noch als Akt der kaiserlichen Milde darstellen. Im Übrigen ist es, wie bereits ausgeführt, ohnehin eher unwahrscheinlich, dass die Rückerstattung sich auf unrechtmäßig konfiszierte Güter beschränkte. Da aber generell nicht

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88 CORCORAN, S., The Publication of Law in the Era of the Tetrarchs – Diocletian, Galerius, Gregorius, Hermogenian. In: DEMANDT, A. *et al.* (Hrsg.), *Diokletian und die Tetrarchie. Aspekte einer Zeitenwende*, Berlin/New York, 2004, S. 65f.; DERS., Galerius's Jigsaw Puzzle, S. 222-226, jeweils mwN.

89 Grundlegend SEECK, *Regesten*, S. 169; ihm folgend in neuerer Zeit etwa SPAGNUOLO VIGORITA, *Secta temporum meorum. Rinnovamento politico e legislazione fiscale agli inizi del principato di Gordiano III*. Palermo, 1978, S. 127f.; DERS., Prohibitae delationes, S. 360 mit Fn. 70; PIETRINI, Delazione criminale, S. 172; CENTOLA, Crimen calumniae, S. 122 Fn. 28; GIGLIO, PS. 5.13-15, S. 206f.; RUSSO RUGGERI, Edictum de accusationibus, S. 425-453; BANFI, *Acerrima indago*, S. 69.

90 Grundlegend BARNES, T., Three imperial Edicts. In: *Zeitschrift für Papyrologie und Epigraphik*, vol. 21, 1976, S. 275-281; wiederholt in DERS., *The New Empire of Diocletian and Constantine*. Cambridge (Mass.)/London, 1982, S. 127f. sowie weiteren Publikationen. Zustimmend etwa LIEBS, D., Recht und Rechtsliteratur. In: HERZOG, R. (Hrsg.), *Handbuch der lateinischen Literatur der Antike. Band 5. Restauration und Erneuerung. Die lateinische Literatur von 284 bis 374 n. Chr.* München, 1989, S 58.

91 CORCORAN, Galerius's Jigsaw Puzzle, S. 221-250; DERS., Emperors and Caesariani, S. 265-284; zustimmend CASELLA, *Galerio*, S. 136-156; BARNES, T., *Constantine. Dynasty, Religion and Power in the Later Roman Empire*, Chichester u.a., 2011, S. 65; MANTOVANI, D., Sulle tracce dei rescripta richiesti da privati nella tarda antichitŕ. In: *Tesserae iuris*, vol. 1 Nr. 1, 2020, S. 13f. mit Fn. 20; tendenziell auch RIEDLBERGER, *Prolegomena*, S. 73, 190 und 220; zweifelnd dagegen BONIN, F., Tollit ille cruces? Della presunta abolizione costantiniana della crocifissione. In: *KOINΩNIA. Rivista dell'Associazione Internazionale di Studi Tardoantichi*, vol. 48, 2018, S. 245f. mit Fn. 78; RIVIČRE, *Histoire du droit pénal Romain*, S. 393f.

92 Ein weiteres Argument besteht darin, dass die in Korkyra gefundene Kopie des *edictum de accusationibus* mit einer Kaisertitulatur beginnt, die gemeinhin als die von Galerius und Constantius Chlorus rekonstruiert wird, doch es ist unklar, ob es sich bei dem äußerst fragmentarisch erhaltenen Text wirklich um ein Exemplar des *edictum de accusationibus* handelt, vgl. CORCORAN, A Tetrarchic Inscription from Corcyra, S. 221-230.

93 BAGNALL, R.S. *et al.*, *Consuls of the Later Roman Empire*. Atlanta (Georgia), 1987, S. 144f.

94 FEISSEL, Deux constitutions, S. 286 und CORCORAN, Galerius's Jigsaw Puzzle, S. 226f. vermuten Ersteres; dort auch Nachweise zur Gegenansicht.

95 CORCORAN, Galerius's Jigsaw Puzzle, S. 226f., 237f.

96 Zu dieser Frage CORCORAN, Galerius's Jigsaw Puzzle, S. 244.

97 Ausführlich CORCORAN, Publication of Law, S. 66f.; DERS., Galerius's Jigsaw Puzzle, S. 246-248; zustimmend CASELLA, *Galerio*, S. 152 und 155f.

genau festzustellen ist, welche Güter zurückerstattet werden sollten, muss der Zusammenhang mit dem Herrschaftsantritt des Galerius eine Vermutung bleiben.

Auch die Datierung in die Jahre 305/306 ist zwar plausibel, aber kann beim derzeitigen Stand der Forschung nicht als gesichert gelten. Näheren Aufschluss könnten wohl nur weitere Inschriftenfunde geben (die durchaus möglich erscheinen: da bereits zwei Kopien des Textes bekannt sind, mag auch eine dritte existieren). Will man auf Vermutungen verzichten, so kann man aber beim gegenwärtigen Forschungsstand nur festhalten, dass das Edikt im frühen 4. Jh. erlassen wurde.

5. Fazit

Das Edikt enthält verschiedene Regeln zur Rückgabe konfiszierter Güter an die früheren Eigentümer oder ihre Erben, die aufgrund der unvollständigen Überlieferung jedoch nur teilweise nachvollzogen werden können. Von zentraler Bedeutung für die Restitution ist ein Stichtag, der wohl in den nicht erhaltenen Passagen des Edikts genannt wurde. Der Kaiser scheint zudem bestrebt, gegen missbräuchliche Praktiken der Fiskalverwaltung vorzugehen. Eingezogene Güter, über die der Kaiser bereits anderweitig verfügt hat, bleiben jedoch von der Rückgabe ausgenommen.

Ein chronologischer und inhaltlicher Zusammenhang zwischen dem Edikt und dem *First Caesariani Decree* sowie dem *edictum de accusationibus* ist plausibel. Der These, dass diese Texte zusammen ein geschlossenes Dossier bilden und gegenseitig aufeinander Bezug nehmen, kann jedoch nicht gefolgt werden. Zu datieren ist das Edikt in das frühe 4. Jh. Manches spricht für einen Erlass durch Galerius in den Jahren 305 oder 306, doch Sicherheit ist beim aktuellen Forschungsstand nicht zu gewinnen.

Auch ohne gesicherte Erkenntnisse über Datierung und Urheberschaft gibt das Edikt indes wichtige Einblicke in die kaiserliche Selbstdarstellung und in die angewandte legislative Technik. Weiterhin illustriert es, dass es sich bei dem Fiskalrecht um einen wichtigen Gegenstand der kaiserlichen Gesetzgebung handelte, bei dem die Kaiser durch komplexe und differenzierte Regeln nach einem Ausgleich zwischen den Interessen des *fiscus* und denen ihrer Untertanten strebten.

Die Haftung der Erben der Munizipalmagistrate. Beispiele aus dem Bereich der magistratischen Vormundsbestellung

(The Responsibility of the Heirs of the Magistratus Municipales. Examples from the Field of Datio Tutoris by the Magistrates)

*Emese Újvári**

Abstract

In the Roman Empire during the imperial period, in certain cases it was possible to take action against the magistratus municipales who had committed an omission or error in the guardianship order, if the default had (indirectly) caused damage to the ward. The sources suggest that the action which could be brought in such cases, the actio subsidiaria, was an actio poenalis and could not originally be brought against the heirs of the magistratus in the event of his death. Later, however, the heirs of the magistratus could also be sued under certain conditions, in order to provide greater protection for the interests of the ward.

Keywords: *datio tutoris; magistratus municipales; actio subsidiaria; hereditary responsibility; satisdatio rem pupilli salvam fore; quasi delictum.*

1. Einführung

In der Literatur gibt es zwar keinen einheitlichen Standpunkt hinsichtlich der privatrechtlichen Haftung der Magistrate für die von ihnen verursachten Schäden, sowie für ihre Delikten,[1] aber die Quellen bezeugen, dass es einen speziellen Aufgabenkreis gab, nämlich die Vormundsbestellung, wofür bestimmte Beamten, insbesondere die *magistratus municipales* auch privatrechtlich hafteten.

Nach einer kurzen Vorstellung der zur *datio tutoris* befugten Personen und ihrer diesbezüglichen Verpflichtungen, sowie des Kreises der haftenden Magistrate, versucht der Beitrag auf die Frage eine Antwort zu geben, ob das Mündel – gegebenenfalls – auch die Erben der für die *datio tutoris* zuständigen Munizipalmagistrate verklagen konnte, und wenn ja, unter welchen Voraussetzungen.

2. Vorfragen

2.1 Die magistratische Vormundsbestellung

Die magistratische Vormundsbestellung war nur dann nötig, wenn ein *sui iuris* Unmündige weder einen von seinem *pater familias* ernannten *tutor testamentarius,*[2] noch einen *tutor legitimus* hatte (der sein gradnächster *agnatus*,[3] später *cogantus* sein konnte).[4]

Das Recht der Vormundsbestellung war sowohl in den verschiedenen Epochen als auch auf den verschiedenen geografischen Gebieten des Römischen Reiches unterschiedlich geregelt.

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1 Die Haftung der Magistrate für die Schäden, die sie Privatpersonen zugefügt haben, bzw. für ihre Delikte ist in der Literatur strittig. Nach Mommsens Meinung hätten die Privatpersonen diejenigen Magistrate belangen können, die ihre Rechte verletzten. Die Magistrate mit *imperium* hätten erst nach dem Ablauf ihrer Amtszeit belangt werden dürfen, gegen die Magistrate mit *potestas* habe man aber auch während ihrer Amtszeit eine Klage erhalten können. Es sei aber auch häufiger vorgekommen, dass der Prozess lieber nach dem Ablauf ihrer Amtszeit aufgeschoben worden sei, damit sie durch den Prozess nicht der Verwaltung der öffentlichen Angelegenheiten entzogen worden seien. (Vgl. Mommsen, Th., *Römisches Staatsrecht, 1. Bd.*, 3. Aufl., Leipzig, 1887, S. 698–708.) Kunkels Meinung nach könne Mommsens Annahme, dass die Privatpersonen, denen die Magistrate Schäden verursachten, sie nach ihrer Amtszeit in Rahmen eines Privatverfahrens verklagen könnten, nicht bestätigt werden. (Vgl. Kunkel, W./Wittmann, R., *Staatsordnung und Staatspraxis der Römischen Republik, 2. Abschnitt, Die Magistratur,* München, 1995, S. 265–272.) Éva Jakab folgert aus den einschlägigen Quellen, dass die Privatpersonen die Magistrate oft hätten belangen können, wenn letztere unter Missbrauch ihrer amtlichen Befugnisse ihnen rechtswidrig Schäden zugefügt hatten. (Vgl. Jakab, É., Adalékok az állam kárfelelősségének történeti gyökereihez, In: Kovács É. M. (Hrsg.), *Ünnepi kötet a 65 éves Imre Miklós tiszteletére,* Budapest, 2020, S. 191-203., S. 197.) Was die Straftaten der Magistrate betrifft, ist Sáry der Meinung, dass man die Magistrate mit *imperium* für ihre Straftaten während ihrer Amtszeit habe nicht verklagen dürfen, die Magistrate mit *potestas* demgegenüber verklagbar gewesen seien. (Vgl. Sáry, P., *Előadások a római büntetőjog köréből*, Miskolc, 2011, S. 30-31.) Zum Thema siehe auch: Bajánházy I., A római magisztrátusok magánjogi felelőssége a D. 18.6.13(12) fragmentum alapján, In: Boóc Á./Homicskó Á./Szuchy R. (Hrsg.), *Studia in honorem József Szalma*, Budapest, 2018, S. 99-111.

2 Gai.1,144–150; Iust.Inst.1,13,3–5.

3 Gai.1,155; Iust.Inst.1,15,1

4 Gai.1,185; Iust. Inst.1,20,1–5.; Kaser, M./Knütel, R./Lohsse, S., *Römisches Privatrecht,* 21.Aufl., München, 2017, S. 376–377; Földi, A./Hamza, G., *A római jog története és institúciói*, 26. Aufl., Budapest, 2022, S. 262; Molnár, I./Jakab, É., Római jog, 7. Aufl., Szeged, 2015, S. 164–165; Benedek, F./Pókecz Kovács, A., *Római magánjog*, 8. Ausgabe, Budapest, 2020, S. 159; Talamanca, M., *Istituzioni di diritto romano*, Milano, 1990, S. 159–160, S. 421–424.

Die magistratische *datio tutoris* wurde durch die *lex Atilia*[5] ermöglicht.[6] In Rom hatten ursprünglich der *praetor urbanus* und der Mehrzahl der Volkstribune über die Vormundsbestellung einen Beschluss zu treffen.[7] Seit Claudius hatte auch der *consul,*[8] seit Mark Aurel der *praetor tutelarius*[9] die Befugnis der Vormundsbestellung,[10] was in der nachklassischen Zeit in Rom und in Konstantinopel auch dem *praefectus urbi* zustand.[11]

In den italienischen Munizipien konnte ab der Zeit von Mark Aurel und Lucius Verus der *iuridicus regionis* Vormünder bestellen.[12]

In den Provinzen stand die Befugnis der *datio tutoris* im Sinne der *lex Iulia et Titia*[13] dem Prokonsul und dem *praeses provinciae* zu.[14] In den lateinischen Munizipien und römischen Kolonien[15] (sowie wahrscheinlich auch in den römischen Munizipien[16]) konnten ab Ende der klassischen Zeit neben dem Statthalter auch die *magistratus municipales* (also meistens die *duumviri,* oder gegebenenfalls die *quattuorviri* der betroffenen Munizipien oder Kolonien) Vormünder bestellen. Dies wurde ihnen durch die gegebene munizipale Verfassung der betroffenen Stadt ermöglicht.[17]

In Bezug auf die Peregrinen-Gemeinden ist es in der Literatur strittig, ob das *ius tutoris dandi* auch den örtlichen Beamten zustand. Was die Zeit vor der *constitutio Antoniniana* betrifft, wird es hinsichtlich der römischen Bürger meistens bezweifelt, bezüglich der Peregrinen wird es aber zumeist bejaht,[18] wie auch hinsichtlich der Zeit nach der *constitutio Antoniniana*.[19]

2.2 Die Verpflichtungen der Magistrate betreffend der *datio turoris*

Die Magistrate mussten sich dann um die Vormundsbestellung kümmern, wenn jemand, der einen Vormund brauchte, keinen hatte, oder wenn das Vorhandensein eines Tutors ungewiss war. In solchen Fällen hatte jeder das Recht – einige nahen Verwandten (wie etwa die Mutter des Unmündigen) sogar die Pflicht – die *datio tutoris* zu beantragen.[20]

Die Beamten hatten oft zu prüfen, ob die vorgeschlagene, oder ausgesuchte Person geeignet (*idoneus*) für die Vormund-

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[5] Die Entstehung des Gesetzes kann auf 210 v. Chr. datiert werden. (Vgl. Nörr, D., Zur Palingenesie der römischen Vormundschaftsgesetze, In: *SZ.* 118., 2001, S. 1–72., S. 2; Kaser/Knütel/Lohsse, *op. cit.*, S. 377.; Kaser, M., Das römische Privatrecht I. Abschnitt, 2. Aufl., München, 1971, S. 357.) Nach Grelles Meinung bildeten die großen Menschenverluste des 1. und 2. punischen Krieges den Grund für den Erlass dieses Gesetzes. (Grelle, F., La datio tutoris dei magistrati municipali, In: *Gli Statuti Municipali*, A cura di Luigi Capogrossi Colognesi e Emilio Gabba, Pavia, 2006, S. 411–442., S. 413).

[6] Vgl. Guzmán, A., *Dos estudios en torno a la historia de la tutela romana*, Pamplona, 1976, S. 27–131.

[7] Gai.1,185; Iust. Inst.1,20,pr.; Fiebiger, O./Liebenam, W., Duoviri, In: Wissowa, G. (Hrsg.), *Paulys Real-Encyclopädie der classischen Altertumswissenschaft* (RE). Band 5, Stuttgart, 1905, S. 1798–1842.,S. 1835.

[8] Suet. Claud. 23,2.; Sachers, E., Tutela, In: Mittelhaus, K./Ziegler, K. (Hrsg.), *Paulys Real-Enciklopädie der classischen Altertumswissenschaft 2. Reihe (R–Z), 7. Bd. Tributum bis Valerius,* (RE 7 A/2), 1948, S. 1497–1599., S. 1512–1513; Pókecz Kovács, A., A római közigazgatás Claudius uralkodása idején (Kr. u. 41–54), In: *JURA* 2015/1, S. 100–110., S. 104; Pókecz Kovács, A., Róma városának közigazgatása a principatus korában, In: *JURA* 2015/2, S. 100–108., S. 100.

[9] Frag. Vat. 244.

[10] Kaser/Knütel/Lohsse, *op. cit.*, S. 377; Kaser, 1971, *op. cit.,* S. 357; Benedek/Pókecz Kovács, *op.cit.*, 159; Talamanca, *op. cit.,* S. 160; Galaboff, N. G., *Die Palingenesie der römischen Vormundschaftsgesetze,* Frankfurt am Main, 2016, S. 137–138; Nörr, *op. cit.,* S. 20, 31; Kruse, Th., Governmental Control of Guardianship over Minors in Roman Egypt, In: Yiftach, U./Faraguna, M. (Ed.), *Ancient Guardianship: Legal Incapacities in the Ancient World* (Legal Documents in Ancient Societies VI Jerusalem, 3–5. 11. 2013.) (GRAECA TERGESTINA STORIA E CIVILTÁ 4), 2017, S. 175–188., S 176; Chevreau, E., The Evolution of Roman Guardianship through the Mechanism of excusatio tutelae, In: Yiftach, U./Faraguna, M. (Ed.), *Ancient Guardianship: Legal Incapacities in the Ancient World* (Legal Documents in Ancient Societies VI Jerusalem, 3-5. 11. 2013.) (GRAECA TERGESTINA STORIA E CIVILTÁ 4), 2017, S. 189–202., S. 190–191; Sciuto, P., I limiti alia competenza dei magistrati municipali in materia di datio tutoris, In: *Studi per Giovanni Nicosia* VII, Milano, 2007, S. 349–392., S. 351.; Siklósi, I., *Római magánjog,* I. Bd., Budapest, 2021, S. 540.

[11] Kaser/Knütel/Lohsse, *op. cit.*, S. 377; Talamanca, *op. cit.,* S. 160; Iust. Inst.1,20,4; Sachers, *op. cit*., S. 1515; Galaboff, *op. cit.,* S. 184.; Kaser, 1971, *op. cit.,* S. 357.

[12] Frag. Vat.205, 232, 241; Kaser, 1971, *op. cit.,* S. 357. Das Amt der *iuridici* wurde von Mark Aurel im Interesse der effektiveren Rechtssprechung zustande gebracht. (Vgl. Pókecz Kovács, A., *A principátus közjoga*, Budapest–Pécs, 2016, S. 125.) Die *iuridici* waren kaiserlichen Beamten, sie wurden von dem Kaiser ernannt, ihre Amtsdauer hing von dem Willen des Kaisers ab, und ihre Gerichtsgewalt leitete sich vom Prinzeps her. (Vgl. Simshäuser, W., *Iuridici und Munizipialgerichtsbarkeit in Italien,* München, 1973, S. 241.)

[13] Nörr, *op. cit.,* S. 2. Diese waren wahrscheinlich zwei Gesetze. Sachers Meinung nach sei die *lex Titia* wahrscheinlich im Jahre 99 v. Chr. entstanden und habe ursprünglich für alle Provinzen gegolten, aber später sei dieses Gesetz nur in den Senatsprovinzen angewandt worden. Die *lex Iulia de tutela* sei für das Jahr 32 v. Chr. anzusetzen, und sie sei in den *provinciae Cesaris* bei der Vormundsbestellung angewandt worden. (Vgl. Sachers, *op. cit*., S. 1513.) Nörr datiert die Entstehung der *lex Titia* auf 31. v. Chr. (Vgl. Nörr, *op. cit.,* S. 2.)

[14] Gai.1,185; Iust. Inst.1,20,pr.; Kaser/Knütel/Lohsse, *op. cit.*, S. 377; Nörr, *op. cit.,* S. 29; Benedek/Pókecz Kovács, *op.cit*. 159; Talamanca, *op. cit.,* S. 160; Sachers, *op. cit*., S. 1513; Sciuto, *op. cit.,* S. 350, 390.; Siklósi, I., *op. cit.,* S. 540. Als *praeses* wurden ab dem 2. Jahrhundert die Provinzstatthalter genannt. (Vgl. Pókecz Kovács, 2016, *op. cit.,* S. 128).

[15] *c. 29 lex municipi (Irnitani, Salpensani)*; *c. 109 lex Coloniae Genetivae Iuliae (lex Ursonensis).* Zum Thema siehe auch: Illés I. Á., *A lex Irnitana (egy Flavius-kori municipium törvénye)*, Documenta Historica 77., Szeged, 2007.

[16] Kaser, 1971, *op. cit.,* S. 357; Fiebiger,/Liebenam, *op. cit.,* S. 1834–1835.; Rudorff, A. A. F., *Das Recht der Vormundschaft, Bd. I.,* Berlin, 1832, S. 354.

[17] Vgl. Erman, H., Eine römisch–ägyptische Vormundschaftssache, In: *SZ*. 15., 1894, S. 241–255., S. 247–253; Talamanca, *op. cit.,* S. 160; Glück, Ch. F., *Ausführliche Erläuterung der Pandecten, 30. Theils, 1. Abteil.,* Erlangen, Pandecten, 30. Theils, 1829, S. 411; Rudorff, A. A. F., *Das Recht der Vormundschaft, Bd. III.,* Berlin, 1834, S. 159; Ziegler, K./Sonthemeier, W. (Hrsg.), *Der Kleine Pauly. Lexikon der Antike, Bd. 3. Iuppiter – Nasidienus,* München, 1979, S. 880–881.; Kaser, 1971, *op. cit.,* S. 357.

[18] Mitteis, L., Über die Kompetenzen zur Vormundsbestellung in den römischen Provinzen, In: *SZ*. 29., 1908, S. 390–403., S. 393.

[19] Sciuto, *op. cit.,* S. 370—371; Mitteis, *op. cit.,* S. 393-396. Kruse, *op. cit.,* S. 181–182.

[20] D.26.6.1; D. 26,6,2,1–2; Kaser/Knütel/Lohsse, *op. cit.*, S. 377; Kaser, 1971, *op. cit.,* S. 358; Sachers, *op. cit*., S. 1518–1519; Galaboff, *op. cit.,* S. 181–183.

schaft war.[21] Weiterhin kam es oft vor, dass die Magistrate die Vormünder am Anfang der Vormundschaft zur *satisdatio/cautio rem pupilli salvam fore* verpflichteten.[22] Es war eine mit Bürgen gesicherte Stipulation, in der der Vormund versprach, dass er das Vermögen des Unmündigen richtig verwalten werde, und er alles in Zusammenhang der Vormundschaft tun werde, was die *bona fides* verlangt.[23] Aus der *satisdatio* stand dem Mündel eine *actio ex stipulatu* gegen den Vormund zu. Diese Klage war inhaltlich praktisch gleichwertig mit der *actio tutelae directa*, und es wurde durch sie gleichzeitig auch ermöglicht, im Falle der Insolvenz des Vormundes auch dessen Bürgen zu verklagen.[24]

Diese Sicherheitsleistung musste aber nicht jeder Vormund versprechen. Normalerweise waren nur die gesetzlichen Vormünder, die von den *magistratus municipales* bestellten Vormünder[25] und die von höheren Magistraten *sine inquisitione* (ohne vorherige Prüfung) bestellten Tutoren zur *satisdatio* verpflichtet.[26]

2.3 Der Kreis der subsidiär haftenden Magistrate

Mit der Zeit hafteten bestimmte Magistrate dem Mündel dafür, wenn sie keinen geeigneten Vormund bestellten, und/oder sie die Vormünder nicht zur geeigneten Sicherheitsleistung verpflichteten, obwohl es nötig gewesen wäre. Das Mündel konnte in solchen Fällen gegen die Magistrate dann auftreten, wenn die Vormünder das Mündelvermögen nicht richtig verwalteten und ihr Vermögen nicht ausreichend war, die dadurch entstandenen Schäden dem Mündel zu ersetzen. Ab der Zeit von Trajan stand dem ehemaligen Mündel in solchen Fällen eine subsidiäre Klage gegen die *magistratus municipales* zu.[27] Diese Klage war die in den Quellen oft als *actio utilis* erwähnte sog. *actio subsidiaria*, die dem Mündel – wie darauf auch ihr Name hinweist – nur subsidiär zustand, also nur dann, wenn das Mündel vorher seine Vormünder verklagte, aber letztere mindestens teilweise insolvent waren:[28]

C.5,75,5: Imperatores Diocletianus, Maximianus

*„In magistratus municipales tutorum nominatores, si administrationis finito tempore non fuerint solvendo nec ex cautione fideiussionis solidum exigi possit, pupillis quondam in subsidium indemnitatis nomine actionem utilem competere ex senatus consulto, quod auctore divo Traiano parente nostro factum est, constitit." * diocl. et maxim. aa. et cc. eugeniae. * <a 294? d. vii id. dec. ipsis et conss.>*

C.5,75,5. Die Kaiser Diocletianus und Maximianus an Eugenia.

Dass gegen die Magistratspersonen der Städte, welche Vormünder vorschlagen, dann wenn diese zur Zeit der Beendigung ihrer Verwaltung nicht zahlungsfähig sind und auch nicht von ihren Bürgen das Ganze beigetrieben werden kann, den ehemaligen Pflegebefohlenen, ihrer Schadloshaltung wegen, gemäß dem Senatsbeschlusse, welcher auf Vorschlag des Kaisers Traianus, Unseres Vorfahren, gegeben worden ist, zur Hilfe eine prätorische Klage zusteht, steht fest.

Geg. VII. id. Dec. (294) unter dem Consulate der Kaiser.[29]

Im Sinne eines früheren Reskriptes von Hadrian konnte das Mündel auch diejenigen Personen verklagen, die die Aufgabe hatten, die von dem Vormund zu leistende *satisdatio* zu bewerten.[30]

Das Mündel konnte – in bestimmten Ausnahmefällen[31] – auch gegen die Mitglieder der *ordo decurionum* (Stadtrat) auftreten. So insbesondere dann, wenn die *decuriones*[32] selbst Vormünder bestellten, weil diejenigen, denen das Recht der Vormundsbestellung zustand, nicht anwesend waren.[33] Oder, wenn der Stadtrat

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[21] D.26,2,18; D.26,7,3,3; Sachers, *op. cit*., S 1519–1520.

[22] Gai.1,119. Földi/Hamza, *op. cit.,* S. 263. Sie dazu auch: Carbone, M., Tutori magistratuali ed esonero dalla satisdatio in Gaio e in Giustiniano, In: *Teoria e Storia del Diritto Privato*, Nr. X., 2017, S. 1–28.

[23] D.46,6,11; Sachers, *op. cit*., S. 1569–1571; Lenel, O., *Das Edictum Perpetuum,* 3. Aufl., 1927, S. 540–541; Kaser/Knütel/Lohsse, *op. cit.*, S. 380; Carbone, M., *Satisdatio tutoris: Sull'obbligo del tutore di garantire per il patrimonio del pupillo*, Milano, 2014, S. 1.

[24] Vgl. Sachers, *op. cit*., S. 1571; Galaboff, *op. cit.,* S. 93. Kaser, 1971, *op. cit.,* S. 364-365.

[25] D.26,4,5,1; D.26,3,5; Gai.1,199; Sachers, *op. cit*., S. 1569–1570; Kaser/Knütel/Lohsse, *op. cit.*, S. 380; Kaser, 1971, *op. cit.,* S. 365; Galaboff, *op. cit.,* S. 92.

[26] C.5,59,5,pr; Levy, E., Die Haftung mehrer Tutoren, In: *SZ*. 37., 1916, S. 14–88., S. 36–37.; Glück, *op. cit.,* S. 357; Kübler, B., Die Haftung für Verschulden bei kontraktsähnlichen und deliktsähnlichen Schuldverhältnissen, In: *SZ*. 39., 1918, S. 172–223., S. 185–186. Zum Thema siehe noch: Carbone, 2014, *op. cit.,* S. 15–23; Carbone, M., Un intervento del Senato in tema di libertas ed hereditas disposte per fideicommissum, In*: Studi per Giovanni Nicosia II,* Milano, 2007, S. 247–268, S. 261–262.

[27] C.5,75,5; D.27,8,2, Levy, E., *Privatstrafe und Schadensersatz im klassischen römischen Recht,* Berlin, 1915, S. 41.; Karlowa, O., *Römische Rechtsgeschichte, Bd. I.*, Leipzig, 1855, S. 596.; Nörr, *op. cit.,* S. 25–26.; Rudorff, 1834, *op. cit.,* S. 154.; Sachers, *op. cit*., S. 1581.; Glück, *op. cit.,* S. 411.; Kaser, 1971, *op. cit.,* S. 367.; Rampazzo, N., La «nominatio» e la responsabilità dei magistrati municipali, In: *Index* 39. 2011, S. 363-378., S.373–374.; Sciuto, *op. cit.,* S. 372-373.

[28] Glück, *op. cit.,* S. 406.; Für den klassischen Ursprung des Namens der Klage: Albertario, E., *Dell' „actio subsidiaria" concessa al minore contro i magistrati*. Studi dell' Istituto di Esercitazioni nelle scienze giuridiche e sociali della R. Universitá di Pavia, 1912, S. 3.; Levy, 1915, *op. cit.,* S. 41.; Lenel, 1927, *op. cit.,* S. 321. Brugi bestreitet den klassischen Ursprung und ist der Meinung, dass der Name auf die iustinianische Kompilation zurückgehe. (Vgl. Brugi, B., Dell' azione sussidiaria in Teoflilo 1, 24, 2, In: *Mélanges P. F. Girard I.*, 1912, S. 143-144.) Laut Levy gehe der Name der Klage wahrscheinlich auf den *senatus consultum* des Kaisers Trajan zurück, der von Anfang an großen Wert auf die Subsidiarität der Klage gelegt habe. (Vgl. Levy, 1915, *op. cit.,* S. 41.) Sachers ist der Ansicht, dass die Klage in der klassischen Zeit als *utilis actio* bezeichnet worden sei, der Begriff *actio subsidiaria* aber wahrscheinlich schon in der spätklassischen Zeit vorkommen sei. (Vgl. Sachers, *op. cit*., S. 1581).

[29] Übersetzung: Haller, R., *Corpus Iuris Civilis. Das römische Zivilrecht. Codex Iustinianus V. Buch,* http://www.opera-platonis.de/CI/CI_B5.pdf (12. 02. 2015)

[30] D.27,8,1,8; Carbone, 2014, *op. cit.,* S. 127. In der klassischen Zeit hatte in Rom und in Konstantinopel der *scriba* des *praetor tutelaris* die Aufgabe, das Vermögen des Mündels einzuschätzen, und aufgrund dieses Inventars die Höhe der *satisdatio* festzustellen. (Siehe: Nov. 94. [Epilogus], Rudorff, 1834, *op. cit.,* S. 159; Sachers, *op. cit*., S. 1582 Glück, *op. cit.,* S. 416–417).

[31] Nörr, *op. cit.,* S. 33; Sachers, *op. cit*., S. 1581.

[32] Die *decuriones* waren in den Gemeinden mit Selbstverwaltung die Mitglieder der *ordo decurionum,* also des Stadtrates. (Vgl. Havas L./Németh Gy./Szabó E., *Római történeti kézikönyv,* Budapest, 2001, S. 182–183).

[33] D.26,5,19pr.

die Haftung für die Vormundsbestellung auf sich genommen hat.[34] In solchen Fällen konnten nur diejenigen *decuriones* belangt werden, die an der Vormundsbestellung teilnahmen.[35]

Diese subsidiäre Haftung belastete aber die höheren Magistrate (wie etwa den Stadtpräfekt, den Prätor, den Konsul, oder den Statthalter), die in erster Linie befugt waren, Vormünder zu bestellen, nie.[36] Für die *datio tutoris* hafteten nur die Beamten von niedrigerem Rang,[37] so insbesondere die *magistratus municipales*.[38]

3. Die Entwicklung der Erbenhaftung – die Doppelnatur der *actio subsidiaria*

Gegebenenfalls konnte für die Mündel, denen von ihren Vormündern Schäden verursacht wurden, auch von Bedeutung sein, ob die Erben der Magistrate verklagbar sind. Wie wir sehen werden, lässt sich aber aus den Quellen schließen, dass die Erben der Magistrate nicht in allen Zeiten und Fällen hafteten.

Aus der folgenden Quelle kann darauf gefolgert werden, dass die *actio subsidiaria* dem Mündel gegen die Erben der Magistrate ursprünglich nicht zur Verfügung stand. Später aber wurde die Klage teilweise durch kaiserliche Konstitutionen, teilweise durch Responsa der Rechtsgelehrten (unter bestimmten Voraussetzungen) auch gegen ihre Erben anwendbar.[39]

Iust. Inst.1,24,2

„Sciendum autem est non solum tutores vel curatores pupillis et adultis ceterisque personis ex administratione teneri, sed etiam in eos qui satisdationem accipiunt subsidiariam actionem esse, quae ultimum eis praesidium possit afferre. Subsidiaria autem actio datur in eos qui vel omnino a tutoribus vel curatoribus satisdari non curaverint aut non idonee passi essent caveri. Quae quidem tam ex prudentium responsis quam ex constitutionibus imperialibus et in heredes eorum extenditur."

Iust. Inst.1,24,2

Man muß aber wissen, daß nicht nur die Vormünder oder Pfleger wegen ihrer Verwaltung den Mündeln, den mündigen Minderjährigen und den übrigen Personen haften, sondern daß diesen als letztes Mittel, das ihnen Hilfe zu leisten vermag, auch eine subsidiäre Klage gegen diejenigen gegeben wird, die die Sicherheitsleistungen haben gelten lassen. Und diese subsidiäre Klage wird gegen die gewährt, die entweder nicht dafür gesorgt haben, daß von den Vormündern und Pflegern überhaupt Sicherheit geleistet wurde, oder die zugelassen haben, daß die Sicherheit in unzureichender Weise geleistet wurde. Und diese Klage wird nach Gutachten der Rechtsgelehrten wie nach Kaiserkonstitutionen auch auf ihre Erben erstreckt.[40]

Diese Entwicklung, dass die *actio subsidiaria* ursprünglich gegen die Erben der Magistrate nicht anwendbar war, später aber auch gegen sie angegeben wurde, hatte höchstwahrscheinlich zwei Gründe:

A. Der erste Grund, warum am Anfang die Erben der Munizipalmagistrate wegen des Mangels der *datio tutoris* nicht verklagt werden konnten, bestand daran, dass die *actio subsidiaria* ursprünglich – aller Wahrscheinlichkeit nach – als eine *actio poenalis* betrachtet wurde,[41] und wie es allgemein bekannt ist, waren die Strafklagen passiv unvererblich.[42]

Der pönale Charakter der Klage wird durch ein Modestinfragment bestätigt, in dem es behauptet wird, dass die Magistrate infolge der gegen sie in Zusammenhang mit der Vormundsbestellung angegebenen Klage eine *poena* bezahlen müssen:

D.27,8,9

Modestinus 4 pand.

„An in magistratus actione data cum usuris sors exigi debeat, an vero usurae peti non possint, quoniam constitutum est poenarum usuras peti non posse, quaesitum est. Et rescriptum est a divis Severo et Antonino et usuras peti posse, quoniam eadem in magistratibus actio datur, quae competit in tutores."

D.27,8,9

Modestin im 4. Buch seiner Pandekten

*Es wurde gefragt, ob dann, wenn die Klage gegen die Magistrate gegeben ist, der Streitwert mit Zinsen eingeklagt werden kann oder ob Zinsen nicht verlangt werden dürfen, weil durch kaiserliche Konstitution bestimmt worden ist, daß bei Strafansprüchen Zinsen nicht gefordert werden dürfen. Und von den vergöttlichten Kaisern Septimius Severus und Antoninus [*Caracalla*] ist entschieden worden, daß auch Zinsen verlangt werden können, weil ja gegen Magistrate dieselbe Klage gewährt wird, die auch gegen Vormünder gegeben ist.*[43]

Nach Levys Meinung könne aus der Stelle darauf gefolgert werden, dass die *actio subsidiaria* sogar noch in der Severerzeit als *actio poenalis* betrachtet worden sei. Deswegen habe überhaupt die Frage entstehen können, ob es möglich sei, von den Magistraten auch Zinsen zu verlangen. Die Tatsache, dass diese Frage als Problem erscheine, weise auf den *poenal*-Charakter der Klage hin, da im Falle einer *actio rei persecutoria* es überhaupt keine Frage wäre, sondern wäre die bejahende Antwort eindeutig.[44]

Die Klage hatte also ursprünglich und grundsätzlich pönaler Charakter, sie hatte aber auch solche Eigenschaften, die viel mehr für die *rei persekutorsichen* Klagen charakteristisch waren.

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[34] D.27,8,1pr.

[35] Sachers, *op. cit*., S. 1581.

[36] Iust. Inst.1,24,4; Rudorff, 1834, *op. cit.,* S. 161; Karlowa, *op. cit.*, S. 596; Glück, *op. cit.,* S. 412.

[37] Im Folgenden werden in erster Linie sie als Magistrate bezeichnet.

[38] Vgl. Sachers, *op. cit*., S. 1582.

[39] Rudorff, 1834, *op. cit.,* S. 164.; Sachers, *op. cit*., S. 1581, 1583.; Kübler, B., *Ferrini Contardo, Sulle fonti delle 'Istituzioni' di Giustiniano, (rec.),* In: *SZ*. 23, 1902, S. 508-525., S. 514.; Kübler, 1918, *op. cit.,* S. 213.

[40] Übersetzung: Behrends, O./Knütel, R./Kupisch, B./Seiler, H. H. (Hrsg.), *Corpus Iuris Civilis. Die Institutionen. Text und Übersetzung,* 2. Aufl., Heidelberg, 1999, S. 39.; Rudorff, 1834, *op. cit.,* S. 164.; Kübler, 1902, *op. cit.,* S. 514.; Kübler, 1918, *op. cit.,* S. 213.

[41] Kaser, 1971, *op. cit.,* S. 367.

[42] Vgl. Kaser, 1971, *op. cit.,* S. 612. Földi/Hamza, *op. cit.,* S. 565.; Benedek/Pókecz Kovács, *op. cit.,*344.; Molnár/Jakab, op. cit., S. 331.; Siklósi, II., *op. cit.,* S. 1611.

[43] Übersetzung: Knütel, R./Kupisch, B./Seiler, H. H./Behrends, O. (Hrsg.), *Corpus Iuris Civilis. Text und Übersetzung IV, Digesten 21-27*, Heidelberg, 2005, S. 513-514.

[44] Levy, 1915, *op. cit.,* S. 43.

So zum Beispiel, die eben behandelte Verlangbarkeit auch der Zinsen, oder dass sie keine noxale Klage war. Wenn nämlich der für die Vormundsbestellung verantwortliche Magistrat unter *patria potestas* stand, haftete der *pater familias* für die mangelhafte *tutoris datio* ursprünglich gar nicht,[45] und auch in den späteren Zeiten nur mit einer *actio de peculio*.[46]

Als Grund der wahrnehmbaren Doppelnatur der Klage kann bezeichnet werden, dass die Klage – wie darauf Levy richtigerweise aufmerksam macht – zur Gruppe der Regressklagen aus amtlichen oder ähnlichen Tätigkeiten gehört, die ihre Strafnatur noch in der klassischen Zeit bewahrten, aber der Regresszweck, also der Ersatzanspruch als Charakteristik der Klage, führte bei ihnen zu *rei persekutorischen* Wirkungen.[47]

Dieser Regresszweck war im Falle der Vormundschaft höchstwahrscheinlich besonders wichtig. Die Quellen lassen nämlich vermuten, dass man versuchte, das Mündelvermögen besonders gut zu schützen. Die *tutela impuberum* war seit dem 2. Jahrhundert n. Chr. ein zentrales Thema der kaiserlichen Gesetzgebung und der dazugehörigen Rechtsprechung.[48] Die Vormundschaft spielte aber schon in der Zeit davor eine zentrale Rolle im Rechtsleben Roms. Dies lag vermutlich daran, dass es in vielen Fällen um die Verwaltung und Kontrolle von großen Vermögenswerten ging, die für die gesellschaftliche Elite Roms von großer sozialer und wirtschaftlicher Bedeutung waren.[49]

Meiner Ansicht nach hatte die Haftung der (Munizipal) Magistrate eine *quasideliktische* Natur,[50] die einen eigenartigen

[45] D.50,1,2pr.-5.

[46] D.27,8,1,17; D.15,1,3,13 Levy, 1915, *op. cit.,* S. 45.; Sachers, *op. cit*., S. 1581, 1583.; Glück, *op. cit.,* S. 415.; Rudorff, 1834, *op. cit.,* S. 165–166.

[47] Levy, 1915, *op. cit.,* S. 41. Nach Levy gehöre auch zu diesem Kreis der Tatbestand des *iudex qui litem suam fecit*, sowie der des *damnum infectu*m säumigen Munizipalmagistrats. (Levy, 1915, *op. cit.,* S. 45-61).

[48] Nörr, *op. cit.,* S. 23.; Jakab É., (2017 b), Vis ac potestas. Gyámi vagyonkezelés a klasszikus római jogban, In: Görög/Hegedűs (Hrsg.) *Lege duce, comite familia. Ünnepi tanulmányok Tóthné Fábián Eszter tiszteletére, jogászi pályafutásának 60. évfordulójára,* 2017, S. 199–211., S. 211. Es fällt auf, dass sich die Juristen in Texten zum Thema Vormundschaft auf eine Vielzahl von kaiserlichen Reskripten beziehen. (Vgl. Jakab É., (2017a), Vormundschaft in lateinischen tabulae, In: Yiftach U./Faraguna, M. (Ed.): *Ancient Guardianship: Legal Incapacities in the Ancient World* (Legal Documents in Ancient Societies VI Jerusalem, 3–5. 11. 2013.) (GRAECA TERGESTINA STORIA E CIVILTÀ 4), 2017, S. 203–220., S. 215.; Jakab, 2017 b, *op. cit.,* S. 211.)

[49] Jakab, 2017a, *op. cit.,* S. 207. Die Vormundschaft war in Rom auch wegen des niedrigeren Durchschnittsalters wichtig. Laut Saller habe etwa ein Drittel der römischen Bürger ihre Väter, noch vor ihrer Mündigkeit verloren, und ein weiteres Drittel, bevor sie 25 Jahre alt wurden. Unter den männlichen *sui iuris* Personen habe es mehr Unmündigen, als Personen über 25 Jahren gegeben. Etwa ein Drittel des Grundbesitzes habe sich im Eigentum von Unmündigen und ein weiteres Fünftel im Eigentum von Personen zwischen 14 und 25 Jahren befunden. Je nach Klasse und Region mag es Abweichungen gegeben haben, die jedoch nichts am Gesamtbild ändern. (Vgl. Saller R. P., *Patriarchy, Property and Death in the Roman Family*, Cambridge, 1994, S. 181–190.) Sallers Berechnungen und Behauptungen sind zwar verblüffend, verdeutlichen aber die strukturellen Unterschiede zwischen der antiken Bevölkerung und modernen Gesellschaften. (Vgl. Grelle, *op. cit.,* S. 412.) Die soziale und wirtschaftliche, aber auch die rechtspolitische Bedeutung der Vormundschaft spiegelt sich in den Quellen wider. So nehmen die Vorschriften zur Vormundschaft etwa ein Drittel des ersten Buches der Institutionen von Gaius ein. Im ersten Buch der Institutionen von Iustinian (*De personis*) steigt dieser Anteil auf 45 % der Zeilen. Von den fünfzig Büchern der Digesten, sind zwei, das D.26 und D.27, der Vormundschaft gewidmet. Es ist bezeichnend, dass die Anzahl der Zeilen zur Vormundschaft etwa 5.500 beträgt, während die beiden für das Wirtschaftsleben der Zeit wichtigsten Verträge, die *emptio venditio*, etwa 3.000 Zeilen und die *locatio conductio* nur 980 Zeilen in den Digesten haben. (Vgl. Jakab, 2017a, *op. cit.,* S. 206-207; Jakab 2017 b, *op. cit.,* S. 202-203).

[50] Die Institutionen von Iustinian erwähnt zwar unter dem Titel *„obligationes quae quasi ex delicto nascuntur"* (wie auch das *Res cottidianae* von Gaius) nur vier quasideliktischen Tatbestände (die Haftung des *iudex qui litem suam fecit,* die Haftung des Hausbesitzers *de deiectis vel effusis,* sowie *de posito vel suspenso,* und schließlich die Haftung der Schiffer der Gastwirt und der Stallwirt für die Diebstähle und Sachbeschädigungen, die ihre Angestellten, bzw. Stammkunden begingen – *actio furti/damni adversus nautas caupones stabularios*) – in diesen Fällen wurden die Haftenden auf *poena* verurteilt. Allerdings ist in Übereinstimmung mit Arangio-Ruiz und Földi davon auszugehen, dass neben den vier aufgezählten Tatbeständen es auch andere quasi-deliktische Tatbestände geben konnten (wie z.B. nach Földi die Haftung der Publikanen), die aber in den kurz gefassten Lehrbüchern wie die Institutionen nicht aufgenommen wurden. (Vgl. Földi, A., Die sogenannte quasideliktische Haftung vom römischen Recht bis zur Gegenwart, In: *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae, Sectio Iuridica*, Tomus XLIV, Budapest, 2004, S. 279-291., S. 280-281.; Földi, A., A kvázideliktuális felelősség a római jogtól napjainkig, In: *Acta Facultatis Politico-iuridicae Universitatis Scientiarum Budapestiensis de Rolando Eötvös nominatae*, Tom. XL, 2003, S. 341-350., s. 342-343.; Földi A., Appunti sulla categoria dei quasi-delitti, In: Földi A.: *Selected Studies on Roman Law and Comparative History of Private Law*, Budapest, 2023, S. 427-446, S. 428-429.; Kaser, M., *Das römische Privatrecht*, 2. Abschnitt, Die nachklassischen Entwicklungen, 2. Auflage, München, 1975, S. 428.) Es ist auch hervorzuheben, dass es aber weder in den Quellen noch in der Literatur einen Konsens über die gemeinsamen dogmatischen Merkmale gibt, die die Tatbestände der Quasidelikten verbinden. (Vgl. Földi, 2004, *op. cit.*, S. 281, Földi, 2003, *op. cit.,* 342-348.; Földi, 2023, *op. cit.* S. 431-435.; Kaser, 1975, *op. cit.*, S. 428.) Nach Földis Zusammenfassung hätten die vier oben genannten Quasidelikte gemeinsam, (1) dass sie historisch durch das prätorische Edikt sanktioniert worden seien, (2) dass es sich um rechtswidrigen Handlungen gehe, auf deren Grundlage eine *actio poenalis* geltend gemacht werden könne, und (3) dass die rechtswidrige Handlung in gewisser Hinsicht indirekt sei (intellektuelle Schadensverursachung, Haftung für fremdes Verhalten, usw.). Diese gemeinsamen Merkmale seien aber Földis Meinung nach kaum geeignet, die dogmatische Unabhängigkeit der Quasidelikte zu begründen. Wenn man doch eine gemeinsame *differentia specifica* identifizieren wollte, wäre es nach Földis Meinung der indirekte Charakter der rechtswidrigen Handlung (im Fall des *iudex qui litem suam fecit* die intellektuelle Schadensverursachung, in den drei anderen Fällen, die Haftung für fremdes Verhalten). Földi weist aber auch darauf hin, dass es auch solche Theorien gäben, die besagten, dass Quasidelikte nicht aufgrund eines einzigen Kriteriums, sondern aufgrund mehrerer negativer Kriterien, die man als „Restprinzipien" bezeichnen könnte, gruppiert worden seien. (Vgl. Földi, 2004, *op. cit.*, S. 284-285.; Földi, 2003, *op. cit.,* 345-346.; Földi, 2023, *op. cit.* S. 431-435.) Einigen Ansichten zufolge könne aber der entscheidende Unterschied darin bestehen, dass ein Delikt (mit Ausnahme von *damnum iniuria datum*) nur vorsätzlich, während die Quasidelikten auch fahrlässig begangen werden konnten. (Vgl. Rotondi, G., *Scritti giuridici, II,* Milano, 1922, S. 386-387, S. 449.; Albertario, E., *Studi di diritto romano III*, Milano, 1936, S. 86-90; Benedek/Pókecz Kovács, *op. cit.,* S. 353.) Földi verwirft jedoch die letztgenannte Theorie (Földi, 2003, *op. cit.,* S. 345-348.). Talamanca ist der Meinung, dass es schwierig zu sagen sei, ob die Aufzählung der Quasidelikte in den Institutionen rein exemplifikativ oder taxativ sei, und aus welchem Grund die bestimmten Tatbestände als Quasidelikte eingestuft worden seien. Er weist darauf hin, dass nach einiger Ansichten die *differentia specifica* entweder die Haftung für die Handlungen anderer sein könnte, oder die Tatsache, dass die Quasidelikte auch fahrlässig begangen werden konnten, aber auch diese Erklärungsvorschläge würden keine allgemeingültige Erklärung bieten, denn hinsichtlich beider gebe es Ausnahmen unter den vier Quasidelikten. (Vgl. Talamanca, *op. cit.,* S. 632-633.) Kübler deutet auch an, dass Gaius die *variae causarum figurae* nicht aus theoretischen, konstruktiven Gründen, sondern aus praktischen Erwägungen heraus in einer bestimmten Weise aufgeteilt haben könnte. (Kübler, 1918, *op. cit.,* S. 219). Zum Thema der Quasidelikten siehe auch: Kaser, 1975, op. cit., S. 428-429; Siklósi, I., *Római magánjog,* II. Bd., Budapest, 2021, S. 1654-1656.

Übergang zwischen der Strafhaftung und der Schadensersatzhaftung bildete, und in der viel mehr der Ersatzcharakter dominant war, da das Hauptziel der Verurteilung der Magistrate die möglichst vollständigere Reparation des Vermögens des Mündels war, und nicht die Bestrafung des Magistrats,[51] der bei der Vormudsbestellung pflichtwidrig verfahren hatte. Und eben im Interesse der Verwirklichung dieser Vermögensreparation als vorrangiges Ziel war es gerechtfertigt, die *actio subsidiaria* dem ehemaligen Mündel nötigenfalls auch gegen die Erben der Munizipalmagistrate zu gewähren.

Die quasideliktische Natur wird auch dadurch bestätigt, dass auch die Quellen eine Parallele zwischen dem *iudex qui litem suam fecit* und den Munizipalmagistrate, die ungeeignete Vormünder bestellten, ziehen.[52]

B. Die andere Ursache davon, dass die Erben der Magistrate, die die *datio tutoris* verwirklichten, ursprünglich nicht verklagbar waren, kann auch damit in Zusammenhang stehen, dass die Munizipalmagistrate in Zusammenhang mit der Vormundsbestellung am häufigsten die Fehler begingen, dass sie die Vormünder nicht zur Stellung von Bürgen verpflichteten, obwohl eine Sicherheitsleistung nötig gewesen wäre. In diesem Fall hatten die Magistrate wegen ihrer Unterlassung (als eine Art von Strafe) selbst so zu haften als wenn sie die Bürgen der von ihnen bestellten Vormünder gewesen wären. Da aber im Falle der *cautio rem pupilli salvam fore* ursprünglich aller Wahrscheinlichkeit nach insbesondere die Sponsionsbürgschaft anwendbar war,[53] und da die Haftung aus der *sponsio* nicht vererblich war, so könnte auch damit die Tatsache gerechtfertigt werden, dass die Erben der Munizipalmagistrate, als *quasi sponsores* ursprünglich auch nicht haften mussten.

Später aber, wahrscheinlich mit der Verbreitung der *fideiussio* auch im Falle der *cautio rem pupilli salvam fore*[54], wurde es – da die Haftung der *fideiussores* schon vererblich war – gerechtfertigter, dass die rechtliche Stellung der als quasi Bürgen haftenden Munizipalmagistrate – auch hinsichtlich der Vererblichkeit ihrer Haftung eher nach der Stellung der *fideiussores* richtete.

Auch das sog. Straßburger Fragment der Disputationen von Ulpian[55] scheint das oben Gesagte zu bestätigen. Teil 2 des Straßburger Fragments (Ulp. fr. Arg. 11-12) behandelt die *actio subsidiaria*, die gegen die *magistratus municipales* eingelegt werden konnte:

„…municipia
…in (?) eos esse tute
… ita demum
…excussis[56]
facultatibus tutorum satis ei fieri non potuerit eamque actionem causa cognita in eos dandam esse divumque Pium rescripsisse et in heredes eorum itidem causa cognita, quamvis Iulianus in heredem magistratus non putaverit tribuendam actionem cum idem heredem iudicis, qui litem suam fecisset, teneri existimaverit. sed utrumque contra est, cum heres magistratus teneatur et iudicis non teneatur. et magistratus /// non ut tutores tenentur: denique in bonis eorum privilegium cessare procul dubio est.

… questionis fuisse, ut sponsores an potius ut fideiussores deberent teneri. et Iulianum quidem ut fideiussores conveniendos putasse, Marcellum vero magis sponsorum locum optinere apud Iulianum notare. Marcelli sententiam ratione iuvari negari non posse: sufficere enim, si in locum eorum succedant, quos accipi neglexerunt vel quos minus idoneus acceperunt."[57]

Die Übersetzung des Textes kann wie folgt versucht werden:

[Wenn] es wegen der Umstände der Vormünder nicht möglich war, [den Mündel] zu befriedigen, sah der vergöttlichte Pius vor, dass dieselbe Klage gegen sie und ihre Erben, ebenfalls causa cognita, gewährt werden sollte, obwohl Julian nicht erwog, die Klage gegen die Erben des Magistrats zu gewähren, obwohl er so hielt, dass die Erben des iudex, qui litem suam fecit selbst haften. Aber die beiden Dinge sind umgekehrt, weil der Erbe des Magistrats haftet, und der Erbe des Richters nicht. Und die Magistrate haften nicht als Vormünder, und hinsichtlich ihres Vermögens gab es zweifellos kein Privileg.

Es stellt sich die Frage, ob sie als Sponsoren oder eher als Fideiussoren haften. Julian ist der Meinung, dass sie sicherlich als Fideiussoren verklagt werden müssen. Marcellus sagt jedoch – wie Julian anmerkt –, dass sie eher als Sponsoren haften. Man kann die Unterstützung der Sentenz von Marcellus nicht verweigern: denn es genügt, dass sie an die Stelle des [Bürgen] treten, dessen Annahme vernachlässigt wurde oder der wenig tauglich war.[58]

In diesem Fragment berichtet Ulpian, dass das Reskript von Antoninus Pius die Haftung der Erben vorschrieb, allerdings

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[51] Zwar in einem anderen Zusammenhang, aber Kaser stellt auch fest, dass es in der postklassischen Zeit eine Tendenz gegeben habe, *„die Straffunktion der Klagen aus Privatdelikten zugunsten der Ersatzfunktion zurückzudrängen"*. (Vgl. Kaser, 1975, op. cit., S. 430).

[52] Siehe unten. (Vgl. auch Levy, 1915, *op. cit.,* S. 48-51; Pernice, A., *Labeo* II, 2 Abt., 2. Aufl., Halle, 1895, 165-170). Im Gegensatz dazu ist Kübler der Ansicht, dass sich die Haftung des Magistrats für die mangelhafte *datio tutoris* eher aus einem Quasikontrakt ergebe - im Gegensatz zum Tatbestand des *iudex qui litem suam fecit*, der tatsächlich ein Quasidelikt sei. (Vgl. Kübler, 1918, *op. cit.,* S. 213-214).

[53] Vgl. Kaser, 1971, *op. cit.,* S. 365.

[54] In den Quellen werden in diesem Zusammenhang mehrmals *fideiussores* erwähnt (zum Beispiel D.27,8,1pr., D. 27,8,1,11; D.27,8,1,13 11; C.5,59,5pr.; C.5,75,4; C.5,75,6pr.-1) Es ist zwar nicht gänzlich auszuschließen, dass sie in dieser Hinsicht interpoliert sind, aber die Erwägung, dass die Magistrate *quasi* als *fideiussores* haften müssten – unter anderem auch im Straßburger Fragment – deutet darauf hin, dass mit der Zeit auch diese Bürgschaftsart bei der *satisdatio* üblich wurde.

[55] Über die Quelle siehe: Lenel, O. (1903a), Neue Bruchstücke aus Ulpians Disputationen, In: *SZ*. 24, 1903, S. 416-418.; Lenel, O. (1903 b), Zwei neue Bruchstücke aus Ulpians Disputationen, In: *Sitzungsberichte der Königlichpreussischen Akademie der Wissenschaften*, Bd. 1903, 2. Halbband, Berlin, S. 922–936.

[56] Nach dem Rekonstruktionsversuch von Lenel kann dieser Teil wie folgt ergänzt werden: *„magistratus ita demum pupillo teneri, si excussis"*, und er ist der Ansicht, dass sich diese Zeilen bereits eindeutig auf die im nächsten Teil des Fragments behandelte *actio subsidiaria* beziehen. (Vgl. Lenel 1903 b, *op. cit.,* S. 931).

[57] Lenel, 1903a, *op. cit.,* S. 417-418.

[58] Eigener Übersetzungsversuch.

nur *causa cognita.* Es kann angenommen werden, dass es in der *in iure*-Phase des Prozesses zuvor höchstwahrscheinlich zwei Dinge zu prüfen waren. Da die Haftung der Erben ebenso subsidiär war wie die des Magistrats, musste zum einen geprüft werden, ob das Mündel zuvor versucht hatte, gegen seinen Vormund aufzutreten, und zum anderen war es zu klären, ob das Magistrat bei der Bestellung des Vormunds ein Versäumnis begangen hatte, oder nicht. Dieses Versäumnis konnte insbesondere das Unterlassen der Bestellung einer Bürgschaft oder die Annahme einer unzureichenden Bürgschaft sein.[59]

Der Abschnitt beschreibt auch die gegensätzlichen Standpunkte in der Frage, ob eine *actio subsidiaria* gegen die Erben der Magistrate erhoben werden kann. Wir erfahren, dass es Antoninus Pius war, der als erster diese Klage gegen die Erben der Magistrate ermöglichte. Einige Zeit zuvor lehnte Julian die Haftung der Erben der Magistrate noch ab, im Gegensatz dazu, hielt er aber eine Klage gegen die Erben des *iudex qui litem suam fecit* für möglich. Ulpian vertritt jedoch den gegenteiligen Standpunkt zu Julian, nämlich dass es gerade umgekehrt sei: Es könne keine Klage gegen die Erben des *iudex*, wohl aber gegen die Erben der Magistrate erhoben werden.[60]

Als er davon schreibt, dass die Magistrate nicht als Vormünder hafteten, und hinsichtlich ihres Vermögens es zweifellos kein Privileg gebe, weist Ulpian aller Wahrscheinlichkeit darauf hin, dass während das Vermögen des Vormundes mit einer *hypotheca legalis* im Interesse des Mündels belastet war, bezüglich des Vermögens des Magistrats gab es kein solches Privileg, also keine *hypotheca legalis*.

In der zweiten Hälfte des Fragments geht es um die Frage, ob die Magistrate als Sponsoren oder als Fideiussoren haften müssen: Nach Julians Meinung, als Fideiussoren, nach Marcellus Ansicht als Sponsoren. Marcellus argumentiert, dass es ausreiche, wenn die Magistrate (unter dem Gesichtspunkt der Haftung) anstelle eines solchen Bürgen treten, dessen Ernennung sie vernachlässigt haben, oder denjenigen sie als ungeeigneter Bürge akzeptierten, und dieses Argument wird auch von Ulpian als logisch angesehen. Das Ende des Fragments ist jedoch unbekannt, so kommt aus dem Text nicht hervor, wie Ulpian letztendlich zu dieser Frage stand.

Nach Lenels Interpretation berichte hier Ulpian über einen Streit zwischen Julian und Marcellus um die Frage, ob Magistrate als Fideiussoren oder als Sponsoren behandelt werden sollten. Marcellus' Argument sei nach Lenel leicht zu verstehen. Die Magistrate seien nämlich im Allgemeinen in Rahmen der *cautio rem pupilli salvam fore* nur verpflichtet gewesen, Sponsoren zu stellen. Das häufigste Versäumnis der Magistrate in Bezug auf die Anordnung der Vormundschaft, die auch die Grundlage für die Gewährung der *actio subsidiaria* gewesen sei, habe in der Regel ja darin bestanden, diese *cautio* entweder gar nicht angeordnet zu haben oder zahlungsunfähige Bürgen akzeptiert zu haben. Marcellus sei daher der Ansicht, dass es ausreiche, wenn die Magistrate die Bürgen, die sie nicht bestellt haben, ersetzten. Und da im Falle der *sponsio* die Verpflichtung des Bürgen nicht auf die Erben der Bürgen übergehe, müssten die Magistrate, wenn sie keine geeigneten Bürgen akzeptierten, so haften, als ob der Bürge gehaftet hätte, woraus folge, dass die Verpflichtung auch nicht auf die Erben der Magistrate übergehe. Und Ulpian finde dieses Argument überzeugend, auch wenn Ulpian unter Berufung auf die *constitutio* von Antoninus Pius die Frage des Übergangs der Haftung auf die Erben letztendlich wohl anders sehe. Denn die Position des Marcellus sei mit der Entscheidung von Antoninus Pius, in deren Sinne die Verantwortung auch auf die Erben des Magistrats übergehen soll, unvereinbar.[61]

Levy hingegen ist der Ansicht, dass es in der zweiten Hälfte des Straßburger Fragments nicht mehr um die Frage gehe, ob eine *actio subsidiaria* gegen die Erben des *magistratus* geltend gemacht werden könne, sondern wohl eher um die Frage der gemeinsamen Haftung mehrerer Personen.[62]

Levy's Meinung nach sei das Thema der Debatte zwischen Julian und Marcellus in der zweiten Hälfte des Straßburger Fragments (ob die Magistraten als Sponsoren oder Fideiussoren haften sollten) wahrscheinlich nicht die Übertragung der magistratischen Haftung auf die Erben – wie Lenel meint – sondern die Haftung mehrerer Magistrate gewesen. Ihrer Ansicht nach sei die Diskussion der Frage der passiven Erbfolge bereits im vorigen Abschnitt (Fr. 11) abgeschlossen worden. Wäre die Frage der Erbfolge hingegen noch Gegenstand von Fr. 12, so wäre die Position von Julian widersprüchlich, denn wenn er in Fr. 12 für die Analogie von Fideiussoren gegenüber der Analogie von Sponsoren argumentieren würde, dann müsste er, wenn er sie im Hinblick auf die Übertragung der Haftung auf die Erben konsequent verfolgen wolle, für die Haftung der Erben eintreten, nicht dagegen, wie Fr. 11 berichtet.[63]

Levys Meinung nach laute daher die Frage, die in diesem Teil des Straßburger Fragments am wahrscheinlichsten zu beantworten sei – da es normalerweise zwei *magistratus municipales* für die Ernennung von Vormündern zuständig gewesen seien –, wie die Haftung zwischen den Magistraten aufgeteilt sei: nach dem Vorbild der Fideiussoren oder der Sponsoren? Daraus, dass Ulpian anerkennend von Marcellus gesprochen habe, lasse sich nach Levy aber noch nicht ableiten, wie Ulpian entschieden habe, da das Fragment abbreche, bevor die Frage beantwortet sei. Levy hält es jedoch für wahrscheinlich, dass Ulpian der Position von Julian zugestimmt habe, weil sie eher den „modernen" Erwartungen an Äquitas entspreche.[64]

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[59] Vgl. Lenel, 1903a, *op. cit.,* S. 418.; Lenel, 1903 b, *op. cit.,* S. 932.

[60] Die Ansicht von Julian, dass die Erben des *iudex, qui litem suam fecit*, aufgrund des Verhaltens des *iudex* hafteten, wird von Ulpian in einer anderen Fragment in den Digesten zurückgewiesen. (Vgl. Lenel, 1903 b, *op. cit.,* S. 931.) D.5,1,16 *Ulpianus 5 ad ed. „Iulianus autem in heredem iudicis, qui litem suam fecit, putat actionem competere: quae sententia vera non est et a multis notata est." D.5,1,16 Ulpian im 5. Buch zum Edikt. Julian meint, die Klage stehe auch gegen den Erben des Richters zu, der den Rechtsstreit zu seinem eigenen gemacht hat. Diese Auffassung ist unrichtig und von vielen gerügt worden.* (Übersetzung: Behrends, O./Knütel, R./Kupisch, B./Seiler, H. H. (Hrsg.): *Corpus Iuris Civilis. Text und Übersetzung II, Digesten 1-10*, Heidelberg, 1995, S. 472-473).

[61] Lenel, 1903 b, *op. cit.,* S. 931-932.; Lenel, 1903a, *op. cit.,* S. 418.; D.27,8,6.

[62] Levy, E., *Die Konkurrenz der Aktionen und Personen im klassischen römischen Recht*, *I. Bd.,* Berlin, 1918, S. 306-309.

[63] Levy, 1918, *op. cit.,* S. 305-307.

[64] Levy, 1918, *op. cit.,* S. 307-309.

Levy hebt auch hervor, dass die Tatsache, dass es sich bei der *actio subsidiaria*, obwohl sie eine Strafklage sei, um *eadem res* handele und nicht um bei den *actiones poenales* übliche Kumulation, lasse sich damit erklären, dass der Hauptzweck der Klage darin bestehe, den Anspruch auf Entschädigung hinsichtlich der Schaden durchzusetzen, der sich aus der Tatsache ergeben habe, dass *„ita demum competit, si universis excussionis facultatibus tutorum satis ei fieri non potuerit"*,[65] weil die Magistrate keine *sponsores* von den Vormündern verlangten oder ungeeignete *sponsores* akzeptierten. Die *actio subsidiaria* habe im Interesse des Mündels gelegen, und ihr wirtschaftlicher Zweck habe darin bestanden, die Magistrate für die mangelnden oder ungeeigneten *sponsores* verantwortlich zu machen. Und Antoninus Pius habe später – wiederum im Interesse des Mündels – auch die Möglichkeit erwogen, die Magistrate als *fideiussores* haftbar zu machen, um eine beschränkte Haftung der Erben einzuführen.[66]

4. Die Voraussetzungen der Erbenhaftung

Auch in einem anderen Fragment beruft sich Ulpian auf die Konstitution von Antoninus Pius, und stellt eindeutig fest, dass auch die Erben der Magistrate für die Mängel der *datio tutoris* haften müssen:

D.27,8,6

Ulpianus 1 ad ed.

„Quod ad heredem magistratus pertinet, exstat divi Pii rescriptum causa cognita debere dari actionem: nam magistratus si tanta fuit neglegentia, ut omnem cautionem omitteret, aequum est haberi eum loco fideiussoris, ut et heres eius teneatur: si vero cavit et tunc idonei fuerunt et postea desierunt, sicut et ipse magistratus probe recusaret hanc actionem, ita et heres multo iustius. Novissime non alias ait in heredem actionem dandam, quam si evidenter magistratus cum minus idoneis fideiussoribus contrahunt."

D.27,8,6

Ulpian im 1. Buch zum Edikt

Was den Erben eines Magistrats angeht, gibt es ein Reskript des vergöttlichten Kaisers Antoninus Pius, dass nach Voruntersuchung eine Klage gewährt werden muß. Denn wenn die Nachlässigkeit des Magistrats so groß gewesen ist, dass er jede Form von Sicherheitsleistung außer Acht gelassen hat, so ist es gerecht, ihn wie einen Bürgen anzusehen, so dass auch sein Erbe haftet. Hat er sich jedoch Sicherheit versprechen lassen und waren die Bürgen zunächst zahlungsfähig, später aber nicht mehr, dann könne, so wie der Magistrat selbst mit gutem Grund die Einlassung auf die Klage ablehnen würde, der Erbe dies mit weit mehr Recht tun. Schließlich müsse, wie er sagt, die Klage gegen den Erben in jedem Fall gegeben werden, wenn der Magistrat offensichtlich mit nicht hinreichend zahlungsfähigen Personen Bürgschaftsverträge abschließt.[67]

Die Quelle berichtet auch von einigen Voraussetzungen der Erbenhaftung: Die erste Voraussetzung, dass die Klage nur *causa cognita* gewährt wurde,[68] also erst nach der Voruntersuchung, ob das Mündel schon seine Vormünder beklagte, und ob letztere mindestens teilweise insolvent waren.

Weiterhin hafteten die Erben des Magistrats für die Mängel der Vormundsbestellung im Sinne der Quelle nur dann, wenn der Magistrat vorsätzlich oder grob fahrlässig verfahren hat.[69] So etwa, wenn er keine Sicherheitsleistung von dem Vormund verlangte, oder wenn er die Stellung von offensichtlich (*evidenter*) ungeeigneten Bürgen akzeptierte.[70] Wenn aber der Magistrat bei der Vormundsbestellung richtig verfahren hat, zahlungsfähige Bürgen als Sicherheitsleistung verlangte, und sie erst später – unvorhersehbar – insolvent wurden, dann weder gegen den Magistrat selbst, noch gegen seine Erben steht dem ehemaligen Mündel die *actio subsidiaria* zu. Daraus kann darauf gefolgert werden, dass die Erben für die *culpa levis* des Magistrats nicht haften mussten.[71]

Diese Annahme wird auch durch das nächste Reskript von Alexander Severus bestätigt:

C.5,75,2 Imperator Alexander Severus

*„In heredes magistratus, cuius non lata culpa idonee cautum pupillo non est, non solet actio dari." * alex. a. paterno. * <a 224 pp.Iii non. Iul.Iuliano et crispino conss.>*

C.5,75,2 Der Kaiser Alexander an Paternus

Gegen die Erben einer Magistrats-Person, welche damit, dass dem Mündel keine hinreichende Bürgschaft gestellt wurde, sich kein grobes Versehen hat zu Schulden kommen lassen, pflegt eine Klage nicht stattgegeben zu werden.

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65 Levys Rekonstruktionsversuch für die fehlenden Teile des Straßburger Fragments. (Vö. Levy, 1918, *op. cit.,* S. 305).

66 Levy, 1918, *op. cit.,* S. 305-306.

67 Übersetzung: Knütel, R./Kupisch, B./Seiler, H. H./Behrends, O., 2005, *op. cit.,* S. 512-513. Nach Lenel deute die Platzierung der Passage in den Digesten darauf hin, dass es sich in der Tat um die Unterlassung der *cautio rem pupilli salvam fore* und damit um die *actio subsidiaria* handeln könnte, die gegen den Magistrat gewährt werden könne, aber es sei auch möglich, dass es sich um die Haftung des Magistrats gegenüber der Stadt und die Unterlassung der *cautio rem publicam salvam fore* oder die Haftung des Magistrats aus dem *edictum de damno infecti* handele. (Vgl. Lenel, O., Beiträge zur Kunde des Edicts und der Edictcommentare, In: *SZ*. 2., 1881, S. 14–82., S. 26-27).

68 Lenel, 1903 b, *op. cit.,* S. 932.

69 Glück, *op. cit.,* S. 419-420.

70 Jakab hebt hervor, dass nach Ulpian im Falle einer solchen groben Fahrlässigkeit die Regeln der fortschrittlicheren Bürgschaft, der *fideiussio*, hinsichtlich des Übergangs der Verpflichtung des Magistrats auf seine Erben anzuwenden seien. (Vgl. Jakab, 2020, *op. cit.,* S. 201.) Es ist erwähnenswert, dass Carbone darauf hinweist, dass zwar aufgrund dieser Stelle darauf gefolgert werden könnte, dass die *magistratus municipales* eine absolute Verpflichtung zur *satisdatio* gehabt hätten, führten die anderen Quellen seiner Meinung nach zu dem Schluss, dass die Magistrate keine absolute Verpflichtung gehabt hätten, die von ihnen ernannten Vormünder zur *satisdatio* zu zwingen. (Vö. Carbone, 2014, *op. cit.,* S. 136-138).

71 Rudorff, 1834, *op. cit.,* S. 164-165.; Glück, *op. cit.,* S. 420.

Geg. III. non. Iul. (224) unter dem Consulate des Julianus und dem des Crispinus.[72]

Wenn also der Magistrat den Vormund nicht zur genügenden Sicherheitsleistung verpflichtete, aber er es weder vorsätzlich noch grob fahrlässig getan hat, geht seine Haftung auf seine Erben nicht über.

Die nächste zu prüfende Frage ist, was der Grund von dieser Entscheidung sein konnte. Zu der Antwort kann uns die nächste Konstitution näherbringen:

C.5,54,1 Imperatores Severus, Antoninus

*„Heredes tutoris ob neglegentiam, quae non latae culpae comparari possit, condemnari non oportet, si non contra tutorem lis inchoata est neque ex damno pupilli lucrum captatum aut gratiae praestitum sit." * sev. et ant. aa. fusciano. * <a 197 pp. vi id. mart. laterano et rufino conss.>*

C.5,54,1 Die Kaiser Severus und Antoninus an Fuscianus

Die Erben von Vormündern sollen nicht wegen einer Nachlässigkeit, die einer groben Fahrlässigkeit nicht gleichgestellt werden kann, verurteilt werden, außer wenn bereits gegen den Vormund der Prozess begonnen hat und aus dem Schaden des Mündels ein Gewinn gezogen oder aus Gunst einem Dritten etwas geleistet worden sein sollte.

Geg. VI. id. Mart. (197) unter dem Consulate des Lateranus und dem des Rufinus.[73]

In der Konstitution von Septimius Severus wird es festgestellt, dass die Erben des Vormundes in der Regel nur wegen des *dolus* oder der *culpa lata* des Vormunds verklagbar sind.

In Zusammenhang mit dieser Tatsache gibt uns Ulpian die Antwort auf die Frage, warum die Magistrats-Erben nur für *dolus* und *culpa lata* des Magistrats haften mussten:

D.27,8,4

Ulpianus 3 disp.

„Non similiter tenentur heredes magistratuum, ut ipsi tenentur: nam nec heres tutoris neglegentiae nomine tenetur. Nam magistratus quidem in omne periculum succedit, heres ipsius dolo proximae culpae succedaneus est."

D.27,8,4

Ulpian im 3. Buch seiner Erörterungen

Die Erben der Magistrate haften nicht in gleicher Weise wie diese. Denn auch der Erbe des Vormunds haftet nicht wegen Fahrlässigkeit. Der Magistrat tritt zwar in die gesamte Haftung ein; sein Erbe tritt aber nur in die Schuld ein, die der Arglist sehr nahe kommt.[74]

Im Sinne der Stelle müssen also die Erben des Magistrats nur dann haften, wenn dieser mit *dolus* oder mit *culpa lata* verfahren hat, weil die Erben des Vormunds auch nicht für (leichte) Fahrlässigkeit haften müssen.[75]

Diese Entscheidung kann nach meiner Ansicht damit in Zusammenhang stehen, dass die Magistrate – wie es schon erwähnt wurde – wegen der von ihnen begangenen groben Fehler hinsichtlich der Vormundsbestellung so zu haften hatten, als wenn sie die Bürgen der Vormünder wären. Die Verpflichtung des Fideiussors kann aber (wegen der Akzessorietät der Bürgschaft) bekannter weise nicht härter sein, als die Verpflichtung des Hauptschuldners. In diesem Fall kann der Vormund als Hauptschuldner betrachtet werden. So wenn der Erbe des Vormunds nur wegen des *dolus* (oder der *culpa lata*) des Vormundes haften muss, kann auch die Haftung der Erben des Magistrats, als quasi Bürgen auch nicht strenger sein.[76]

Noch vor der Zusammenfassung der Ergebnisse könnte es hinsichtlich des Themas interessant sein, ein Papinian-Fragment zu prüfen, das einen ziemlich komplizierten Sachverhalt über die Erbenhaftung für die Mängel der magistratischen Vormundsbestellung behandelt:

D.46,3,96,1

Papinianus 11 resp.

„Cum pupilla magistratui, qui per fraudem pupillo tutorem dedit, heres extitisset, tutores eius cum adulescente transegerunt: eam transactionem pupilla ratam habere noluit: nihilo minus erit tutorum pecunia liberata nec tutores contra adulescentem actionem nec utilem habebunt, qui suum reciperavit. Plane si adulescens pecuniam restituere tutori pupillae maluerit, rescisso quod gestum est actionem utilem in pupillam heredem magistratus accipiet."

D.46,3,96,1

Papinian im Buch 11. seiner Rechtsgutachten

Als eine Mündelin Erbin der obrigkeitlichen Person, welche einem Mündel auf eine betrügerische Weise einen Vormund bestellt hatte, geworden war, haben die Vormünder derselben mit dem Jüngling einen Vergleich geschlossen; diesen Vergleich hat die Mündelin nicht genehmigen wollen. Nichtsdestoweniger wird sie durch das Geld der Vormünder befreit sein, auch werden die Vormünder gegen den Mündel keine Klage, auch keine analoge, haben, weil derselbe das Seinige wiedererlangt hat. Freilich wenn der Jüngling das Geld dem Vormund der Mündelin hat lieber zurückerstatten wollen, so wird er, nachdem Das, was geschehen war, wieder aufgehoben worden ist, eine analoge Klage gegen die Mündelin, als Erbin der obrigkeitlichen Person, erhalten.[77]

Der Sachverhalt kann folgenderweise rekonstruiert werden: einem Mündel hat ein Magistrat auf eine betrügerische Weise (*per fraudem*) einen Vormund bestellt. Dem Mündel hat die nicht richtige Vermögensverwaltung des Vormundes Schäden verursacht. Der ehemalige Mündel hat nach der Beendigung der

[72] Übersetzung: Haller, *op. cit.* Obwohl Lenel die Stelle sprachlich für einwandfrei hält, verdächtigt er sie bezüglich *„non lata"* mit Interpolation. (Vgl. Lenel, O., Culpa lata und culpa levis, In: *SZ.* 38, 1907, S. 263-289., S. 269.) Binding ist aber für den klassischen Ursprung der Stelle. (Vgl. Binding, K., Culpa. Culpa lata und culpa levis, In: *SZ.* 39, 1918, S. 1-35., S. 16).

[73] Übersetzung: Haller, *op. cit.*

[74] Übersetzung: Knütel/Kupisch/Seiler/Behrends, 2005, *op. cit.,* S. 512.

[75] Vgl. D.26,7,39,6; Kübler, 1918, *op. cit.,* S. 183-185.; Kaser/Knütel/Lohsse, *op. cit.*, S. 381.

[76] Vgl. Kübler, 1918, *op. cit.,* S. 213-214.

[77] Übersetzung: Otto, C. E./Schilling, B./Sintenis, C. F. F. (Hrsg.), *Das Corpus Juris Civilis in's Deutsche übersetzt von einem Vereine Rechtsgelehrter, IV. Bd.,* Leipzig, 1832, S. 767-768.

Vormundschaft von seinem Vormund aller Wahrscheinlichkeit nach Rechenschaft, die Herausgabe des Mündelvermögens und Schadensersatz verlangt, aber der Vormund war mindestens teilweise insolvent. In solchen Fällen stand dem Mündel die *actio subsidiaria* gegen den Magistrat zu, der in Zusammenhang mit der Vormundsbestellung arglistig oder fahrlässig verfahren hat.

In dem Sachverhalt ist aber der Magistrat noch vor seinem Verklagen gestorben. Er hatte eine Erbin, die selber noch unmündig war, und Vormünder hatte. Die Vormünder der Mündelin, als sie von der Forderung des Jünglings erfahren haben, haben einen Vergleich mit dem Jüngling geschlossen, und haben ihm die Summe des Vergleichs auch bezahlt. Die Mündelin wollte aber den Vergleich nicht genehmigen.

Nach Papinians Meinung könne aber die bezahlte Summe von dem Jüngling nicht einmal mit einer *actio utilis* zurückverlangt werden, weil er das bekommen habe, was ihm zugestanden habe. Und die Mündelin sei, unabhängig davon, dass sie den Vergleich nicht genehmigt habe, durch die Leistung der Vormünder von der Obligation mit dem Jüngling befreit worden.

Andererseits stand aber dem Jüngling, der nach der Beendigung der Vormundschaft, und aller Wahrscheinlichkeit nach, auch während des Abschlusses des Vergleichs noch ein *minor* war, die Möglichkeit einer *in integrum restitutio* zu. Er konnte also vom Prätor die *in integrum restitutio* verlangen, und dementsprechend den Vergleich mit den Vormündern der Mündelin anfechten. Wenn er mit dieser Möglichkeit leben wollte, hatte er die Summe, die er als Erfüllung des Vergleichs bekommen hat, den Vormündern der Mündelin zurückzugeben. In diesem Fall entstand ihm aber wegen der *in integrum restitutio* wieder den originellen Anspruch gegen die Erbin des Magistrats. Da – wie es schon erwähnt wurde – der Magistrat damals bei der Vormundsbestellung für den Jüngling arglistig verfahren hat, konnte der Jüngling als ehemaliger Mündel eine Klage, eine *actio utilis* gegen die Erben des Magistrats, in diesem Fall gegen die Mündelin erhalten. Und diese *actio utilis* war aller Wahrscheinlichkeit nach die *actio subsidiaria*, die normalerweise gegen den Magistrat gewährt worden wäre.

5. Fazit

Zusammenfassend lässt sich feststellen, dass die Haftung der Munizipalmagistrate in Zusammenhang mit der Vormundsbestellung ursprünglich höchstwahrscheinlich überwiegend einen deliktischen Charakter hatte, aber der vorrangige Zweck der gegen sie anwendbaren Klage war die Minderung der Schäden der Mündel, die sie infolge der Vormundschaft erlitten haben. Im Interesse dieses Ziels relativierte sich aber die pönale Natur der Klage aus mehrenren Hinsichten. (Man konnte in diesem Fall praktisch von einem Quasidelikt sprechen.) Diesem Vermögensreparationszweck diente unter anderem auch die Gewährung der *actio subsidiaria* auch gegen die Erben der Magistrate. Diese Möglichkeit begründete der Kaiser mit dem Argument, dass die Magistrate für die Mängel der Vormundsbestellung quasi als *fideiussores* des Vormundes zu haften haben.

Bekannter weise konnte die Haftung des Fideiussors nicht härter als die des Hauptschuldners, also in diesem Fall des Vormundes sein. Da aber – wie davon die Quellen berichten – die Erben des Vormundes nicht wegen der *culpa levis* des Vormundes verklagbar waren, traten die Erben des Magistrats auch nur dann in die Schuld des Magistrats ein, wenn dieser mit *dolus* oder mit *culpa lata* verfahren hatte.

Auf der Grundlage der oben Genannten könnte auch die Lehre gezogen werden, dass die Römer die Einzelfälle nicht immer im Rahmen strikter dogmatischen Kategorien beurteilten, sondern manchmal einen flexiblen Übergang zwischen den verschiedenen dogmatischen Kategorien vorsahen, wenn es den praktischen Bedürfnissen des Alltags, und den rechtspolitischen Interessen besser entsprach.[78] So konnte es – im Interesse des Vermögensschutzes des Mündels – möglich werden, mittels der pönalen *actio subsidiaria* Zinsen von dem Magistrat einzufordern oder sogar gegen dessen Erben vorzugehen.

[78] Es ist erwähnenswert, dass laut der wichtigsten Vertreter der ungarischen Interpolationsforschung, Kálmán Személyi, die Hauptantriebskraft der Entwicklung des klassischen Rechts die Rechtspolitik gewesen sei. Seiner Meinung nach sei das klassische Recht eine echte *ars aequi et boni*, in der die wissenschaftliche Kohärenz nicht wie in der byzantinischen Entwicklungsphase „den Rechtssinn ersticke". (Vgl. Személyi, K., Az interpolatios kutató módszer, Pécs, 1929, S. 81).

Hans-Christian Herrmann (Hg.)

Die Strukturkrise an der Saar und ihr langer Schatten. Bilanz und Perspektiven von Montanregionen im europäischen Vergleich

St. Ingbert: CONTE-Verlag, 2020, 354 S., ISBN 978-3-95602-224-1

Der Herausgeber Hans-Christian Herrmann, Leiter des Saarbrücker Stadtarchivs und Vorsitzender des Saarländischen Archivverbandes, eröffnet den Reigen, indem er Strukturkrise und deren Wandel im vergleichenden Überblick erklärt und den Lesern sofort klarmacht, dass der hohe Aktualitätsbezug immer historischen Hintergrund braucht, um gemachte Fehler nicht noch einmal zu begehen. Ralf Banken schaut in den Rückspiegel und skizziert den Montansektor an der Saar seit dem Beginn des I. Weltkrieges bis 1960; dabei stellt er fest, dass das Saargebiet, wie es seit dem Versailler Vertrag zwischen 1920 und 1935 hieß, sodann Saarland seit 1935, sich zwar zunächst stets anpassen konnte, aber später in den verpassten Strukturwandel hineinschlitterte. Das Buch geht über die Grenzen der Saar hinaus und wird damit seinem Untertitel voll gerecht, nämlich eine vergleichende Bilanz und Perspektiven von anderen, vornehmlich benachbarten europäischen Montanregionen zu bieten. So geht Stefan Goch der Strukturwandelbewältigung im Ruhrgebiet nach, wo Städte davon besonders betroffen waren. Eine 40jährige Stahlkrise lässt Pascal Raggi für Lothringen Revue passieren (von 1974 bis 2014), ehe Barbara Hesse den Untergang des lothringischen Kohlebergbaus beleuchtet. Der Strukturkrise möchte Marc Birchen für Luxemburg sogar Katastropheneigenschaft auf nationaler Ebene bescheinigen.

Den vergleichenden regionalen Untersuchungen folgen in dem Buch ausgezeichnet recherchierte und Quellen gestützte Städteanalysen, um für die Saar typische kommunale Bewältigungsversuche zu belegen. Hierzu kommen passend die Stadtarchivare zu Wort: Michael Röhrig bearbeitet die Auswirkungen der Stahlkrise der 1970er und 1980er Jahre auf die Stadtentwicklung Völklingens, bevor Heidemarie Ertle die Geschichte der Erfolge für St. Ingbert benennt. Für Neunkirchen spannt Christian Reuther den Bogen von 1945 bis 1990. Herausgeber Herrmann überprüft am Beispiel von Saarbrücken-Burbach kritisch, ob die Last des Strukturwandels kommunal geschultert werden konnte, widerspricht dabei der Mär von einer uneingeschränkten Erfolgsbilanz und benennt ehrlich die noch heute verbleibenden Defizite.

Die schon in der frühen Bundesrepublik etablierte Mitbestimmung markiert den Unterschied zwischen Lothringen und der Saar. Dies erfahren wir aus dem Aufsatz von Frank Hirsch, dem Leiter des Dokumentationszentrums der Arbeitskammer des Saarlandes. Denn während in Lothringen ein zum Teil gewaltsamer Kampf ums wirtschaftliche Überleben einsetzte, den die Arbeiterschaft schließlich verlor, verliefen die Auseinandersetzungen an der Saar gerade dank der Mitspracherechte positiv, verbunden mit der Mobilisierung von Beschäftigten und der Öffentlichkeit im sozialpartnerschaftlichen Dialog des Interessensausgleichs. Die Gründung der Stahl-Stiftung war für die Saar eine innovative Form der sozialen Krisenbewältigung, die auf andere Regionen nicht unmittelbar übertragbar sind. Kurze Wege und persönliche Netzwerke wirkten auch hier einmal mehr im Saarland. Betriebsräte, die dank der Mitbestimmung Zugang zu internen Informationen besaßen, konnten gut informiert und auf Augenhöhe mitentscheiden.

Aus dieser saarländischen Wirtschafts- und Rechtsgeschichte sollten die Entscheidungsträger lernen und beherzigen, dass die Mitbestimmung auch in Zukunft den Strukturwandel begleiten muss, vor allem bei großen Neuansiedlungen. Mitbestimmung hat sich zudem weiterentwickelt, denn über die gesellschafts-, arbeits- und kommunalrechtliche Mitsprache hinaus muss es verstärkt zu einer umweltrechtlich abgesicherten Mitbestimmung kommen. Der nicht mehr zu leugnende Klimawandel verlangt von den Unternehmen ökologische Verantwortung, die Verwaltung sowie die Menschen, die im Saarland leben, maßvoll einfordern dürfen und sollten.

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Michael Röhrig (Hg.)

Königshof und Landgemeinde. Geschichte Völklingens von den Anfängen bis zur Mitte des 19. Jahrhunderts

St. Ingbert: CONTE-Verlag, 2022, 312 S., ISBN 978-3-939150-12-1

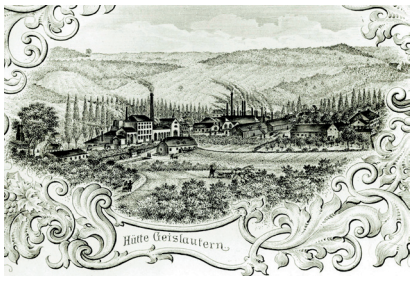
Fulkilo grüßt seinen Königshof – Völklingen ist älter als 1200 Jahre

Das Jahr 2023 bedeutet für das saarländische Völklingen: Vor genau 150 Jahren wurde die Hütte gegründet, mit der die Stadt meistens in Verbindung gebracht wird. Das UNESCO-Weltkulturerbe Völklinger Hütte lebt glücklicherweise diese Tradition weiter. Das Buch von Stadtarchivar Michael Röhrig legt jedoch bewusst den Schwerpunkt auf die Zeit vor Gründung der Hütte, also vor 1873. Es beginnt mit der ersten Erwähnung *Fulcolingas* in einer Urkunde aus dem Jahre 822; fester Grundstein für den 1200. Geburtstag Völklingens.

Der Herausgeber Michael Röhrig, Leiter des Völklinger Stadtarchivs, hat für seine Buchpremiere namhafte Autoren gewinnen können. Thomas Martin und Constanze Höpken, Anne-Katharina Farle, Wolfgang Haubrichs und Hans-Walter Herrmann, Joachim Conrad, Gabriele B. Clemens, Michael Röhrig und Michael Sander sowie Hubert Kesternich führen quellenfundiert, mit sehr gut verständlichen Texten und überzeugenden Karten, Plänen und Fotos durch Völklingens Historie. Von den ersten Spuren, der ersten urkundlichen Erwähnung 822, durch das ereignisreiche Mittelalter, Reformationszeitalter zur Französischen Revolution, der Preußenzeit tief in die frühe Industrialisierung mit Kohle, Eisen und Glas. Völklingens Geschichte lässt sich also nicht nur auf die Hüttenzeit verkürzen, sondern liefert reiche Erkenntnisse in vorindustrieller Zeit. Deshalb ist es goldrichtig, bis in die Stein- und Eisenzeit zurückzugehen, Siedlungs- und Flurnamen aufzuspüren oder Verlauf und Auswirkungen des Dreißigjährigen Krieges darzulegen. Wie wurde Völklingen nach Napoleon unter preußischer Herrschaft verwaltet? Im Hinblick auf das preußische Erbe in Deutschland ein zentrales Thema, siehe die immer wiederkehrende Diskussion um den Erhalt des Namens der „Stiftung Preußischer Kulturbesitz“. Es folgen die Kapitel Saarschifffahrt und Eisenbahn sowie das Schulwesen. Weitere aufschlussreiche Themen sind die Kohlegruben, das Geislauterner Eisenwerk als Zweigwerk der Dillinger Hütte und schließlich die Glasherstellung, noch ehe die Hütte 1873 in Völklingen gegründet wurde.

Weitere wichtige Inhalte

Greifen wir einige Punkte heraus, die zeigen, dass das Buch nicht nur für Völklingen von Interesse ist, sondern die Geschichte des Saarlandes sowie des Grenzraums Lothringen (L'Hôpital, Thionville) betrifft. Im sorgfältig gefertigten Personen- und Ortsregister erkennt man, dass alle Landkreise und die meisten Städte und Gemeinden des Saarlandes Bezüge zu Völklingen aufweisen: der Warndtwald in der Bronzezeit, die spätrömische Fliehburg auf dem „Heidstock“, das Köllertal, Püttlingen und natürlich Dillingen. Das Buch kann themenbezogen gelesen werden und schafft Netzverbindungen zwischen Völklingen und anderen Orten und Personen. Für die Kirchengeschichte interessant ist die Zugehörigkeit vieler Gemeinden wie Schwalbach oder Saarwellingen zu einer „Urpfarrei“ Völklingen über den Heiligen Martin – anschaulich in einer Zeit, in der die Pfarreien erneut auf XXL-Größe



Quelle: Genehmigung Conte-Verlag.

wachsen werden. Nennen wir ferner die in den 1830er Jahren gebaute „chaussierte“ Straße rechts der Saar von Völklingen über Bous bis Saarlouis, an die bis heute das Bouser „Chausseefest“ erinnert. Verblüffende Bezüge zu Homburg, Merzig, Neunkirchen, Saarbrücken und anderen Orten wird der Leser im Buch dankbar entdecken. Dem schließen sich Personen- und Familiennamen an, z.B. Condé, Duhamel, Röchling, Villeroy oder Vopelius. Damit bietet das Buch eine vorbildlich organisierte Saar-Entdeckungstour von A-Z.

Wer mit lauter Stimme das alte *Fulcolingas* ausspricht, merkt sofort die sprachliche Ähnlichkeit, denn Völklingen ist die Stadt, die nach *Fulkilo* benannt ist. Völklingen als ursprünglicher Königshof zur Bewirtschaftung des Waldlandes und Beherbergung des Kaisers gegründet (damals Ludwig der Fromme, Sohn Karls des Großen) bedeutet ausgeschrieben: „Siedlung des *Fulkilo* und der ihm zugehörigen Leute“. So muss es vor 1200 Jahren mit dem Königshof begonnen haben, der sich von der Landgemeinde zur Industriestadt entwickelte.

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Alfred Söllner, Christian Baldus

Römisches Recht

Heidelberg: Jedermann-Verlag, 2022, 305 p., ISBN 978-3-86825-353-5

This is the 6th edition of the deceased Alfred Söllner's textbook on Roman law, revised by Christian Baldus. The structure of the textbook is a combination of a chronological and systematic approach. The introductory section (*Ausgangspunkte*, pp. 11-25) first explains the relevance of Roman law for the present, provides a periodisation and outlines basic information about Justinian's codification and further development. This is followed by an exposition on the individual periods (the archaic period pp. 27–44, the foundations of the republican system pp. 45–88, the pre-classical period pp. 89–116, the classical period pp. 117–184, the post-classical period pp. 185–220, and, as an epilogue, a brief discussion of the further fate of Roman law in Germany pp. 221–228). This approach allows the legal aspects to be better linked to the overall context of the period, reflecting the fact that the textbook is aimed (as stated in the preface on p. 9) not only at students of law but also at those interested in the history of antiquity.

In the individual parts (with the exception of the epilogue, of course), we find explanations of the sources of law, civil procedure, family law and law of succession, property, torts and contracts, with the individual aspects being represented unevenly in each period depending on the degree of their development or changes that occurred during the period. On the other hand, this places higher demands on the student in the sense that if he is interested in the legal regulation of only one particular branch, he must seek information in several places to cover the entire development.

A characteristic feature of the textbook reviewed is its comprehensiveness, manifested in an effort to provide the reader with the broadest context possible, thus introducing the reader not only into "pure" Roman law, but also providing insight into the cultural and social context, while also giving explicit insights into modern law. An example of the former would be a discussion of the influence of Hellenism and rhetoric, as conveyed by Cicero or Quintilian, among others, on jurisprudence, where the speaker should not only be *vir bonus dicendi peritus*, as Cato states (Quint. *Inst*. XII, 1, 1), but shall also have knowledge and experience in the field of law (*peritia und cognitio iuris*, p. 112). Subsequently, the connection between law and rhetoric is illustrated by the well-known and often cited case *causa Curiana*.

The exposition of the textbook is accompanied by numerous citations of legal (and to a lesser extent non-legal) sources, where the German translation is always given in juxta position. Another aspect that contributes to the comprehensiveness of the textbook is that at selected places in the textbook reference to the corresponding provision in the BGB is also made. This approach, which is in principle superfluous from a purely Roman law point of view, can, however, be very useful in illustrating the fact that the current legislation (which, of course, applies not only to Germany) is not only based on Roman law, but its rules are very often similar or even identical.

Considering that the expected reader of the textbook is a first-year student with no previous knowledge of law or Latin (p. 229), it is most useful to include a list of abbreviations (pp. 235–236). This is followed (pp. 237–239) by a chronological overview of selected key events in the Roman Empire (and a few later ones).

A very important part of the textbook is the guidance on how to work with and interpret the source text (pp. 241–243). Here it is very important to start by getting acquainted with the source text itself (p. 241) and then to compare (and correct it if necessary) your interpretation with existing translations. This procedure is based on the self-evident fact (or it at least should be self-evident) that translation is in fact a kind of interpretation *sui generis*. The next step (although the respective steps cannot be strictly separated, as they interact) is to familiarise yourself with the 'metadata' that may be relevant to the interpretation of the case (e.g.

the author of the text, his profession, the focus of his work). Only when all the relevant information has been taken into account can the actual interpretation take place, in which the facts and legal issues need to be identified, and the solutions and hypotheses considered. Only then should the literature (p. 243) on the subject be analysed, which allows a better understanding of the place under study (or to check the accuracy of one's own understanding) – but it is important to study the literature only at the end of the interpretation, i.e. after one has reached an understanding of the text under study on the basis of his own research (otherwise there is a danger of uncritical adopting the conclusions from the literature, which will not contribute to a deeper understanding). The final step suggested is a comparison with current law. This is not, of course, an anachronistic solution of an ancient case, nor an examination of whether the current regulation is a result of a systematic adoption of the Roman law regulation. The purpose of this last step is didactic, since (similarly to the indication of the BGB paragraph numbers in the textbook as mentioned above) it allows a more illustrative understanding of the parallel approaches and tendencies of Roman and modern law. For practical purposes, there is also an online bonus material by Robin Repnow (linked on p. 7), which provides a 38-page exegesis of a sample case.

On pp. 247–268 there are well-organised sources, names and subject indices, followed (pp. 269–305) by a very extensive list of literature. The list of literature (which was updated for the 6th edition) includes not only monographs but also scientific articles, not only in German but also in the other main languages (Italian, English, French, Spanish), which are grouped correspondingly to the chapters and subchapters of the textbook reviewed. It therefore allows the reader to find very easily further information on any of the problems under study, which can be a valuable tool not only for study purposes but also as a first step when writing a thesis.

From the above mentioned information, it is evident that the main advantage of the reviewed textbook is its complexity combined with clarity, where on the one hand, a relatively large amount of information is provided, but it is very clearly structured, which allows easy orientation for the reader without previous experience, but at the same time it is possible to penetrate directly into the essence of the problem under study thanks to numerous references to sources and a systematically structured list of literature. The comprehensiveness of the textbook is reflected, among other things, in the emphasis placed not only on the legal regulation itself, but also on the contemporary context; equally important are the instructions on the procedure for the exegesis of the source text, the online accessible guide for case analysis, and the numerous explanatory notes on the concept of the textbook on pp. 229–235, as well as references to current legislation.

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Ulrike Babusiaux, Christian Baldus, Wolfgang Ernst, Franz-Stefan Meissel, Johannes Platschek, Thomas Rüfner (Hrsg.)

Handbuch des Römischen Privatrechts

Tübingen: Mohr Siebeck, 2023, xcvi+3707 p. (2 Bände + Register), ISBN 978-3-16-152359-5

In an era characterized by fervent discussions surrounding the integration of artificial intelligence into the realm of education, a strong and influential perspective has emerged from the rich European continental legal tradition. At the outset of 2023, Mohr Siebeck publishing house released a remarkable opus titled *Handbuch des Römischen Privatrechts* (*Compendium of Roman Private Law*). This work was curated by eminent scholars specializing in Roman, civil, and comparative law hailing from the universities of Zurich (Ulrike Babusiaux), Oxford and Zurich (Wolfgang Ernst), Heidelberg (Christian Baldus), Vienna (Franz-Stefan Meissel), Munich (Johannes Platschek), and Trier (Thomas Rüfner).

The notable strength of this endeavour lies in its approach to delegate the composition of individual sections of the publication to an international consortium of Roman law scholars. This approach ensured that each topic was not only explored by experts in the respective discipline but, more importantly, by specialists in the specific subject matter. In a concise *Preface*, the Editors expressed their gratitude to this transnational and multi-generational group of as many as 64 Authors. They also extended their appreciation to the numerous colleagues who actively participated in various stages of the editorial process, from the initial concept to manuscript editing and the creation of comprehensive indices. Furthermore, the Editors acknowledged the exceptional support rendered by the Mohr Siebeck publishing house and paid tribute to those Authors and Contributors who regrettably passed away before witnessing the publication's fruition. Unfortunately, the Editors did not disclose the precise duration of this monumental undertaking, which, by all indications, spanned several years. The *Handbuch* consists of three substantial volumes (XCVI+3707 pages in total), complete with meticulously prepared subject index, source index, and literature references (*Register*). In many ways, it is hard not to draw parallels with the three-volume Justinian Codification, even though this compendium does not encapsulate the origins of Roman law but, instead, delves into the extensive body of knowledge that it comprises.

The work maintains a consistent structure in terms of chapter and page numbering throughout its entirety. The substantive volumes are divided into four chapters, which are contained within Volume One, and the fifth chapter, in Volume Two. Volume

three contains the previously mentioned *Register*. This systematic approach distinctly embodies the essence of Roman legal tradition. Many studies and textbooks on ancient Roman law typically follow the 19th-century systematic developed by the Pandectists, which divides the private law into five parts: general part, obligations, property, family, and inheritance law. In contrast, the Editors here have adopted an institutional framework (slightly modified for the purpose of this work) that draws inspiration from Gaius' tripartite subdivision of legal material, categorizing it into the law relating to persons (*personae*), things (*res*), and actions (*actiones*). Consequently, the *Handbuch* comprehensively covers Roman private law and civil procedure, encompassing the earliest legal sources up to the era of Justinian. Furthermore, it sheds light on late republican and imperial jurisprudence within the context and perspective of procedural law. A notable feature of this work is the inclusion of epigraphic and papyrological sources, along with the presentation of provincial laws.

The initial chapter provides introductory discussions and emphasizes the historical development of the sources of Roman private law, ranging from the Roman Republic to the Justinian era, and their distinctive features. This section was authored by (in the order of the issues presented): Michel Humbert, Pierangelo Buongiorno, Emanuele Stolfi, Lorena Atzeri, Peter Pieler †, Ulrike Babusiaux, Detlef Liebs, and José Luis Alonso Rodríguez.

The second chapter, titled *Zivilprozess und Handlungsformen* (*Civil procedure and forms of action*), provides an in-depth examination of Roman trial and the evolution of legal actions This chapter employs a chronological approach to delve into the various forms of Roman civil procedure, taking into account its phases of transformation. Topics cover the *legis actiones* (§ 9; Mario Varvaro), formulary procedure (§ 10-14; Johannes Platschek, Ernest Metzger, Philipp Klausberger, Constantin Willems), as well as the *cognitio* procedure (§ 15; C. Willems). Within the realm of the forms of actions, which encompass legal acts, declarations of intent, and contracts, the following subjects are presented: *in iure cessio* and related (§ 16; Guido Pfeifer), actions effected through a formal conveyance *per aes et libram*, by bronze and scales: *mancipatio*, *nexum*, *solutio per aes et libram* (§ 17; G. Pfeifer), *testamentum per aes et libram* and other forms of disposing of property on death (§ 18; Thomas Rüfner), *confarreatio* and *conventio in manum* (§ 19; Verena Halbwachs), oaths, stipulation (§ 20-21; Thomas Finkenauer), as well as contracts *re*, *litteris*, *consensu* (§ 22-24; Peter Gröschler), and *recepta* (§ 25; J. Platschek).

The third chapter, *Personen* (*personae*), is subdivided into two subchapters: *Person und Handlungsfähigkeit* (*Person and Capacity*) and *Hausverband* (*Familia*). In the former, it encompasses discussions on citizens and peregrines, matters related to enslavement and the right of return, known as *ius postliminii* (§ 26-27; Francesca Lamberti), infamy (§ 28; C. Willems), the legal status of women (§ 29; Evelyn Höbenreich), cases involving limited legal capacity (§ 30; Jakob Fortunat Stagl and Giorgia Maragno), guardianship and curatorship (§ 31; Susanne Hähnchen), and substitution (§ 32; Bastian Zahn). The second subsection, in turn, comprises the following topics: marriage and other forms of cohabitation (§ 33; V. Halbwachs), *filii familias* (§ 34; F. Lamberti), matrimonial property regime (§ 35; J.F. Stagl), issues regarding slaves (§ 36; Richard Gamauf), and freedmen (§ 37; Carla Masi Doria).

In the fourth chapter, *Vermögensrecht* (*res*), the initial two subsections are dedicated to ownership and possession (*Eigentum und Besitz*) and limited real rights (*Beschränkte dingliche Rechte*), while the third subsection is focused on inheritance law (*Erbschaft und Erbgang*). The first subsection covers ten thematic blocks, including: objects of law and types of things (§ 38; Ralph Backhaus), the concept of property (§ 39; Fabian Klinck), *possessio civilis* (§ 40; F. Klinck), *occupatio* (§ 41; Jean-François Gerkens), *accessio, specificatio, commixtio, confusio* (§ 42; Anna Plisecka), formal forms of conveyance of ownership (*mancipatio, in iure cessio*), and informal *traditio* (§ 43; G. Pfeifer), *usucapio* (§ 44; F. Klinck), *causa* as a prerequisite for acquisition (§ 45; G. Pfeifer), *fiducia* (§ 46; Dietmar Schanbacher), and joint ownership (§ 47; Wojciech Dajczak).

The subsection on the *iura in re aliena* discusses the right of pledge in the form of *pignus* and hypothec (§ 48; D. Schanbacher), the right to use another's property (*ususfructus*, *usus*, *habitatio* - § 49; Riccardo Cardilli), other servitudes (§ 50; Maria Floriana Cursi), and emphyteusis, surface law, and related rights (§ 51; Federico Battaglia). The last subsection in this chapter covers the capacity to inherit, testate (§ 52-53; T. Rüfner), and intestate succession (§ 54; Markus Wimmer), the complaint of undutiful will (*querela inofficiosi testamenti* - § 55; M. Wimmer), the acceptance, acquisition, and rejection of an inheritance (§ 56; Benedikt Strobel), inheritance under praetorian law (*bonorum possessio* - § 57; U. Babusiaux), as well as the heir's liability for inheritance debts (§ 58; Wolfram Buchwitz).

The second volume of the work was devoted exclusively to the law of actions (*actiones*), that last of the Gaian scheme, which is discussed in more than 1,500 pages. Needless to say, this strongly emphasizes the nature of Roman law. The volume is divided into five subsections, within which individual *actiones in rem* - § 59-66 (Ch. Baldus, M. Wimmer, José-Domingo Rodríguez Martín, Johannes Michael Rainer, J. Platschek, Francisco Javier Andrés Santos, Lisa Isola), *actiones* containing *adiudicatio* in the procedural formula - § 67 (Amelia Castresana Herrero), *actiones in personam* - § 68-100, liability of persons in *potestas* of *pater familias* - § 101-105 (Alphonse Bürge, R. Gamauf, M. Pennitz), and finally *exceptiones* and other measures - § 106-112 (J. Platschek, P. Gröschler, Tommaso dalla Massara, Birgit Forgó-Feldner, Hans-Peter Benöhr†, Pascal Pichonnaz). The most extensive, for obvious reasons, Subchapter III is further divided into five smaller editorial units devoted, respectively, to *actio* and *obligatio* (§ 68; Adolfo Wegmann Stockebrand), *condictiones* (§ 69-77; J. Platschek, Iole Fargnoli, M. Varvaro, Philipp Schmieder, T. Finkenauer, T. Rüfner, C. Willems), *bonae fidei iudicia* (§ 78-90; F.-S. Meissel, Anna Novitskaya, W. Ernst, Paul J. du Plessis, Susanne Heinemeyer, U. Babusiaux, Tom Walter, Philipp Scheibelreiter, D. Schanbacher, J.F. Stagl), delictual and quasi-delictual actions (§ 91-96; J. Platschek, Bénédict Winiger, Martin Pennitz, T. dalla Massara, Alessandro Hirata, P. Klausberger), and protection of inheritance claims (§ 97-100; Sebastian Lohsse, T. Rüfner, David Rüger, D. Schanbacher).

The layout, editorial design, and colour scheme of the volumes bear a striking resemblance to another publication from Mohr Siebeck: *Historisch-kritischer Kommentar zum BGB* (*Historical-critical Commentary on the BGB*). Also, both works share an almost identical internal structure. Their fundamental systematic unit consists of paragraphs, each preceded by a comprehensive table of contents and an extensive bibliography. Within individual paragraphs, there are boundary numbers and an extensive apparatus. This similarity carries many advantages. It enables readers to gain a comprehensive understanding of the evolution of private law, from ancient Rome to modern regulations contained in the BGB. Furthermore, they provide a historical and dogmatic legal analysis of the economic, social, and cultural factors that have shaped German civil law. By referencing the tradition of Roman law, both publications reveal the foundations of German private law, thereby delineating the regulations of other European (and not only) legal systems [1].

This context raises questions about the intended audience for this work. The title *Handbuch* may appear somewhat misleading in the given context, especially that translating the title *Handbuch des Römischen Privatrechts* as a *textbook on Roman private law* might be (almost) equally fitting, although the work's scope exceeds that of a traditionally understood position of this kind. Viewed as an academic textbook, the *Handbuch*'s ideal audience consists of advanced-level students, such as doctoral students, with a specific interest in Roman law or legal-comparative studies, specializing in legal history. In such cases, the compendium would serve as a crucial source of knowledge, a tool for in-depth exploration of the legal foundations of Western Europe, and an inspiration for advancing discussions in this field. The *Handbuch* serves as an excellent starting point for comparative research, catering to both early-career scholars and more experienced researchers. It not only presents the current state of research, encompassing the vast and expanding literature on the subject, but also serves as a guidepost for exploring a range of research topics, not necessarily limited to antiquity. Consequently, the work's audience extends beyond researchers of Roman law, and includes historians of antiquity, classical philologists, scholars from various humanities and social sciences disciplines, as well as legal scholars in general. In essence, the *Handbuch* can serve as a valuable reference for conducting advanced international research, spanning both Roman law and interdisciplinary studies.

In an era where legal history subjects are gradually being removed from curricula of legal studies, and debates surrounding artificial intelligence are increasingly dominating discussions in the field of law, undertakings like the *Handbuch* carry a profound significance. They represent a steadfast and unwavering message to those who may have lost touch with their cultural roots. It is worth noting that even the choice of language for this publication serves as a reminder. The German language is a perfectly natural choice for discussing legal history, especially Roman law and its impact on Western Europe. It is reassuring that the Authors of this endeavour have resisted the trend that is eroding and diluting national legal languages at an alarming pace, and have chosen not to publish this work in English.

Addressing what has been occupying the thoughts of legal practitioners, theorists, and historians lately: while artificial intelligence is certain to find applications in various aspects of law, such as data analysis or the automation of processes, we should keep in mind that the study of Roman law focuses on an entirely distinct facet. It remains vital for understanding foundational legal principles, the legal-historical context, and, above all, the rich legal heritage of Europe. Hence, as we move forward, we can do so with unwavering confidence, for the pivotal role of Roman law in shaping a modern and enlightened world remains beyond dispute.

Dagmara Skrzywanek-Jaworska,* Joanna Kulawiak-Cyrankowska*

[1] A somewhat similar endeavour to reconcile these diverse perspectives has been accomplished by Polish Romanists Dajczak, W. –Giaro, T. – Longchamps de Bérier, F., *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa, 2014. In this work, the authors skilfully guide readers through a wealth of material pertaining to the history of private law, ranging from Roman law to contemporary European legal systems.

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Tagungsbericht: Ausnahme und Vielfalt im Recht der Vormoderne Münster 7.–9. September 2023

Von 7. bis 9. September 2023 veranstaltete das Käte-Hamburger-Kolleg in Münster die von Gregor Albers und Peter Oestmann organisierte Tagung „Ausnahme und Vielfalt im Recht der Vormoderne"; die zweite in einer Serie von drei Tagungen zu Ausnahme und Vielfalt. Die erste, genau ein Jahr vorher, hatte sich mit Ausnahme und Vielfalt in der Antike beschäftigt, die zweite Tagung widmete sich demselben Thema im Recht der Vormoderne.

Nach einer Einleitung von Gregor Albers (Münster) behandelte Thomas Rüfner (Trier) im ersten Vortrag der Tagung die *clausula rebus sic stantibus*, die – wie er ausführte – Platz für Ausnahmen bietet, die man nicht benennen bzw. „domestizieren" kann. In weiterer Folge stellte Rüfner vier Fälle (überliefert von Iason da Mayno, Jacobus Menochius, Benedikt Carpzov und Johann Heinrich von Berger) aus dem späten Mittelalter und der Frühen Neuzeit vor, in denen jeweils auf die *clausula rebus sic stantibus* Bezug genommen wurde.

Zwei der Fälle bezogen sich auf Eide und zwei auf rechtskräftige Gerichtsentscheidungen. Rüfner wies in seinem Resümee darauf hin, dass die *clausula rebus sic stantibus* somit in den vier ausgewählten Fällen nicht – wie heute typischerweise – im Zusammenhang mit der Vertragsauslegung angewendet wurde, sondern auf Fallkonstellationen, für die sie heute nicht mehr relevant ist – bei Eiden, weil sie als Verpflichtungsgrund keine Rolle mehr spielen, bei rechtskräftigen Urteilen, weil es heute andere Instrumente gibt, um spätere Geschehnisse zur berücksichtigen.

Sebastian Lohsse (Münster) behandelte „die Ausnahme als Kehrseite der Regelbildung bei den Glossatoren". Er hielt zunächst fest, dass Justinian die Widerspruchslosigkeit der Digesten postuliert hatte, und dass es das Arbeitsprogramm der Glossatoren war, Widersprüche in den Digesten als scheinbar aufzulösen. Lohsse wies darauf hin, dass sich das moderne Schrifttum dazu primär mit Darstellungsformen beschäftigt.

Sein Vortrag thematisierte demgegenüber die Dogmatik von Ausnahmen. Der Ausgangspunkt dafür war Paulus' Erklärung von *regulae* in D 50, 17, 1. Diese Stelle war für die Glossatoren der Anlass, sich theoretisch mit *regulae* zu beschäftigen. Dabei thematisierten sie das Verhältnis zwischen Regel und Begründung, jenes von Regel und Recht und schließlich das Verhältnis von Regel und Ausnahme. Lohsse stellte die unterschiedlichen Auffassungen einzelner Glossatoren zu diesen Bereichen dar und kam zum Schluss, dass Ausnahmen für die mittelalterlichen Juristen eine wunderbare Möglichkeit waren, die Einheit in der Vielfalt zu erhalten.

Guido Rossi (Edinburgh) nahm das Werk von Socinus über 445 Regeln und ihre Ausnahmen zum Ausgangspunkt seines Vortrags über „Rules and Exceptions to the Rules in Medieval Jurists". Er erläuterte allerdings, dass dieses Buch wenig geeignet ist, sich dogmatisch mit dem Verhältnis von Regeln und Ausnahmen in der mittelalterlichen Jurisprudenz zu befassen, da es nichts anderes ist als eine Auflistung der Regeln und ihrer Ausnahmen („a telephone list").

Rossi beschrieb Ausnahmen als Fälle, in denen aus Gründen der *aequitas* die *ratio* der Regel nicht anwendbar war. Das war aber nur bei *aequitas constituta*, im Recht niedergelegter *aequitas*, möglich, woraus sich wiederum ergab, dass Ausnahmen nicht durch Analogie ausgedehnt werden konnten. Deshalb – so schloss Rossi – war Socinus' Buch so populär. Da Ausnahmen nicht analog angewendet werden konnten, war die Kenntnis aller anerkannten Ausnahmen der einzige Weg, die Regeln richtig anzuwenden, und diese Kenntnis vermittelte Socinus' „telephone list".

Der Vortrag von Salvatore Marino (Neapel) widmete sich der Geschichte des Begriffs Privilegium. Dabei betrachtete er zunächst die römische Antike, in der Cicero in *de legibus* ein Privileg als einen gesetzesähnlichen Rechtsakt verstanden hatte, der sich aber nicht an die Allgemeinheit richtete. Die Spätantike beschrieb Marino als Flaschenhals, in dem sich *privilegium* gegenüber anderen konkurrierenden Begriffen durchsetzte, wies aber darauf hin, dass die klassische Vielfalt von Begriffen zwar verdeckt wurde, aber trotzdem weiterwirkte.

Für das Frühmittelalter konstatierte Marino eine „Physikalisierung" der Begriffe. So wie mit *beneficium* nunmehr das Lehen als Land bezeichnet wurde, wurde *privilegium* auch zur Bezeichnung für die Urkunden selbst – und nicht nur für die darin verbrieften Sonderrechte. Im zweiten Jahrtausend wurde schließlich – so Marino – die begriffliche Vielfalt der klassischen Antike wiedergewonnen, die er dann umfassend darstellte.

Susanne Lepsius (München) widmete sich der Herrschaftsausübung durch Privilegienerteilung am Beispiel des römische-deutschen Königs und Kaisers im Spätmittelalter. Dabei behandelte sie zunächst die Charakteristika mittelalterliche Privilegien sowie die zeitgenössische Terminologie, um sich dann dem Inhalt der Privilegien zu widmen. Typische Inhalte der mittelalterlichen Privilegien waren Schenkungen, Lehenserneuerungen und Einzelbegünstigungen wie etwa die Legitimation unehelicher Kinder, das Recht, Notare zu ernennen, die Verleihung der *venia aetatis*, die Aufhebung der Infamie oder Standeserhöhungen.

Peter Oestmann (Münster) behandelte Appellationsprivilegien im Alten Reich. Dabei gab er zunächst eine Typologie dieser Privilegien und analysierte dann je zwei Beispiele für unbeschränkte (Kurköln, Kurhannover) und für beschränkte

Privilegien (Lübeck, Frankfurt). In den ersten beiden Fällen wurden die Privilegien als Gegenleistung dafür erteilt, dass die privilegierten Territorien eigene Rechtsmittelgerichte errichtet hatten bzw. deren Errichtung zusagten. Bei den beschränkten Privilegien, die sich einmal auf Eintragungen im Stadtbuch und einmal auf Bauangelegenheiten bezogen, gab es keine derartige Gegenleistung.

Die Voraussetzung für unbeschränkte Appellationsprivilegien war somit die Einrichtung eigener Rechtsmittelgerichte, die den Kameralprozess anwendeten. Damit führten die unbeschränkten Appelationsprivilegien zur Verbreitung des Kameralprozesses. Oestmann hielt daher in seinem Resümee fest, dass paradoxerweise gerade die unbeschränkten Appellationsprivilegien nicht nur zu formellen Abkoppelung der territorialen Gerichtsbarkeit, sondern auch inhaltlich zu einer größeren Einheit durch den Kameralprozess führten, während die beschränkten Privilegien inhaltlich eine stärkere Vielfalt beibehielten.

Tobias Schenk (Wien) nahm, das Zitat „So sind Fürsten und Herren auch ihrer Diener und Räthe Sklaven …“ zum Aufhänger für „praxeologische Beobachtungen zur Privilegienvergabe am Beispiel des kaiserlichen Reichshofrats“. Er hielt ein Plädoyer dafür, bei der Erforschung historischer Behördenentscheidungen auch die Praxis der Entscheidungsfindung zu berücksichtigen. Dazu genüge mehr Empirie alleine nicht, vielmehr sei ein theoriegeleiteter Zugang nötig.

Dass es zwischen formaler und tatsächlicher Entscheidungsfindung große Unterschiede gab, zeigte Schenk dann anhand zweier konkreter Fälle, für die es eine Überlieferung zu den tatsächlichen Hintergründen der Entscheidung gibt. Als Fazit stellte er bei Studien zur Privilegienerteilung einen Mangel an der prozeduralen Analyse der kollektiven Rechtsfindung fest und empfahl die historische Organisationsforschung als geeigneten interdisziplinären Rahmen, um diesen Mangel zu beheben.

Gregor Albers (Münster) beschäftigte sich mit den Überlegungen von Samuel Stryk zur Kollision von Privilegien, wozu er dessen *Disputatio Juridica de Jure Privilegiati contra Privilegiatum* aus dem Jahr 1684 vorstellte. Entsprechend der Struktur von Stryks Werk behandelte Albers zunächst dessen Idee, dass sich Privilegien gegen den Privilegierten umkehren konnten, dann das Aufeinandertreffen mehrerer Privilegien bei Geschäften unter Lebenden, bei letztwilligen Verfügungen und vor Gericht.

Das Fazit war, dass Stryk keine einheitlichen Regeln für die Kollision von Privilegien aufstellte, weil auch die Privilegien selbst nicht einheitlich waren. Albers unterschied zwischen Privilegien als Rechtssatz, etwa individuell von Fürsten verliehenen Privilegien, und Privilegien als Rechtsposition, wie abstrakten gesetzlichen Privilegien. Im ersten Fall ging es um eine Normenkonkurrenz, im zweiten um einen gerechten Ausgleich zwischen den Privilegierten.

Tilman Repgen (Hamburg) widmete sich in seinem Vortrag über die „Beweislast für Einreden und Ausnahmen“ dem Begriff der Einrede in Azos *summa codicis*. Er stellte Azos Systematisierung dar (Einreden im weiteren und im engeren Sinn, *exceptiones perpetuae et peremptoriae* und *exceptiones temporales et dilatoriae*) und behandelte dann dessen drei Regeln zur Beweislast (die Beweislast ergibt sich aus der Prozessrolle, Negatives kann nicht bewiesen werden, Vermutungen verschieben die Beweislast).

Zum Abschluss zog Repgen eine Parallele von der juristischen Einrede zur außerjuristischen Ausrede und kam zu dem Fazit, dass jede Forderung in irgendeiner Weise die Handlungsfreiheit des in Anspruch Genommenen beschränkt und dass Verteidigungsmittel wie Einreden diese Freiheit schützen.

Maciej Mikula (Krakau) widmete sich „Ausnahmen vom sächsich-magdeburgischen Recht im Beweisrecht in polnischen Städten“. Dazu hielt er zunächst fest, dass das Strafverfahren des 16. bis 18. Jahrhunderts gut erforscht ist, das Zivilverfahren hingegen nur bruchstückhaft. Dann erläuterte er die Quellen des sächsisch-magdeburgischen Rechts in Polen und zeigte etwa am Beispiel von Eiden wie das sächsisch-magdeburgische Recht in Polen adaptiert wurde.

Schließlich behandelte Mikula den Entwurf eines *Processus iuris civilis crocoviensis*, der in zwei Fassungen von 1544 und 1546 überliefert ist und wegen Konflikten zwischen Patriziern und Bürgern scheiterte. Er zeigte, dass es für die Unterschiede zwischen dem sächsisch-magdeburgischen Recht und den beiden Fassungen des Entwurfs kein einheitliches Schema gibt.

Marie S. Kim (St. Cloud/Münster) gab in ihrem Vortrag zu „Sources of Law and the Monarchy in Early Modern France“ einen breiten und weiten Überblick zum Begriff *legal pluralism* wie auch zu den frühneuzeitlichen französischen Rechtsquellen.

Heikki Pihlajamäki (Helsinki) widmete sich in seinem Vortrag über „Local Statutes as Exceptions in Spanish Colonial Law“ einem Spezifikum des spanischen Kolonialrechts, dem *obedezcase pero no se cumpla*. Diese im Mittelalter in Kastilien entwickelte Formel wurde in den spanisch-amerikanischen Gebieten angewendet, um königliche Anordnungen nicht anzuwenden, wenn sie gegen die dortige Auffassung von Naturrecht oder das dortige Gewohnheitsrecht verstießen oder sonst unpraktikabel waren (etwa wenn ein König ernannter Amtsträger für seine Position ungeeignet schien).

Die Tagung war hervorragend organisiert, die Vorträge waren ganz überwiegend ebenso gehaltvoll wie die anschließenden Diskussionen. Auch die die Zeitdisziplin war bemerkenswert – zwei diesbezügliche Ausreißer wurden durch die späteren Vortragenden bzw. die Vorsitzenden geschickt ausgeglichen. Somit ist die Vorfreude auf die folgende Tagung zu „Ausnahme und Vielfalt im Recht im 19. Jahrhundert“ groß.

Christoph Schmetterer*

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Stephan Toscani: Jurist, früherer Minister und Landtagspräsident, nunmehr Träger „Professor Alfred Diwersy Ehrenpreis“

Quelle: Genehmigung CDU-Landtagsfraktion Saarland.

Als Freund und Förderer der Pfadfinder im Saarland (F+F Saar) ist es mir eine helle Freude, ein Grußwort für den „Prof. Alfred Diwersy[1] Ehrenpreis“ beizutragen, der zum ersten Male am 30. März 2023 in Saarlouis-Roden an Stephan Toscani verliehen wird. Dabei geht es um das publizistische Werk Stephan Toscani, das die europäische Rechtsgeschichte geradewegs „atmet“ und wiederum „beatmet“.

1. Engagement gegen das Vergessen und für öffentliche Erinnerungsarbeit

Der Preisträger erfüllt vollends die Ausschreibungs- und Verleihungskriterien, denn es ist ein Preis, „mit dem wir zukünftig Personen des öffentlichen Lebens ehren wollen, die sich in herausragender Weise für saarländische Pfadfinderinnen und Pfadfinder einsetzen.“ Stephan Toscanis Engagement für seine öffentliche Erinnerungsarbeit hinsichtlich der Ausgrenzung und Ermordung von jüdischen Deutschen, insbesondere auch Pfadfindern, während des NS-Terrors, wird damit gewürdigt[2]. Die Erinnerung an die Schoa, gleichfalls das Engagement Stephan Toscanis in Erinnerung an die in Saarlouis geborene Esther Bejarano, belegt Toscanis öffentliches Bekenntnis, das für ihn nicht bloß Anwesend-Sein, sondern das Ausfüllen der Erinnerungsarbeit in Wort und Tat ist[3]. Für diese Kultur steht der „Vater“ des Preises, der Merziger Pfadfinder Alfred Diwersy (1930-2017), der in seiner politischen wie verlegerischen Tätigkeit den Mut hatte, auch solche Bücher zu verantworten. Neben der Rehabilitierung von Gustav Regler[4] in Merzig im Jahre 1983 schrieb Diwersy in der „Saarheimat“ 23/1979: Aus der Geschichte der jüdischen Gemeinde Merzig. Er verlegte 2012 in seinem Verlagshaus „Gollenstein“ in Merzig: „Reb Mosche und die jüdische Geschichte der Stadt“[5].

Alfred Diwersy war ein Mann der Bücher sowohl als Autor und als Verleger. Als Begründer der Edition Karlsberg (1988–1995) und als Chef des Gollenstein-Verlages (1993 bis 2012) brachte er an die 400 Bücher heraus – Landschafts- und Kulturgeschichtliches, Mundart, Krimis, Kochrezepte, Neuauflagen historisch bedeutender Publikationen mit Saarland-Bezug, politische und kulturpolitische Analysen, Philosophisches, Lyrik, Romane, schreibt Inge Plettenberg im Literaturland Saar[6]. Die Aussöhnung mit den ins Exil getriebenen Merzigern und Merzigerinnen jüdischen Glaubens bedeutete Diwersy zeitlebens sehr viel, denn bei ihm bekamen die „verstoßenen Söhne und Töchter der Stadt“ ihre Namen. Wie Diwersy sind seinem Nachfolger „im Geiste“ die Lebensgeschichten sehr wichtig. Die Versöhnung in der Erinnerung ist beiden gemeinsam. In der politischen Arbeit legte Stephan Toscani, der saarländischer Finanz-, Europa-, Innen- und Justizminister war, darauf viel Gewicht, und aus seiner Zeit als Präsident des saarländischen Landtags wissen wir dies. So war er zugegen und ergriff das Wort bei beiden Aktionen zur Erinnerung an die verfolgten und ermordeten jüdischen Pfadfinder und Pfadfinderinnen in St. Ingbert (2022) wie in Saarlouis (2019).

Religionen wie das Juden- und Christentum müssen sich aufgrund des Schöpfungsgedankens uneingeschränkt für Humanität stark machen, im Verbund mit den Pfadfindern, denn der nachhaltige und pflegliche Umgang mit der Natur gehört zum Kern von Pfadfinden, so Hans Enzinger, der geschäftsführende Vorsitzende der Freunde und Förderer der Pfadfinder Saar, der ferner sagte: „Pfadfinden ist politisch“[7]. Ja, hier sollten wir alle Pfadfinder sein und den Pfad gegen den „Hass“ und gegen den Antisemitismus in sozialen Medien, aber auch im nicht-virtuellen Leben einschlagen. Alfred Diwersy hat es uns vorgelebt. Stephan Toscani verleihen wir

1 https://www.literaturland-saar.de/personen/alfred-diwersy/ [24. 03. 2023], von Inge Plettenberg.
2 Siehe zur letzten Veranstaltung in St. Ingbert unseren Beitrag: Pfadfinden und Recht an der Saar. Rede anlässlich der Gedenkfeier zur Erinnerung an die jüdischen Pfadfinder in St. Ingbert/Saar. In: Journal on European History of Law 13, 2/2022, S. 163-165.
3 Siehe: Gergen, Der Esther-Bejarano-Platz in Saarlouis: Eine Dokumentation wider das Nazi-Unrecht. In: Journal on European History of Law 14, 1/2023, S. 241-248.
4 https://www.literaturland-saar.de/personen/gustav-regler/ von Inge Plettenberg / [24. 06. 2023].
5 Herausgegeben zusammen mit Hans Herkes.
6 https://www.literaturland-saar.de/personen/alfred-diwersy/ [24. 06. 2023].
7 Siehe die Rede des Vorsitzenden F+F Saar, in der Dokumentation unter https://s6851cfb9df78c9fb.jimcontent.com/download/version/1648654871/module/9328816576/name/Gedenkstunde%20MAKKABI%20HAZAIR.pdf – dort Seite 25 [11. 04. 2022].

den Professor Diwersy dedizierten Preis, um zu unterstreichen, dass sich der Preisträger genau hier für starkmacht und seine Stimme erhebt.

2. Im Geiste des Verlegers Diwersy: Der nicht verlegene und themenstarke Publizist Stephan Toscani

Mir neu und gleichsam faszinierend ist die publizistische Seite des Stephan Toscani. Insofern knüpft er an die meinungsstarke Verlagstätigkeit von Alfred Diwersy an. Allein 30 Beiträge erscheinen in der Karlsruher Virtuellen Bibliothek unter dem Namen von Stephan Toscani, so noch als Präsident des saarländischen Landtages bzw. Herausgeber der Schrift „Parlamentarische Gedenkstunde des Landtages des Saarlandes, aus Anlass des Gedenktages für die Opfer des Nationalsozialismus am 27. Januar 2022“, erschienen in Saarbrücken, Landtag des Saarlandes, im April 2022.

Das Interview von Albrecht Herold und Stephan Toscani lässt zudem aufhorchen „Sprachrohr der Großregion seit 35 Jahren: seit Jahrzehnten erarbeiten Parlamentarier aus vier Ländern zusammen Lösungen für Probleme der Grenzräume“ [8]. Es zeigt Toscanis waches Einsetzen für die saarländische Heimat [9] und für eine starke Grenz- und Großregion. Mit finanzpolitischer Umsicht geschrieben ist „Die Koordination der Länderfinanzen: vom Finanzplanungsrat zum Stabilitätsrat.“ [10] Genau sowie der Aufsatz „Reformperspektiven der föderalen Aufgaben- und Finanzverteilung“ [11].

Saarland, Frankreich und Europa ziehen sich als Themen durch Stephan Toscanis Publikationen; dafür steht der Beitrag: „Der Aachener Vertrag - neue Zeit für die deutsch-französischen Beziehungen in der Grenzregion“, veröffentlicht im Buch zu „Der Aachener Vertrag und das Deutsch-Französische Parlamentsabkommen“.[12] Unbeschreiblich deutlich wird der Preisträger bei: „Europa gehört zur DNA des Saarlandes“, erschienen in „Euro-Saar“ [13]. Oder schauen wir auf die Studie „Die europäische Dimension der Innenpolitik: Der saarländische Landesminister für Finanzen und Europa über Grenzregionen als Laboratorien der europäischen Idee.“ [14] Und obendrein leuchtet der folgende Titel auf: „Politische Empathie statt polterndes Pathos: Den deutsch-französischen Beziehungen mangelt es an klaren Worten.“ [15]

Und schließlich der Mensch und Politiker, welcher sein Ego gerade nicht in den Mittelpunkt rückt, sondern Gemeinwohl- und Gemeinschafts-orientiert agierte; wir erinnern uns an die Nachfolge für das Amt des Ministerpräsident: „Es geht nicht um Egotrips“: Saar-Innenminister Stephan Toscani hat gekämpft und doch verloren; denn eigentlich wollte der Innenminister künftiger Ministerpräsident des Saarlandes werden, also Peter Müller beerben…[16] Ein SR-Porträt von 2018 wählte zurecht die Apposition: „Der Mann für die gedämpften Töne“ [17]; so heißt es: Toscani „gilt als sachlich, seine Politik als nüchtern. Stephan Toscani ist in der Saar-CDU bestens vernetzt.“ Der Jurist [18], im „ordentlichen“ Beruf erst einmal als Referent im Bundesbildungsministerium in Bonn, ehe er 1999 an die Saar zurückkehrte, um Mitglied des Landtages zu werden, diente im guten Sinne des lateinischen „ministrare“ seinem Bundesland mehrfach als Landesminister, Landtagspräsident und nunmehr Landtags-Fraktionschef der CDU Saar.

3. Ohne Einschränkung der Preisverleihung würdig – Verleihung im Pfadfinderheim Roden (Saarlouis)

Wenn die Pfadfinderschaft ihn anfordert, ist Stephan Toscani zur Stelle, er ist Möglichmacher über Parteigrenzen hinweg, ein politischer Unternehmergeist. In weiterer Grund für diese Preisverleihung.

Hoffen wir, dass sein Neudenken in der künftigen Präambel unserer saarländischen Verfassung zum Ausdruck kommt. Themen wie die Abschaffung des unsäglichen Begriffes der „Rasse“ sind dabei sicherlich zu vermeiden. Europa, Nachhaltigkeit und Verantwortung der Menschen vor der Natur

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[8] Maillasson, Hélène [InterviewerIn]. - In: Saarbrücker Zeitung. - Saarbrücken: Buchgewerbehaus. - 2021, 40 (17. Februar), S. B2.

[9] Zur Renaissance saarländischer Heimatliteratur ganz frisch: Hubert Schommer, Sie erweckte bäuerliche Welt zum Leben, in: Saarbrücker Zeitung, Kreis Saarlouis, Bildung & Kultur, 23. März 2023, Seite C4. Im Gollenstein-Verlag bei und von Alfred Diwersy erschien: Anmerkungen zu Leben und Werk einer Autorin aus unserer Heimat. In: Maria Croon. Den drejdejen Pätter. Schwank in drei Aufzügen, Merzig 1981.

[10] In: Haushalts- und Finanzwirtschaft der Länder in der Bundesrepublik Deutschland. - Berlin: BWV, Berliner Wissenschafts-Verlag. - 2017, S. 207-219.

[11] In: Föderale Finanzbeziehungen unter Druck. - Rehburg-Loccum: Evangelische Akademie Loccum. - 2016, S. 205-214.

[12] Wiesbaden: Springer VS. - 2020, S. 119-126.

[13] Bexbach: Propos Media Verlag. - 2020, 1, S. 25, 1 Porträt, 2 Illustrationen.

[14] In: Die politische Meinung. - Osnabrück: Fromm, ISSN 0032-3446. - 2017, 542 (03. Februar), S. 42-46.

[15] In: Saarbrücker Zeitung. - Saarbrücken: Buchgewerbehaus. - 2011, 92 (19. April), S. A 4.

[16] Hoffmann, Thomas; Toscani, Stephan. - In: Forum. - Saarbrücken: Forum, Agentur für Verlagswesen, Werbung, Marketing und PR. - 2011, 16, S. 18-22.

[17] https://www.sr.de › home › stephan_toscani_portraet100 vom 19. 2. 2018 [24. 03. 2023].

[18] Stephan Toscani/Roland This (Hg.), 70 Jahre Verfassung des Saarlandes. Ein Stück europäische Verfassungsgeschichte, Saarbrücken 2018; zu 75 Jahren nunmehr Gergen: Die saarländische Verfassung von 1947: Landesgrundgesetz mit Frankreich-Präambel. In: Die Saar 1945 - 1955: Ein Problem der europäischen Geschichte - La Sarre 1945-1955: Un problème de l'histoire européenne. Hrsg. von Rainer Hudemann, Raymond Poidevin † und Armin Heinen. Unter Mitarbeit von Thomas Kees. 3. maßgeblich erweiterte Auflage. München: de Gruyter Oldenbourg 2022, S. 557-574; sowie Gergen, Die Saar-Verfassung: Demokratiebegleiter seit 75 Jahren. In: Die Saar-Verfassung als Magazin, Hamburg 2022, S. 6-7.

werden sicherlich Einzug halten. Hoffen wir als Christen -und dies nicht nur sonn- und feiertags, sondern auch werktags, dass, um es im Pfadfinderheim in Roden neben der Pfarrkirche Mariä Himmelfahrt völlig untechnisch, aber dafür aus Seele und Herz kommend zu sagen, „usa Herrgott“ wieder auf Verfassungsebene als ethischer Bezugspunkt der Menschen an der Saar erwähnt wird, nachdem er in den letzten Jahrzehnten aus vielen nationalen wie europäischen Texten verschwunden, ja getilgt worden ist. Wir Saarländerinnen und Saarländer könnten dies im tolerant-interreligiösen Dialog umsetzen. Alfred Diwersy[19] galten Glaube und dessen Umsetzung in der Politik als sehr wesentliche Grundsätze. Für die weitere Arbeit in der Politik zum Wohle des Landes wünsche ich: Alles erdenklich Gute und Gottes Segen, lieber Stephan Toscani! Herzliche Glückwünsche zum „Prof. Alfred Diwersy Ehrenpreis“ der F+F Saar.

Thomas Gergen*

Hans Enzinger, Vorsitzender F+F-Saar mit dem Preisträger Stephan Toscani, MdL

[19] Literatur über Alfred Diwersy: Verleger, Autor, Politiker. Ein Buch für Alfred Diwersy. Hrsg. Markus Gestier / Ralph Schock. Saarbrücken 2017 (Union Stiftung Malstatt).

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