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Der Bona-Dea-Skandal – jugendlicher Leichtsinn oder gezielte Intrige? Eine analytische Betrachtung der Handlungsmotive des Clodius anhand der Quellenlage von Plutarch und Cicero*

(The Bona Dea Scandal – Juvenile Recklessness or Deliberate Intrigue? An Analytical Exam-ination of Clodius' Motives Based on the Sources of Plutarch and Cicero)

*Kathrin Schichtel***

Abstract

This article examines the Bona Dea scandal of 62 BCE, during which Publius Clodius Pulcher, disguised in female attire, illicitly entered a cultic festival strictly reserved for women. This transgression appears not only to have triggered his enduring enmity with Marcus Tullius Cicero, but also to have constituted a decisive tactical moment in the shifting political landscape of the late Roman Republic. The analysis centres on the question of Clodius' underlying motivation: was his action prompted by youthful indiscretion and personal motives, or rather by deliberate political calculation? To explore this, the study undertakes a systematic analysis of primary sources, focusing on Cicero's Epistulae ad Atticum and Plutarch's Vitae Parallelae, and supplements this with a critical review of current scholarship. Methodologically, it adopts a source-critical and argumentatively comparative approach to various interpretative models. The findings suggest that Clodius' conduct was not an impulsive or private act, but a politically motivated intervention aimed at deepening factional divides, weakening Cicero, and mobilising popular support. Both the socio-political context and the symbolic significance of the Bona Dea festival are shown to have played a crucial role. Clodius' actions are thus interpreted as a calculated provocation within the broader power struggles at the close of the Republic.

Keywords: *Bona Dea scandal; Marcus Tullius Cicero; Publius Clodius Pulcher; Epistulae ad Atticum; political intrigue; religious sacrilege; Clodius' motivation.*

Einleitung

In der Nacht vom 4. auf den 5. Dezember 62 v. Chr. wurde im Hause Caesars von seiner Frau Pompeia das Fest zur Ehren der Göttin Bona Dea ausgerichtet. Der Skandal, der sich dort ereignet hat, zog nicht nur weitreichende Konsequenzen nach sich, sondern begründete auch die lebenslange Feindschaft zwischen Publius Clodius Pulcher und Marcus Tullius Cicero. Denn auf dieses nächtliche Fest der Vestalinnen, das zusammen mit Frauen der römischen Oberschicht einmal jährlich im Haus eines höheren Beamten (Prätor oder Konsul) zelebriert wurde und ausschließlich für eine strenge weibliche Teilnehmerschaft bestimmt war, schlich sich der als Frau verkleidete Clodius ein. Da er entdeckt und enttarnt worden war, verbreiteten sich Gerüchte um das Geschehen an den Tagen darauf rasant. Das Fest galt als entweiht und es kam in der Folge zu einer Anklage wegen Religionsfrevel und zu einem konfliktreichen Prozess, dessen Verlauf sich auf die Öffentlichkeit ebenso stark auswirkte wie auf die politischen Verhältnisse der involvierten Akteure.[1] Doch neben den erheblichen und diversen Auswirkung von Clodius' nächtlichem Besuch stellt sich vor allem eine grundsätzliche Frage: Warum hat er das überhaupt getan? Die Hintergründe des Vorfalls blieben ungeklärt und boten ausgiebig Raum für Vermutungen und Spekulationen in die verschiedensten Richtungen. Ausgehend von dieser Fragestellung beschäftigt sich die vorliegende Arbeit mit den möglichen Motiven seiner Handlung und soll darüber zeigen, dass Clodius damit gezielte Pläne verfolgte, die einer politischen Intention dienten. Dafür wird zuerst die Quellenlage betrachtet, die hauptsächlich auf Plutarchs *vitae parallelae* bzw. βίοι παράλληλοι im ursprünglichen Originaltitel und Ciceros *epistulae ad Atticum* beruht, damit die Ausgangsgrundlage des Geschehens quellenbasiert bewertet werden kann. Aufbauend auf diesen Erkenntnissen werden unterschiedliche Theorien zu Clodius' möglichen Motiven für den Bona-Dea-Skandal dargestellt und kritisch betrachtet. Anschließend wird zu den erläuterten Ansätzen begründet Stellung genommen, sodass schließlich ein fundiertes Ergebnis im Gesamtkontext erzielt werden kann.

Obwohl über das Fest der Bona Dea kaum etwas bekannt ist und die überlieferten Vorgänge des Skandals hauptsächlich auf den Ausführungen der beiden zuvor genannten antiken Autoren beruhen, sind in der Forschungsliteratur mehrere Erklärungsansätze für Clodius' mögliche Handlungsmotive vorhanden. Wolfgang Will gelangt in seinen Monographien aus den Jahren 1991 und 2009 zu der Ansicht, dass es sich bei dem Skandal um einen politischen Akt gehandelt haben muss, da Clodius

* Die Veröffentlichung dieses Aufsatzes resultierte aus der Teilnahme am XXVIII. Internationalen Sommerseminar zur Antiken Rechtsgeschichte vom 22. bis 25. Mai 2025 im Kloster Obermarchtal. Allen, die die Teilnahme daran möglich gemacht haben, sei an dieser Stelle ganz herzlich gedankt.

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[1] Vgl. WILL, W., *Der römische Mob. Soziale Konflikte in der späten Republik.* Darmstadt, 1991, S. 52-53.

dadurch eindeutig auf das Bona-Dea-Fest im Vorjahr Bezug genommen habe, das bei Caesar ausgerichtet worden war und mit der Verurteilung der Catilinarier in Verbindung gestanden hat. Er sieht darin deshalb eine bewusste Provokation gegen Cicero, indem er mit seinem Auftreten auf die Ereignisse bei der Catilinarischen Verschwörung hingewiesen habe.[2] Michael Sommer vertritt in seiner Arbeit von 2023 ebenfalls die Meinung, dass die Intention eine politische gewesen war. Seine These verfolgt jedoch den Ansatz eines angestrebten Umschwungs sowie der geplanten Spaltung der beiden politischen Richtungen in der späten Römischen Republik, der Populären und der Optimaten.[3] Neben den rein politischen Folgen zieht Herbert Benner auch die gesellschaftliche Rolle in seine Betrachtung mit ein. In seiner literarischen Abhandlung aus dem Jahr 1987 vertritt er die These, dass diese ebenso ein zentrales Motiv gewesen sei, da die *plebs* im anschließenden Prozess sowie für Clodius' weiteres Vorgehen eine wichtige Position eingenommen habe.[4] Elke Hartmann hingegen betrachtet in ihrem Aufsatz von 2015 die Bedeutung der Frauen innerhalb des Skandals beim Bona-Dea-Fest. Ausgehend von geschlechterbezogenen Diffamierungen deutet sie den Skandal als einen politischen Machtgestus, der über den Ehebruch demonstriert wurde. Nach ihrer These ist somit – im Gegensatz zu Wills Auffassung – viel mehr Caesar und weniger Cicero das Ziel von Clodius' Tat gewesen.[5] Auch Darja Sterbenc Erker befasst sich in ihrer Monographie von 2013 mit der Rolle der Frauen, wobei sie aber die zentrale Stellung des Bona-Dea-Festes bei Clodius' Handlung hervorhebt, welches das Machtverhältnis zwischen den Geschlechtern im sozialen Gefüge positioniere und über diesen weitläufigen Wirkungsbereich für politische Zwecke genutzt worden sei.[6]

1. Die Quellenlage

1.1 Ciceros *epistulae ad Atticum*

Zu den Geschehnisse auf dem Fest der Bona Dea 62 v. Chr. äußerte sich Cicero erstmals in der *epistula ad Atticum* 1, 12, 3 vom 1. Januar 62 v. Chr., vier Wochen nach dem Ereignis. Er schrieb: *P. Clodium Appi f. credo te audisse cum veste muliebri deprehensum domi C. Caesaris cum sacrificium pro populo fieret, eumque per manus servulae servatum et eductum; rem esse insigni infamia.*[7] – „Ich glaube, dass du gehört hast, dass Publius Clodius, Sohn des Appius, mit einem weiblichen Gewand im Haus von Gaius Caesar ergriffen worden ist, als das Opferfest für das Volk geschah, und er durch die Hände einer Sklavin gerettet und herausgeführt worden ist; die Angelegenheit ist von Schande gezeichnet." Damit bleibt er vorerst auf einer rein informativen Ebene. Die durchgehende indirekte Rede und die kurze Schilderung, die zudem am Ende des Briefes steht, wirken distanziert. Es scheint hier so, als sei der Vorfall von geringer Bedeutung und würde eher als belanglose Plauderei des aktuellen öffentlichen Geredes fungieren.[8] Weitere vier Wochen später, am 25. Januar, schrieb er: […] *sed vereor ne hoc quod infectum est serpat longius.*[9] – „Ich fürchte aber, dass das, was eingedrungen ist, sich weiter unbemerkt ausbreitet." Darauf schildert er den weiteren Verlauf, dass das Fest wiederholt, der Vorfall vom Senatsbeschluss vor das Priesterkollegium und die Vestalinnen gebracht und als *nefas* eingestuft worden sei und dass Clodius versuche, die Optimaten vom Fall zu entfernen.[10] Auch hier behält er den nüchternen und deskriptiven Stil in der indirekten Rede bei und äußert sich nur kurz zu Beginn und am Schluss noch einmal in ähnlicher Weise zu seinen Befürchtungen über die Entwicklung dieser Angelegenheit. Der Stil mag sicherlich durch die Form des Briefes bedingt sein, der natürlich anderen Zwecken dient als eine Rede und eventuelle ungewollte Fremdleser mitberücksichtigt haben wird, aber dennoch wirken seine Darstellungen zurückhaltend. Die potenzielle Gefahr, die nicht zu vernachlässigen ist, sieht Cicero in diesem Brief allerdings schon mehr als im ersten Schreiben.

Im Brief vom 13. Februar 62 v. Chr. wechselt der Ton hingegen ein wenig. Die Erläuterungen zum Prozessablauf enthalten spöttische und ironische Aussagen, wenn er zum Beispiel die *barbatuli iuvenes* nicht nur mittels eines Diminutivs betitelt, sondern auch zugleich als *totus ille grex Catilinae* bezeichnet und damit gleichsetzt, oder wenn er von der Besetzung der *pontes* durch die *operae Clodianae* und den Stimmtäfelchen, die nur das zustimmende *uti rogas* enthielten, berichtet.[11] Zudem ist die Syntax stellenweise länger und komplexer geworden, was in ähnlich ironischer Weise auf die chaotischen Prozessverhältnisse hinweisen soll. Auch wenn es hier für Clodius noch schlecht ausgesehen haben mag, teilt Cicero schließlich einige Wochen später, vermutlich im Juli, im Brief 1, 16 das Urteil des Freispruchs mit deutlicher Mehrheit mit, das er als schändlich bewertet und stark kritisiert.[12] Nun bekommt die Thematik auch erheblich mehr Raum, als es im ersten Brief der Fall gewesen war. Bereits daran lässt sich die inzwischen entwickelte, hohe Relevanz des Vorfalls erkennen. Cicero scheint hier mit seinen

[2] Vgl. WILL, W., *Der römische Mob. Soziale Konflikte in der späten Republik.* Darmstadt, 1991, S. 52-58; WILL, W., *Caesar*. Gestalten der Antike. Darmstadt, 2009, S. 70-74.
[3] Vgl. SOMMER, M., *Volkstribun. Die Verführung der Massen und der Untergang der Römischen Republik.* 2. Aufl., Hamburg, 2023, S. 131-157.
[4] Vgl. BENNER, H., *Die Politik des P. Clodius Pulcher. Untersuchung zur Denaturierung des Clientelwesens in der ausgehenden Römischen Republik*. Historia Einzelschriften 50. Stuttgart, 1987, S. 37-44.
[5] Vgl. HARTMANN, E., Zur Semantik des Seitensprungs. Ehebruch als politische Waffe in der späten Republik. In: *Historische Anthropologie,* Jg. 23, Nr. 2, 2015, 229-252.
[6] Vgl. ERKER, D. S., *Religiöse Rollen römischer Frauen in „griechischen" Ritualen.* Potsdamer altertumswissenschaftliche Beiträge 43. Stuttgart, 2013, S. 51-64.
[7] CICERO, *Epistulae ad Atticum* 1, 12, 3.
[8] Vgl. ERMETE, K., *Terentia und Tullia – Frauen der senatorischen Oberschicht*. Europäische Hochschulschriften III 951. Frankfurt a. M., 2003, S. 166.
[9] CICERO, *Epistulae ad Atticum* 1, 13, 3.
[10] Vgl. CICERO, *Epistulae ad Atticum* 1, 13, 3.
[11] CICERO, *Epistulae ad Atticum* 1, 14, 5.
[12] Vgl. CICERO, *Epistulae ad Atticum* 1, 16, 1-3.

Äußerungen stilistisch die Verbitterung auszudrücken, während er mit dem deskriptiven, nüchternen Ton im ersten Brief die Dimension des Skandals noch nicht erfasst zu haben scheint.[13]

Folglich lässt sich daran erkennen, dass die *epistulae ad Atticum* zwar eine faktenreiche Beschreibung des Skandals sowie des folgenden Prozessverlaufs beinhalten, über die Motive des Clodius jedoch nicht ein einziges Wort verlieren. Angesichts der Ausmaße, die dieser Vorfall im Verlauf angenommen hat und die auch analog in der Thematisierung dessen in den Atticus-Briefen vorzufinden sind, ist es auffällig, dass die Frage nach dem ursprünglichen Grund für das ganze Geschehen völlig unbeachtet bleibt. Natürlich muss hierbei berücksichtigt werden, dass Cicero Clodius feindlich gesinnt war und auch mit dieser Grundeinstellung geschrieben hat, was eine kritische Bewertung der Darstellungen erforderlich macht. Er lässt die Handlungsmotive vollkommen ungeklärt, weshalb die Betrachtung einer weiteren Schilderung nun sogar in doppelter Hinsicht erforderlich ist.

1.2 Putarchs *vitae parallelae*

Eine etwas weniger subjektiv gefärbte Schilderung der Ereignisse mag bei Plutarch zu finden sein. Er schreibt etwa 150 Jahre nach den Ereignissen, und hat damit einen nicht unerheblichen zeitlichen Abstand zu den Vorfällen, war jedoch selbst längere Zeit in Rom und hatte Zugang zu den Quellen dort.[14] In der Biographie von Cicero beschreibt er den Ablauf beim Bona-Dea-Fest sehr detailliert und ausführlich. So berichtet er, Clodius sei hochmütig und anmaßend, habe sich als Harfenspielerin verkleidet, sei ein noch unbärtiger Jüngling gewesen und wollte sich zu seiner Geliebten Pompeia einschleichen, Caesars Ehefrau.[15] Zudem berichtet er von dem Alibi, dass Cicero Clodius verwehrt hat, wobei er dieses Verhalten nicht mit einer Wahrheitsverpflichtung von Cicero erklärt, sondern viel mehr damit, dass er es wegen seiner dominierenden Frau Terentia tat. Sie dachte, dass Clodia, die Schwester von Clodius, Cicero heiraten wollte, weshalb Terentia wohl gegen beide erzürnt war.[16] In der Biographie von Caesar schildert Plutarch die Ereignisse ähnlich. Auch hier habe sich der bartlose Clodius als Harfenspielerin verkleidet, auf das Fest eingeschlichen und sei an seiner Stimme erkannt worden. Als Grund für das Eindringen nennt er ebenfalls den Versuch, sich mit seiner Geliebten Pompeia zu treffen, wobei das Fest den Zugang ermöglicht haben soll, der sonst aufgrund der gut bewachten Gemächer versperrt sei.[17] Neben dem unterschiedlichen Umfang der Ausführungen, kleineren Abweichung in der detaillierten Beschreibung und den sich grundsätzlich gleichenden Beschreibungen der Vorkommnisse und ihren Abläufen fällt besonders ein Aspekt auf: Im Gegensatz zu Cicero liefert Plutarch ein Motiv für Clodius‘ Tat. Fragwürdig bleibt jedoch einerseits, wie plausibel diese Erklärung wirklich ist, und andererseits, welche anderen Handlungsmotive denkbar und überzeugend wären.

2. Mögliche Handlungsmotive

2.1 Gezielte Spaltung im politischen Umschwung

Plutarchs Erklärung steht in der Forschungsliteratur vielfach in der Kritik. So erklärt auch Michael Sommer diese Vermutung für unplausibel. Ein solcher jugendlicher Leichtsinn aufgrund einer Liebesaffäre sei ebenso wenig überzeugend wie Neugier, Faszination oder Abenteuerlust, die ihn durch die geheimen Rituale eines rein weiblichen Festes dazu verlockt haben könnten. Zudem hätte sich Clodius für einen Besuch bei Pompeia nicht den Abend des Bona-Dea-Festes ausgesucht. Denn für Sommer widersprechen diese Verhaltensweisen dem ansonsten bekannten Charakter von Clodius. Er habe ein großes Ego gehabt, sei sich seines Einflusses in seinen Kreisen wohl bewusst gewesen und in diesem Rahmen durchaus zu Risiken bereit. Zudem habe er vor seinem Besuch sehr genau gewusst, dass er nicht nur dank seiner Abstammung wichtige und einflussreiche Freunde hatte, sondern auch großen Rückhalt im Volk besaß und schließlich, dass die politische Lage zu der Zeit in Bewegung geraten war. Dies alles spreche deutlich für ein gut durchdachtes, siegessicheres Verhalten und keinesfalls für eine triebgesteuerte Handlung eines naiven Jungen.[18] Da weitere, realistische Motive in den Quellen nicht aufzufinden sind, nähert sich Sommer der Fragestellung systematisch an. Dafür gliedert er den Prozess in vier Subphasen und betrachtet unter Berücksichtigung der jeweiligen Entwicklung die Motive von den Senatoren, von Caesar und von Cicero genauer, um darüber das Verhalten von Clodius erklären zu können.[19]

Den auffälligen Meinungsumschwung bei den Senatoren im Prozessverlauf sieht er in deren Angst vor Clodius begründet. Die Anklage beruhte auf *incestum*, was eine sexuelle Beziehung zu Blutsverwandten oder das Vergehen an einer Vestalin beinhalten konnte. Da diese eigentlich nicht einschlägig gewesen sei und eine Anklage wegen *sacrilegium* nach der Wiederholung des Festes und damit auch der Heilung des Frevels nicht möglich gewesen sei, habe sie nur als Vorwand für überhaupt eine mögliche Anklage gedient. Die ursprüngliche Dehnung des Straftatbestandes zeige also, dass die meisten Senatoren anfänglich eine Verurteilung von Clodius angestrebt hätten. Dass die Abstimmung, die auf ungültigen Abgaben und nicht auf eindeutigen Standpunkten basierte, jedoch anders ausging, liege in der Angst vor Clodius‘ Anhänger begründet, in der akuten Gefahr, die diese darstellten, sowie schließlich in den Bestechungen, die verübt wurden.[20] Von diesem ausgeübten Druck während des

[13] Vgl. WILL, W., *Caesar*. Gestalten der Antike. Darmstadt, 2009, S. 72.
[14] Vgl. HARTMANN, E., Zur Semantik des Seitensprungs. Ehebruch als politische Waffe in der späten Republik. In: *Historische Anthropologie,* Jg. 23, Nr. 2, 2015, S. 231; vgl. SCHOECK, G., *Zeitgenosse Ciceros. Ein Lebensbild aus zeitgenössischen Quellen.* Zürich, 1977, S. 4.
[15] Vgl. PLUTARCH, *Cicero* 28.
[16] Vgl. PLUTARCH, *Cicero* 29.
[17] Vgl. PLUTARCH, *Caesar* 9-10.
[18] Vgl. SOMMER, M., *Volkstribun. Die Verführung der Massen und der Untergang der Römischen Republik.* 2. Aufl., Hamburg, 2023, S. 154f.
[19] Vgl. SOMMER, M., *Volkstribun. Die Verführung der Massen und der Untergang der Römischen Republik.* 2. Aufl., Hamburg, 2023, S. 146f.
[20] Vgl. SOMMER, M., *Volkstribun. Die Verführung der Massen und der Untergang der Römischen Republik.* 2. Aufl., Hamburg, 2023, S. 139, 147f.

Prozesses berichten auch Cicero und Plutarch. Die politische Dimension wird hier folglich gut ersichtlich.

Caesar blieb allerdings vor Gericht passiv und sagte nicht als Zeuge aus, obwohl er mit der daraus resultierenden Scheidung seiner Frau Pompeia, weil er „eine Frau nicht im Hause dulde, auf der auch nur der Schatten eines Argwohns liegt“[21], von der Angelegenheit unmittelbar betroffen war. Nach Sommer unternahm er vor Gericht deshalb nichts, weil der Skandal seine Amtsführung als *pontifex maximus*, die Caesar zu der Zeit innehatte und die mehr politisch relevant als religiös gewesen war, hätte hinterfragen können. Zudem wurde die Entstehung verschieden gelagerter Positionen bei den Senatoren angeregt. Er habe sich zugunsten seiner Beliebtheit nicht auf einer Seite positionieren wollen, weshalb er es für besser und angenehmer hielte, während des Prozesses zu verreisen.[22] Auch Caesars Motiv beruht nach dieser These folglich vor allem auf politischen Beweggründen.

Cicero hingegen nahm eine aktive Rolle ein, nachdem er nach anfänglichem passiven Verhalten das angebliche Alibi von Clodius widerlegte, der angegeben hatte, er sei an dem Tag in der 120 Kilometer südöstlich von Rom entfernten Stadt Interamna gewesen.[23] Zunächst ist festzustellen, dass Cicero die Angelegenheit keineswegs vor den Senat gebracht hatte, sondern dass das durch den Senator Quintus Cornificius geschah. Indem Cicero jedoch einen Besuch von Clodius bei ihm in Rom am selben Tag bestätigte, löste er im Prozess einen zentralen Wendepunkt aus. Auch hierzu liefert Plutarch ein mögliches Motiv, wenn er beschreibt, dass er vermutlich „dieses Zeugnis nicht um der Wahrheit Willen abgelegt habe, sondern um sich seiner Frau Terentia gegenüber zu rechtfertigen. Denn sie hatte einen Groll auf Clodius wegen seiner Schwester Clodia.“[24] Dass er zwischen einer Fehde zweier Frauen stand, überzeugt aufgrund der allgemein politischen Denk- und Handlungsweise, die von Cicero bekannt ist, kaum, weshalb die herrschende Meinung diesen Erklärungsansatz – ebenso wie seine These über Clodius‘ Handlungsmotiv – begründet ablehnt. Sommer sieht darin viel mehr als Hintergrund den anfänglichen Versuch, offene Konflikte und politische Schäden zu vermeiden. Als Clodius dann jedoch in einer späteren Phase des Prozesses in den *contiones* sprach, die ihm als öffentliche politische Debatten ein zentrales Mittel für die Überzeugungsarbeit von politischen Gruppierungen boten, habe Cicero vor allem die Diskreditierung von Clodius und weniger die Verurteilung zu bezwecken versucht. Zusätzlich habe er sich als persönlichen Beweggrund auch noch rechtfertigen wollen, da er wegen der Hinrichtung der Catilinarier bereits vielfach in Kritik stand. Seine Reden würden einer rhetorischen Schlacht gleichen, womit er auf diese Kritik reagiert habe. Diese Schwachstelle habe ihn zu einem leichten Ziel einer politischen Auseinandersetzung für Clodius gemacht.[25] Damit bewegen sich auch hier die Beweggründe auf einer politischen Ebene. Cicero sah also ab einem bestimmten Punkt die potenzielle Entwicklung des Vorfalls voraus, wie es auch bereits in den Atticus-Briefen erkennbar war.

Und Clodius tat dies mit hoher Wahrscheinlichkeit auch. Er ging bewusst ein großes Risiko ein, bei einem für ihn weniger glücklichen Verlauf hätte er durchaus verurteilt werden können. Zusätzlich war er sich vermutlich auch darüber im Klaren, dass die *religio* bei vielen römischen Bürgern einen hohen Stellenwert hatte und ein religiöser Frevel darum leicht den eigenen Ruf beschädigen kann. Aus diesen Erkenntnissen zieht Sommer die Konsequenz, dass Clodius in der politischen Situation einen günstigen Moment sah. Er ging ein volles Risiko ein und lenkte dabei geschickt die Aufmerksamkeit von Pompeius‘ Rückkehr aus dem Mithridatischen Krieg weg, wählte gezielt Cicero als angreifbare Schwachstelle auf Seiten der Optimaten und nutzte die Umstände taktisch zur Politisierung des Volkes. Für Sommer fungierte der Bona-Dea-Skandal demnach dazu, dass Clodius diese günstige Situation gezielt für die Erzwingung eines politischen Umstandes verwendete. Der Adel war gespalten und Ciceros Diffamierungsangriffe waren vor diesem Hintergrund tolerierbar. Sogar Caesar habe durch seine sehr unbeteiligte Haltung langfristig vom Skandal profitieren können, obwohl er vorerst durch die Scheidung geschädigt wurde. Nach dieser These waren die eigentlichen Verlierer die Optimaten, die während des Prozessverlaufes die Kontrolle verloren und mit der entstandenen Spaltung den Populären und damit letztlich auch Clodius den Weg bereiteten.[26]

2.2 Politische Provokation – die Hinrichtung der Catilinarier

Eine ähnliche Ansicht vertritt Wolfgang Will. Auch er zweifelt Plutarchs Erläuterungen an, indem er die eifersüchtige Terentia bei der Zeugenaussage Ciceros sowie Clodius‘ Verlangen nach Pompeia als „oberflächliche[n] Frauentypologie“ mit „Anekdotenwert“[27] bezeichnet. Das Motiv der Liebesaffäre überzeuge nicht, es handele sich bei dem Vorfall viel mehr um eine politische Angelegenheit. Genau ein Jahr zuvor, am 4. Dezember 63 v. Chr., hatte Terentia das Fest zu Ehren der Bona Dea ausgerichtet. Als dort das erlöschende Feuer aufflammte und die Vestalinnen dies als bekräftigendes Zeichen der Göttin deuteten, überbrachte sie Cicero persönlich die Kunde, dass sein eigentlich gesetzeswidriges Vorgehen gegen die Catilinarier dadurch als göttlich legitimiert angesehen wurde.[28] Doch die

[21] PLUTARCH, *Fünf Doppelbiographien, 1. Teil: Alexandros und Caesar. Aristeides und Marcus Cato. Perikles und Fabius Maximus.* Griechisch und deutsch. Übers. v. ZIEGLER, K. – WUHRMANN. W. Ausgew. von FUHRMANN, M. Zürich, 199, S. 219.
[22] Vgl. SOMMER, M., *Volkstribun. Die Verführung der Massen und der Untergang der Römischen Republik.* 2. Aufl., Hamburg, 2023, S. 150.
[23] Vgl. FUHRMANN, M., *Cicero und die römische Republik. Eine Biographie,* 3. Aufl., München, 1999, S. 125.
[24] PLUTARCH, *Fünf Doppelbiographien, 2. Teil: Gaius Marcius und Alkibiades. Demosthenes und Cicero.* Griechisch und deutsch. Übers. v. ZIEGLER, K. – WUHRMANN. W. Ausgew. von FUHRMANN, M. Zürich, 1994, S. 1019.
[25] Vgl. SOMMER, M., *Volkstribun. Die Verführung der Massen und der Untergang der Römischen Republik.* 2. Aufl., Hamburg, 2023, S. 137, S. 151-154.
[26] Vgl. SOMMER, M., *Volkstribun. Die Verführung der Massen und der Untergang der Römischen Republik.* 2. Aufl., Hamburg, 2023, S. 156f.
[27] WILL, W., *Der römische Mob. Soziale Konflikte in der späten Republik.* Darmstadt, 1991, S. 56.
[28] Vgl. WILL, W., *Der römische Mob. Soziale Konflikte in der späten Republik.* Darmstadt, 1991, S. 57; PLUTARCH, *Cicero* 20,1; CICERO, *Epistulae ad Atticum* 1, 19, 6.

frevelhafte Verletzung des Festes für die von der *plebs* stark verehrte Göttin, blieb nicht ohne Auswirkungen. Und hierin lag nach Will der politische Nutzen. Die Fokussierung von Moral und Sittenverfall bot eine Gelegenheit, die Politiker zu verfeinden. Durch sein skandalöses Auftreten habe Clodius folglich an die Ereignisse im Vorjahr zurückerinnern und aufmerksam machen wollen, wodurch er die Senatoren und das Priesterkollegium absichtlich provoziert habe. Zudem habe er ein deutliches Zeichen für die ehemaligen Anhänger Catilinas und schließlich auch für das politisch popular zentrierte Volk gesetzt. Indem er sich dabei auf Cicero bezogen habe, bildete er den Ursprung des tatsächlich politischen Aktes, der sich letztlich zu einem innenpolitischen Machtkampf entwickelte.[29] Die Dimension ließe sich in den *contiones* während des Prozesses erkennen, die stark besucht waren und somit eine gute Zielgruppe darstellten, in der Clodius deren Einstellung zu den Optimaten und auch zum Priesterkollegium sowie zu den Vestalinnen profitabel habe beeinflussen können. Der Erfolg dieser Handlungsmaßnahmen sei in der während des Prozessverlaufes immer lauter werdenden *plebs* ersichtlich. Die daraus resultierende „Gretchen-frage der späteren Republik“[30], der sich Clodius nach dem siegreichen Prozess annahm, lautete nach Will, ob der *senatus consultum ultimum* zu einer Hinrichtung der Gegner ohne Gerichtsverfahren berechtigen konnte. Die Bestechungsvorwürfe von Cicero seien vor allem in seiner Wut über die Niederlage begründet, bestochen hätten sicherlich beide Seiten, da das, ebenso wie Diffamierungen und Beschimpfungen, in einem Prozess übliche Methoden gewesen seien. Somit sei Clodius‘ Tat eine provokative, politische Affäre gewesen, bei der der religiöse Frevel im Verlaufe der Verhandlungen und der Urteilsfindung nahezu belanglos geworden sei. Die Sieger dieses Machtkampfes waren demnach entsprechend Clodius, Caesar und am Ende auch Crassus, da sie davon in der Politik und ihrer Beliebtheit profitierten.[31]

2.3 Öffentliche Einflüsse

2.3.1 Die Macht der Gesellschaft

Auch für Herbert Benner ist das Motiv des jugendlichen Leichtsinns nicht plausibel, was an der Inszenierung und dem Verlauf ersichtlich werde. Nach seiner Ansicht wusste Clodius sehr wohl um das Risiko seines Besuches und habe mit der entsprechenden Reaktion der Senatoren kalkuliert. Skandale führten zu öffentlichem Gerede und würden damit die nötige Bekanntheit im Adel einbringen.[32] Außerdem musste Clodius bei seinem Besuch bei Cicero am Nachmittag, der von ihm bezeugt wurde und mit hoher Wahrscheinlichkeit auch stattgefunden hatte, mit Zeugen rechnen – er könnte ja auch noch von anderen Menschen gesehen worden sein. Folglich ist das Verhalten von Clodius entweder enorm rätselhaft und widersprüchlich gewesen, oder es war ganz im Gegenteil clever geplant. Da Cicero wegen der Hinrichtung der Catilinarier in öffentlicher Unbeliebtheit stand und damit bereits zur Zielscheibe ausersehen war, ist es nicht verwunderlich, dass Clodius das für sich nutzen wollte und ihn als Gegner auswählte. Benner vermutet darum auch, dass das falsche Alibi von Clodius, er sei in Interamna gewesen, sogar eine bewusst provozierende Aussage gewesen sein könnte, die Cicero zur Aussage reizen sollte, mit der er eine unübersehbare Distanz schaffen und sich klar positionieren würde.[33] Zudem war das Bona-Dea-Fest im römischen Volk von Bedeutung, weshalb es als ein Thema, an dem die *plebs* großes Interesse zeigen wird, gut geeignet gewesen sei. Die öffentlichen Debatten, die *contiones*, die Clodius im Prozessverlauf dazu erstmalig führte, machten ihn zu einem popularen Politiker und seien später zentral für seine typische Vorgehensweise gewesen. Dass Clodius auch Terentias Schwester Fabia angriff, die als Vestalin an dem Abend des Vorfalls ebenfalls anwesend war, sei eine übliche, taktische Diffamierung gewesen, so wie sie auch Cicero einsetzte.[34] Somit habe es sich auch nach Benners These bei Clodius keineswegs um persönliche Handlungsmotive wie die jugendliche Neugier oder die Liebesaffäre gehandelt, sondern um konkrete politische und auch gesellschaftliche Motive.

Die gerichtlichen Nachwirkungen nahmen dabei eine ganz entscheidende Rolle für Clodius‘ weitere politische Denk- und Handlungsweisen ein. Eine solche Beurteilung tätigte Cicero im Nachhinein auch in der *oratio de haruspicum responsis,* als er sich sechs Jahre später, kurz nach seinem Exil, vor dem Senat gegen die Anschuldigungen des Clodius verteidigte, wenn er sagte: *Atque hic ei gradus – o misera tempora stultasque nostras discordias! – P. Clodio gradus ad rem publicam hic primus fuit et aditus ad popularem iactationem atque ascensus*.[35] – Und dieser Schritt war für ihn – oh unglückliche Zeiten und unsere dummen Uneinigkeiten – dieser Schritt war für Publius Clodius der erste zum Staat und der Zugang zur Erregung des Volkes und der Aufstieg.[36] Es werden somit vor allem zwei Auffälligkeiten ersichtlich: Clodius zeigte ein mutiges Auftreten gegen seine Gegner und er bevorzugte die popularen Methoden. Durch die Einflüsse der *plebs* auf den Prozess, durch die teils gewaltsame, politische Entscheidungsmanipulation seiner Anhänger, die die Richter in hemmende Furcht versetzte, und durch seine abstammungsbedingten Beziehungen zu den Claudiern etablierte Clodius für

[29] Vgl. WILL, W., *Der römische Mob. Soziale Konflikte in der späten Republik.* Darmstadt, 1991, S. 52f., 55, 57.
[30] WILL, W., *Der römische Mob. Soziale Konflikte in der späten Republik.* Darmstadt, 1991, S. 57.
[31] Vgl. WILL, W., *Der römische Mob. Soziale Konflikte in der späten Republik.* Darmstadt, 1991, S. 56-58.
[32] Vgl. BENNER, H., *Die Politik des P. Clodius Pulcher. Untersuchung zur Denaturierung des Clientelwesens in der ausgehenden Römischen Republik*. Historia Einzelschriften 50. Stuttgart, 1987, S. 37f.
[33] Vgl. BENNER, H., *Die Politik des P. Clodius Pulcher. Untersuchung zur Denaturierung des Clientelwesens in der ausgehenden Römischen Republik*. Historia Einzelschriften 50. Stuttgart, 1987, 39f.
[34] Vgl. BENNER, H., *Die Politik des P. Clodius Pulcher. Untersuchung zur Denaturierung des Clientelwesens in der ausgehenden Römischen Republik*. Historia Einzelschriften 50. Stuttgart, 1987, S. 40f.
[35] CICERO, *De haruspicum responso oratio* 20, 43.
[36] Vgl. BENNER, H., *Die Politik des P. Clodius Pulcher. Untersuchung zur Denaturierung des Clientelwesens in der ausgehenden Römischen Republik*. Historia Einzelschriften 50. Stuttgart, 1987, S. 40.

sich mit Hilfe des Skandals neue Wege zur politischen Machtgewinnung.[37]

2.3.2 barbatuli iuvenes

Im Zuge einer nachvollziehbaren Prüfung von Benners These sollen diese Wege tiefgehender betrachtet werden. In der *epistula ad Atticum* vom 13. Februar 61 v. Chr. berichtete Cicero: *concursabant barbatuli iuvenes, totus ille grex Catilinae, duce filiola Curonis.*[38] – „Leicht bärtige Jünglinge liefen zusammen, die ganze Schar Catilinas, unter der Führung des Töchterleins des Curio." Diese „milchbärtige[n] Jünglinge"[39] bezeichneten eine Gruppe einer bestimmten Altersklasse mit politischem Einfluss. Allerdings ist zu beachten, dass die Betitelung von Cicero stammt, der die Anhänger seiner Feindes Clodius sicherlich bewusst durch abwertende Bezeichnungen negativ darstellen wollte. Jan Timmer beschäftigte sich in seinem Aufsatz mit der Jugend in Rom und kommt in seinen Betrachtungen zu dem Ergebnis, dass solche jugendlichen Gruppierungen häufiger vorgekommen sind. Sie traten dort auf, wo politische Entscheidungen getroffen wurden, und wurden dabei als eine eigenständige, gesonderte Gruppe wahrgenommen, die Anhänger eines Politikers der späten Republik waren. Zudem kann er in seinen anderen Beispielen keine Präferenz einer bestimmten politischen Richtung von jugendlichen Gruppierungen feststellen. Allerdings sei der Zusammenhang mit öffentlicher Gewaltanwendung sehr häufig. Timmer begründet dies in der logischen Konsequenz der politischen Verhältnisse, denn die jungen Männer würden von der veränderten Kommunikationsform Gebrauch machen, weil sie noch nicht vollständig im System integriert wären und sich nur über den erweiterten Kreis von politischen Akteuren einbringen könnten.[40] Darüber hinaus betont er, dass die *barbatuli iuvenes* als Anhänger von Clodius außerhalb des Bona-Dea-Prozesses kaum mehr relevant waren. Dass es sich tatsächlich um Jünglinge handelt, sei weniger aus dem Begriff zu schließen – *iuvenis* kann nämlich einen Mann ohne Amtsträgerschaft Mitte 20 sowie Mitte 40 beschreiben –, sondern es werde viel mehr aus dem Kontext offensichtlich.[41]

Will interpretiert die Ausdrücke Ciceros über die *barbatuli, grex Catilinae* und *duce filiola* als Wutäußerungen. Er beschreibt die „bärtigen Jünglinge"[42] als einen literarisch-politischen Kreis um Clodius und seine Schwester Clodia herum, die mit ihren kurzen Bärten ihre Haltung gegen die Greise des Adels ausdrückten. Sie wurden im Bona-Dea-Prozess aufgerufen und konnten die Abstimmung beeinflussen, obwohl der Senat vermutlich auch diese Gruppe einzuschüchtern versuchte.[43] Gaius Scribonius Curio war der Sohn des gleichnamigen Konsuls vom Jahr 76 v. Chr., welcher den Prozess leitete, und wurde dabei als einziger von Cicero selbst als Teil dieser jugendlichen Anhängerschaft von Clodius benannt.[44] Die Diffamierung mit der Bezeichnung als *filiola* wäre ein häufig von Cicero genutzter Homosexualitätsvorwurf zur Diskreditierung politischer Gegner.[45] Als weitere Mitglieder werden unter anderem Marcus Antonius, Quintus Hortensius, Marcus Caelius Rufus, Gaius Sallustius Crispus und Gaius Vallerius Catullus vermutet. Sie waren nahezu ausschließlich Gegner der Optimaten, strebten im weiteren Lebensverlauf jedoch eine eigene politische Karriere an und brachten mit ihren Tätigkeiten die Wut und Enttäuschung der jungen Generation über Roms korrupte Politik zum Ausdruck. Das erklärt, warum sie bei Clodius auch später nicht mehr auftauchten, und macht anhand von beispielsweise Catulls *Carmina* auch die Einordnung in den literarisch-politischen Kreis um Clodia und Clodius plausibel.[46] Während des Prozesses manipulierten sie die Abstimmung in der Volksversammlung, indem sie die Zugänge der *pontes* besetzten. Die Seitentreppen des Tempels fungierten vermutlich als Aufgänge zu den Wahlurnen. Zudem gaben sie nur ablehnende Tafeln bei der Wahl über die Zusammensetzung der Gerichtshöfe aus.[47] Später bei Ciceros Rückkehr sollen die Zugangstreppen sogar gewaltsam eingerissen worden sein, woran sich die Etablierung von Clodius' verfestigten, politischen Vorgehensweisen erkennen ließe. Schließlich sollen beim Bona-Dea-Prozess auch die Bestechungen der Richter, die jeweils mit 300000 – 400000 Sesterzen sowie als *cumulus mercedis,* als Zusatzlohn, mit *adulescentuli nobiles* und *certae mulieres*, also adeligen Jünglingen und gewissen Frauen, bestochen worden sein sollen, verantwortlich gewesen sein.[48] Auch wenn die *barbatuli iuvenes* danach eine eigene politische Laufbahn verfolgten, kam es teilweise dennoch vereinzelt noch zu Bündnissen untereinander oder Clodius diente ihnen zumindest als Vorbild im politischen Handeln.[49]

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[37] Vgl. BENNER, H., *Die Politik des P. Clodius Pulcher. Untersuchung zur Denaturierung des Clientelwesens in der ausgehenden Römischen Republik*. Historia Einzelschriften 50. Stuttgart, 1987, S. 44.

[38] CICERO. *Epistulae ad Atticum* 1, 14, 5.

[39] TIMMER, J. M., Barbatuli iuvenes – Überlegungen zur Stellung der „Jugend" in der späten römischen Republik. In: *Historische Anthropologie,* Jg. 13, Nr. 2, 2005, S. 197.

[40] Vgl. TIMMER, J. M., Barbatuli iuvenes – Überlegungen zur Stellung der „Jugend" in der späten römischen Republik. In: *Historische Anthropologie,* Jg. 13, Nr. 2, 2005, S. 206.

[41] Vgl. TIMMER, J. M., Barbatuli iuvenes – Überlegungen zur Stellung der „Jugend" in der späten römischen Republik. In: *Historische Anthropologie,* Jg. 13, Nr. 2, 2005, S. 198, 206.

[42] Vgl. WILL, W., *Der römische Mob. Soziale Konflikte in der späten Republik.* Darmstadt, 1991, S. 62.

[43] Vgl. WILL, W., *Der römische Mob. Soziale Konflikte in der späten Republik.* Darmstadt, 1991, S. 62f.

[44] Vgl. CICERO, *Epistulae ad Atticum* 1, 14, 5.

[45] Vgl. SOMMER, M., *Volkstribun. Die Verführung der Massen und der Untergang der Römischen Republik.* 2. Aufl., Hamburg, 2023, S. 140.

[46] Vgl. WILL, W., *Der römische Mob. Soziale Konflikte in der späten Republik.* Darmstadt, 1991, S. 63-65.

[47] Vgl. CICERO, *Epistulae ad Atticum* 1, 14, 5.

[48] Vgl. BENNER, H., *Die Politik des P. Clodius Pulcher. Untersuchung zur Denaturierung des Clientelwesens in der ausgehenden Römischen Republik*. Historia Einzelschriften 50. Stuttgart, 1987, S. 82; vgl. WILL, W., *Der römische Mob. Soziale Konflikte in der späten Republik.* Darmstadt, 1991, S. 25, vgl. CICERO, *Epistulae ad Atticum* 1, 16, 5.

[49] Vgl. BENNER, H., *Die Politik des P. Clodius Pulcher. Untersuchung zur Denaturierung des Clientelwesens in der ausgehenden Römischen Republik*. Historia Einzelschriften 50. Stuttgart, 1987, S. 82.

Die Unzufriedenheit dieser Gruppe wegen des Vorgehens gegen die Catilinarier und auch wegen der generellen Verhältnisse war letztlich von zentraler Bedeutung beim Prozess sowie auch für Clodius' öffentliches Ansehen und schließlich auch für seinen politischen Werdegang. Somit lässt sich festhalten, dass die *barbatuli iuvenes* für die gesellschaftlich-öffentlichen Einflüsse zugunsten von Clodius während des Prozesses über den Bona-Dea-Skandal ganz im Sinne von Brenners These eine maßgebliche Position einnahmen.

2.4 Geschlechterdiskurs: Die Rolle der Frauen

2.4.1 Der Ehebruch als Machtgestus

Einen anderen Ansatz verfolgt hingegen Elke Hartmann, die sich hauptsächlich mit der Stellung und Funktion der Frauen innerhalb dieser Thematik beschäftigt hat. Auch sie bewertet die Darstellungen in den Quellen dazu kritisch. Plutarch habe zwar, obwohl er kein Zeitzeuge war, viel Quellenmaterial für seine Biographien genutzt, er hätte aber eigene erkennbare Deutungen und Bewertungen hinzugefügt. Und bei Ciceros Briefen müsse das Verhältnis zu den jeweiligen Menschen unbedingt beachtet werden. Ihre These basiert auf der Auffassung, dass der Ehebruch als gezielte Machtdemonstration von einflussreichen Politikern eingesetzt wurde, weil dadurch ein Symbol für die Verfügungsgewalt und Weisungsbefugnis über seine Gegner gesetzt worden sei.[50] Dafür erläutert sie die sich im ersten Jahrhundert etablierte Eheform *sine manu*, bei der die Frau nicht mehr in die *potestas* des Ehemanns übergeht, sondern auch nach der Eheschließung noch in der des Vaters bleibt. Dies bot vor allem wirtschaftliche Vorteile für den Vater, besonders bezüglich der Erbschaft. Weitergehend betont Hartmann die vordergründige politische Wirkung einer Eheschließung, mit der man sich positionierte und Nähe oder Distanz zu bestimmten Kreisen statuieren konnte. Darum sei das römische Ursprungsideal einer lebenslangen Ehe auch kaum praktiziert worden, sondern stattdessen von einem häufigen Frauenwechsel abgelöst worden, was trotzdem noch als anstößig galt und zu öffentlichem Gerede führte. Ebenso anstößig sei der Ehebruch gewesen, das *adulterium*, was das Eindringen eines Mannes in eine fremde Ehe bezeichnete und die Keuschheit der Ehefrau verletzte; Auch sie verletzte dabei die Ehe.[51] Das *stuprum* stelle eine Sonderform des *adulterium* dar und habe ein illegales Sexualvergehen bezeichnet. Üblicherweise sei derlei mit der Scheidung und einem geschädigten Ruf – vor allem der Frau – sanktioniert worden, Tötungen seien nicht belegt, vermutlich hätte es dafür eine Anklage des Mordes gebraucht.[52]

Basierend auf diesem Hintergrundwissen hält Hartmann die stark politischen Deutungen in der Forschung zu Clodius' *nefas,* wie etwa Wills Theorie, die einen Bezug zum Zeichen bei der Verurteilung der Catilinarier im Vorjahr postuliert, für unwahrscheinlich. Für sie habe sich dieser Bezug vermutlich erst im Prozessverlauf ergeben, als Cicero verstärkt darin involviert worden ist, und wäre nicht die ursprüngliche Intention von Clodius gewesen. Stattdessen sei es ein Versuch gewesen, sich mit Caesar zu messen. Clodius habe um die Tatsache des Kultvergehens und des Ehebruchs gewusst, außerdem müsste er die vielen Zeugen und das große Aufsehen darum vorausgesehen haben. Er habe mit der Entdeckung nicht nur kalkuliert, sondern sie auch bewusst provoziert (schließlich lief er auch in den Gängen umher)[53]. Durch die Vereinnahmung seiner Frau Pompeia habe Clodius Caesar als eigentliches Ziel schädigen wollen, welcher wiederum geschickt ausgewichen sei, indem er sich scheiden ließ und seine Frau damit von sich wies, ohne dabei den Vorwurf anzuerkennen oder gar zu bestätigen.[54] Clodius sei letztlich mit seinem riskanten Vorgehen erfolgreich gewesen. Caesars *dignitas* sei beschädigt worden und er ermöglichte ihm schließlich den Werdegang als Volkstribun durch die Adoption, was als Anerkennung des Dominanzgestus von Clodius angesehen werden könne, der mit dem Bona-Dea-Skandal öffentlich inszeniert worden sei.[55] Zur Bekräftigung ihrer These führt Hartmann noch sechs weitere, ähnliche gelagerte Fallbeispiele an, bei denen Caesar selbst Ehebruch beging, um bei politischen Konflikten mit deren Ehemännern darüber sowie aus der daraus resultierenden Ehescheidung einen gezielten politischen Machtanspruch zu demonstrieren.[56] Diese Praxis des Adels habe der traditionellen Moralvorstellung widersprochen, da ein solches Verhalten den Ehebruch begünstigte, zumal die Attraktivität der Frauen für eine erneute Eheschließung nicht zwingend geschmälert worden sei, wenn der Ehebruch einvernehmlich gewesen war. Somit sei in der späten Republik der gezielte Ehebruch ein typisches politisches Kampfmittel gewesen, bei dem der geschädigte Ehemann degradiert worden sei. So wie Caesar habe sich folglich auch Clodius dieser Methode bedient. Die Frau, Pompeia, wurde sozial in ihrem Ruf geschädigt, der Ehemann, Caesar, wurde in seiner (häuslichen) Macht und maskulinen Dominanz in Frage gestellt und der Ehebrecher, Clodius, habe trotz Sittenwidrigkeit durch den Erfolg soziale Anerkennung erhalten und seine Überlegenheit demonstriert.[57]

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[50] Vgl. HARTMANN, E., Zur Semantik des Seitensprungs. Ehebruch als politische Waffe in der späten Republik. In: *Historische Anthropologie,* Jg. 23, Nr. 2, 2015, S. 230f.

[51] Vgl. HARTMANN, E., Zur Semantik des Seitensprungs. Ehebruch als politische Waffe in der späten Republik. In: *Historische Anthropologie,* Jg. 23, Nr. 2, 2015, S. 132-134.

[52] Vgl. HARTMANN, E., Zur Semantik des Seitensprungs. Ehebruch als politische Waffe in der späten Republik. In: *Historische Anthropologie,* Jg. 23, Nr. 2, 2015, S. 234f.

[53] Vgl. PLUTARCH, *Cic*ero 29; vgl. PLUTARCH, *Caes*ar 10.

[54] Vgl. PLUTARCH, *Cic*ero 29; vgl. PLUTARCH, *Caes*ar 10.

[55] Vgl. HARTMANN, E., Zur Semantik des Seitensprungs. Ehebruch als politische Waffe in der späten Republik. In: *Historische Anthropologie,* Jg. 23, Nr. 2, 2015, S. 236f.

[56] So etwa bei Cato d. J. oder Pompeius. Zu den einzelnen Fallbsp. vgl. HARTMANN, E., Zur Semantik des Seitensprungs. Ehebruch als politische Waffe in der späten Republik. In: *Historische Anthropologie,* Jg. 23, Nr. 2, 2015, S. 238-243.

[57] Vgl. HARTMANN, E., Zur Semantik des Seitensprungs. Ehebruch als politische Waffe in der späten Republik. In: *Historische Anthropologie,* Jg. 23, Nr. 2, 2015, S. 244f., 250-252.

Mithin ist nach Hartmanns Theorie Caesar das Ziel gewesen, weshalb das Handlungsmotiv von Clodius der politisch instrumentalisierte Ehebruch zur Machtdemonstration gewesen war.

2.4.2 Der Einfluss Terentias

Daran lässt sich erkennen, dass die Frauen eine nicht zu vernachlässigende Rolle innerhalb des Skandals von Clodius spielten, zumal der Vorfall während eines ausschließlich weiblich dominierten Festes geschah. Während einerseits das Verhalten von Clodius Erklärungsbedarf erfordert, lässt andererseits auch die Zeugenaussage Ciceros die Frage nach der Motivation offen. Denn schließlich brachte sie eine entscheidende Wende im Verlauf des Prozesses und wurde zum Teil in literarischen Abhandlungen als „größte[r] politische[r] Fehler seines Lebens“ [58] beschrieben. Zu beiden Beweggründen hat Plutarch eine These aufgestellt, die laut Karen Ermete in der Forschung inzwischen zwar mitunter gestützt werde, aber inkorrekt sei.[59] Demnach habe Terentia einen harten und resoluten Charakter gehabt, sie habe Cicero beherrscht und sich mehr in politische als in häusliche Angelegenheiten eingemischt. Zudem habe sie für eine strenge Bestrafung der Catilinarier sowie für Ciceros Aussage gesorgt, die wiederum ihren ursprünglichen Auslöser in Clodias Begehren gehabt haben soll.[60] Für Ermetes Ausführung muss berücksichtigt werden, dass die Heirat von Cicero und Terentia in den profitablen Verbindungen sowie dem Geld begründet lag. Immerhin stammte sie aus der wohlhabenden Familie der Terentier und brachte eine Mitgift von 480 000 Sesterzen, was die für die Zugehörigkeit zur Ritterschaft erforderlichen Summe von 400 000 Sesterzen überschreitet, sowie Ländereien mit in die Ehe. Zudem war sie eine finanziell selbständig agierende Ehefrau *sine manu* und sie hatte eine Halbschwester Fabia, die eine Priesterin bei den Vestalinnen war.[61] Für Ermete ist es wahrscheinlicher, dass Cicero von Fabia dazu gedrängt wurde. Denn diese war ebenfalls bei dem besagten Bona-Dea-Fest anwesend und war darüber hinaus als Vestapriesterin auch für die korrekte Durchführung des feierlichen Rituals verantwortlich. Zudem stand sie aufgrund des Skandals wegen Keuschheitsbruch vor Gericht, wurde jedoch freigesprochen.[62] Ciceros Bezeugung könnte mithin auf einer dadurch verletzten Eitelkeit oder auf einem darin erhofften Erfolg beruhen.

Des Weiteren stellt Ermete fest, dass in Plutarchs Quelle seine These durch nichts zusätzlich gestützt werde und er damit eigentlich nur von Ciceros Fehlverhalten habe ablenken wollen. Die darin implizierte Feindlichkeit gegen Cicero unterstellt sie Plutarch dabei nicht. Denn der Vorwurf treffe schließlich nicht Terentia, sondern Cicero, was vermutlich nicht in Plutarch Absicht gelegen habe. Der angenommene Einfluss seiner Frau sollte für den politischen Fehler eine entschuldigende Erklärung sein können.[63] Allerdings sei eine politische Einflussnahme Terentias nur in zwei Fällen bekannt: Einmal habe es eine Absprache zwischen Mitgliedern der Familie gegeben, als 62 v. Chr. der Proquaestor in Macedonia Publius Sestius zuerst seine Absetzung erbat und sich dem anschließend selbst widersprach. Cicero bat Terentia, sich bei Sestius‘ Ehefrau Cornelia zu erkundigen, was als „inoffizielle Politik“ [64] erachtet worden und in Rom üblich, legal sowie geschlechterunspezifisch gewesen sei.[65] Das zweite Mal sei während Ciceros Verbannung gewesen, in der Terentia ihm das politische Geschehen sowie ihre Meinung dazu in Briefen mitteilte, politische Freunde für den Erhalt der Verbindung traf und damit für die Sicherheit der Familie und der Finanzen Sorge trug. Folglich übernahm sie in dieser Zeit die Rolle einer Vermittlerin ein, was laut Ermete bei einer verbannungsbedingten, längerfristigen Abwesenheit nicht nur eine übliche Praxis innerhalb einer Familie war, sondern auch eine absolut Notwendigkeit für die familiäre Sicherheit darstellte.[66] Dies sei auch das Hauptmotiv bei der dritten Ehe ihrer Tochter Tullia mit Dolabella gewesen, die Terentia beschlossen hatte.

Somit gelangt Ermete zu dem Ergebnis, dass Terentia keine Beteiligung an der Verurteilung der Catilinarier sowie an Ciceros Zeugenaussage nachgewiesen werden könne. Sie überbrachte zwar das Zeichen, die Deutung oblag allerdings bei den Vestalinnen. Das Motiv der weiblichen Einflussnahme sei ein typisches Topoi bei politischen Debatten gewesen, es komme ausschließlich bei Plutarch vor und sei damit nicht wahrscheinlich. Terentia habe zwar durchaus ein politisches Verständnis gehabt, sie sei religiös, einflussreich und anerkannt gewesen, weshalb die Ersatzfunktion während der Verbannung und die Übernahme der Pflichten des *pater familias* gesellschaftlich akzeptiert und sogar erwartet gewesen seien. Dennoch sei ihr Handeln passiv und von Cicero bestimmt gewesen. Folglich könne sie ihn nicht zu seiner Aussage im Prozess beeinflusst haben.[67]

2.4.3 Das Bona-Dea-Fest: Diffamierung sexueller Motive?

Dass durch die Verbreitung eines solchen Gerüchtes eine Diffamierung der weiblichen Position vorgenommen wurde, die den Machtkampf gegen politische Gegner mittels gesellschaftlichem Verruf gewinnen sollte, sieht auch Rosmarie Günther so. Vor dem Hintergrund von der sexuellen Diffamierung der Frauengestalten betrachtet sie den Bona-Dea-Skandal als einen politischen Akt, mit dem Clodius auf den Religionsfrevel von

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[58] ERMETE, K., *Terentia und Tullia – Frauen der senatorischen Oberschicht*. Europäische Hochschulschriften III 951. Frankfurt a. M., 2003, S. 167.
[59] Vgl. ERMETE, K., *Terentia und Tullia – Frauen der senatorischen Oberschicht*. Europäische Hochschulschriften III 951. Frankfurt a. M., 2003, S. 167; vgl. PLUTARCH, *Cic*ero 29.
[60] Vgl. PLUTARCH, *Cic*ero 29; vgl. FUHRMANN, M., *Cicero und die römische Republik. Eine Biographie,* 3. Aufl., München, 1999, S. 58.
[61] Vgl. SCHEUERMANN, E. S., Cicero und das Geld. Frankfurt a. M., 2015, S. 77; vgl. FUHRMANN, M., *Cicero und die römische Republik. Eine Biographie,* 3. Aufl., München, 1999, S. 58; vgl. PLUTARCH, *Cicero* 8.
[62] Vgl. FUHRMANN, M., *Cicero und die römische Republik. Eine Biographie,* 3. Aufl., München, 1999, S. 58.
[63] Vgl. ERMETE, K., *Terentia und Tullia – Frauen der senatorischen Oberschicht*. Europäische Hochschulschriften III 951. Frankfurt a. M., 2003, S. 168.
[64] ERMETE, K., *Terentia und Tullia – Frauen der senatorischen Oberschicht*. Europäische Hochschulschriften III 951. Frankfurt a. M., 2003, S. 169.
[65] Vgl. ERMETE, K., *Terentia und Tullia – Frauen der senatorischen Oberschicht*. Europäische Hochschulschriften III 951. Frankfurt a. M., 2003, S. 169.
[66] Vgl. ERMETE, K., *Terentia und Tullia – Frauen der senatorischen Oberschicht*. Europäische Hochschulschriften III 951. Frankfurt a. M., 2003, S. 170.
[67] Vgl. ERMETE, K., *Terentia und Tullia – Frauen der senatorischen Oberschicht*. Europäische Hochschulschriften III 951. Frankfurt a. M., 2003, S. 173.

Terentias Zeichen im Vorjahr, den zusätzlich ihre Halbschwester Fabia als Vestalin mitgedeutet hatte, hinzuweisen versuchte. Sie schließt sich folglich den Ausführungen von Will an.[68] Eine ähnliche Theorie verfolgt auch Darja Sterbenc Erker, die sich mit den religiösen Rollen römischer Frauen auf dem Fest der Bona Dea beschäftigt hat. Bekannt ist darüber, dass es sich um ein nächtliches, öffentliches Ritual, ein *sacra publica*, handelte, das jährlich Anfang Dezember ausgerichtet wurde. Es fand stets im Hause eines Magistraten *cum imperio* statt und wurde ausschließlich von Matronen und Vestalinnen gefeiert. Das Fest, bei dem die Frauen ein Schwein geopfert, Wein als Symbol für Milch getrunken und zu Musik getanzt haben sollen, wurde im Zeichen der Fruchtbarkeit, Heilung und Jungfräulichkeit *pro populo* vollzogen. Es soll mit Weinranken und einer Schlange ausgestattet gewesen sein, die dem göttlichen Symbol dienten, männliche Abbilder sollen verhängt und männliche Tiere sogar verboten worden sein.[69] Dass in der Literatur und vor allem in satirischen Quellen das Ritual mit unehrenhaften Abläufen dargestellt wird, wie Erker feststellte, sei ein verzerrtes Bild, das den individuellen Fantasien zum geheimen Ablauf entsprungen sei und die Frauen wegen der Riten, die von der Normalität abweichen, zu diffamieren versuchen. Solche negativen Stereotype lägen im Verlangen einer männlichen Machtausübung über das weiblich dominierte Fest begründet. Und genau an diesem Punkt setzt Erkers These an, denn das Fest der Bona Dea sei vor allem wegen der sozialen Auswirkungen so zentral gewesen. Die Beziehungen zwischen den weiblichen Teilnehmerinnen sei gestärkt und die Abgrenzung zu den nicht Teilnehmenden deutlich gemacht worden. Dadurch sei die soziale Stellung der Frau erhöht worden, die nicht nur die Begleiterin des Mannes war, sondern in besonderen Fällen als Reserve fungierte, um die männlichen, politischen Aufgaben zu vertreten. – Zum Beispiel im Exil, so wie es auch bei Cicero und Terentia der Fall gewesen war. Das Fest gäbe den Frauen den dafür nötigen Raum, damit sie sich in ihrer sozialen Stellung positionieren und diese bekräftigen konnten. Es habe folglich vor allem als Grenzfestlegung und ausgelebtes Machtverhältnis zwischen den Geschlechtern gedient.[70]

Beruhend auf dieser zentralen Bedeutung der Geschlechtertrennung scheint der Frevel von Clodius eine neue Dimension zu bekommen. Abgesehen davon, dass seine Anwesenheit ein *vitium* im Ablauf darstellte, der die Wiederholung des Festes erzwungen hatte, wurde der Fokus extrem auf diesen rituellen Kult gerichtet. Die Motive waren deswegen auch nur nebensächlich, möglicherweise wurden sie auch gerade aus diesem Grund in den Überlieferungen vernachlässigt. Laut Erker haben die Männer offiziell nichts über dieses geheime Fest wissen dürfen, allerdings könne man davon ausgehen, dass sie dennoch sehr wohl über die Riten und Abläufe Bescheid gewusst haben. Sie hätten darüber jedoch mündlich wie schriftlich schweigen müssen, sodass die symbolische Geschlechtertrennung aufrechterhalten worden sei. Damit wird auch die These von Clodius' Neugier als mögliches Motiv hinfällig. Die Deutungen von Cicero und Plutarch als religiöser Frevel und als Liebestreffen würden eine Diffamierung sexueller Motive sowie einen Akt gegen die Öffentlichkeit darstellen.[71] Schließlich konnte demnach der Schauplatz des Festes für politische Zwecke genutzt werden, wie es auch bei Terentias Omen im Vorjahr getan worden sei, wodurch Clodius' symbolischer Frevel zusätzlich verstärkt und damit intensiver wahrgenommen wurde.[72]

3. Stellungnahme

Erkennbar ist, dass einige unterschiedliche Theorien zu den Motiven für Clodius' Eindringen beim Bona-Dea-Fest 62 v. Chr. existieren. Dass die Erklärung Plutarchs, Clodius habe seine Affäre Pompeia besuchen wollen und das Fest sei die einzige Gelegenheit dazu gewesen, nur ein vorgeschobener Grund gewesen sein kann, der die Neugier befriedigen sollte und für öffentliches Gerede zu erachten ist, sieht die herrschende Meinung so. Das erscheint plausibel, zumal Plutarchs zweite These zum Motiv von Ciceros Zeugenaussage im Rahmen der aktuellen Forschung über die Einflüsse Terentias ebenfalls nicht glaubhaft ist. Darum ist hierbei der herrschenden Forschungsmeinung zu folgen.

Dem stehen vor allem zwei übergeordnete Richtungen bezüglich der motivationalen Ansätzen für Clodius' Handeln gegenüber: Einerseits wird der zentrale Grund im Politischen gesehen. Für Will stellte das Vorgehen eine bewusste Provokation dar, die auf Cicero abzielte und auf dessen Fehlverhalten bei der prozessfreien Hinrichtung der Catilinarier aufmerksam machen sollte. Sie wurde durch Pompeias Zeichen beim Bona-Dea-Fest in Caesars Haus im Jahr zuvor legitimiert und habe in der Folge zu einem innenpolitischen Machtkampf geführt. Für Sommer hingegen lag der Fokus von Clodius unmittelbar im politischen Umschwung der Parteien, die er mit seinem Verhalten gezielt spalten wollte. Sein Frevel löste einen politischen Skandal in ganz Rom aus und führte zu einer dauerhaften Neuorientierung der Kreise, die Clodius bewusst erzwang. Cicero war dabei eine willkommene Zielscheibe der Optimaten, die er für die Politisierung der *plebs* nutzen konnte. Benner teilt diese Ansicht weitestgehend, wobei in seinem Ansatz die gesellschaftlichen Auswirkungen stärker zentriert werden. Unter Berücksichtigung des öffentlichen Einflusses vom Volk und den *barbatuli iuvenes* wollte nach ihm Clodius das beim *populus* so

[68] Vgl. GÜNTHER, R., Sexuelle Diffamierung und politische Intrigen in der Republik: P. Clodius Pulcher und Clodia. In: SPÄTH, T. – WAGNER-HASEL, B. (Hrsg.), *Frauenwelten in der Antike. Geschlechterordnung und weibliche Lebenspraxis*. Stuttgart, 2006, S. 228, 231.

[69] Vgl. ERKER, D. S., *Religiöse Rollen römischer Frauen in „griechischen" Ritualen.* Potsdamer altertumswissenschaftliche Beiträge 43. Stuttgart, 2013, S. 51f., vgl. HARTZ, C., *Skandalon! Skandale und Aufreger rund um die Antike*. Darmstadt, 2014. S. 123-125; vgl. PLUTARCH, *Caes*ar 9, 5-8.

[70] Vgl. ERKER, D. S., *Religiöse Rollen römischer Frauen in „griechischen" Ritualen.* Potsdamer altertumswissenschaftliche Beiträge 43. Stuttgart, 2013, S. 53-58.

[71] Vgl. ERKER, D. S., *Religiöse Rollen römischer Frauen in „griechischen" Ritualen.* Potsdamer altertumswissenschaftliche Beiträge 43. Stuttgart, 2013, S. 59.

[72] Vgl. ERKER, D. S., *Religiöse Rollen römischer Frauen in „griechischen" Ritualen.* Potsdamer altertumswissenschaftliche Beiträge 43. Stuttgart, 2013, S. 63f.

wichtige Bona-Dea-Fest dafür nutzen, vor allem die Populären mit entsprechenden Methoden auf seine Seite zu bringen, um durch die neuen Wege die politische Machtgewinnung zu erzielen. Diesen Ansätzen ist insofern zu folgen, dass das zentrale Motiv in der politischen Dimension gelegen haben muss. Die Absicht eines erzwungenen Umschwungs mittels, Parteienspaltung' sowie einer Machtgewinnung durch die Mobilisierung des Volkes erscheinen nachvollziehbar und plausibel, zumal diese Ziele für Clodius zum Zeitpunkt des Skandals in der Zukunft gelegen haben. Der provozierende Rückverweis auf Ciceros Fehltritt würde hingegen ein bereits abgeschlossenes Handeln in der Vergangenheit anstreben, das nur bezwecken würde, den ohnehin bereits beschädigten Ruf Ciceros in ein noch schlechteres Ansehen zu führen. Es ist durchaus möglich, dass Clodius diese nützliche Parallele zwischen den beiden Vorfällen der Bona-Dea-Feste der Jahre 63 und 62 v. Chr. zusätzlich für seine Vorhaben zu verwenden wusste, dass dies der einzige Grund gewesen sein soll, überzeugt jedoch nicht. Somit ist Wills These zwar ein plausibler, hinzutretender Teilgrund, dessen langfristige Auswirkung auch durchaus auf ähnliche Konsequenzen wie die der anderen Thesen hinausläuft, als Hauptmotiv ist jedoch den politisch-gesellschaft-lichen Ansätzen von Brenner und Sommer zu folgen, während Wills Theorie ergänzend zu betrachten ist.

Andererseits werden die feministischen Theorien vertreten, die die Position und den Einfluss der Frauen zentrieren. Für Hartmann lag das Ziel im Ehebruch, der den Dominanzgestus über Caesar bezwecken sollte. Damit stellt sie sich gegen Wills These und würde konsequenterweise einen wahren Kern in Plutarchs Aussage anerkennen. Zudem ist hiernach keineswegs Cicero das Ziel gewesen, sondern viel mehr Caesar, der Clodius anschließend im Machtgefälle als dominierend anerkennt, sich unterwirft und ihm deswegen eine politische Karriere ermöglicht. Hartmanns Ansicht weicht mithin nicht nur im Beweggrund, sondern auch in der Beurteilung der Quellenlage und dem eigentlichen Ziel des Skandals auffallend von den übrigen Meinungen ab. Sie ist deswegen kritisch zu betrachten. Basierend auf dem erläuterten Einfluss Terentias muss Plutarchs Glaubwürdigkeit bei seinen beiden vermuteten Motiven angezweifelt werden, wodurch die Überzeugungskraft dieser Theorie zusätzlich abgeschwächt wird. Dass das Bona-Dea-Fest bewusst ausgewählt und für Clodius' Zwecke auch notwendig gewesen sein muss, ist spätestens bei Erkers Ausführungen ersichtlich. Die zentrale Position des Festes innerhalb der Geschlechterrollen und für die soziale Stellung der Frauen fokussiert das bestehende Machtverhältnis. Zudem argumentiert auch Will für die unübersehbare Bedeutung des Festes beim Skandal, wenn er richtigerweise feststellt, Clodius hätte Pompeia auch anschließend leicht besuchen können, da Caesars Abreise in die Provinz bereits geplant gewesen war. Die Liebesaffäre könnte also bereits rein logisch nicht der Grund gewesen sein, sondern das Bona-Dea-Fest selbst muss den Besuch veranlasst haben, der auf Cicero abzielte.[73] Dass Clodius diese fürs Volk enorm wichtige Stellung des Festes als Sprungbrett für einen politischen Zweck genutzt hat, erscheint somit plausibel und widerspricht in seinen zentralen Motiven nicht der politisch-gesellschaftlichen Theorie. Folglich kann diese ebenfalls als Ergänzung dazu erachtet werden, während Hartmanns Ausführungen für sich alleine stehen, in mehreren Aspekten den übrigen Thesen widersprechen, anhand von diesen widerlegt werden können und damit nicht überzeugen.

Conclusio

Abschließend wurde die Vielfalt der Motivtheorien ersichtlich. Es kann festgehalten werden, dass sich Clodius weder wegen abenteuerlustiger Neugier, jugendlichen Leichtsinns oder arroganter Unreife noch wegen des reinen Liebesinteresses im Alter von 30 Jahren als Frau verkleidet und auf das Fest der Bona Dea am 4. Dez. 62 v. Chr. eingeschlichen hatte. Ob ihn hauptsächlich die politischen Auswirkungen, der gesellschaftliche Nutzen für seine Karriere oder die bedeutende Position des Bona-Dea-Festes, die für das Volk und für die soziale Stellung der Frauen von großer Relevanz waren, dazu verleitetet haben, ist nicht mehr mit absoluter Sicherheit zu sagen. Jede Theorie argumentiert nachvollziehbar und ist plausibel und sehr wahrscheinlich werden alle Gründe davon Teilaspekte gewesen sein, die zusammen gewirkt und sich gegenseitig ergänzt haben. Auch wenn die Relation der Gewichtung der jeweiligen möglichen Motive nicht mehr hinlänglich festzustellen ist und damit offen bleiben muss, so kann doch mit Sicherheit gesagt werden, dass der übergeordnete Grund ein politischer gewesen sein wird. Auch wenn die Auswirkungen interessant sind, die entstehen, wenn Caesar im Sinne Hartmanns als eigentliches Ziel betrachtet wird, scheint im Rahmen der Gesamtbetrachtung doch Cicero als Ziel des Skandals mehr zu überzeugend. Schließlich haben er, Pompeia und langfristig die Optimaten im dadurch ausgelösten Prozess verloren, während Clodius und Caesar davon profitierten. Eine zukunftsgerichtete Absicht ist zudem vor dem Hintergrund der Denkweisen und Interessensbereiche eines politisch denkenden und sorgfältig planenden jungen Mannes naheliegend. Der Rückverweis auf die Catilinarier mag eventuell sogar ein glücklicher Zufall gewesen sein, den Clodius im Verlauf der Geschehnisse geschickt in seinen Strategien zu nutzen wusste. Zusammenfassend kann folglich gesagt werden, dass es nicht abschließend zu beantworten ist, warum Clodius das getan hat. Die möglichen Motive können aber eingegrenzt und mit hoher Wahrscheinlichkeit auf ein politisches Motiv zurückgeführt werden, das den gesellschaftlichen Nutzen für seine weitere Karriere, die angespannte Situation der bereits gespaltenen politischen Kreise sowie die Einflüsse der sozialen Position der Frauen innerhalb des Skandals in gewissen Anteilen inkludiert hat. Das Fest der Bona Dea bei Caesar sowie Ciceros derzeitige Situation haben Clodius für seine Absichten schließlich den passenden Weg bereiten können.

[73] Vgl. WILL, W., *Caesar*. Gestalten der Antike. Darmstadt, 2009, S. 73.

D. 1, 3, 28 *(Paul. 5 ad legem Iuliam et Papiam)* – Retroactive interpretation and the *leges Iulia et Papia Poppaea*

Tomislav Karlović, Lara Šmic***

Abstract

Among different forms of retroactivity and their regulation, retroactive interpretation was one of the forms that have been already mentioned in Roman law. Apart from the Justinian's Novels, which provided specifically for the authentic (retroactive) interpretation, retroactive interpretation is expressly dealt with in the D. 1, 3, 28 (Paul. 5 ad legem Iuliam et Papiam). This very short fragment is a part of the title on the sources of law; however, it stands out among the other opinions selected to represent principles of the interpretation, prescribing the use of more recent laws in the interpretation of those preceding them. In this paper we shall try to clarify the original meaning of this statement, with reference to its original subject matter, lex or better said leges Iulia et Papia (Poppaea), the Roman family legislation with important repercussions in the field of succession law, i.e. in the form of the introduction of escheated property (bona caduca). It is discussed the temporal argument in the Paul's commentary regarding the sequence of two acts and its specific goals. Furthermore, it is pointed to the Justinian's legislation abrogating the rules on bona caduca and how it might help in possibly offering some more specific background for this rule.

Keywords: *retroactivity; retroactive interpretation; interpretation; lex Iulia et Papia; lex Iulia de maritandis ordinibus; Lex Papia Poppaea; bona caduca; escheated property.*

Introduction

Different forms of retroactivity and pertinent rules were recognized rather early in the development of Roman legal thought. The initial thinking that legislation is an expression of existing law that is applied in an immediate and absolute sense, regardless of the time of the event to which it is applied, was replaced in the Roman Republic with the consciousness of the time-element in law.[1] These changes were primarily reflected in the laws from the middle Republic[2], such as *lex Papiria de Sacramentis*, *lex Plaetoria de iurisdictione*, and others, in which the words *post hanc legem* were added indicating their future application.[3] Also, the temporal element with regard to the application of *lex Atinia* was questioned already by the first professional jurists, the well-known founders of legal science in Rome, in the second half of the second century BC.[4] Furthermore, we find a very elaborate discussion and the attack by Cicero on the retroactive edict in his speech *In Verrem*.[5] In the imperial period, towards its end, i.e. during the so-called postclassical period, the emperors very clearly posited rules on the prohibition of retroactive legislation, with strictly limited exceptions[6], as well as on the authentic interpretation which was formally regarded as the authority belonging to the emperors as part of their *imperialis potestas*.[7]

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1 SIBER, H., *Analogie, Amtsrecht und Rückwirkung im Strafrechte des römischen Freistaates*. Leipzig, 1936, p. 44; BROGGINI, G., Retroactivity of Laws in the Roman Perspective. In: *Irish Jurist*, Vol. 1, No. 1, 1966, p. 151; LAFFI, U., Il principio dell' irretroattività della lege nell' esperienza giuridica romana dell' età repubblicana. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, Vol. 138, 2021, p. 248.

2 BROGGINI, G., La retroattivitf della legge nella prospettiva romanistica. In: BROGGINI, G., *Coniectanea, Studi di diritto romano*. Milano, 1966, p. 359.

3 MARKY, T., Appunti sul problema della retroattività delle norme giuridiche nel diritto romano. In: *The Bullettino dell'Istituto di Diritto Romano (BIDR)*, Vol. LIII, 1948, p. 243; BROGGINI, G., La retroattività della legge nella prospettiva romanistica. In: BROGGINI, G., *Coniectanea, Studi di diritto romano*. Milano, 1966, p. 360.

4 DUCOS, M., *Les Romains et la loi*. Paris, 1984, p. 269; LAFFI, U., Il principio dell' irretroattività della lege nell' esperienza giuridica romana dell' età repubblicana. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, Vol. 138, 2021, p. 249-253.

5 In effect, this can be considered a case of the retroactive interpretation of an act of a popular assembly by a praetor's edict, however, Cicero argued it on different lines. See: KARLOVIĆ, T., Retroactivity in Preclassical Roman Law. In: HORNYÁK, S. – JUHÁSZ, B. – KORSÓSNÉ DELACASSE, K. – PERES, Z. (eds.), *Turning Points and Breaklines*. München, 2009, p. 256-269.

6 SAVIGNY, F. C. von, *System des heutigen römischen Rechts*. Berlin: 1849, Vol. 8, p. 392; AFFOLTER, F., *Das intertemporale Recht. Geschichte des intertemporalen Privatrechts*. Leipzig, 1902, p. 70-71; ROUBIER, P., *Les conflits de lois dans le temps*. Paris, 1960, p. 32-35.

7 While the legislation itself may contain provisions with retroactive effect, impacting not only the enduring legal affairs but also finished legal acts, the retroactive effects can be achieved also by interpreting the law. The most prominent and discussed form of such interpretation is the authentic interpretation which can be defined as a legally prescribed interpretation ordained by its drafter. It mostly emerges because of the unclarity of certain rules in practice, whereby the legislator is called upon to elaborate its intention imposing rules for judiciary with the retroactive and absolute effect. See: AFFOLTER, F., *Das intertemporale Recht. Geschichte des intertemporalen Privatrechts*. Leipzig, 1902, p. 112-114; ROUBIER, P., *Les conflits de lois dans le temps*. Paris, 1960, p. 39-41; BROGGINI, G., La retroattività della legge nella prospettiva romanistica. In: BROGGINI, G., *Coniectanea, Studi di diritto romano*. Milano, 1966, p. 388-389; BERNER, K., Authentic Interpretation in Public International Law. In: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 76, 2016, p. 852-853.

With regard to the former, the most prominent is the Theodosian constitution incorporated into the Justinian's Code as C. 1, 14, 7[8], while the latter authority was quite incontrovertibly articulated in Justinian's Nov. 19 and 143[9]. In the last sentence of the first paragraph of Nov. 143, Justinian confirmed the retroactive effects of the authentic interpretation by declaring: "… we decree that this interpretation is to be valid not only for future caes but also for past ones, as if our law had been promulgated with such interpretation from the outset."[10]

In the absence of such a system of centralized judiciary and law-making as it developed by Justinian's time and which facilitated authentic interpretation, having in mind the nature of the sources of law during the preclassical and classical period, retroactive interpretation in the earlier periods could primarily arise from the competing or partially overlapping successive legislation. In the rhetorical and juristic commentaries on the manners in which the new acts impact previous regulations, especially in the differentiations between abrogation and derogation, the anonymous author of *Rhetorica ad Herrenium* (2, 10, 15), Cicero (*ad Att.* 3, 23,2) and pseudo-Ulpian (*Ulp. Reg.* 1, 3) quite succinctly explained how the later act could fully or partially substitute the provisions of an earlier one by regulating the matter differently.[11] Nevertheless, as not all acts were precise enough, nor did they provide for a full regulation of their subject matter, it opened space for the interpretation of old law, still in force, before the courts.

In the Justinian's Digest, texts providing rules on the interpretation are listed in the title on the sources of law, D. 1, 3 "*De legibus senatusque consultis et longa consuetudine*". Among these stands out Paul's fragment D. 1, 3, 28: "*Sed et posteriores leges ad priores pertinent, nisi contrariae sint, idque multis argumentis probatur*", summarily prescribing the use of more recent laws in the interpretation of those preceding them, if they were not contrary to each other. In our understanding, this would mean that new laws should be used in the adjudication based on the provisions of old ones, which were not directly derogated, thus changing the existing practice, what can be considered as a form of indirect retroactive legislation or more precisely the retroactive interpretation of law.[12] Naturally, with such a result, the text solicits many questions, especially in light of the fact that similar statements on the issues of law were usually given in Roman law, in line with the casuistic method of classical jurists, as arguments in answers to specific cases.[13]

In this paper, we shall try to clarify the meaning of this statement, with special reference to its original context, *leges Iulia et Papia Poppaea*, the Roman family legislation with important repercussions in the field of succession law, i.e. the introduction of escheated property (*bona caduca*). The focus will be on the temporal argument in Paul's commentary, its connection with the sequence of two laws and its specific goals. It is also pointed to Justinian's legislation abrogating the rules on *bona caduca* and how it might help in finding the background for this rule.

1. D. 1, 13, 28 and its context in the *Digest*

Notwithstanding the role and the contents of title D. 50, 17 "*De diversis regulis iuris antiqui*", which occupies a central place in the studies on the legal principles and rules, general rules on the interpretation are mostly gathered in the first book of the Digest, under the title D. 1, 3, on the statutes, senatorial decrees and long-established custom (*De legibus senatusque consultis et longa consuetudine*).[14] Central section of the title, which is predominantly dedicated to the interpretation, focuses on the temporal element in law, starting with the D. 1, 3, 20 (*Iul. 55 digestorum*), instructing readers – judges and parties – that it is sometimes futile to search for the *ratio* of the old law, i.e. the purpose lying behind the decisions of *maiores*, or as Neratius said in the following fragment D. 1, 3, 21 (*Ner. 6 membranarum*), this should be even better avoided not to subvert the law. The compilers continued the sequence with the texts by Ulpian, D.

[8] C. 1, 14, 7 (Impp. Theodosius, Valentinianus): "It is certain that statutes and constitutions fix a rule only for future transactions, and cannot be applied to past acts, unless special provision was made concerning past time in regard to matters still pending." Translation according to: BLUHME, F. H. – DILLON, J. N. In: FRIER, B. W. (ed.), *The Codex of Justinian*. Cambridge, 2016, Vol. 1, p. 260-261.

[9] It is stated in the first sentence of the preamble of Nov. C. 143: "That the head of the state alone has power to interpret a law is something that it occurs to no-one to doubt, seeing that his pre-eminent status also claims for itself the authoritiy to promulgate the law.", while the last one proclaimed: "To cut away their unnecessary doubt for the future as well, we have theferore chosen to interpret the earlier law by means of the present one." Translation according to: MILLER, J. D. – SARRIS, P. (eds.), *The Novels of Justinian*. Cambridge, 2018, Vol. 2, p. 937-938.

[10] Nov. 143, 1: „… *Quam interpretationem non in futuris tantummodo casibus, verum in praeteritis etiam valere sancimus, tamquam si nostra lex ab initio cum interpretatione tali promulgata fuisset…*" Translation according to: MILLER, J. D. - SARRIS, P. (eds.), *The Novels of Justinian*. Cambridge, 2018, Vol. 2, p. 939. See also: LEVEL, P., *Essai sur les conflits de lois dans le temps*. Paris, 1959, p. 29; ROUBIER, P., *Les conflits de lois dans le temps*. Paris, 1960, p. 40-41.

[11] FERRARY, J.-L., Chapitres tralatices et références à des lois antérieures dans les lois romaines. In: FRASCHETTI, A. (ed.), *La commemorazione di Germanico nella documentazione epigrafica, Convegno Internazionale di Studi Cassino 21-24 ottobre 1991*. Roma, 2000, p. 89-93; BONIN, F., Tra *ius antiquum*, *lex Iulia* e *lex Papia*: il complesso destino dei *caduca* in età augustea. In: *Teoria e storia del diritto privato*, Vol. XII, 2019, p. 19-25; LAMBERTI, F., Profili del coordinamento "temporale" fra *leges rogatae*, tra repubblica e principato. In: CHEVREAU, E. – MASI DORIA, C. – RAINER, J. M. (eds.), *Liber amicorum - Mélanges en l'honneur de Jean-Pierre Coriat*. Paris, 2019, p. 454-456.

[12] It is also discussed as the "changement de jurisprudence", see: ROUBIER, P., *Les conflits de lois dans le temps*. Paris, 1960, p. 23-29.

[13] On the casuistry of Roman jurists see e.g. KASER, M., *Das römische Privatrecht*. München, 1971, Vol. I, p. 210-214; WALDSTEIN, W., Entscheidungsgrundlagen der klassischen römischen Juristen. In: TEMPORINI, H. *et al.* (eds.), *Aufstieg und Niedergang der römischen Welt. Geschichte und Kultur Roms im Spiegel der neueren Forschung. Teil II: Principat. Band 15: Recht (Methoden, Schulen, einzelne Juristen)*. Berlin, 1976, p. 3–100; HUMBERT, M., Faktoren der Rechtsbildung. In: BABUSIAUX, U. *et al.* (eds.), *Handbuch des Römischen Privatrechts*. Tübingen, 2023, Vol. I, p. 26-27.

[14] These are mainly excerpts from different types of books belonging to the "problematic literature" as well as the passages from the commentaries on earlier acts or the edicts, with smaller part coming from the *institutiones*, *regulae*, and *epitomae*. Overall, majority are extracts from the opinions given on individual questions and problems. On the types of legal literature see e.g. SCHULZ, F., *History of Roman Legal Science*. Oxford, 1953, p. 183-242; BABUSIAUX, U., Legal Writing and Legal Reasoning. In: DU PLESSIS, P. J. – ANDO, C. – TUORI, K. (eds.), *The Oxford Handbook of Roman Law and Society*. New York, 2016, p. 176-187.

1, 3, 22 (*Ulp. 35 ad edictum*), that the laws which forbid something for the future leave the past as such, and Paul's statement in D. 1, 3, 23 (*Paul. 4 ad Plautium*), that steady, settled interpretation should be upheld.

Providing a possible link in the text of D. 1, 3, 24 (*Cels. 9 digestorum*), on the integral interpretation, but not as much with the D. 1, 3, 25 (*Mod. 8 responsorum*), there follows a line of three provisions on the interrelation between old and new legislation and how they impact each other. It starts with the fragment from Paul's fourth book of Questions – D. 1, 3, 26 (*Paul. 5 quaestionum*): "*Non est novum, ut priores leges ad posteriores trahantur.*"[15], which is further explained by the one from Tertullian's first book of Questions D. 1, 3, 27: "*Ideo, quia antiquiores leges ad posteriores trahi usitatum est, semper quasi hoc legibus inesse credi oportet, ut ad eas quoque personas et ad eas res pertinerent, quae quandoque similes erunt*."[16] The first one states that prior laws influence the (interpretation of) posterior laws, to which the other adds that because it is a long custom that the old laws have a draw on the new legislation, they are considered their integral part, i.e. they affect similar situations and addressees. This is easily comprehensible bearing in mind the unity of the legal system which was regarded by Romans as such, despite the multiple layers of law and their different sources.[17] The established practice, continuity of law-making and the application of law should normally entail the reliance on previous legislation. In that sense, one can only recall the endurance of the provisions of the *Leges duodecim tabularum* and the rules of *ius civile* in the classical period, and even later.[18]

The final one[19], and the central object of this study, is Paul's text (*Paul. 5 ad legem Iuliam et Papiam*): D. 1, 3, 28: "*Sed et posteriores leges ad priores pertinent, nisi contrariae sint, idque multis argumentis probatur*."[20], which in MacCormick's translation (within Watson's edition) reads: "But later laws also refer to earlier ones, unless they contradict them, there are many proofs of this." In German translation, by Seiler, it is: "Aber auch spätere Gesetze wirken auf frühere ein, wenn sie ihnen nicht entgegenstehen, und das wird durch zahlreiche Beispiele bestätigt."[21] It is visible from these differing translations that the terms used by Paul are rather ambiguous, especially the word "*pertinent*", which makes it more complicated to form a clear idea and appreciation of the sentence. Thus, while we can acknowledge that Paul stated that the new legislation belongs to the earlier one unless they are contrary, what is confirmed by many, here unknown[22], examples, what this exactly means, or at least what the compilers inferred that it had meant, is only partially elucidated by the given context in the Digest.

Seemingly, compilers understood the text as a rule on interpretation, which would be read in conjunction with the preceding two in a manner that the later act influences the interpretation of an earlier one and reversely, in as much as they are not contrary to each other.[23] It does sound quite clear at first, however, the specifics, the true scope of application and the original purpose of the text remain blurry. In what sense, which acts and on what issues, how do they affect each other – these are just a few questions that arise from the sentence.

In the literature on intertemporal rules and the prohibition of retroactivity in Roman law[24], Paul's text and these issues are not really discussed. Affolter, in his fundamental treatise on the historical development of rules on retroactivity from the beginning of the 20th Century, used this line of texts strictly to show what does not belong to the issue of "intertemporales Privatrecht", defining them as "Staatsrecht", i.e. public law rules on the succession of acts.[25] Lamberti, on the other side, mentions the Paul's text in the conclusion of her article on the temporal relationship of acts and the mutual references, using it strictly as an example indicating the presumed ("doveva contenere") general practice of referencing *lex Iulia de maritandis ordinibus* in *lex Papia*

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[15] D. 1, 3, 26: "It is not an innovation to reconcile earlier laws with later ones." Translation according to: MACCORMICK, D. N. In: WATSON, A. (ed.), *The Digest of Justinian*. Philadelphia, 1985, Vol. I, p. 13.

[16] D. 1, 3, 27: "Accordingly, because the practice is to read earlier laws in the light of later ones, we ought always to deem it already inherent in statutes that they refer also to those persons and those things which may at any time turn out analogous (with persons and things expressly referred to)." Translation according to: MACCORMICK, D. N. In: WATSON, A. (ed.), *The Digest of Justinian*. Philadelphia, 1985, Vol. I, p. 13.

[17] See: BABUSIAUX, U., Römische Rechtsschichten. In: BABUSIAUX, U. *et al.* (eds.), *Handbuch des Römischen Privatrechts*. Tübingen, 2023, Vol. I, p. 115-275.

[18] *Ibid*., p. 125.

[19] The ensuing fragment is also by Paul, from his commentary on *lex Cincia*, which speaks about the *fraus legis*, i.e. fraudulent behaviour circumventing the act's provisions, but it does not belong to the same line of argument. *Cf*. D. 1, 3, 29 (*Paul. sing. ad legem Cinciam*): "*Contra legem facit, qui id facit quod lex prohibet, in fraudem vero, qui salvis verbis legis sententiam eius circumvenit*." (It is a contravention of the law if someone does what the law forbids, but fraudulently, in that he sticks to the words of the law but evades its sense.). Translation according to: MACCORMICK, D. N. In: WATSON, A. (ed.), *The Digest of Justinian*. Philadelphia, 1985, Vol. I, p. 13.

[20] English translation according to: MACCORMICK, D. N. In: WATSON, A. (ed.), *The Digest of Justinian*. Philadelphia, 1985, Vol. I, p. 13.

[21] German translation according to: SEILER, H. H. In: BEHRENDS. O. *et al.* (eds.), *Corpus Iuris Civilis. Text und Übersetzung. Digesten 1-10 (Bd. II).* Heidelberg, 1995, p. 114.

[22] TURAMINI, A., *Ad rubricam Pandectarum de legibus libri tres*. Florentiae, 1590, p. 309, where he mentioned under *multis argumentis* as the example *lex Velleia*. E.g. Ruggiero alludes that these would be examples in the *lex Papia* referencing the *lex Iulia*. See: RUGGIERO, I., *Iulius Paulus: Ad Legem Iuliam et Papiam libri X*. Roma, 2023, p. 125.

[23] In that sense it was quoted in the jurisprudence of the 19th Century and was mentioned e.g. in *Il Digesto italiano*, but it was not elaborated further. SAREDO, G., Abrogazione delle leggi. In: *Il Digesto italiano*. Torino, 1884, Vol. I, p. 129.

[24] The medieval jurists approached the text based on Irnerius' opinion, who explained it solely as dealing with the laws taken in the Codification, not with the proper parts of Codification. Thus, they were not investigated further. SAVIGNY, F. C. von, *Geschichte des Römischen Rechts im Mittelalter*. Heidelberg, 1822, Vol. 3, p. 402.

[25] AFFOLTER, F., *Das intertemporale Recht. Geschichte des intertemporalen Privatrechts*. Leipzig, 1902, p. 62-64.

Poppaea.[26] However, the remarks on the fragment do not go further than that. Consequently, with regard to the questions on the role of Paul's text in the context of retroactive application and interpretation of law, the next step is to try to determine the original place and function of the statement, i.e. what was the specific situation, or an issue that Paul had in mind when expressing this opinion.

2. *Lex Iulia de maritandis ordinibus* from 18 BC and *Lex Papia Poppaea* from 9 AD – sequence of acts and possible explanations for D. 1, 13, 28

At first glance, the inscription of the fragment, *Paul. 5 ad legem Iuliam et Papiam*, allows for an assumption that the text concerns the relationship between *lex Iulia de maritandis ordinibus* from 18 BC and *lex Papia Poppaea* from 9 AD, two laws which were discussed and commented jointly by 3rd-Century jurists such as Paul and Ulpian.[27] The unified exposition of the two acts is most clearly reflected in the title of the book from which this fragment was taken. Nevertheless, as can be perceived from Gaius[28], pseudo-Ulpian[29] and several other sources (e.g. Cassius Dio and Suetonius)[30], but most prominently from the text of *lex municipii Troesmensium* from 177-180 AD[31], there was an evident differentiation between these two acts and the successive chapters they contained. Specifically, chapter 27 of *lex municipii Troesmensium* outlines the sequence of its sources – the exact provision of the *lex Iulia*, followed by the commentary that formed the basis for the *lex Papia Poppaea* from 5 AD, and finally the *lex Papia Poppaea* itself.[32]

The distinctive contents of the two acts, their complementary elements, and the extent of emendations made to the *lex Iulia* by the *lex Papia* can be inferred to some extent based on the indications provided by the mentioned juristic and literary works, although they are not always clearly discernable.[33] In general terms, *lex Iulia de maritandis ordinibus* regulated the prohibition of mixed marriages between classes and prescribed that men and women were supposed to be married at certain ages.[34] If they failed to comply with these rules, the main penalty was the inability to acquire inheritance *ex testamento* and bequests made in the form of legacies (*legatum*).

Widespread discontent and numerous issues with its application led to the enactment of *lex Papia Poppaea*, bringing changes to *lex Iulia de maritandis ordinibus*, but focusing mainly on encouraging procreation and introducing sanctions for persons without children.[35] Thus, in addition to the penalties for unmarried individuals (*caelibes*), they were also imposed on those who were married but had no children (*orbi*). Among the various measures, the principle penalty was again in the sphere of testamentary dispositions, specifically the inability to receive the full inheritance or legacies. To sum up, except in the case of close relatives up to the 6th degree, the *caelibes* could not be appointed as heirs or legatees in the will nor receive anything on that account, while the *orbi* could inherit only half of what was left to them. If, due to these rules, the designated persons were not eligible, the property would become the escheated property (*bona caduca*[36]), and if there were no substitute or intestate heirs

[26] LAMBERTI, F., Profili del coordinamento "temporale" fra *leges rogatae*, tra repubblica e principato. In: CHEVREAU, E. – MASI DORIA, C. – RAINER, J. M. (eds.), *Liber amicorum - Mélanges en l'honneur de Jean-Pierre Coriat*. Paris, 2019, p. 477: "Anche l'affermazione attribuita a Paolo (fra l'altro proprio nel commento alla *lex Iulia et Papia*) per cui *posteriores leges ad priores pertinent* potrebbe considerarsi, senza particolari forzature, essere stata relativa, nel suo contesto originario, ai rinvii costanti che la *lex Papia* doveva contenere alla *lex Iulia de maritandis ordinibus* (e – come documenta la *lex Troesmensium* – anche, forse, al *commentarius propositus* nel 5 d.C. che aveva preceduto l'approvazione della *lex Papia Poppaea*)."

[27] From the literature on these acts, see: HEINECCIUS, J. G, *Ad legem Iuliam et Papiam commentarius quo multa iuris auctorumque veterum loca explicantur, vindicantur, emendantur atque illustrantur*. Amsterdam, 1731; JÖRS, P., *Ueber das Verhältnis der Lex Iulia de maritandis ordinibus zur Lex Papia Poppaea*. Bonn, 1882; METTE-DITTMANN, A., *Die Ehegesetze des Augustus. Eine Untersuchung im Rahmen der Gesellschaftspolitik des princeps*. Stuttgart, 1991; ASTOLFI, R., *La lex Iulia et Papia*. Padova, 1996; MOREAU, P., *Loi Iulia de maritandis ordinibus*. In: *Lepor. Leges Populi Romani* [online]. Paris, 2007. Available at: https://telma.irht.cnrs.fr/outils/lepor/notice449/ [Accessed 29 April 2025]; SPAGNUOLO VIGORITA, T., *Casta domus. Un seminario sulla legislazione matrimoniale augustea*. Napoli, 2010; REVERCHON, F., Réguler par l'honneur, discipliner par le droit : essai d'interprétation des lois matrimoniales d'Auguste. In: *Cahiers Jean Moulin*, Vol. 5, 2019; BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020; RUGGIERO, I., *Iulius Paulus: Ad Legem Iuliam et Papiam libri X*. Roma, 2023.
See on the general idea about the purpose of this text, which is discussed in the following chapter: LENEL, O., *Palingenesia iuris civilis.* Leipzig, 1899 (Frankfurt am Main, 2006), p. 1128.

[28] E.g. *Gai. Inst*. II, 111; II, 144; II, 206; II, 286-286a.

[29] E.g. *Ulp. Reg.* 13 and further. More on *Tituli ex corpore Ulpiani, Epitomae* or *Regulae Ulpiani*, which will be cited as *Ulp. Reg.*, see in: AVENARIUS, M., *Der pseudo-ulpianische liber singularis regularum. Entstehung, Eigenart und Überlieferung einer hochklassischen Juristenschrift*. Göttingen, 2005.

[30] See more in: BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 17-19.

[31] See more in: R. CÎRJAN, The Municipal Law of 'Troesmis': Preliminary Remarks. In: PANAITE, A. – CÎRJAN, R. – CAPITA, C. (eds.), *Moesica et Christiana. Studies in Honour of Professor Alexandru Barnea*. Braila, 2016, p. 289-300; ECK, W., Die *lex Troesmensium*: Ein Stadtgesetz für ein *municipium civium Romanorum*. In: *Zeitschrift für Papyrologie und Epigraphik*, Vol. 200, 2016, p. 565-606; PLATSCHEK, J., Zur Lesung von Kap. 27 der 'lex Troesmensium'. In: *TYCHE*, Vol. 32, 2017, p. 151-165.

[32] LAMBERTI, F., Profili del coordinamento "temporale" fra *leges rogatae*, tra repubblica e principato. In: CHEVREAU, E. – MASI DORIA, C. – RAINER, J. M. (eds.), *Liber amicorum - Mélanges en l'honneur de Jean-Pierre Coriat*. Paris, 2019, p. 472-474.

[33] METTE-DITTMANN, A., *Die Ehegesetze des Augustus. Eine Untersuchung im Rahmen der Gesellschaftspolitik des princeps*. Stuttgart, 1991, p. 162-163.

[34] ASTOLFI, R., *La lex Iulia et Papia*. Padova, 1996, p. 335-336; TREGGIARI, S., *Roman Marriage. Iusti Coniuges from the Time of Cicero to the time of Ulpian*. Oxford, 1991, p. 65-66.

[35] DIXON, S., *The Roman Family*. London, 1992, p. 120. On the law of 4 AD which would be precursor to the *lex Papia Poppaea* by introducing the sanctions for childless spouses, and the suggestion that these rules were part of *lex Aelia Sentia*, see more in: SPAGNUOLO VIGORITA, T., *Casta domus. Un seminario sulla legislazione matrimoniale augustea*. Napoli, 2010, p. 71-76; BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020 p. 136-144.

[36] On the use of term and its meaning: ASTOLFI, R., *La lex Iulia et Papia*. Padova, 1996, p. 235-240.

who could acquire inheritance or legacies (*bona vacantia*[37]), they would "fall" to the state.[38]

Despite being only a simplified description of the contents of both acts, it was in the context of *bona caduca* and *bona vacantia* that Astolfi, one of the preeminent authors on *leges Iulia et Papia*, mentioned Paul's D. 1, 3, 28.[39] In his treatise on these acts, he wrote that the provisons of the *lex Iulia* would apply to *bona vacantia* in cases where the sole testamentary heir failed to accept the inheritance and the ensuing succession *ab intestato* did not take place, while the *lex Papia* regulated the system of devolution for testamentary dispositions in favour of *incapaces*, and which would be applied in cases of multiple heirs, benefiting *patres*, whereby he stated that one could use Paul's text to explain how the later law (*lex Papia*) should be used in the intepretation of the earlier (*lex Iulia*), although it was not exactly prepared in relation to this topic.[40] Unfortunately, Astolfi did not elaborate further on the possible application of Paul's sentence to this matter. Moreover, his reservation, that the text was not specifically intended to address this issue, probably influenced later authors not to follow the argument deeper, nor to go in that specific direction in its analysis. Consequently, Bonin and Ruggiero, who dedicated the most attention to the fragment, later approached the text from a broader angle, initially indicated by Lenel in 1899, of the relationship between the two acts in general.[41]

In Bonin's study on the differentation between the two acts and the difficulties in identifying the layers and changes introduced by the *lex Papia*, Paul's text is discussed as an example of the Sabinian method of interpreting legislative acts and of "Rechtsquellenlehre".[42] As such, it is directly connected with the preceding fragments D. 1, 3, 26 and 27, which similarily point to the persistence of earlier legislation and its role in the interpretation of the posterior.[43] In total, these fragments reflect the idea of positive law mirroring natural law[44], i.e. the understanding that different laws create a unity of legal order, and in that sense *lex Iulia* and *lex Papia* are interpreted as parts of that unity.[45] As Bonin stated: „In diesem Regelungskomplex diente nach ihrem Verständnis die frühere *lex Iulia* auch nach dem Erlass der späteren *lex Papia* als Mittel, um gerechte und vernünftige Regelungen zu treffen."[46]

In a similar fashion, Ruggiero assumed that Paul's text concerned the changes and the integration of the *lex Iulia* made by the provisions of the *lex Papia*.[47] She followed as well with the elaboration of legislative technique of early Principate as applied in the case of the *leges Iulia* and *Papia*, emphasizing that the latter did not fully abrogate the former but rather modified it.[48] Ruggiero situates the fragment within the context of juristic discussions aimed at resolving specific inconsistencies and frictions between the two acts, especially in the light of needed references to the prior in the posterior one.[49] Nevertheless, she did not try to pinpoint

[37] In connection with the *Gai. Inst.* II, 150. See: ASTOLFI, R., *La lex Iulia et Papia*. Padova, 1996, p. 301-308; BONIN, F., Tra *ius antiquum*, *lex Iulia* e *lex Papia*: il complesso destino dei *caduca* in età augustea. In: *Teoria e storia del diritto privato*, Vol. XII, 2019, p. 9-17, 43.

[38] See e.g. also: MCGINN, A., J., T., *Prostitution, Sexuality and Law in Ancient Rome*. Oxford, 1998, p. 73.

[39] ASTOLFI, R., *La lex Iulia et Papia*. Padova, 1996, p. 303.

[40] First part of the footnote where the text is mentioned reads: "Si puo ricordare quanto osserva Paolo, se non proprio in relazione a questo punto particolare, a riguardo delle integrazioni e modificazioni apportate, in via generale, dalla *lex Papia* alla *lex Iulia*: 5 ad l. I et P. 947 D. 1, 3, 28: …" ASTOLFI, R., *La lex Iulia et Papia*. Padova, 1996, p. 303, fn. 8.

[41] It is an approach proposed by Lenel in his *Palingenesia iuris civilis* (1899), which forms the basis of the following chapter, but which is reflected in these works: BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 184-188; RUGGIERO, I., *Iulius Paulus: Ad Legem Iuliam et Papiam libri X*. Roma, 2023, p. 124-126.

[42] Before that, in the sense that it is one of the texts showing the abandonment of the "Derogationstheorie", it is mentioned by Behrends and Avenarius: BEHRENDS, O., Gesetz und Sprache. Das römische Gesetz unter dem Einfluss der hellenistischen Philosophie. In: BEHRENDS, O., *Institut und Prinzip. Siedlungsgeschichtliche Grundlagen, philosophische Einflüsse und das Fortwirken der beiden republikanischen Konzeptionen in den kaiserzeitlichen Rechtsschulen*. Göttingen, 2004, Vol. I, p. 123, fn. 63; AVENARIUS, M., *Der pseudo-ulpianische liber singularis regularum. Entstehung, Eigenart und Überlieferung einer hochklassischen Juristenschrift*. Göttingen, 2005, p. 168, fn. 40. See also: BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 184-185.

[43] BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 185: "Auf dieser Methode beruht der Gedanke, der auf die vorklassischen *veteres* zurückzuführen ist, dass das alte Recht bestehen bleiben muss, um in diesem Rahmen vernünftige Lösungen bei der Interpretation nach dem Sinn und Zweck des neuen Gesetzes zu ermitteln."

[44] BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 185: "Diese Art von Interpretation ist im Bereich des vorklassischen Rechtsdenkens durch die Vorstellung bedingt, dass positives Recht jeweils einen Versuch darstellt, das *ius quod est*, d.h. das überpositive Naturrecht, abzubilden."

[45] It should be added that Bonin proposed in a footnote that the text dealt with the method of intrepretation in general, not just *leges Iulia et Papia*, relying also on Lenel: "Hier spricht Paulus nur über seine Methode in der Gesetzesauslegung im Allgemeinen und nicht notwendigerweise nur in Bezug auf die Ehegesetze [vgl. in diesem Sinne auch Lenel, 1960 (1899), I, 1128 Fn. 7]." BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 185, fn. 61.

[46] BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 186-187. Similar understanding is expressed in Bonin's final remarks that the fragments in the Digest *ad legem Iuliam et Papiam* – "…sind aus verschiedenen Gründen überwiegend von der vorklassich-sabinianischen Auslegungsmethode geprägt…Nach dieser Methode konnten die älteren Gesetze mit ihren Regelung in die jüngeren einbezogen werden und mussten so im Lichte der letzeren (und umgekehrt) ausgelegt werden." BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 379-380.

[47] Relying on Lenel's conclusion, as the text is accompanied by a footnote referencing Lenel, p. 1128, fn. 7, the author writes: "Il frammento riguarda con ogni probabilita – nonostante il tono generale dell enunciazione – le specifiche modifiche e integrazioni apportate dalla *lex Papia* alla *lex Iulia*, e dunque il reciproco coordinamento delle loro disposizioni." RUGGIERO, I., *Iulius Paulus: Ad Legem Iuliam et Papiam libri X*. Roma, 2023, p. 124.

[48] One can specifically, as a sort of intermediary conclusion, cite: "Le leggi che rimangono formalmente in vigore, anche se i successivi emendamenti le hanno profondamente trasformate, sono proprio quelle citate e commentate dai giuristi." RUGGIERO, I., *Iulius Paulus: Ad Legem Iuliam et Papiam libri X*. Roma, 2023, p. 125.

[49] "In questo contesto si inserisce [F. 20], ove Paulo si sofferma sul metodo impiegato per interpretare la nostra lex, con una chiara allusione ai rinvii costanti che la Papia doveva fare alla legge Giulia." RUGGIERO, I., *Iulius Paulus: Ad Legem Iuliam et Papiam libri X*. Roma, 2023, p. 125.

the exact problem to which the text might refer, remaining at the "macro" level by considering its use simply in interpreting legislative acts as such, in Paul's book as it was used later by compilers.

It can be thus concluded, with regard to both authors, that they focused on the broader meaning and use of Paul's text. Bonin went into more detail, emphasizing the preclassical Sabinian method of interpreting the law as a unified cathegory, according to which the older laws could be viewed in the light of later legislation and interpreted through it, and reversly. Ruggiero, by contrast, stressed the coinciding application of the two acts. Despite the validity of such reasoning, the issue of retroactive interpretation was not tackled as such, and the exact object, motive and aim of Paul's text remain unclear.

3. *Paul. 5 ad legem Iuliam et Papiam* – its contents, place and role of D. 1, 3, 28

3.1 *Lex Papia Poppaea – caduca, aditio and dies cedens*

In relation to the more precise positioning of the text within the Paul's commentary, which would allow for an assumption of its role and object, primary source is Lenel's *Palingenesia iuris civilis* (1899).[50] Although somewhat different ordering of texts within the Paul's 10 books *ad legem Iuliam et Papiam* was proposed slightly later by Ferrini (1901)[51], and Ruggiero most recently (2020) prepared a thorough commentary on each specific text[52], Lenel's placement of D. 1, 3, 28, at the head of book 5 has heavily influenced all the later authors.[53] Ferrini even put forward the hypothesis that D. 1, 3, 28 marked the beginning of commentary on *lex Papia*, suggesting that the first four books dealt with the *lex Iulia*.[54] In broadest lines, it was followed by Astolfi, although recognizing some discrepancies, meaning that commentaries on *lex Iulia* were found in later books, while those on *lex Papia* in the first four.[55] These exceptions were later emphasized by Crawford and Moreau, who rejected Ferrini's thesis.[56] Ultimately, the sharp delineation between the two acts in the commentaries was refuted by Bonin.[57]

Lenel's footnote with the text: "*Spectant haec, ut opinor, ad intrepretationem legis Iuliae et Papiae, ut, quod alter legi desit, ex altera suppletur.*"[58], had a greater and even more lasting impact. It was stressed as similar to his understanding first by Ferrini.[59] Additionally, Astolfi[60], and more recently Bonin and Ruggiero[61], have also taken this short Lenel's comment at its face value, as mentioned *supra*, without questioning the possibility of a more specific role of D. 1, 3, 28 within the context of the 5th book, to which we shall move the focus.

According to the Lenel' reconstruction, Paul's 5th book *ad legem Iuliam et Papiam* is titled *De his quae lege Papia caduca fiunt*, in line with its contents, *caduca* in wider sense of the word.[62] Summarily, they are as follows: D. 28, 5, 72 deals with the *heredis institutio*, or *institutiones captatoriae* which are considered *pro non scripta*[63]; then, D. 31, 49, 1 to 3 and D. 32, 88 discuss the legacies and the issue of changes in the object of legacy, or its features, or the suitability of a subject to acquire the object, also mainly *legata* considered *pro non scripta*; D. 31, 49, 4 tackles the duty to fulfil the *legatum per damnationem* after the exercise of the right of accrual, while D. 34, 4, 6 brings up the problem of *translatio legati* (change of the burdened heir). D. 29, 2, 68 deals with the issue of a slave owned by several, *servus communis*, appointed as an heir and the orders for *aditio*, while D. 29, 2, 80 similarly explains the situation with one heir having multiple shares and different legacies, wherein paragraph 2 is focused on the *aditio*. Intriguing problem is dealt with in D. 29, 7, 20 – validity of a will and whether it is oral or written and when the heirs can make acquisition if there was a nuncupatory will and the *tabulae testamenti* containing only written legacies. Next, D. 41, 5, 4 shortly proclaims the needed capacity for *usucapio pro herede*, and, finally, D. 42, 5, 29 discusses very complicated types of objects of legacies and their status, especially if they were put on public ground and had public purpose.

Two common issues in book 5 can be recognized: *aditio*, acceptance of the inheritance, and the validity of legacies, *legata*.

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[50] LENEL, O., *Palingenesia iuris civilis.* Leipzig, 1899 (Frankfurt am Main, 2006), p. 1128.

[51] FERRINI, C., I commentarii di Ulpiano e di Paolo *ad legem Iuliam et Papiam*. In: *Rendiconti. Istituto Lombardo*, Vol. XXXIV, 1901, p. 398 (= FERRINI, C., *Opere di Contardo Ferrini*. Milano, 1929, Vol. II, p. 240).

[52] RUGGIERO, I., *Iulius Paulus: Ad Legem Iuliam et Papiam libri X*. Roma, 2023, p. 240.

[53] ASTOLFI, R., *La lex Iulia et Papia*. Padova, 1996, p. 386, nt. 30; MOREAU, P., *Loi Iulia de maritandis ordinibus*. In: *Lepor. Leges Populi Romani* [online]. Paris, 2007. Available at: https://telma.irht.cnrs.fr/outils/lepor/notice449/?#souspartie2.2, § 2,2 and 2,3 [Accessed 29 April 2025]; BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 185; RUGGIERO, I., *Iulius Paulus: Ad Legem Iuliam et Papiam libri X*. Roma, 2023, p. 123.

[54] He leaned on Lenel's general conclusion that the D. 1, 3, 28 dealt in general with the relationship between the two acts. FERRINI, C., *Opere di Contardo Ferrini*. Milano, 1929, Vol. II, p. 237. See in more detail on the issue: BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 171, fn. 15.

[55] ASTOLFI, R., *La lex Iulia et Papia*. Padova, 1996, p. 303, fn. 8, and p. 386.

[56] CRAWFORD, M. H., *Roman Statutes*. London, 1996, Vol. II, p. 802; MOREAU, P., *Loi Iulia de maritandis ordinibus*. In: *Lepor. Leges Populi Romani* [online]. Paris, 2007. Available at: https://telma.irht.cnrs.fr/outils/lepor/notice449/?#souspartie2.2, § 2,2 [Accessed 29 April 2025].

[57] He criticised it mainly because it would be contrary to the Sabinian method of interpretation, the one he expounded in relation to the D. 1, 3, 28. BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 171, fn. 15 and p. 185, fn. 61. Ruggiero mentioned Ferrini's thesis, but did not express any specific opinion about it. RUGGIERO, I., *Iulius Paulus: Ad Legem Iuliam et Papiam libri X*. Roma, 2023, p. 124, fn. 380.

[58] LENEL, O., *Palingenesia iuris civilis.* Leipzig, 1899 (Frankfurt am Main, 2006), p. 1128.

[59] FERRINI, C., *Opere di Contardo Ferrini*. Milano, 1929, Vol. II, p. 240.

[60] ASTOLFI, R., *La lex Iulia et Papia*. Padova, 1996, p. 386.

[61] BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 185, fn. 61; RUGGIERO, I., *Iulius Paulus: Ad Legem Iuliam et Papiam libri X*. Roma, 2023, p. 185.

[62] LENEL, O., *Palingenesia iuris civilis.* Leipzig, 1899 (Frankfurt am Main, 2006), p. 1128-1130.

[63] For the specific texts it would be pointed to, as the most recent analysis and having the most recent overview of literature, to: RUGGIERO, I., *Iulius Paulus: Ad Legem Iuliam et Papiam libri X*. Roma, 2023.

These are consistent with the contents of *lex Papia* as they are recounted in Justinian's *lex* C. 6, 51, 1 from 534 AD which extinguished the escheated property.[64] Following the initial argument concerning the general reasons for the introduction and later abolition of *bona caduca*, its paragraph 1c reads:

> C. 6, 51, 1, 1c: *Cum igitur materiam et exordium caducorum lex Papia ab additionibus, quae circa defunctorum hereditates procedebant, sumpsit et ideo non a morte testatoris, sed ab apertura tabularum dies cedere legatorum senatus consulta, quae circa legem Papiam introducta sunt, concesserunt, ut, quod in medio deficiat, hoc caducum fiant, primum hoc corrigentes et antiquum statum renovantes sancimus omnes habere licentiam a morte testatoris adire hereditates similique modo legatorum vel fideicommisorum pure vel in diem relictorum diem a morte testatoris cedere.*[65]

It is stated that the overall regulation of *caduca* in the *lex Papia* starts with the *additiones*. Words *„materiam et exordium caducorum – ab additionalibus – sumpsit*" can be interpreted at the same time in the sense that the process of devolution of *bona caduca*, in each specific case, begins with the *aditio*, i.e. that the objects of inheritance can become escheated only from that moment onward (in line with the *Ulp. Reg.* 1, 21), as well as, more sprecifically the word "*materiam*", that the provisions on *caduca* in the *lex Papia*, or the act itself in general, begin with the *aditio*.[66] This is followed by the assertion that, equally, the *dies cedens* for the acquisition of bequests is moved by certain *senatus consulta* related to the *lex Papia* from the death of the testator to the moment of opening the testament.

Justinian's *lex* emphasizes the importance of this postponement when the inheritance can be entered and the legacies are due, making a substantial change from the old law, *antiquus status*, to which his constitution now reverts. Nonetheless, the *lex* ties the shifting of *dies cedens* to the senatorial decrees accompanying the *lex Papia*, while the earlier pseudo-Ulpian attributes it clearly and directly to the *lex Papia* itself:

> *Ulp. Reg.* 24, 31: *Legatorum, quae pure uel in diem certum relicta sunt, dies cedit antiquo quidem iure ex mortis testatoris tempore: per legem autem Papiam Poppaeam ex apertis tabulis testamenti: eorum uero, quae sub condicione relicta sunt, cum conditio extiterit.*[67]

In the *Regulae*, which are significant because of the explicit differentiation between the two acts, it is thus unequivocally stated that the *lex Papia Poppaea* provided for legal effects of succession with regard to the legacies to take place only from the opening of the will, as opposed to the *ius antiquum* according to which it was from the time of death of testator. Strong argument in favour of the pseudo-Ulpian, next to the time difference, is the fact that the *lex Papia Poppaea* was enacted shortly after the *lex Iulia de vicesima hereditatium* on the taxation of inheritance in 5 AD, which required opening of the will for entering the inheritance, and thus also for the bequests to take effect.[68] In that sense, and as it is commonly held in the literature, suspension of the *dies cedens* is seen to pertain to the *lex Papia*.[69]

Aditio, being part of the initial provision of *lex Papia*, as envisaged as well by Jörs[70], was probably not its sole content. The argument for that can be found in the C. 6, 51, 1, i.e. in the sequence of three situations in which the objects can become escheated – *pro non scripta*, *in causa caduci*, and *caduca* (among which only the third would be part of the act, while the first two can be explained through interpretation as they predated the act), as well as in the contents of Pauls's 5th book *ad legem Iuliam et Papiam* which can be reduced to the explanation of possible heirs, their right to *adire* and the *legata*. Based on this, it is our contention that the initial provision could be more easily conceived as similar to the second chapter of the *lex Falcidia*, as in D. 35, 2, 1 pr. (*Paul. sing. ad legem Falcidiam*)[71], or to the elements of the *lex Iulia Vellaea* in D. 28, 2, 29, 12-14 (*Scaev. 6 quaestion-*

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[64] ASTOLFI, R., *La lex Iulia et Papia*. Padova, 1996, p. 297-300; RÜFNER, T., Erbfähigkeit. In: BABUSIAUX, U. *et al.* (eds.), *Handbuch des Römischen Privatrechts*. Tübingen, 2023, Vol. I, p. 1301.

[65] C. 6, 51, 1, 1c: "Therefore since the lex Papia took its material and beginning of escheated property from the entering that proceeded in connection with the inheritances of the deceased, and, for that reason, the decrees of the Senate, which were introduced concerning the lex Papia, allowed (the time for) legacies to become due (to be calculated) not from the death of the testator, but from the opening of the will, so that, what might be flawed in the meantime might become escheated, first to correct this and to renew the ancient legal regime We ordain that everyone have permission to enter inheritances from (the time of) the death of the testator, and in a similar fashion that legacies or trusts left unconditionlly (*pure*) or for a definite date (*in diem*) become due from the death of testator." Translation according to: BLUME, F. H. – FRIER, B. W. – KEHOE, D. P. – MCGINN, T A. J. In: FRIER, B. W. (ed.), *The Codex of Justinian*. Cambridge, 2016, Vol. 2, p. 955.

[66] Comparing the different commentaries on *lex Iulia et Papia* it should be added that this refers to the *caduca* taken *stricto sensu*, as the corresponding part (or initial) of the *lex Papia* would appear to commence with the legacies considered *pro non scripta*, pertaining to the *caduca* in wider sense. See ASTOLFI, R., *La lex Iulia et Papia*. Padova, 1996, p. 377-380.

[67] *Ulp. Reg.* 24, 31: "Legacies that are left unconditionally or with a fixed term, are acquired according to the old law at the time of the testator's death, and according to *lex Papia Poppaea*, from the opening the will, while those that are left under a condition are acquired when the condition is fullfilled." Compare: AVENARIUS, M., *Der pseudo-ulpianische liber singularis regularum. Entstehung, Eigenart und Überlieferung einer hochklassischen Juristenschrift*. Göttingen, 2005, p. 472.

[68] BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 160-164.

[69] AVENARIUS, M., *Der pseudo-ulpianische liber singularis regularum. Entstehung, Eigenart und Überlieferung einer hochklassischen Juristenschrift*. Göttingen, 2005, p. 472; BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 350, fn. 959.

[70] Jörs has thus stated: "Ob der Sa[t]z, dass der Tag der Testamentseröffnung massgebend sei für den Antritt des Erben, in der Lex Papia noch einen besondern Ausdruck fand, mag dahingestellt sein. Es war das ja selbstverständlich. Dagegen war es von grosser Wichtigkeit, dass auch der Dies legati cedens im Gegensaz zum Ius antiquum auf diesen Termin angesezt wurde." JÖRS, P., *Ueber das Verhältnis der Lex Iulia de maritandis ordinibus zur Lex Papia Poppaea*. Bonn, 1882, p. 47.

[71] D. 35, 2, 1 pr. (*Paul. sing. ad legem Falcidiam*): "*Lex Falcidia lata est, quae primo capite liberam legandi facultatem dedit usque ad dodrantem his verbis: "Qui cives Romani sunt, qui eorum post hanc legem rogatam testamentum facere volet, ut eam pecuniam easque res quibusque dare legare volet, ius potestasque esto, ut hac lege sequenti licebit". Secundo capite modum legatorum constituit his verbis: "Quicumque civis Romanus post hanc legem rogatam testamentum faciet, is quantam cuique civi Romano pecuniam iure publico dare legare volet, ius potestasque esto, dum ita detur legatum, ne minus quam partem quartam hereditatis eo testamento heredes capiant, eis, quibus quid ita datum legatumve erit, eam pecuniam sine fraude sua capere liceto isque heres, qui eam pecuniam dare iussus damnatus erit, eam pecuniam debeto dare, quam damnatus est"."*

um)[72]. Thus, it would have initially addressed the right to *capere in solidum* by heirs *cum liberis*, followed by the right to *capere ex testamento dimidiam partem hereditatis* and/or *legati* of those who did not have children at the time of *aditio* or *apertura tabularum*. The remaining share then fell, *cecidit*, to the *patres*, and finally in their absence to the state.

Concerning both the C. 6, 51, 1 and *Ulp. Reg.* 24, 31, it can be noticed that there is a lack of mention of the *lex Iulia de maritandis ordinibus*. There are acknowledged opposing positions between the *ius antiquum* and the *lex Papia Poppaea*, while there are no references, also in general in the sources on the issue, to the *lex Iulia*. Obviously, it did not include references to *aditio* and *dies cedens*, however, it created *caduca*. Accordingly, the question arises as to the possible significance of these moments for the application of *lex Iulia*, especially in light of the later *lex Papia*.

3.2 *"Caduca"* according to the *lex Iulia de maritandis ordinibus,* and the retroactive interpretation

As stated before, *lex Iulia de maritandis ordinibus* regulated the incapacity of *caelibes*, so, in comparison to these texts on the *lex Papia Poppaea*, the main issue would be the moment when their status as *caelibes* would be considered. In line with the *ius antiquum*, i.e. continuing with the application of *ius civile*, the right to acquire inheritance, and consequently the status of *caelibes*, was determined at the time of testator's death, with the *delatio*.[73] The same moment would be also *dies cedens* for legacies, meaning that the right of legatees accrued at that time, but also that their capacity to acquire legacies would have to exist then as well.[74]

The principal arguments in these considerations are the two pseudo-Ulpian's texts. First is *Ulp. Reg.* 17, 1, the one giving definition of *caduca*:

> *Ulp. Reg.* 17, 1: *Quod quis sibi testamento relictum, ita ut iure civili capere possit, aliqua ex causa non ceperit, 'caducum' appellatur, veluti cecidit ab eo: verbi gratia si caelibi vel Latino Iuniano legatum fuerit, nec intra dies centum vel caelebs legi paruerit, vel Latinus ius Quiritium consecutus sit; aut si ex parte heres scriptus vel legatarius ante apertas tabulas decesserit vel peregrinus factus sit.*[75]

It is explained the etymological origin of *caducum*, from falling away, in cases when the person was able to acquire inheritance according to the *ius civile*, but there were other reasons because of which he could not do it. The two examples are *caelibes* and *Latini Iuniani*, which could acquire legacy if they would marry or get the full status within the 100 days. The additional ones are the heirs and legatees *ex parte* who died or became *peregrini* before the opening of the will, and who, by all appearances, were added based on the interpretation of the *lex Papia*.[76]

Although it is not specifically given here, the period of 100 days would start, in line with the *ius antiquum*, from the moment of *delatio*, the death of the testator, as it is written in the second text, *Ulp. Reg.* 22, 3:

> *Ulp. Reg.* 22, 3: *<Latinus Iunianus> si quidem mortis testatoris tempore vel intra diem cretionis civis Romanus sit, heres esse potest; quodsi Latinus manserit, lege Iunia capere hereditatem prohibetur. Idem iuris est in persona caelibis propter legem Iuliam.*[77]

It is stated that the slave manumitted in an improper form would be eligible to acquire an inheritance if he was a Roman citizen at the time of testator's death or became one within the period required for formal acceptance of inheritance (*tempus cretionis*). Same as previously, this example is followed by that of *caelibes*, proclaiming that the same rule applies to them according to the *lex Iulia*.[78]

What can be observed from both texts is the mere possibility for *caelibes* to acquire inheritance or bequests if they fulfilled the prerequisite within 100 days or *tempus cretionis* as defined by the *lex Iulia*. However, after *lex Papia*, this potential could be realized only at the moment of *aditio*, if the heirs accepted inheritance, while the rights of legatees accrued only from the opening of the

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[72] D. 28, 2, 29 (*Scaev. 6 quaestionum*): "*12…Nam etsi ita verba sunt: "Qui testamentum faciet, is omnis virilis sexus, qui ei suus heres futurus erit" et cetera.; 13: Et bene verba se habent "si quis ex suis heredibus suus heres esse desierit" ad omnes casus pertinentia, quos supplendos in Galli Aquili [Aquilii] sententia diximus: ; 14: Videndum, num hac posteriore parte "si quis ex suis heredibus suus heres esse desierit, liberi eius" et cetera "in locum suorum sui heredes succedunt"…"*

[73] ASTOLFI, R., *La lex Iulia et Papia*. Padova, 1996, p. 16; BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 204, 299.

[74] ASTOLFI, R., *La lex Iulia et Papia*. Padova, 1996, p. 226; BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 204, 300.

[75] *Ulp. Reg.* 17, 1: "If something was left to someone in such a way that he could acquire it under civil law, and for some reason, he doesn't, this is called escheated property, as it fell from him, for example, in the case where something is left as a legacy to an unmarried person or to a Junian Latin, and within one hundred days either person who is not married does not obey the provisions of the law, either the Latin does not acquire Quirite right, that is Roman citizenship, or if the heir in a particular part of property or the legatee dies before the opening of the will or becomes a foreigner, that is, loses the status of a citizen." See also: AVENARIUS, M., *Der pseudo-ulpianische liber singularis regularum. Entstehung, Eigenart und Überlieferung einer hochklassischen Juristenschrift*. Göttingen, 2005, p. 345-347.

[76] BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 347, n. 943.

[77] *Ulp. Reg.* 22, 3: "If the Junian Latin would be a Roman citizen at the time of the testator's death or within the day of *cretio*, he can be an heir; but if he remains a Latin, he is prohibited from taking the inheritance by the Junian law. The same right applies to an unmarried person because of the Julian law." See also: AVENARIUS, M., *Der pseudo-ulpianische liber singularis regularum. Entstehung, Eigenart und Überlieferung einer hochklassischen Juristenschrift*. Göttingen, 2005, p. 398-399.

[78] In the literature since Heineccius it is discussed the correspondence of 100 days in *Ulp. Reg.* 17, 1 and the *tempus cretionis*, i.e. whether the testator could prolong the *tempus cretionis* and the period for the fulfilment of conditions prescribed by the *lex Iunia Norbana* and the *lex Iulia*. According to Bonin, the *Ulp. Reg.* 22, 3 would allow the heir to acquire inheritance in the longer period given by testator, i.e. if the person became *capax* within the *tempus cretionis*. HEINECCIUS, J. G, *Ad legem Iuliam et Papiam commentarius quo multa iuris auctorumque veterum loca explicantur, vindicantur, emendantur atque illustrantur*. Amsterdam, 1731, p. 341; ASTOLFI, R., *La lex Iulia et Papia*. Padova, 1996, p. 19-20; BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 302-303.

will. Although the second was supposed to happen very quickly, within 3-5 days, it could still take time, and in both situations, for heirs and legatees, we can imagine that a person would marry within 100 days, but they would enter the inheritance only at a later date, or the will would be opened later. Thus, if they were married, but still without children, their half would fall away, i.e. become escheated (*caduca*), only at that later date, as given by *lex Papia.* If the will was opened earlier, *dies cedens* would naturally fall at the time of marriage, while the *aditio hereditatis* was possible in any case only after the will is opened and the person married.

Consequently, in line with the *aditio* being at the head of the regulation of *caduca*, i. e. the fifth book *ad legem Iuliam et Papiam* where D. 1, 3, 28 is located, while acknowledging that Lenel's positioning of the text at the beginning of same book does not need to be correct and is probably influenced by his opinion on the purpose of the fragment, it is our proposal that the Paul's fragment could refer to the application of rules on *caduca* arising from the celibacy as prescribed in the *lex Iulia*, but from the moments, *aditio* and *dies cedens*, according to the *lex Papia*. Although there are some other situations in which the Paul's opinion on the intrepretation could be used, such as the *ius adcrescendi* (the right of accrual) given to the *exceptae personae* up to the third grade of kinship by the *lex Papia* according to the *Ulp. Reg.* 18, 1 [79], as discussed in detail by Bonin [80], whereby the *lex Papia* would make a change to the scope of application of *ius antiquum* and would not contradict the *lex Iulia* as it would not have any specific rules on the issue, we are more inclined to tie the Paul's text to the creation of *caduca* than to its exceptions.

Chronologically, to sum up, according to the *ius antiquum* the right to inheritance and to the bequests was determined at the moment of testator's death; *lex Iulia* had no provisions on this, withdrawing only the right to inheritance and bequests to those who did not marry within 100 days; and the *lex Papia* determined the moment of the opening of the will as the one when it will be determined if the inheritance and bequests will become *caduca* and fall to the *patres*, heirs and legatees with children, if there were such. Therefore, if, in all appeareance, the *lex Papia* prescribed that the *pars caducaria* will fall away at the moment of *aditio*, or the right of accrual will be exercised in case of the *exceptae personae*, the question was how this applied to the *caduca* arising from the *lex Iulia*. Considering that these two laws are different, but again that they were treated as supplementary to each other, and the undefined legal issues under the *lex Iulia* should be interpreted using the provisions of the *lex Papia*, it is suggested according to the Paul's D. 1, 3, 28 that the overall decision on *caduca* would be deffered to the opening of the will and the ensuing *aditio*.

Conclusion

Paul's text D. 1, 3, 28 provides a rule of interpretation, stating that when interpreting earlier acts, one should also take into account and use later acts, except in the case of clearly conflicting provisions. Given the context of the fragment, the commentary on the *lex/leges Iulia et Papia*, it is generally held in modern scholarship, starting with Lenel, that the rule refers to these two acts, one as the basis of interpretation (*lex Papia Poppaea*) and the other (*lex Iulia de maritandis ordinibus*) as its object, in general. As an intertemporal rule, it can be understood, probably on the similar lines as it was inserted in the Digest, as an instruction for the retroactive "application" of the new act in cases adjudicated according to the provisions of the earlier one, in situations where there were certain legal gaps or interpretative conflicts in the judicature, which essentially created room for changing the established interpretation in light of the new act.

In line with the casuistic approach of Roman jurists, and based on the context of the 5th book of Paul's commentary and the contents of C. 6, 51, 1, this paper proposes that Paul's text arose in connection with the issue of the moment of acquisition of inheritance and legacies by *caelibes*. Namely, since the *lex Iulia* only contained provisions on the time period within which a *caelebs* had to marry in order to acquire an inheritance or legacy, while the acquisition of the inheritance and the initial moment of *tempus cretionis* were governed by *ius antiquum*, the enactment of the *lex Papia* and the regulation of *caduca* for the *orbi* would raise the question of whether the postponement of *aditio* and *tempus cretionis* also applied to *caelibes*. It is our suggestion that Paul's answer would have been affirmative, and the possible explanation, the *ratio* behind this, would be precisely the words "*Sed et posteriores leges ad priores pertinent*". Thus, relying both on the analogy and the connectedness of two acts, one would be able to apply the rules of the *lex Papia* regarding the postponement of *aditio* and *dies cedens* also to situations governed by *lex Iulia*. Effectively, it meant the retroactive interpretation of the *lex Iulia*, but not on the basis of changed social circumstances as the retrospective interpretation is usually founded upon, but in line with the later legislation.

[79] *Ulp. Reg.* 18, 1: "*Item liberis et parentibus testatoris usque ad tertium gradum lex Papia ius antiquum dedit, ut heredibus illis institutis, quod quis ex eo testamento non capit, ad hos pertineat aut totum aut ex parte, prout pertinere possit.*" (In the same manner the Papian law gave the testator's children and parents up to the third degree the ancient right that, when those heirs are appointed, whatever someone does not receive from that will belongs to them, either in whole or in part, as it may belong to them.). See: AVENARIUS, M., *Der pseudo-ulpianische liber singularis regularum. Entstehung, Eigenart und Überlieferung einer hochklassischen Juristenschrift*. Göttingen, 2005, p. 352-355.

[80] This issue was investigated thoroughly by Bonin, although without any reference to D. 1, 3, 28. See: BONIN, F., *Intra 'legem Iuliam et Papiam'. Die Entwicklung des augusteischen Eherechts im Spiegel der Rechtsquellenlehren der klassischen Zeit*. Bari, 2020, p. 304-308.

Evolution of Fraud in Spanish Law: From Roman 'Dolus' to Modern Codification

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Abstract

Fraud in Spain is a consolidated criminal offense with a clear historical lineage that reflects the nation's broader legal and social transformations. This article examines its evolution in detail, beginning with its origins in Roman law. We analyze the foundational duality between the 'actio de dolo', a private civil remedy designed to provide restitution for financial harm caused by deception, and 'stellionatus', a public crime that punished malicious cunning not covered by other offenses. This Roman distinction between civil and criminal liability laid the groundwork for all subsequent developments.

The analysis then proceeds through the Middle Ages, highlighting the influence of Canon Law, which moralized the concept by treating any form of deceit as a sin against good faith. This perspective was synthesized in foundational Spanish texts like the Siete Partidas of Alfonso X, which began to frame fraud as a vice of consent.

The core of the article focuses on the codification process from the 19th century onward, exploring the penal codes of 1822 and 1848. A central focus is the case of Baldomera Larra (1876-1879), a pioneering pyramid scheme. This case is presented as a critical milestone that exposed the severe shortcomings of a rigid, casuistic legal framework unable to cope with complex economic crimes. Larra's eventual acquittal on a civil law technicality demonstrated an urgent need for reform.

Finally, the article concludes by evaluating the modern configuration of fraud in the 1995 Penal Code. It argues that this legislation successfully integrates its long historical legacy while responding effectively to contemporary challenges, explicitly criminalizing computer fraud and establishing aggravating circumstances to combat the mass-scale frauds that the Larra case foreshadowed. The study draws on primary sources, academic scholarship, and historical references to offer a comprehensive analysis of the crime's foundations and its modern implications.

Keywords: *Fraud; Codification; Roman Law; Stellionatus; Legal History; Spanish Law.*

1. Introduction

The concept of fraud in modern Spanish law has its genesis in Roman law, where *dolus malus* (malicious deception) was a core principle for protecting good faith and property in legal dealings. Scholar Max Kaser emphasizes that the *actio de dolo*, introduced around 66 B.C., was a milestone in the legal protection of trust [1]. It was designed to punish intentional deception that caused financial harm when no other specific legal action was available. According to Reinhard Zimmermann, this civil action was infamous in nature and prioritized 'restitutio in integrum' (restoration to the previous state) over punishment, making it more of a remedial than a punitive instrument [2]. *Stellionatus*, on the other hand, emerged as a separate criminal offense in postclassical law to punish general fraudulent acts that did not fit into specific crimes like forgery (*falsum*) or theft (*furtum*). As O.F. Robinson explains, the penalties for *stellionatus* varied based on the offender's social status, highlighting its function within the 'cognitio *extraordinaria' procedure* [3]. This duality between the civil dimension of 'dolus' and the criminal dimension of *stellionatus* became a fundamental legacy for later legal systems [4].

2. Fraud and stellionatus in Roman Law

Roman Law developed a sophisticated system to sanction *dolus malus*, understood as malicious deception that harms another in legal traffic, in contrast to *dolus bonus*, the lawful cunning tolerated in certain negotiations. The *actio de dolo* and the *stellionatus* were key instruments in this task, reflecting the tension between contractual freedom and the need to protect good faith. While the *actio de dolo* operated in the civil sphere, repairing individual damages, the *stellionatus* emerged as a public crime in the Principate, punishing fraud with a social impact. Both mechanisms show the evolution of fraud from a republi-

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1 KASER, M., *Das römische Privatrecht*. Munich, 1971, s. 197-203.

2 ZIMMERMANN, R., *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford, 1996, p. 664-678.

3 ROBINSON, O. F., *The Criminal Law of Ancient Rome.* London, 1995, p. 75-82.

4 FERNÁNDEZ DE BUJÁN, A., *Sistema contractual romano*. 5th ed. Madrid, 2018, p. 321-335.

can punitive concept to a compensatory one, laying the foundations for its modern configuration [5].

The term *dolus* derives from the Latin verb *dolere* (to deceive), whose form *dolo* (I deceive) reflects intentional action [6], which involves deceiving or acting cunningly, and is distinguished from related concepts such as *fraus* (general fraud) and *machinatio* (machination). Ulpian, quoting Labeon, defines *dolus malus* as a deliberate intention to deceive: *Dolum malum Servius quidem ita definiit: machinationem quandam alterius decipiendi causa, aliud simulatur et aliud agitur* [7]. This definition underlines the subjective element of fraud: the will to harm by deception. On the other hand, *dolus bonus* was accepted in contexts where cunning did not involve illicit harm, such as in negotiations or military tactics, reflecting a pragmatic view of trade and politics.

The distinction between *dolus malus* and *dolus bonus* has roots in Stoic philosophy, which profoundly influenced Roman legal thought. The Stoics, such as Seneca and Cicero, advocated an ethic based on virtue and rectitude, condemning deception that violated natural justice. Cicero, in *De Officiis*, criticizes deception in business, arguing that true utility must be aligned with honesty: *Ex quo intelligitur, quoniam ius naturae rectum est, id autem dolo malo corrumpitur, nihil utile esse quod non sit honestum* [8]. This Stoic perspective shaped the condemnation of *dolus malus* in Roman law, while *dolus bonus* was tolerated as a form of legitimate ingenuity in non-harmful contexts [9].

2.1 Actio doli

The primary civil remedy against deceit was the *actio de dolo*. I argue that this action was initially punitive within the context of the formulary procedure, as its sanctioning effect relied on the defendant's choice to offer voluntary restitution to avoid a potentially overvalued monetary sentence [10]. This punitive character, however, disappeared with the rise of the *extraordinaria cognitio*, when the judge could directly enforce in-kind restitution, shifting the action's purpose entirely to compensation [11]. This action was complemented by the *exceptio doli*, a procedural defense used to neutralize claims based on those fraudulent grounds [12].

2.2 Exceptio doli

The *exceptio doli*, as the procedural counterpart of the *actio de dolo*, made it possible to enervate claims based on fraudulent business, reinforcing the protection against fraud. Ulpiano gives an accurate description of its application:

D.44.4.2 Ulpianus book 4 ad edictum: Sequitur, ut videamus, in quibus causis locum habeat exceptio et quibus personis obiciatur. Et quidem illud adnotandum est, quod specialiter exprimendum est, de cuius dolo quis queratur, non in rem "si in ea re nihil dolo malo factum est", sed sic "si in ea re nihil dolo malo actoris factum est.".

This requirement to identify the plaintiff as responsible for the fraud marks a crucial step towards the conception of deception as a vice of the will, since the fraud had to be directly linked to his procedural intention. Ulpiano adds that the *exceptio* could be applied even if the fraudulent nature arose after the conclusion of the business (but before the litigation began), as in the case of claiming a *stipulatio* without a valid cause:

D.44.4.2.3 Ulpianus book 4 ad edictum: Si quis sine causa ab aliquo fuerit stipulatus, deinde ex ea stipulatione experiatur, exceptio utique doli mali ei nocebit: licet enim eo tempore, quo stipulabatur, nihil dolo malo admiserit, tamen dicendum est eum, cum litem contestatur, dolo facere, qui perseveret ex ea stipulatione petere.

This breadth of the *exceptio doli* anticipates modern defenses against procedural abuse, showing how Roman law already considered deceptive intent as the core of the wrong. The interaction between the *actio* and the *exceptio* shows the versatility of the Roman system, capable of sanctioning fraud both in the formation of the business and in its procedural execution.

2.3 Stellionatus

Stellionatus emerged in the Principate as a public crime, extending the penalty for fraud beyond the civil limits of the *actio de dolo*. Its name, metaphorically associated with the lizard (*stellio*) for its cunning, reflects the Roman perception of deception as a threat to the social order. Although Robles Velasco argues that this action was created specifically to punish anyone who pledged an asset already attached to a previous debt (a type of fraud that corresponds to the Greek figure of ἀνεπαφή [13], Roman sources, such as D.47. 20. 3, link *stellionatus* to various frauds and scams, suggesting that its scope expanded over time [14]. Ulpian describes it as the penal version of the *actio de dolo* [15].

Stellionatus was a residual crime, applicable when there was no other specific criminal type, covering conduct such as sell-

[5] KASER, M., *Das römische Privatrecht*. Munich, 1971, s. 230.

[6] Related to the Greek δόλος, both words seem to come from the Indo-European dolh$_1$os* (to divide, to separate), although there is no consensus on this. Vid. VAAN, M. de. *Etymological Dictionary of Latin and the other Italic Languages*. Leiden, 2008, p. 177.

[7] D. 4.3.1.2 (Labeon/Ulpian): Translation: „Servius defines evil malice thus: a certain machination to deceive another, when one thing is feigned and another is done." All the translations that appear in this work have been made by the author and are included for purely interpretative purposes.

[8] CICERO, M. T., *De Officiis*, 3. 68. Translation: "From this it is understood that, since natural law is right, but is corrupted by evil malice, nothing useful can be so if it is not honest."

[9] D'ORS, A., *Derecho privado romano*. 10th ed. Pamplona, 2004, p. 48.

[10] KASER, M., *Das römische Privatrecht*. Munich, 1971, s. 234.

[11] D. 4.3.18 (Paul).

[12] WACKE, A., The 'exceptio doli' in classical Roman law and the 'Verwirkung' in modern German law. In: PARICIO SERRANO, J. (ed.), *Derecho romano de obligaciones: homenaje al profesor José Luis Murga Gener*. Madrid, 1994, s. 977.

[13] In Greek, *intouchable.*

[14] ROBLES VELASCO, L. M., El artículo 1.862 del Código Civil español y el delito de stellionatus en la conventio pignoris. In: *Revista Crítica de Derecho Inmobiliario*, 2005, No. 688, p. 514.

[15] D. 47.20.3.1 (Ulpian): Quod in privatis… persecution. Translation: „What in private trials is action by malice, in crimes is persecution by stellionatus."

ing goods already compromised, falsifying goods or colluding to harm another[16]. Papinianus, at the end of the second century, indicates that the *stellionatus* was a recent figure, not fully integrated into public or private trials, which suggests its development in the context of the *cognitio extra ordinem*, a procedure that granted greater discretion to the judge[17].

The creation of the *stellionatus* responds to the bureaucratization of Principate, where the State assumed an active role in the repression of behaviors contrary to common ethics. Ulpiano details some typical cases, such as fraud in the sale of goods[18].

A practical example of *stellionatus* is the case of a merchant who sells a mortgaged property to a third party, presenting it as free of encumbrances. Ulpian describes this behavior as a typical *stellionatus*, punishable by extraordinary penalties[19]. In addition, *the stellionatus* shared elements with the crime of *forgery*, which punished the forgery of documents or coins. While *falsum* focused on the material alteration of the truth (e.g., forging a will), *stellionatus* encompassed broader frauds, such as collusion between parties to defraud a third party. For example, if two people agreed to simulate a sale to harm a creditor, they could be charged with *stellionatus*[20].

During the Principate (1st-3rd centuries AD), *stellionatus* was consolidated as an extraordinary crime, sanctioned by the *cognitio extra ordinem*, which allowed the judge to impose penalties adapted to the seriousness of the case, from fines to exile. In the Dominate (4th-5th centuries AD), the *stellionatus* was more formally integrated into the penal system, as reflected in a rescript by Alexander Severus that punishes with extraordinary penalties the sale of goods committed as if they were free[21]. Ulpian clarifies that, although the *stellionatus* was not infamous, it involved severe coercion adapted to the seriousness of the fraud[22].

The interaction between *actio de dolo* and *stellionatus* is significant for understanding the evolution of malice. While the former focused, in classical times, on repairing individual damage, the *stellionatus* sanctioned the social impact of fraud, as in cases of fraudulent pledge or mass deception. This civil-criminal duality prefigures the modern distinction between contractual fraud, which annuls the business, and the criminal type of fraud, which punishes the responsible party[23]. The evolution of these Roman concepts demonstrates their remarkable resilience and adaptability, a topic of continuous academic interest that highlights the significance of Roman law for modern legal systems, even in emerging fields such as digital law, as noted by contemporary scholars in the field of European legal history[24].

3. Medieval Law

The Roman legal framework was profoundly transformed during the Middle Ages, primarily through the influence of Canon Law. Shifting the focus from financial remedy to moral culpability, canonists treated any form of deceit as a sin against good faith[25], effectively rejecting the Roman tolerance for 'dolus bonus'. This moralistic view, which framed fraud as a fundamental vice of consent, was integrated into the ius commune by the Glossators and later crystallized in Castilian law through Alfonso X's Siete Partidas[26]. This medieval synthesis was crucial, as it cemented the conceptual transition of fraud from a procedural wrong to an intrinsic defect of the will, paving the way for its modern configuration in criminal law.

4. The Codification of the Crime of Fraud in Spain: Nineteenth and Twentieth Centuries

The transition from the Ancien Régime to the liberal State in the nineteenth century imposed the need to unify and systematize the heterogeneous Spanish penal panorama. This codification process, strongly influenced by the Napoleonic model and Enlightenment thought, marked the birth of the "scam" as an autonomous criminal figure, detached from its purely civil roots of the Roman *dolus*. This drive towards systematic codification was a pan-European phenomenon, with other legal schools,

[16] D. 47.20.3.2-5 (Ulpian): Ubicumque igitur titulus criminis deficit, illic stellionatus obiciemus… nec est opus species enumerare. Translation: „Thus, where there is no specific title of crime, we will accuse of stellionatus… without the need to list all its forms."

[17] D. 47.20.1 (Papinian): Actio stellionatus neque publicis iudiciis neque privatis actionibus continetur. Translation: „The action of stellionatus is contained neither in public trials nor in private actions."

[18] D. 47.20.3.3 (Ulpian): Maxime autem… Stellionatum Continent. Translation: „This applies especially when someone, concealing that a thing is committed to another, cunningly sells, exchanges, or delivers it in payment to another person, for all these forms are stellionatus."

[19] D. 47.20.3.3 (Ulpian)

[20] D. 47.20.3.4 (Ulpian): Si duo inter se collogii sint, ut tertium fraudarent, stellionatus crimen committitur. Translation: „If two people collude with each other to defraud a third party, they commit the crime of stellionatus."

[21] CJ 9.34.2 (Alexander Severus): Si quis obligatum praedium vel obligatam rem mobilem quasi liberam sciens dolo malo vendiderit, poena stellionatus coerceatur.

[22] Digest 47.20.2 (Ulpian): Stellionatus iudicium famosum quidem non est, sed coercitionem extraordinariam habet. Translation: „The trial by stellionatus is not, in fact, infamous, but it entails extraordinary coercion." There is a contradiction between Ulpian's texts on the character of stellionatus: while D.47.20.2 affirms that it is not infamous (Stellionatus iudicium famosum quidem non est), D.47.20.3.pr suggests that it is by comparing it with the actio de dolo, notoriously infamous (Quod in privatis iudiciis est de dolo actio, hoc in criminibus stellionatus persecutio), and D.3.2.1 explicitly includes it among the infamous causes (Infamia autem notatur qui ex turpi causa… stellionatus). This discrepancy has led some Romanists to suggest that D.47.20.2 could be interpolated, possibly by the Justinian compilers, who would have adapted the text to the practice of their time, in which extraordinary crimes did not always imply infamy. Max Kaser, Op. cit., 245

[23] ROBLES VELASCO, L. M., El artículo 1.862 del Código Civil español y el delito de stellionatus en la conventio pignoris. In: *Revista Crítica de Derecho Inmobiliario*, 2005, No. 688, p. 515.

[24] This demonstrates the enduring relevance of Roman legal structures in shaping modern penal concepts, a phenomenon whose significance extends even to contemporary challenges such as digital law

[25] SANTUCCI, G., *Diritto romano e diritti europei: Continuità e discontinuità nell'età dell'integrazione*. Bologna: Il Mulino, 2015, p. 102.

[26] Siete Partidas, VII.16. 2.

such as the German Pandectist School, simultaneously developing new dogmatic approaches to core legal concepts like the declaration of will[27].

In France, the Penal Code of 1810, which directly influenced the Spanish Code of 1848, defined fraud (*escroquerie*, article 405) as a crime based on deception to induce the delivery of goods but adopted a more flexible approach by including future frauds, overcoming the casuistic limitations of the initial Spanish code. In Italy, the Zanardelli Penal Code of 1889 and the later Rocco Code of 1930 (*truffa*, article 640) emphasized the protection of property against complex deceptions, incorporating early figures such as contract fraud, which contrasted with the rigidity of nineteenth-century Spain.

The Penal Code of 1822, promulgated during the Liberal Triennium, was the first attempt to create a modern and unified penal system in Spain[28]. In its Title XII, Article 766 generically sanctioned "*anyone who with some artifice, deception, trickery, superstitious practice, or other similar deception has extracted money, effects or deeds from another*."

The doctrine is unanimous in pointing out the broad and residual nature of this precept. Its wording, rather than defining a specific criminal type, acted as a "catch-all" intended to punish any financial damage achieved by means of a ruse, which functionally resembles the Roman *stellionatus*. This first legislative effort, although it reflected the new liberal ideas and the need to protect heritage in the context of socioeconomic change, had an ephemeral validity due to the absolutist restoration of 1823, limiting its practical and doctrinal impact.

The Penal Code of 1848, enacted under the reign of Isabel II, marked the true turning point. Heavily influenced by the French model, it introduced "fraud" as an autonomous and casuistic crime, distinguishing several modalities such as defrauding in the substance of goods or deceiving another into signing a document creating an obligation. While a notable technical advance, its rigid, case-based approach soon proved insufficient. Jurists of the time, such as Joaquín Francisco Pacheco, praised its clarity but warned of its inability to cover more complex frauds that did not fit neatly into the prescribed categories, leaving significant gaps that the courts struggled to fill.

4.1 The Case of Baldomera Larra: The Tension Between Law and Social Reality

No event better exposed the limitations of 19th-century legislation than the case of Baldomera Larra (1876-1879). Larra, daughter of the famous writer Mariano José de Larra, designed a pioneering pyramid scheme called "*La Caja de Imposiciones*". It promised impossibly high returns, attracting thousands of investors and causing a financial collapse with a major social impact.[29].

The trial was conducted under the 1870 Penal Code, whose definition of fraud already required a "profit motive," "deception" inducing "error," and a harmful "act of disposition". Initially, the court sentenced Larra to six years in prison.[30].

4.2 The Codes of the Twentieth Century: Political Consolidation and Adjustments

4.2.1 The Codes of 1928 and 1932: Authoritarianism versus Technical Refinement

Promulgated during the dictatorship of Miguel Primo de Rivera, the Penal Code of 1928 maintained the casuistic structure of its predecessor. However, it was interpreted through an authoritarian lens that prioritized social control and a protected national economy. Influential jurists of the period, such as Quintiliano Saldaña, advocated for a penal system that served the state's interests[31]. Consequently, economic crimes like fraud were viewed not just as attacks on individual property but as potential disruptions to the public economic order.

In stark contrast, the Penal Code of 1932, a product of the Second Republic, represented a significant attempt at modernization and technical refinement. Deeply influenced by German criminal science and the work of Spanish jurists like Luis Jiménez de Asúa, its drafters sought to create a more systematic and rights-based code[32]. The Republican code refined the description of fraud, attempting to provide a more precise definition of "sufficient deception"[33]. However, its short-lived application due to the Spanish Civil War limited its long-term impact on jurisprudence.

4.2.2 The Francoist Period and the Democratic Transition: The Crystallization of Modern Fraud

The post-war text of 1944, which was a revised version of the 1932 Code, marked a return to more traditional principles. For decades, the jurisprudence of the Tribunal Supremo struggled to adapt the classic definition of fraud to new economic realities. However, the period following the promulgation of the 1978 Constitution was decisive.

During the 1970s and 1980s, jurisprudence began to develop a more sophisticated and flexible doctrine of „sufficient deception". In landmark rulings[34], the court moved away from a rigid interpretation that required an elaborate "*mise-en-scène*." Instead, it began to consider the specific context of the transaction and the victim's professional and personal circumstances.

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[27] JELISEJEVS, A., From Bona Fides to Laba Ticība: Historical Interpretation of the Good Faith Principle in Latvian Law. In: *Journal on European History of Law*, vol 14, Nr. 2, 2023, p. 46-57.

[28] MERRYMAN, J. H., PÉREZ-PERDOMO, R., *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*. 4th ed. Stanford, 2018, pp. 89-102.

[29] La Iberia, January 20, 1879, p. 3

[30] Gaceta de Madrid, March 17, 1880, p. 12

[31] SALDAÑA, Q., *La nueva criminología*. Madrid, 1936, p. 54. In this time works, Saldaña linked criminal law with Sociology and History, showing it like a defensive tool for the "social organism", aligned with the authoritarian corporativism view of Primo de Rivera.

[32] JIMÉNEZ DE ASÚA, L., *Tratado de Derecho Penal*. Tomo I. 2Ş ed. Buenos Aires, 1950, p. 112. This monumental work introduced the dogmatic and systematic principles of the German school into Spanish legal thought, advocating a criminal law based on technical and guarantees.

[33] *Engaño bastante.*

[34] E.g., Sentencia del Tribunal Supremo de 17 de noviembre de 1977 (STS (Sala de lo Penal) de 17 de noviembre de 1977 (RJ 1977\4478).)

This jurisprudential shift was heavily influenced by the work of prominent scholars like Enrique Gimbernat Ordeig, who argued for an interpretation of deception that could address the complexities of modern white-collar crime[35]. This evolution established that deception could also consist of concealing crucial information in business dealings[36], thus expanding the scope of the crime and paving the way for the great reform that would culminate in the 1995 Penal Code.

5. Conclusion

Fraud in Spain has evolved from the foundations of the Roman *dolus* and the practical provisions of the Siete Partidas to its modern configuration in the Penal Code of 1995, a process marked by milestones such as the case of Baldomera Larra. This historical development combines the classic legal heritage with the need to respond to contemporary challenges, consolidating an essential crime for the protection of heritage in an increasingly complex society. The trajectory of the scam reflects not only legal advances, but also the social and economic transformations that have shaped Spanish criminal law. This demonstrates the enduring relevance of Roman legal foundations in understanding and shaping even the most modern areas of law, a topic of continuous academic interest[37].

[35] GIMBERNAT ORDEIG, E., "¿Qué es el 'engaño' en el delito de estafa?". En: *Estudios de Derecho Penal.* 3Ş ed. Madrid, 1990, pp. 225-240. Gimernat's doctrinal work at this time was crucial in redefining key concepts of crime theory, arguing for an interpretation of deception that effectively protected the victim in complex economic contexts.

[36] *„Negocios jurídicos criminalizados"*.

[37] 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, no. 2, 2022, p. 99-107.

Das Volksbegehren über den Anschluss Salzburgs an Deutschland vom 29. Mai 1921 – ein Überblick

(The Referendum on the Union of Salzburg with Germany on 29 May 1921: an Overview)

Sonja Pallauf[*]

Abstract

At the end of World War I (1918), the Republic of „German-Austria" was founded as one of many successor states of the Habsburg Empire. The political representatives of „German-Austria" welcomed the idea of Austria's unification with Germany for both economic and ideological reasons. However, the Treaty of Saint-Germain-en Laye (1919) explicitly prohibited such a union under Article 88, placing Austria under significant diplomatic and financial pressure from the victorious Allies of World War I. The federal government was forced to distance itself from the idea of „Anschluss" (unification). Support for the union shifted from the federal level to the regional level. On May 29, 1921, a referendum was held in Salzburg province, with nearly 99 percent of voters expressing support for joining Germany. This article examines the political and economic context of the Salzburg referendum, drawing on primary sources such as official announcements and propaganda materials.

Keywords: *End of World War I (1918); Republic of „German-Austria"; Article 88 Treaty of Saint Germain-en-Laye (1919); Salzburg province; Salzburg referendum (1921); unification with Germany.*

1. Einleitung

Vor etwas mehr als 100 Jahren - im Mai 1921 - hat sich im Land Salzburg ein von der Öffentlichkeit kaum beachtetes Ereignis zugetragen. Die Bevölkerung Salzburgs hat sich im Rahmen eines Referendums mit einer Mehrheit von fast 99 Prozent für den Anschluss an das Deutsche Reich ausgesprochen.

Das Thema, durch ein Votum den Anschluss Salzburgs an Deutschland zu erreichen, wird bereits im Februar 1919, also kurz nach Ausrufung der Republik „Deutschösterreich"[1], in einem Leitartikel des Salzburger Volksblatts[2] aufgegriffen. Darin wird die Aufnahme eines Referendums in die künftige Bundesverfassung geradezu enthusiastisch gefordert:

Die Eröffnung der konstituierenden deutschen Nationalversammlung in Weimar hat Anlass zu vielen herzerfreuenden Kundgebungen für den Anschluss Deutschösterreichs an das Deutsche Reich gegeben… Bei den Besprechungen über die künftige Gestaltung der Verfassung Deutschösterreichs und in den Programmen verschiedener Parteien… wurde auf das Referendum hingewiesen, das in die Verfassung aufzunehmen wäre: Über besonders wichtige gesetzgeberische und insbesondere verfassungsrechtliche Fragen wäre das ganze Volk zu befragen und hätte im Wege einer allgemeinen Volksabstimmung zu entscheiden. Wir meinen, eine wichtigere und folgenschwere Entscheidung, als die über den Anschluss Deutschösterreichs an das Deutsche Reich könnte es für das deutschösterreichische Volk nicht geben. Wenn überhaupt irgendeine Frage, so wäre diese im Wege eines Referendums zur Entscheidung zu bringen…[3]

Zu diesem Zeitpunkt war es über die Parteigrenzen hinweg sowohl auf Bundes- als auch auf Länderebene unstrittig, dass ein Anschluss der Republik Deutschösterreich an das Deutsche Reich rechtlich nur über eine in der künftigen Bundesverfassung verankerten Volksabstimmung erfolgen solle. Ein selbstständiger Anschluss Salzburgs an Deutschland stand unmittelbar nach Gründung der Republik nicht zur Debatte.

Sowohl die Provisorische Nationalversammlung für Deutschösterreich als auch die Weimarer Nationalversammlung begrüßten einhellig *die Bildung eines größeren Deutschlands*.[4] Ihre Haltung zu dieser grundlegenden Frage änderte sich jedoch mit dem Abschluss des Staatsvertrages von Saint-Germain-en Laye im September 1919[5] schlagartig. Österreich

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1 Unmittelbar nach Auflösung des habsburgischen Vielvölkerstaates und nach Kaiser Karls I. Völkermanifest beschloss die Provisorische Nationalversammlung am 12. November 1918 die Republik „Deutschösterreich" auszurufen. Das Bekenntnis der Provisorischen Nationalversammlung zur Demokratie und Volkssouveränität war nicht neu, das zur republikanischen Staatsform hingegen schon.

2 Das Salzburger Volksblatt (SVB) war eine Tageszeitung des Landes Salzburg. Ihre politische Ausrichtung in der Ersten Republik war deutschnational. Sie stand der Großdeutschen Volkspartei nahe.

3 Salzburger Volksblatt (SVB), 12. 2. 1919, S. 1, „Ein Referendum über den Anschluss".

4 SVB, 12. 2. 1919, S. 1.

5 Am 10. September 1919 unterzeichneten die österreichischen Delegierten den Staatsvertrag von Saint-Germain-en Laye, StGBl Nr. 303/1920. Neben den territorialen Bestimmungen über die Aufteilung Österreich-Ungarns regelt der Vertrag die Kriegsschuldfrage Österreichs. Ein Anschluss Österreichs an das Deutsche Reich und die Verwendung des Staatsnamens „Deutschösterreich" wurden verboten. Dazu weiterführende Literatur: KALB, H., OLECHOWSKI, T., ZIEGERHOFER, A. (Hrsg.), *Der Vertrag von St. Germain. Kommentar*, Wien, 2021.

wurde vertraglich verpflichtet, keinen Anschluss an Deutschland herzustellen.

Die österreichische Bundesregierung musste sich aufgrund des außenpolitischen Druckes der Siegermächte des Ersten Weltkriegs[6] - insbesondere Frankreichs - zunehmend von der Idee des Anschlusses entfernen. Die Begeisterung für den Anschluss verlagerte sich infolgedessen immer mehr von der Bundesebene auf die Länderebene.

Im Frühjahr 1921 wurden in den Bundesländern Tirol und Salzburg Referenden über den Anschluss an Deutschland abgehalten, und das ohne Zustimmung der Bundesregierung. Auch das Land Steiermark beschloss selbstständig ein Referendum durchzuführen. Dieses konnte jedoch durch die Bundesregierung erfolgreich verhindert werden.

Die Art und Weise insbesondere auch die Beweggründe, wie es zu diesen Referenden auf Länderebene kam, soll im Folgenden anhand von Primärquellen am Beispiel des Landes Salzburgs erörtert werden.

2. Die Anschlusspläne „Österreichs" an Deutschland nach 1918 im Überblick

Nach Ende des Ersten Weltkrieges, innerhalb weniger Wochen im Herbst 1918[7], entstand ein neuer österreichischer Staat als einer von vielen Nachfolgestaaten der sich auflösenden Österreichisch-Ungarischen Monarchie. Sein Name war „Deutschösterreich".[8]

Der Terminus „Deutschösterreich" war keine neue Wortschöpfung, sondern ein durchaus Ende des 19. Jahrhunderts im Sprachgebrauch üblicher, jedoch nicht amtlicher Name für das von Deutschen bewohnte Gebiet Österreich/Cisleithanien[9]. Durchaus gängig war es auch, die sogenannten Deutschen im Habsburgerreich als Deutschösterreicher zu bezeichnen.

Die Provisorische Nationalversammlung für Deutschösterreich[10] bekannte sich im Art. 1 des Gesetzes vom 12. November 1918 über die Staats- und Regierungsform von Deutschösterreich, StGBl. Nr. 5/1918, einhellig zur Demokratie, Volkssouveränität und republikanischen Staatsform.

Für weite Teile der österreichischen Bevölkerung war jedoch die Frage nach der Staats- und Regierungsform nicht die dringlichste. Die Frage nach Sicherung des eigenen Überlebens trat aufgrund der katastrophalen wirtschaftlichen Lage in den Vordergrund.[11] Auch die politisch Handelnden aus allen politischen Lagern glaubten nicht an die wirtschaftliche Überlebensfähigkeit eines österreichischen Kleinstaates.[12]

Das christlich-soziale Lager suchte primär das ökonomische und nicht das politische Heil in einem Anschluss an Deutschland.

Die anfängliche Anschlusseuphorie der Sozialdemokraten gründete sich neben den wirtschaftlichen Aspekten auf den Gedanken der Schaffung einer Einheitsfront mit den deutschen Sozialisten. Als politisches Ziel hatten die Sozialdemokraten die Vereinigung mit dem „roten Deutschland" vor Augen.

Die Deutschnationalen, ab 1920 überwiegend Mitglieder der *Großdeutschen Volkspartei*, vertraten den Anschluss aus ideologischen Gründen, wenngleich auch ökonomische Aspekte eine Rolle spielten. Sie versuchten unter anderem die Anschlusspläne mit dem gemeinsamen kulturellen Erbe, der Nationalität und der gemeinsamen Sprache zu begründen.

Mit Art. 2 des Gesetzes vom 12. November 1918 über die Staats- und Regierungsform erklärte die Provisorische Nationalversammlung einhellig - über alle Parteigrenzen hinweg - Österreich als Teil Deutschlands. So formuliert Art. 2 in aller Klarheit: *Deutschösterreich ist ein Bestandteil der Deutschen Republik*. Dieser Artikel konnte aufgrund des im Staatsvertrag von Saint-Germain-en-Laye vom 10. September 1919, StGBl. Nr. 303/1920, normierten „Anschlussverbotes" staats- und völkerrechtlich nicht relevant werden. In weiterer Folge reduzierte sich die Auslegung des Art. 2 auf eine politische Bekundung des Anschlusswillens.

Nach Art. 88 des Staatsvertrages von Saint-Germain-en-Laye durfte Österreich seine Unabhängigkeit nur mit Zustimmung des neu gegründeten Völkerbundes[13] aufgeben und hatte alles zu unterlassen, was seine Autonomie gefährden könnte.[14] Die österreichische Bundesregierung musste ihrerseits die Unabhängigkeit Österreichs gegenüber den Siegermächten im Vertrag von Saint-Germain garantieren.[15] Der am 16. Juli 1920 formell in Kraft getretene Vertrag bestätigte den Fortbestand Österreichs als souveränen Staat. Mit Inkrafttreten des Vertrages war die Verwendung des Namens „Deutschösterreich" untersagt. Der Staatsname „Republik Deutschösterreich" wurde auf Grundlage des Gesetzes über die Staatsform vom 21. Oktober 1919, StGBl. Nr. 484/1919, auf „Republik Österreich" umbenannt. Damit verbunden war auch die Aufhebung des Art. 2 des ursprünglichen Gesetzes über die Staats- und Regierungsform

[6] Großbritannien, Frankreich, Italien und die USA.
[7] Vom 21. Oktober bis zum 12. November 1918.
[8] Dazu SAAGE, R., Die deutsche Frage. Die Erste Republik im Spannungsfeld zwischen österreichischer und deutscher Identität. In: KONRAD, H., MADERTHANER, W. (Hrsg.), *Das Werden der Ersten Republik: … der Rest ist Österreich*, Bd.1, Wien, 2008, S. 65-75.
[9] Cisleithanien wird seit 1915 offiziell „Österreich" genannt.
[10] Die Provisorische Nationalversammlung für Deutschösterreich war die parlamentarische Vertretung aller Deutschen Cisleithaniens. Provisorisch wurde sie genannt, weil den bereits im Jahr 1911 gewählten Abgeordneten der deutschen Reichsratswahlbezirke die Legitimationsgrundlage fehlte. Ihr politisches Mandat war längst abgelaufen.
[11] PALLAUF, S., Der Weg von der Monarchie zur Republik 1918. Das Beispiel Salzburg. In: SALZBURGER LANDTAG, WEISER, K. (Hrsg.), *Demokratische Zukunft der (Salzburger) Landesgesetzgebung*. Salzburg, 2018, S. 24-25.
[12] Dazu SCHEFBECK, G., Staatsgründung durch ein Parlamentsprovisorium. In: BRAUNEDER, W., LESER, N. (Hrsg.), *Staatsgründungen 1918*, Wien, 1999, S. 75-78.
[13] Österreich trat dem Völkerbund 1920 bei.
[14] Dazu ausführlich OLECHOWSKI, T., Das „Anschlußverbot" im Vertrag von Saint Germain. In: *Zeitgeschichte,* Jg. 46, 2019, S. 371-385.
[15] Dazu näher BRAUNEDER, W., Verfassungsrechtliche Hauptaspekte des Vertrages von St. Germain. In: RAFFEINER A. (Hrsg.), *100 Jahre Staatsvertrag von St. Germain – Der Rest ist Österreich*, Wien, 2020, S. 39-48.

von Deutschösterreich.[16] Als Staatssprache wurde - unbeschadet der den sprachlichen Minderheiten gesetzlich eingeräumten Rechte - die deutsche Sprache eingeführt.[17]

Seitens der politischen Vertreter der Weimarer Republik erfuhr obgenannter Art. 2 des Gesetzes über die Staats- und Regierungsform zunächst durchwegs Zustimmung. Der Art. 61 Abs. 2 der Weimarer Verfassung[18] ermöglicht Deutschösterreich eine Anschlussoption. Durch die Pariser Vorortverträge[19] insbesondere durch den Vertrag von Versailles[20] wurden die deutschen Anschlusspläne gegenstandslos. Deutschland hatte seinen Art. 61 Abs. 2 für nichtig zu erklären. Deutsche Gebietsverluste sollten nicht mit dem Zugewinn von Österreich kompensiert werden. Zu sehr fürchteten die Siegermächte des Ersten Weltkrieges ein neuerliches Erstarken der deutschen Vormachtstellung im europäischen Raum.

Während sich die Anhänger des Anschlussgedankens, welcher durch den Vertrag von Saint Germain nicht ausgelöscht werden konnte, an die Hoffnung einer Änderung des Art. 88 klammerten, sahen die „Realpolitiker" der damaligen österreichischen Bundesregierung hingegen ein, dass die junge Republik auf finanzielle Hilfe von außen dringend angewiesen war.[21] Die Bundesregierung konnte sich über den Vertrag von Saint-Germain nicht hinwegsetzen. Im Fall eines Vertragsbruches drohte ein Stopp der mit dem Völkerbund gerade erst angelaufenen Kreditverhandlungen. Zudem drohte auch die Gefahr der Fälligkeitsstellung der von den Siegermächten aufgeschobenen Reparationszahlungen, deren Höhe nicht einmal festgelegt war.

Die rasante Geldentwertung in Österreich in den Griff zu bekommen, war schwierig. Die Bundesregierung benötigte dringend Kredite aus dem Ausland. Wegen der hohen Kriegskosten wurde während der Ersten Weltkrieges bereits früh begonnen, Kriegskosten durch die Ausgabe zusätzlicher Banknoten zu decken. Zugleich schrumpfte der Goldbestand der Nationalbank, da Gold zur Bezahlung von Warenlieferungen aus dem Ausland entnommen wurde. Die zunehmende Menge an Papiergeld war damit immer weniger durch Edelmetall gedeckt. Nach Kriegsende erwies sich dieser Umstand für Österreich als problematisch. Nachdem der Zahlungsverkehr wieder aufgenommen worden war, verlor die Kronenwährung im Ausland im Vergleich zum Vorkriegswert massiv an Wert.[22]

Durch die Hyperinflation und auch durch die steigende Arbeitslosigkeit hatte sich die wirtschaftliche Lage der jungen Republik in der zweiten Hälfte des Jahres 1919 rasant verschlechtert. Des Weiteren drohte die Unterbrechung von Lebensmittel- und Kohlelieferungen, auf welche Österreich dringend angewiesen war. Die funktionierende länderübergreifende, zentral organisierte Ernährungsverwaltung der Habsburgermonarchie war schlagartig zusammengebrochen. Und wirtschaftlich hoch entwickelte Gebiete in Deutschböhmen, Deutschmähren und Deutschschlesien gingen mit dem Vertrag von Saint-Germain an die Tschechoslowakei verloren.[23] Durch den schlagartigen Abfall sämtlicher nichtdeutscher Nationen verlor Österreich abrupt das gut funktionierende Wirtschaftsgefüge des habsburgischen Vielvölkerstaates.

Wien fungierte in der Monarchie als Zentrum der politischen Macht und zugleich als wichtige Finanzdrehscheibe. Es war Zentrum der Banken, Versicherungen, Handels- und Industrieorganisationen. Den nicht deutschsprachigen Nationen war demgegenüber die Rolle der Rohstoffbeschaffer und der landwirtschaftlichen Produzenten zugedacht gewesen. Der Wegfall dieser war wie erwähnt ein schwerer Schlag gegen die ökonomische Grundlage der jungen Republik.[24] Über Parteigrenzen hinaus wurde das neue Österreich nicht als überlebensfähig angesehen. Die Bundesregierung hatte gar keine andere Wahl, als sich schrittweise vom Anschlussgedanken zu distanzieren.

Art. 27 des Vertrages von Saint Germain legte die neuen Staatsgrenzen Österreichs fest.[25] Deutschösterreich war der deutschsprachige Rest eines historisch gewachsenen Großreiches. Die territoriale Zerschlagung der Habsburgermonarchie führte zur Entstehung mehrerer Nachfolgestaaten. Darunter waren neben Österreich und der Tschechoslowakei die Staaten Ungarn, Polen und Jugoslawien, deren staatliche Souveränität völkerrechtlich von Österreich anzuerkennen war.

Südtirol wurde Italien zugeschlagen, während Teile der Untersteiermark und Kärntens an das Königreich der Serben, Kroaten und Slowenen[26] fielen.

Der Vertrag von Saint Germain normierte nicht nur Gebietsabtretungen, sondern auch kleinere Gebietszugewinne: So wurde das formal ungarische Gebiet Deutsch-Westungarn[27] an Österreich abgetreten und erhielt den Namen Burgenland. Der

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16 KALB, H., OLECHOWSKI, T., ZIEGERHOFER, A.(Hrsg.), *Der Vertrag von St. Germain Kommentar*, S. 263-265.

17 BRAUNEDER, W., *Verfassungsrechtliche Hauptaspekte des Vertrags von St. Germain*, S. 41.

18 Deutsches Reichsgesetzblatt (deutsches RGBl.) Nr. 152/1919.

19 Die Pariser Vorortverträge (u.a. Vertrag von Versailles, Vertrag von Saint-Germain-en-Laye) wurden im Rahmen der Pariser Friedenskonferenz von den Alliierten und Assoziierten Mächten bis Mai 1919 ausgehandelt.

20 Gemäß Art. 80 des Staatsvertrages von Versailles vom 28. Juni 1919, deutsches RGBl. Nr. 140/1919, erkennt Deutschland die Unabhängigkeit Österreichs an.

21 STIFTER, W., *Die Anschlussbewegung im Bundesland Salzburg nach 1918*, Hausarbeit aus Geschichte, Salzburg, 1974, S. 18.

22 1924 wurde der Schilling als neue Währung eingeführt.

23 Dazu SPARER, N., Die Lage der Deutschen in Böhmen, Mähren und Österreichisch-Schlesien auf der Friedenskonferenz von St. Germain mit Ausblick auf die ersten Jahre der Tschechoslowakei. In: RAFFEINER, A. (Hrsg.), *100 Jahre Staatsvertrag von St. Germain*, Wien, 2020, S. 191-196.

24 SAAGE, R., Die deutsche Frage. Die Erste Republik im Spannungsfeld zwischen österreichischer und deutscher Identität, S.76.

25 KALB, H., OLECHOWSKI, T., ZIEGERHOFER, A. (Hrsg.), *Der Vertrag von St. Germain Kommentar*, Art. 27, S. 111-116.

26 Der Vertrag von Saint Germain sah eine Volksabstimmung in den zweisprachigen Teilgebieten Südkärntens vor. Am 10. Oktober 1920 sprach sich die Kärntner Bevölkerung in einer demokratischen Abstimmung mehrheitlich für den Verbleib Kärntens bei Österreich aus. Lediglich das Mießtal ging an das Königreich der Slowenen, Kroaten und Serben. Weiterführende Literatur: RUMPLER, H. (Hrsg.), Kärntens Volksabstimmung 1920. Wissenschaftliche Kontroversen und historisch-politische Diskussionen anlässlich des internationalen Symposions Klagenfurt 1980, Klagenfurt, 1981, S. 178-297.

27 Die Komitate Wieselburg, Ödenburg und Eisenburg.

Vertrag von Trianon vom 4. Juni 1920[28] legte fest, dass Ungarn im August 1921 das Burgenland an Österreich offiziell zu übergeben hatte. Ungarn versuchte dies mit militärischen und diplomatischen Mitteln zu verhindern. Erst durch das „Venediger Protokoll" vom 13. Oktober 1921[29] verpflichtete sich Ungarn zur Abtretung. Der Vertrag wurde über italienische Vermittlung abgeschlossen.

Der Grenzverlauf des österreichischen Staatsgebiets stand nun definitiv fest. Die Konflikte um Grenzziehungen mit den Nachfolgestaaten der Habsburgermonarchie wurden endgültig beigelegt. Die Gebietsverluste für Österreich waren enorm. Aus einer Großmacht wurde ein Kleinstaat.

Der Zweifel der österreichischen Bevölkerung an der Überlebensfähigkeit dieses neuen Staates war durchaus nachvollziehbar. Die Politik konnte gerade zu einem Zeitpunkt, als die Grenzziehung des österreichischen Staatsgebietes abgeschlossen war, diesem Zweifel nur insoweit begegnen, indem sie mit den Siegermächten kooperierte, wenngleich dieser Weg nicht unumstritten und zweifelsohne unpopulär war.

So schloss am 16. Dezember 1921 Bundeskanzler Schober[30] mit dem Nachfolgestaat Tschechoslowakei den Vertrag von Lana[31]. Der tschechische Staat war für die österreichische Bundesregierung ein idealer Bündnispartner. Denn die Tschechen wollten weder eine Restauration der Habsburger noch einen Anschluss Österreichs an Deutschland. Im Vertrag von Lana wurden die Grenzen beider Staaten garantiert und nochmals das „Anschlussverbot" an Deutschland bekräftigt. Die Tschechoslowakei erklärte sich vertraglich zur Gewährung von Krediten und zur Lieferung von dringend benötigten Rohstoffen und Lebensmitteln an Österreich bereit. Im Gegenzug musste Österreich die Annexion der deutschsprachigen Gebiete[32] in Tschechien durch die Tschechen anerkennen.[33]

Dem Vertrag von Lana folgten zeitnah die Genfer Protokolle vom 4. Oktober 1922.[34] Die Tatsache, dass ein Nachfolgestaat des Habsburgerreiches einen Staatsvertrag mit Österreich schloss, erhöhte das Vertrauen der Siegermächte in Österreich. Die Freigabe der dringend benötigten Auslandskredite wurde möglich.

Auf Grundlage der Genfer Protokolle erhielt Österreich unter Bundeskanzler Seipel[35] von Großbritannien, Frankreich, Italien und der Tschechoslowakei im Rahmen des Völkerbundes eine garantierte Anleihe in Höhe von 650 Millionen Goldkronen mit einer Laufzeit von zwanzig Jahren.

Somit war der Grundstein zur Sanierung des österreichischen Staatshaushaltes gelegt. Österreich musste sich im Gegenzug ein weiteres Mal verpflichten, politisch und wirtschaftlich unabhängig zu bleiben. Der Anschlusswunsch an Deutschland rückte damit in weite Ferne.

Bemerkenswert ist, dass zwei Jahre vor der Genfer Sanierung von der Konstituierende Nationalversammlung am 1. Oktober 1920 beschlossen wurde, eine Volksabstimmung über den Anschluss an Deutschland abzuhalten. Diese Resolution erfolgte parallel zur Beschlussfassung über das neue Bundes-Verfassungsgesetz[36]. Innerhalb sechs Monate nach Inkrafttreten des Bundes-Verfassungsgesetzes hätte eine Abstimmung über den Anschluss verfassungsgesetzlich angeordnet werden müssen. Das Abstimmungsergebnis wäre bindend und die Basis für weitere Verhandlungen der Bundesregierung mit Deutschland gewesen. Das Referendum fand nie statt. Die Bundesregierung setzte diesen Beschluss der Nationalversammlung nicht um. Zu groß waren die finanzielle Abhängigkeit und der politische Druck der Siegermächte.

Die „Anschlussbewegung" begann sich daher Ende des Jahres 1920 von „Wien" auf die einzelnen Bundesländer zu verlagern. In weiten Kreisen der österreichischen Bevölkerung wurde die Vereinigung mit Deutschland immer noch als einzige Lösung angesehen, um wirtschaftlich überleben zu können.

Im Nachfolgestaat Österreich fehlte das politische Zusammengehörigkeitsgefühl zwischen den einzelnen Bundesländern. Gerade die eher ländlich geprägten Bundesländer wollten mit dem von den Sozialdemokraten beherrschten „roten Wien" nicht kooperieren. Dieses Motiv bestärkte zusätzlich den Wunsch nach Anschluss an ein Deutschland, das nicht sozialistisch geworden war. Vor allem die mehrheitlich konservativ regierten westlichen Bundesländer strebten eine Einheit mit Deutschland an.

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[28] Näher zu Vertrag von Trianon: KALB, H., OLECHOWSKI, T., ZIEGERHOFER, A. (Hrsg.), *Der Vertrag von St. Germain Kommentar*, S. 27-30.

[29] Auf Grundlage des Venediger Protokolls (BGBl. Nr. 138/1922) fand wie in Kärnten eine demokratische Volksabstimmung in Sopron (Ödenburg) am 14./15. Dezember 1921 statt. Sie endete mit dem Verbleib Soprons (Ödenburgs) bei Ungarn.

[30] Johann Schober (1874 -1932) war ein österreichischer Beamter und Politiker. In den Jahren 1921/1922 und 1929/30 amtierte er als parteiloser Bundeskanzler.

[31] Der Staatsvertrag von Lana (BGBl. Nr. 173/1922) trat am 15. März 1922 in Kraft.

[32] Sudetenland, Böhmerwald und Südmähren.

[33] In Österreich wurde damit eine Regierungskrise ausgelöst. Bundeskanzler Schober musste zurücktreten. Ihm wurde vom deutschnationalen Lager „Verrat an den Sudetendeutschen" vorgeworfen. Dazu näher SCHAUSBERGER, F., Vertrag von Lana: Gut für Österreich schlecht für den Kanzler. In: *Wiener Zeitung* 21. 12. 2021.

[34] Die Genfer Protokolle wurden als Staatsvertrag zwischen Österreich einerseits und Großbritannien, Frankreich, Italien und der Tschechoslowakei andererseits am 4. Oktober 1922 abgeschlossen. Sie wurden durch das Bundesverfassungsgesetz vom 26. November 1922 kundgemacht und im BGBl. Nr. 844/1922 veröffentlicht. Die Protokolle garantierten die Souveränität Österreichs durch den Völkerbund. Zugleich beinhalten sie ein Verbot des politischen und wirtschaftlichen Zusammenschlusses Österreichs an Deutschland. Einnahmen aus Zöllen und das österreichische Tabakmonopol wurden zugunsten des Völkerbundes verpfändet. Ein strikt einzuhaltendes Konsolidierungsprogramm des österreichischen Staatshaushaltes wurde eingeleitet. Weiterführende Literatur: HÖBELT, L., *„Größter Fehler ist nervös zu werden". Seipel, der „Bürgerblock" und die „Genfer Sanierung"*1922, Wien, 2023, S. 94.

[35] Ignaz Seipel (1876-1932) war Priester, Theologe und Politiker der Christlich-sozialen Partei. In den Jahren 1922-1924 und 1926-1929 amtierte er als Bundeskanzler.

[36] Formal ist der Beschluss der Konstituierenden Nationalversammlung vom 1. Oktober 1920 nicht Teil des Bundes-Verfassungsgesetzes (B-VG), BGBl. Nr.1/1920.

In Vorarlberg wurde eine politische Vereinigung mit der Schweiz favorisiert.[37] In der Steiermark wurde die von der Steirischen Landesregierung geplante Volksabstimmung über den Anschluss an Deutschland durch die Bundesregierung erfolgreich verhindert.[38]

In Tirol[39] beschloss der Landtag am 20. Jänner 1921, ein Referendum über den Anschluss abzuhalten, falls eine nationale Abstimmung nicht stattfände. Eine Absprache zwischen den einzelnen Bundesländern über Termin und Fragestellung der in Aussicht genommenen Abstimmung ist seitens der Tiroler Landesregierung zum Zwecke eines einheitlichen Vorgehens nie erfolgt.

Am 11. März 1921 erklärte die Bundesregierung die Durchführung der Volksabstimmung für Tirol als unzulässig. Die Antwort aus Tirol folgte prompt. Die Tiroler Landesregierung wies darauf hin, dass lediglich der Wille des Volkes erkundet werden solle, um weitere politische Schritte einleiten zu können. Der Landtag hielt am 15. März 1921 an seinem Beschluss fest, eigenständig ohne Zustimmung der Bundesregierung eine Abstimmung durchführen zu wollen. Über 98% der Tiroler stimmten am 24. April 1921 für den Anschluss. Die Abstimmungsfrage lautete: *„Wird der Anschluss an das Deutsche Reich gefordert?"*

Die Stimmzettel befanden sich nicht in Wahlumschlägen. Sie wurden der Wahlbehörde lediglich gefaltet übergeben. Die leeren Stimmzettel waren mit „Ja" oder „Nein" auszufüllen. Darüber hinaus waren mit „Ja" vorgedruckte Stimmzettel im Umlauf, die für gültig erklärt wurden. Durch diese Manipulationen des Wahlvorganges wurde der Wert des Wahlergebnisses geschmälert. Dazu kam noch die massive Propaganda durch das deutschnationale Lager in und außerhalb Tirols kurz vor der Abstimmung.[40]

In Salzburg setzte sich die Landesregierung nach „Tiroler Vorbild" über das „Anschlussverbot" von Saint-Germain[41] hinweg und sprach sich mit großem Einsatz für die Vereinigung mit Deutschland aus. Der politische Druck aller im Salzburger Landtag vertretenen Parteien[42] auf die Landesregierung war groß. Damit brachte das Land Salzburg die österreichische Bundesregierung in ein politisches Dilemma.[43]

Das Salzburger Referendum vom 29. Mai 1921

Trotz des im Art. 88 des Vertrages von Saint Germain normierten „Anschlussverbotes" hofften Salzburgs „Anschlussbefürworter" auf die baldige Revision dieser Bestimmung durch den Völkerbund. Neben dem Argument der wirtschaftlichen Notwendigkeit trat auch jenes nach der völkerrechtlichen Berechtigung.[44]

Im November 1920 setzte der Salzburger Landtag einen Anschlussausschuss[45] ein, welcher den Auftrag hatte, *alle denkbaren Schritte zur Revision der Friedensverträge von Versailles und Saint Germain zu unternehmen und vorerst wenigstens den wirtschaftlichen Anschluss in die Wege zu leiten.*[46]

Dieser Ausschuss hatte sich zur Aufgabe gemacht, die Korrespondenz mit der österreichischen Bundesregierung und den übrigen Bundesländern zu führen. Er hatte sich für eine österreichweite Volksabstimmung in Absprache mit den Bundesländern einzusetzen und war dem Salzburger Landtag zur Berichterstattung verpflichtet. Der Ausschuss konstituierte sich im Jänner 1921. Zu diesem Zeitpunkt glaubte man noch an eine gesamtstaatliche Lösung der „Anschlussfrage".[47]

Salzburgs Abgeordnete warteten vergeblich auf eine Anordnung der provisorischen Nationalversammlung zur bundesweiten Volksabstimmung. Auch die österreichische Bundesregierung unter dem Vorsitz von Bundeskanzler Mayr signalisierte immer weniger Bereitschaft zu gemeinsamen Gesprächen in dieser Grundsatzfrage.

Zu groß war die Sorge der Bundesregierung vor Reparationsforderungen durch die Siegermächte einerseits und auch vor Verlusten von dringend benötigten Auslandskrediten und Hilfslieferungen andererseits. Der außenpolitische Druck auf den Bundeskanzler und auf die Salzburger Landesregierung erhöhte sich, als das Land Tirol im Alleingang eine Volksabstimmung zur Anschlussfrage für den 24. April 1921 festsetzte

[37] Dazu näher: KOLLER, C., „… der Wiener Judenstaat, von dem wir uns unter allen Umständen trennen wollen": die Vorarlberger Anschlussbewegung an die Schweiz. In: KONRAD, H., MADERTHANER, W. (Hrsg.), *Das Werden der Ersten Republik,* Bd.1, Wien, 2008, S. 83-102.

[38] Bundeskanzler Michael Mayr untersagte die steirische, für den 3. Juli 1921 anberaumte Volksabstimmung. Gründe hierfür waren die mit den Siegermächten laufenden Verhandlungen über Kredite und Wirtschaftshilfen. Der steirische Landtag hielt daran fest. Bundeskanzler Mayr trat daraufhin am 1. Juni 1921 zurück. Michael Mayr (1864-1922) war Historiker und Politiker der Christlich-sozialen Partei. Von 7. Juli 1920 war er Staatskanzler, mit Inkrafttreten des B-VG am 10. November 1920 erster Bundeskanzler Österreichs.

[39] Dazu näher KUPRIAN, J.W., Tirol und die Anschlussfrage 1918-1921. In: ALBRICH, T., EISTERER K., STEININGER, R. (Hrsg.), *Tirol und der Anschluss, Voraussetzungen, Entwicklungen, Rahmenbedingungen 1918-1938*, Innsbruck 1988, S. 43-74; GEHLER, M., *Tirol im 20. Jahrhundert. Vom Ende der Monarchie bis zur Europaregion,* 2. Aufl., Innsbruck, 2009, S. 76-80.

[40] BIELKA, E., Die Volksabstimmung in Tirol 1921 und ihre Vorgeschichte. In: ACKERL, I., NECK, R. (Hrsg.), *Saint-Germain 1919. Protokoll des Symposiums am 29. und 30. Mai 1979 in Wien*. Wien, 1989, S. 303-326.

[41] Dazu OLECHOWSKI, T., Das „Anschlußverbot" im Vertrag von Saint Germain. In: *Zeitgeschichte*, Jg. 46, 2019, S. 371-385.

[42] Christlich-soziale Partei, Sozialdemokratische Partei, Parteien aus dem deutschfreiheitlichen Lager.

[43] Dazu KRIECHBAUMER, R., 29. Mai 1921 - Volksbefragung über den Anschluss. In: KRIECHBAUMER, R., VOITHOFER, R. (Hrsg.), *Politik im Wandel, Der Salzburger Landtag im Chiemseehof 1868-2018,* Bd. 1, Salzburg, 2018, S. 307-308.

[44] Den Kampf gegen das „Anschlussverbot" mit dem vom amerikanischen Präsidenten Wilson ursprünglich verkündeten Selbstbestimmungsrecht der Völker zu rechtfertigen, ist zu hinterfragen. Dazu ausführlich: KÖFNER, G. Volksabstimmungen in Österreich nach 1918 außerhalb Kärntens. In: RUMPLER, H. (Hrsg.), *Kärntens Volksabstimmung 1920*, Klagenfurt 1981, S. 298-300.

[45] Mitglieder der Salzburger Anschlusskommission: Etter und Schernthanner (Christlich-soziale Partei); Breitenfelder und Baumgartner (Sozialdemokratische Partei); Prodinger und Schwarzenbrunner (Deutschfreiheitliches Lager).

[46] SVB, 23. 11. 1920, S. 5.

[47] Bereits am 1. Oktober 1920 wurde von der provisorischen Nationalversammlung beschlossen, innerhalb von sechs Monaten eine Abstimmung über den Anschluss an Deutschland verfassungsgesetzlich anzuordnen. Erst am 12. Mai 1921 wurde im Nationalrat ein Beschluss zur Durchführung einer österreichweiten Volksbefragung gefasst. Ein Datum zur Durchführung dieser wurde nie festgesetzt.

und in weiterer Folge abhielt. Sich den politischen Willen der Entente entgegenzustellen, war nicht nur schwer, sondern auch äußerst riskant.

Nichtsdestotrotz beharrten die Salzburger im Sinne des „Tiroler Vorbildes" auf Abhaltung eines Anschlussvotums. In der Landtagssitzung vom 11. März 1921 legte der Anschlussausschuss nachstehende Anträge zur Beschlussfassung vor:

1. Im Land Salzburg hat in der Frage des Anschlusses an Deutschland eine Volksabstimmung stattzufinden.

2. Abstimmungstag ist der 24. April 1921, falls nicht die Bundesregierung aufgrund des Beschlusses der Nationalversammlung die Abstimmung für das ganze Bundesgebiet zu einem früheren Zeitpunkt anordnet.

3. Die Abstimmungsformel hat zu lauten: Ich bin dafür, dass dem Völkerbund der Antrag vorgelegt wird. „Der Anschluss Österreichs an Deutschland soll ehestens vollzogen werden!"

4. Die Landesregierung wird aufgefordert, unverzüglich die nötigen Vorarbeiten zu treffen und von dem Beschlusse des Landtages sowohl die Bundesregierung als auch die Regierungen der übrigen Bundesländer in Kenntnis zu setzen.[48]

Die Anträge wurden vom Landtag einhellig angenommen. Damit wurde der Alleingang Salzburgs in der „Abstimmungsfrage" de facto besiegelt. Dennoch ist im Punkt 2 des Antrages ein gewisser Hoffnungsschimmer auf eine bundesweite Abstimmung zu erkennen.

Als Abstimmungstag wurde in Anlehnung an Tirol der 24. April 1921 bestimmt. Salzburgs Abgeordnete waren sich durchaus der Tatsache bewusst, dass auf regionaler Ebene eine Durchsetzung des Anschlusses an Deutschland schwer realisierbar war.[49] Die Abstimmungsformel war indirekt formuliert: Der Antrag, dass Österreich Deutschland angeschlossen werde, sollte dem Völkerbund vorgelegt werden.

Die Antwort aus Wien zum gegenständlichen Landtagsbeschluss folgte prompt. Der Bundeskanzler nahm am 5. April 1921 dazu Stellung:

Die geplante Volksabstimmung soll über die Frage des Anschlusses der Republik Österreich, also des gesamten Bundesstaates, stattfinden. Es liegt auf der Hand, dass es sich um eine Frage handelt, welche weit über eine Landesangelegenheit hinausgeht. Daher wäre der Landtag höchstens berechtigt, bei der Bundesregierung den Antrag auf Maßnahmen in dieser Frage zu stellen, keinesfalls aber kann der Beschluss, wonach in einem Gliedstaat allein eine Volksabstimmung über eine Frage durchgeführt werden soll, die das Schicksal des ganzen Bundesstaates betrifft, als zulässig angesehen werden.[50]

Der Bundeskanzler lehnte aus verfassungsrechtlichen Gründen entschlossen den gegenständlichen Landtagsbeschluss ab. Außenpolitische Agenden fielen ausnahmslos in den Wirkungsbereich des Bundes. Selbst wenn der Salzburger Landtag ein Volksbegehren nach Art. 46 des Bundes-Verfassungsgesetzes anstelle der Volksabstimmung anstreben sollte, sei dies Bundessache.

Die Salzburger Landesregierung entgegnete dem Schreiben des Bundeskanzlers in ihrer Stellungnahme vom 12. April 1921 entschieden und erklärte, dass Volksbegehren, welche den Willen des Salzburger Volkes zum Ausdruck bringen, primär durch die Salzburger Landesverfassung geregelt seien. Die Landesregierung sah in der Kompetenzforderung des Bundes *ein vollkommenes Verkennen des Wesens der vom Landtage beschlossenen Volksbefragung*. Diese sei nur als eine Art *„Volksresolution"* zu werten.[51]

Die Landesregierung erklärte sich gleichzeitig dazu bereit, auf eine Volksabstimmung zu verzichten, sofern eine solche umgehend vom Nationalrat beschlossen würde. So empfahl sie dem Landtag den Termin zur Abstimmung vom 24. April auf den 29. Mai zu verschieben. Die Verschiebung des Abstimmungstermins erfolgte mit einstimmigen Beschluss des Landtages in der Sitzung vom 27. April.[52]

Noch in derselben Sitzung änderte der Landtag im Wege eines Antrages des Verfassungsausschusses die Abstimmungsfrage: Der Satz *„Der Anschluss Österreichs an Deutschland soll ehestens vollzogen werden"* wich der Frage *„Wird der Anschluss an Deutschland gefordert?"* Durch diese Neuformulierung war der direkte Bezug zu Österreich zumindest sprachlich weggefallen.[53]

Die Vertreter des Verfassungsausschusses wiesen in ihrem Bericht vor dem Landtag insbesondere darauf hin, *dass Artikel 88 des Friedensvertrages von St. Germain nichts darüber enthält, dass eine derartige Fragestellung oder Abstimmung untersagt ist. Diese Abstimmung soll vorerst die Grundlage dafür schaffen, dass gemäß dem zitierten Artikel des Friedensvertrages an den Völkerbund um Zustimmung zur Abänderung der staatsrechtlichen Verhältnisse Österreichs bzw. des Landes Salzburg zu einem Nachbarstaat herangetreten werden kann.* Sie wurden auch nicht müde zu betonen, dass *die elementare Bewegung für den Anschluss lediglich aus dem Lebensinteresse des in höchster wirtschaftlicher Not befindlichen Volkes entstanden ist*.[54]

Mit den Landtagsbeschlüssen vom 27. April waren sämtliche Weichen für die Abhaltung der „Volksabstimmung" gestellt. Kurz danach, am 3. Mai erfolgte die Kundmachung des Referendums. Ein Arbeitsausschuss, in dem alle Landtagsparteien vertreten waren, übernahm die organisatorische Abwicklung.

In Aufrufen sämtlicher Lokalzeitungen wurde an die Salzburger Bevölkerung eindringlich appelliert, sich - über die Parteigrenzen hinweg - an den Abstimmungsvorbereitungen durch persönlichen und finanziellen Einsatz zu beteiligen.

So heißt es im Aufruf vom 7. Mai: *Um allen Zweifeln im vornhinein zu begegnen, sei ausdrücklich festgestellt, dass es sich bei dieser Äußerung des Volkswillens nicht um eine Sache einer einzelnen Partei handelt, sondern um höhere Interessen, die jedem Deutschösterreicher in gleicher Weise am Herzen liegen.*[55]

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[48] Verhandlungen des Salzburger Landtages der II. Session der I. Wahlperiode 1920/21, 21. Sitzung am 11. März 1921, S. 1130.
[49] Dazu SVB, 24. 3. 1921, S. 2.
[50] Verhandlungen des Salzburger Landtages, 28. Sitzung am 12. April 1921, S. 1357.
[51] Verhandlungen des Salzburger Landtages, 28. Sitzung, S. 1357.
[52] Ausführlich STIFTER, W., *Die Anschlussbewegung im Bundesland Salzburg nach 1918*, Diplomarbeit Universität Salzburg, Salzburg, 1974, S. 72.
[53] Verhandlungen des Salzburger Landtages, 34. Sitzung am 27. April 1921, S.1759.
[54] Verhandlungen des Salzburger Landtages, 34. Sitzung, S. 1757.
[55] SVB, 7. 5. 1921, S. 1; *Salzburger Chronik* (S.Ch.), 7. 5. 1921, S.1.; *Salzburger Wacht* (SW), 7. 5. 1921, S.1.

Und der Aufruf am 10. Mai fordert die Bevölkerung zum Spenden auf: *Die Landesregierung wendet sich bei diesem so volkstümlichen und mit unserem Nationalempfinden so innig verbundenen Anlasse an die Opferwilligkeit der Salzburger Bevölkerung und erwartet, dass jeder deutschbewusste Salzburger durch Geldbeträge die gemeinsame große Sache fördere*.[56]

Durch Presseaufrufe und Werbeplakate wurde intensiv versucht, Einfluss auf das Abstimmungsverhalten der Salzburger Bevölkerung zu nehmen. Im Rahmen dieser Aufklärungskampagne wurden auch „Anschlussversammlungen" organisiert und abgehalten.

Die österreichische Bundesregierung sprach sich erneut in ihrer Stellungnahme vom 9. Mai gegen länderweise Sonderabstimmungen und einen Alleingang Salzburg aus. Sie warnte vor den drohenden außenpolitischen Konsequenzen, die diese Volksabstimmung in Salzburg mit sich bringen könnte.[57]

Am 14. Mai begab sich der Bundeskanzler persönlich nach Salzburg und sprach in einer Sitzung der Salzburger Landesregierung vor: *„Fürs erste stehen uns territoriale Verluste bevor, wodurch uns Gebiete, die uns nach dem Friedensvertrag zufallen sollen, entzogen werden und wir andere Gebiete, die wir durch Volksabstimmung erhalten haben, verlieren und darüber hinaus noch weiter Gebietsverluste erleiden sollen. Dann wird uns gedroht, dass die Absicht der Entente, unsere finanzielle Lage zu sanieren, sofort und für immer fallengelassen wird und noch mehr, dass die Reparationen wieder in den Vordergrund treten…*[58]

Vor diesem Hintergrund fand über Antrag des Salzburger Verfassungsausschusses am 18. Mai erneut eine Landtagssitzung statt. In dieser wurde der ursprüngliche Abstimmungsbeschluss vom 27. April einstimmig geändert. Anstelle der Landesregierung sollten die im Landtag vertretenen Parteien die künftige Durchführung des Referendums übernehmen! Durch diesen gekonnten Schachzug bekam die Volksbefragung einen gewissen inoffiziellen Charakter und wurde so zur „Privatsache" der Parteien.[59]

Eine weitere Verschiebung des Termins oder gar eine Absage konnte durch diesen taktisch geschickten Ausweg verhindert werden. Auch eine weitere Eskalierung des angespannten Verhältnisses zwischen Bund und Land Salzburg wurde dadurch weitgehend vermieden.

Seitens des Bundes wurde die Weisung an den Landeshauptmann erteilt, die Organe der Bundesverwaltung anzuweisen, sich jeder unmittelbaren und mittelbaren Mitwirkung an der Befragung zu enthalten.[60]

Am Sonntag, den 29. Mai 1921 um 7.00 Uhr früh war es so weit: Die „Volksabstimmung" fand statt. Die Stimmungslage der Bevölkerung spiegelte sich im Ergebnis der Abstimmung wieder. 98986 Ja-Stimmen, 889 Nein-Stimmen und 386 ungültige Stimmen wurden gezählt. In Prozenten formuliert haben demnach 98,7 % der Abstimmenden mit „Ja" votiert![61] Nach Bekanntgabe dieses eindeutigen Ergebnisses fanden in Salzburg festliche Abschlussveranstaltungen statt. In der Stadt Salzburg zierten *huntfarbige Fahnen und Flaggen die Mehrzahl der Häuser. Aufschriften an Litfaßsäulen, Mauern und Rollläden, auch auf Auslagenfenstern, sagten es zum hundertsten oder tausendsten Male jedem wieder, was schon jeder wusste.*[62]

In der Bewertung des Abstimmungsergebnisses waren sich Salzburgs Parteien einig: Dieses demonstriere lediglich den Anschlusswillen der Salzburger Bevölkerung. Das Ziel, den Anschluss an Deutschland tatsächlich umsetzen zu können, lag zu diesem Zeitpunkt ferner denn je.

Hatte das Salzburger Referendum Folgen für Österreich? Dies ist mit einem klaren „Nein" zu beantworten. Das Resultat der Abstimmung wurde dem Völkerbund nie weitergeleitet. Die Bundesregierung hatte aus dem Ergebnis keinerlei Konsequenzen gezogen.

3. Schlussbetrachtung

Das Salzburger Anschlussreferendum war dem Grunde nach ein Volksbegehren bzw. eine Volksbefragung, entstanden durch die Initiative der Salzburger Bevölkerung. In diesem Zusammenhang von Volksabstimmung[63] oder Plebiszit im engeren Sinne zu sprechen, ist aufgrund des fehlenden Legitimitätsanspruches aus rechtlicher Sicht problematisch.

Das Salzburger Volksbegehren war keine Abstimmung über eine Territorialfrage oder über einen Grenzziehungskonflikt. Es war auch keine Abstimmung über völkische Minderheiten und deren staatliche Zugehörigkeit, wie es in Burgenland und Kärnten der Fall war.

Die Salzburger Abstimmung stand im engen Konnex mit der österreichischen Innen-, Außen- und Wirtschaftspolitik. Die „Anschlussfrage" spiegelte insbesondere die wirtschaftliche Unzufriedenheit der Salzburger Bevölkerung wieder, wenngleich ideologisch untermauert.

Die Tatsache an sich, dass im Frühjahr 1921 ein Volksbegehren zum Anschluss an Deutschland in Salzburg stattgefunden hat, ist durchaus bemerkenswert: Zum einem ist es das Abstimmungsverhalten der Salzburger Bevölkerung. Sie sah in der Anbindung an einen größeren Staat die einzige Lösung zur Überwindung der wirtschaftlichen Probleme. Zum anderen ist es die Einhelligkeit aller politischen Kräfte im Salzburger Landtag in der Frage zur Abhaltung des Referendums.

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[56] SVB, 10. 5. 1921, S. 1.
[57] Dazu STIFTER, W., *Die Anschlussbewegung*, S.76-77.
[58] Verhandlungen des Salzburger Landtages, 37. Sitzung am 17. Mai 1921, S. 2043.
[59] KRIECHBAUMER, R., Volksbefragung über den Anschluss. In: KRIECHBAUMER, R., VOITHOFER, R. (Hrsg.) *Politik im Wandel*, S. 308.
[60] Dazu BIELKA, E., Salzburger Volksabstimmung 1921- auch manipuliert. In: ACKERL, I., NECK, R. (Hrsg.), *Saint Germain 1919*, Wien, 1989, S. 339.
[61] Zum Abstimmungsergebnis ausführlich BIELKA, E., Salzburger Volksabstimmung. In: ACKERL, I., NECK, R. (Hrsg.), *Saint Germain 1919*, S. 344-349. Vgl. SVB 30. 5. 1921, S.1.; S.Ch. 31. 5. 1921, S.1.; SW 30. 5. 1921, S.1.
[62] *Salzburger Chronik* (S.Ch.), 31. 5. 1921, S. 1.
[63] In den Primär- und Sekundärunterlagen wie auch teilweise im Text finden sich meist unterschiedliche Begrifflichkeiten.

Die politischen Parteien waren es auch, die an Stelle des Landes Salzburg das Referendum zur Durchführung brachten, nachdem auf Einspruch der Bundesregierung der Salzburger Landtag das Volksbegehren in einen „inoffiziellen“ Vorgang umgewandelt hatte.

Sozialdemokraten, Christlich-soziale und Deutschfreiheitliche bzw. Deutschnationale standen gemeinsam hinter der Idee des Anschlusses - und das in der gesamten Vorbereitungs- und Durchführungsphase des Referendums! Alle Parteien suchten trotz divergierender Ideologien und daraus resultierender unterschiedlicher Motive nicht den Konflikt, sondern den Konsens[64] zu einem Zeitpunkt, als dem Anschlussgedanken das reale Fundament bereits entzogen war.

Mit dem Vertrag von Saint Germain 1919 hatte die Anschlussidee die Rolle eines Hoffnungsträgers in der Ersten Republik[65] überwiegend eingebüßt.[66] Der Wunsch nach einem politischen und wirtschaftlichen Anschluss Österreichs an Deutschland blieb in weiten Teilen der Bevölkerung in unterschiedlicher Weise bestehen. Das Thema „Anschluss an Deutschland“ als Ideal stand daher immer wieder - einmal schwächer, einmal stärker wiederkehrend - auf der bundes- und landespolitischen Tagesordnung der Ersten Republik.

[64] Zur Frage, welche Faktoren das Funktionieren der Konsensdemokratie in Salzburg bestimmten, ausführlich HANISCH, E., Die Erste Republik. In: DOPSCH, H., SPATZENEGGER, H. (Hrsg.), *Geschichte Salzburgs*, Band II/2, Salzburg, 1988, S. 1066-1070.

[65] Der Terminus „Erste Republik“ bezeichnet die Periode von der Ausrufung der Republik Deutschösterreich im November 1918 bis zum Ende der parlamentarischen Demokratie 1933 bzw. bis zur Errichtung des österreichischen „Ständestaates“ 1934.

[66] SAAGE, R., *Die deutsche Frage. Die Erste Republik im Spannungsfeld zwischen österreichischer und deutscher Identität*, S. 79.

The Real Purpose of Cartels: Theory and Practice in Hungary between the Two World Wars*

*Norbert Varga***

Abstract

During the interwar period, economic conditions in Hungary changed significantly, which also had an impact on the development of law, including private and commercial law. The Hungarian Cartel Act of 1931 legalized cartels under certain conditions. This resulted in cartels being placed under supervision and their operations being controlled in the public interest. This was the most important aim of the state, which was enshrined in legislation against cartels. The question is what the real purpose of cartels was, what motivated them and kept them alive during the period under review. The aim of the cartels can be examined on the basis of the cartel agreements found in the archives. The aim of this study is to use archival sources to reveal the aim of the cartel, which fundamentally determined its organizational structure.

Keywords: *cartel law; aim of cartel agreement; Hungary; private law of cartels.*

1. Introduction

In the period between the two world wars, significant changes occurred in economic circumstances, which also had an impact on the development of law, including private and commercial law.[1] After the turn of the century, agreements restricting economic competition were not always automatically considered to be contrary to good morals, only if they conducted an activity that was harmful to the public interest. The courts have examined the validity of cartel agreements on a case-by-case basis.[2] This meant that there was a sharp turn in how cartel agreements were judged by the courts in the first half of the 20th century.[3] The real change came with the adoption of the Hungarian Cartel Act of 1931[4], which legalised cartels under certain conditions. The result was that cartels were placed under supervision and their operation was controlled for the purpose of public interest.[5] From the state's point of view, this is the most important objective that has been enacted into law against cartels. The question is what the real aim of cartels was, what motivated and kept these companies alive during the period examined.

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2 VARGA, N., The Validity of Cartel Agreements in Hungarian Cartel Law in the Period between the two World Wars with a European Perspective. *Journal on European History of Law*, Vol. 16, No. 1, 2025, p. 160-171.

3 HOMOKI-NAGY, M., Kartellszerződések a gyakorlatban. *Versenytükör,* Special issue, 2017, p. 5, SZABÓ, I., Az 1931. évi XX. tc. törvénycikk rendes bíróságok előtti gyakorlata. In: *Versenytükör,* Special issue, 2017, p. 35-46; SZABÓ, I., Jogesetek az első magyar kartelltörvény gyakorlatából (1931). In: HOMICSKÓ, Á. – SZUCHY, R. (eds.), *60 Studia in honorem Péter Miskolczi-Bodnár.* Budapest, 2017, p. 489-490; PÉTERVÁRI, M., A kivételes hatalomról rendelkező törvény alapján elrendelet moratórium hatása a csődeljárásokra. *Katonai és Hadijogi Szemle*, Vol. 8, No. 2, 2020, p. 25-39.

4 STIPTA, I., A gazdasági versenyt szabályzó megállapodásokról szóló 1931. évi XX. tc. hazai előzményei. *Versenytükör*, Special issue, 2016, p. 60-63.

5 SZABÓ, I., A kartellfelügyelet szervezet és hatásköre az 1931. évi törvénycikk nyomán. *Versenytükör*, Special Issue, 2016, pp. 64-83; SZABÓ, I., A Kartelbíróság (1931). In: *Jogtörténeti Szemle*, Vol. 19, No. 1-2, 2017, p. 11-18; SZABÓ, I., Einige Merkmale des ungarischen Wirtschaftsrechts in der Zwischenkriegszeit. In: *Dokud vlak nezastavi: Historie habsburgskeho prostoru k jubileu Milana Hlavačky.* Praha, 2025, p. 409-413; SZABÓ, I., A gazdasági verseny szabályozásának morális kérdései az első magyar kartelltörvényben (1931). In: KOMÁROMI, L. et al. (eds.), *Munus et dilectio: Ünnepi kötet Kuminetz Géza 65. születésnapja alkalmából.* Budapest, 2024, p. 344-347; SZABÓ, I., Két jogértelmezési probléma az 1931-es kartelltörvény gyakorlatából. In: BARNA, A. et al. (eds.), *Laudator temporis acti. Ünnepi tanulmányok a 65 éves Horváth Attila tiszteletére*. Budapest, 2024, p. 650-651.

2. Theoretical basis for the purpose of cartels

One of the key elements of private cartel law is the cartel agreement. A thorough examination of the operation of cartels, based on archival sources, is fundamentally still lacking in the relevant literature. In this paper, I will briefly discuss the purpose of cartels, drawing on cartel agreements preserved in the records of the Archives of Budapest and the Economic Archives Department of the Hungarian National Archives.

The private law of cartels was not fundamentally regulated in 1931, which meant that the relevant rules of general private law and commercial law had to be applied.[6] There were no cogent elements in cartel contracts; however, practice shows that there were regularly recurrent elements. Among these, the purpose of the cartels, which has not been dealt with in the literature, is the subject of the present study. I consider it necessary to examine the purpose of cartels, because this is what has determined the further content elements of cartel agreements. The activities of the companies grouped into a cartel were regulated in accordance with the cartel's purpose. The necessity of forming cartels was justified by the cartels' purpose. However, it should be noted on the basis of the archival sources that not all cartel agreements contained a declared purpose.

Before turning to the analysis of the archival sources, it is worth considering whether the purpose of cartels was examined during the legislative process and how the purpose of cartels was presented in the literature. The purpose of cartels was also discussed during the parliamentary debate on the 1931 Cartels Act, although it must be acknowledged that this was not the main point of the debate. The speech by József Csik, member of Parliament, who said the following, should be highlighted. "The cartel was set up under the false pretext that its aim was to organise industrial production and rationalise operations. In reality, however, this was just a sham on the part of the cartel, because its real aim was to eliminate economic competition and thereby increase production profits."[7] The explanatory memorandum to the bill stated the following about the purpose of cartels: The additional and economically most essential content of a cartel "agreement or decision is the direct aim of the imposition of the obligation, which is here the regulation of economic competition. This regulation is most often related to the restriction of competition, but it may also be done in other ways (e.g. by imposing commercial conditions)."[8] Here we were talking about cartel agreements that aim to determine in advance and for a longer period of time the conduct of the cartel members.

The purpose of cartels was "to restrict competition, or in its more perfect forms to exclude competition."[9] This basically meant nothing more than primarily regulating production and sales, as well as fixing the price. Zoltán Ráth was the jurist who, in his summary work, described the purpose and nature of cartels. "Even if the cartel agreements themselves describe their purpose in more or less fine-sounding terms – even if they mention the avoidance of crises, the prevention of overproduction, the elimination of unhealthy competition, etc. – it does not require much insight to find the true purpose in brief: to secure and increase entrepreneurial profits. The bitter resignation from free initiative and full autonomy was made in order to more reliably achieve the goal of securing profit – this ultimate natural objective of all entrepreneurial activity."[10] According to Ödön Kuncz, an internationally renowned scholar of commercial law, the purpose of cartels is "to adapt production to the consumer, i.e. to eliminate or at least substantially restrict free competition."[11]

In the literature, the purpose of cartels is also discussed in the context of their classification. It should be noted at the outset that I will not undertake a detailed discussion of the classification of cartels in the context of this paper. In the literature on domestic cartels, we can observe a number of classifications closely related to the purpose of cartels.

Nándor Baumgarten and Artur Meszlényi divided cartels into three groups, the first of which included those that "aim at overcoming the symptoms of competition," i.e. condition and production cartels, and the second group included those cartels, which eliminated or limited the "motives of competition" (profit-sharing cartels), and in the third category were those cartels (consumption-sharing and sales cartels) that eliminated competition.[12] In the first category, the aim was to fix the conditions of sale, fix minimum prices and gradually increase them, increase the profits of the undertakings, and impose restrictions or closures of production facilities. The primary goal of the profit-sharing cartels in the second group was the prior allocation (distribution according to a quota) among the entrepreneurs of the quantity of goods entering the market. The third group of cartels was aimed at properly allocating consumption among the members and thereby eliminating competition. In the case of the selling cartels, the aim was to allocate orders and contracts between the cartel members, usually by setting up a separate organisation.[13]

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[6] HORVÁTH, A., Az első magyar kereskedelmi társaságokról szóló törvény. In: *Jogtörténeti Szemle,* Vol. 6, No. 4, 2004, p. 7-15; STIPTA, I., Az első magyar kartelltörvény (1931. évi XX. tc.) dogmatikai jellemzői. In: *FORUM: Acta Juridica et Politica,* Vol. 5, No. 1, 2015, p. 115-131.

[7] Az *1927. évi január hó 25-ére hirdetett országgyűlés Képviselőházának naplója*. 33. kötet (továbbiakban KN) Budapest, 1931, p. 344. Ezt a célt emelte ki a kartelltörvényünk országgyűlési vitája alkalmával Moser Ernő. KN p. 123. Lásd még Görgey István felszólalását, aki szintén az áremelkedést emelte ki. KN p. 314.

[8] 1931. évi XX. törvénycikk indokolása a gazdasági versenyt szabályzó megállapodásokról. Online: https://net.jogtar.hu/ezer-ev-torveny?docid=93100020.TVI&searchUrl=/ezer-ev-torvenyei%3Fpagenum%3D49

[9] A kartellekről. In: *Magyar Mérnök és Építész Egylet Közlönye,* Vol. 34, No. 20, 1900, p. 510.

[10] RÁTH, Z., Emlékirat a kartellekről. In: *Központi Értesítő*, Vol. 25, No. 94, 1900, p. 14.

[11] A Magyar Jogászegylet Gazdaságijogi Intézete május hó 8., 14. és 16-án rendezte kartellankétjét. *Kereskedelmi Jog*, Vol. 26, No. 6, 1929, p. 168. Lásd még: HORVÁTH, A., *A magyar magánjog történetének alapjai*. Budapest, 2006, p. 183-189

[12] BAUMGARTEN, N., MESZLÉNY, N., *Kartelek, Trustök: Keletkezésük – Fejlődésük – Helyzetük a gazdasági és jogrendben*. Budapest, 1906, p. 83.

[13] Ibid pp. 84-92.

Cartels can also be classified according to their purpose. "Cartels seek to achieve their objectives either by fixing prices and business conditions, or by restricting production, or by eliminating competition for the conclusion of transactions."[14] On the basis of the above, Károly Dobrovics divided cartels into three main groups, the first of which he classified as price and condition cartels, the second as production-restricting cartels, the third as territory-securing or buyer protecting cartels.[15]

Ferenc Király Harasztosi also dealt with the purpose of cartels, and more specifically whether or not a defined cartel purpose is a necessary element of the having a cartel. In his opinion, the focus of cartels is on the result. "Cartels are existing and functioning as interconnections of companies that have a notable effect on the market; in practice, it is most effective to look for the natural and essential elements within the *de facto* organization and operation of these economic structures that are necessary for the formation of the concept of a cartel."[16] Cartels are basically created for monopoly, profit and profitable production. According to Harasztosi, one objective cannot be identified as the general purpose of a cartel. Rather than the purpose, it is the economic power of the cartel that should be analysed, the actual economic result. "By comparison, cartels are defined as aggregations of independent undertakings with identical or related objects which, by virtue of their economic superiority resulting from their combination and permanently restricting or eliminating competition, control the market."[17] Before listing and describing in detail the "species of cartels" (e.g. condition cartels, price cartels, price calculation cartels, market-sharing or territory allocation cartels, customer protection cartels, quota-setting cartels, price suppression cartels), Harasztosi highlighted the main purpose of cartels, which is "to satisfy the profit aspirations of the entrepreneurs who form them, to protect them in times of crisis and to safeguard the disciplined order of economic life by autonomous means".[18]

According to Nándor Ranschburg, the ultimate aim of cartels is "to prevent prices from changing to the detriment of the entrepreneurs and to secure prices which are best suited to the interests of the entrepreneurs who are members of the cartel."[19] In his view, the organisation of the market and the rationalisation of production are not the aim of cartels, but rather their means. According to Ranschburg, cartels were created for "private economic ends." The real purpose of cartels is to promote the interests of cartel members by influencing market prices.[20]

3. The real purpose of cartels based on practice

I will now turn to an analysis of the relevant parts of the cartel agreements. In my view, on the basis of the archival sources, cartels can be divided into two broad categories on the basis of their aims shown in the agreements. The first category includes those cartel agreements in which economic production and rationalisation appear to be the main aims. The second category includes agreements where the aim is more specific, i.e. the coordination of production, distribution, turnover, sales or transport. It can be stated at the outset that the aim of cartels was to increase profits and eliminate or at least restrict competition.[21] Most of the time, the aim did not appear in a "pure" form, but could be observed as a combination of both.

The first group includes the cartel agreement related to the production and sale of copper sheets, tin plates, strips, pipes, rods, wires, and bare cables, concluded between Felten és Guilleaume Kábel-, Sodrony- és Sodronykötélgyár Rt., a Fémáru-, Fegyver- és Gépgyár Rt., a Magyar Rézhengermüvek Rt. és a Weiss Manfréd Acél- és Fémművei Rt. with the aim of rationalising production and combating foreign competition.[22]

The woollen yarn agreement was concluded by Hazai Fésüsfonó és Szövőgyár Rt., Soproni Fésüsfonalgyár, Vöslaui Fésüsfonalgyár Rt. fióktelepe, Kokron József és Fiai, Kötszövöttárugyár, Kistarcsai Fésüsfonalgyár Rt., Első Rákospalotai Kötő- és Kötőszövőgyár Rt. and Csepeli Fésüsfonalgyár Rt. The aim of the agreement was to make production more economical by properly proportioning deliveries between the factories. A stable price policy was established which takes into account the interests of domestic wool producers and domestic consumers as well. They also sought to regulate payment and delivery terms which took into account the economic situation and the performance of the yarn mills and their customers at any given time. The final aim was to regulate the granting of credit in general.[23]

The electric meter cartel agreement was concluded by Ganz és Társa Villamossági, Waggon- és Hajógyár Rt. and Hajós és Szántó Elektromos Gyár Rt., both of them companies registered in Budapest, in which they agreed on the aim of the cartel. The parties have resolved that, in order to make economical production and the supply of domestically manufactured products of the highest quality, made in Hungary, in line with the needs of consumers, they would coordinate the division of the domestic market for electric meters.[24]

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[14] DOBROVICS, K., *A kartelek helyzete és működése Magyarországon*. Budapest, 1934, p. 323.
[15] Ibid, p. 323.
[16] HARASZTOSI KIRÁLY, F., *A kartel*. Budapest, 1936, p. 122.
[17] Ibid, p. 123.
[18] Ibid, p. 195.
[19] RANSCHBURG, N., *Kartelljog kartelszervezet: A gazdasági versenyt szabályozó megállapodásokról szóló 1931. évi XX-ik törvénycikk (karteltörvény) magyarázatával és végrehajtási rendeletekkel*. Budapest, 1931, p. 26.
[20] Ibid, p. 26.
[21] TRÓCSÁNYI, J., A kartellekről. *Kereskedelmi Jog,* Vol. 7, No. 4, 1910, p. 77.
[22] Kartell megállapodás vörösrézből készült lemezek, bádogok, szalagok, csövek, rudak, huzalok és csupasz kábelek gyártására és értékesítésére. In: HU-MNL-Z 466-D-19.
[23] Kartell ügyek: Fésüs-gyapjúfonal kartell egyezmény iratai, 1937-1947. In: HU BFL XI.533.C 2 kisdoboz [1].
[24] Áramszámláló kartell tárgyában megállapodások, jegyzőkönyvek stb. 1926-1948. In: HU-MNL-OL-Z 425-C-20.

In the rayon crepe de chine and rayon marocain conventions, the participating companies (Hungária, Sopron Silk, Szentgothárd, Goldberger, Adria, Kammer, Kispest Textile, Filtex, Kispest Silk, Trebitsch, Carpathia, Dr. Händler, Hoffer & Co., Continental, Tolnai Textile, Dénes István)[25] agreed to take all necessary measures to improve the economic viability of their production of plain rayon crepe de chine and plain rayon marocain in order to meet domestic demand as efficiently as possible. The aim of the agreement was to rationalise production by regulating (standardising) the quality of the products according to uniform principles. The aim was to introduce a price policy which would take account of the purchasing power and quality requirements of domestic consumers. They intended to regulate payment and delivery conditions in a uniform way, taking into consideration the economic situation and performance of both the factories and the consumers.[26]

The parties to the transport and lifting equipment cartel (Magyar Waggon- és Gépgyár Rt., Ganz és Társa-Danubius Villamossági-, Gép-, Waggon- és Hajógyár Rt., Roessemann & Kühnemann Machinery, Mining Machinery and Mechanical Handling Equipment Works Rt, Laufer József Maschinenfabrik) have decided that, in order to ensure rational production, the domestic demand for the transport equipment – such as electric pulley blocks, all types of manually or otherwise powered cranes, grabs, pushing benches, trolley hoists for manual and electric operation, wagon tippers, round hoists, wagon towing equipment with closed and open ropes, mining and haulage machines, mining winches and their accessories, electric winches (spills), steam winches, cableway installations, suspension railways, complete coal classifying plants, coal grinding plants, boiler house coal and slag handling plants, fixed and conveyor belts, conveyor pulleys, serpentine elevators, bag elevators, shaking chutes, glides, inclined elevators, chain elevators, endless ropeways, granary plants and dry dumps – will be met, as far as possible, in common agreement. The parties also agreed that a joint trustee will be selected by the participants to achieve this objective. All requests for proposals for any of the listed materials were to be notified to the trustee. The trustee could then, on the basis of the notifications, convene the factories invited to submit bids to a joint meeting for consultation. It was also stipulated that the allocation of work should be made with a view to rational production requirements. The trustee acted in accordance with the principles laid down in the agreement and was bound by confidentiality with regard to the information provided or disclosed.[27] The parties have also agreed to appoint Mr. Tódor Kende, former Chief Government Counsellor and Managing Director of the National Association of Hungarian Iron Mills and Machine Works, as the trustee.

The rationalisation of production was generally stated as the main objective of the cartels in the agreements, which meant that the cartelised companies could add other objectives to this. In the second group were those agreements where the cartel objectives were essentially defined in relation to production and consumption and where additional objectives were specified in relation to this area of activity.

Délkárpáti Kőolajfinomító és Kereskedelmi Rt., Vitéz Egerváry Sándor and Partners, Erdélyi Magyar-Olaj-s Ásványolajgyárak Rt., Fanto Egyesült Magyar Ásványolajgyárak Rt., Kőolajfinomítógyár, Dr. Motaidlovszky Elek and Partner, Lardoline Olaj, Zsiradék- és Vegyigyár Rt., Magyar Olajmüvek Rt., Magyarországi-Vacuum-Olaj plants operated by the Hungarian Royal Treasury, Magyar Petroleumipar Rt., Nyirbogdányi Petroleumgyár Rt, Péti Nitrogénmüvek Rt., Smell Kőolaj Rt., Steaua Magyar Kőolaj Rt. and Szőregi Petroleumgyár Rt. "concluded the following agreement at the request of the Government".[28] The petroleum cartel agreement was established to regulate between the above named companies "the exclusive distribution, marketing, transport, sale and partial storage of the products of domestic petroleum refineries during the war, and the exclusive monopoly of the import and marketing of petroleum products and the export of petroleum products".[29] In order to achieve this objective, a separate sales organisation was set up under the name of the Petroleum Centre.

The cartel agreement on the marketing of fireclay products was set up by the Kőszénbánya- s Téglagyár Társulat in Pest, the Hungarian branch of Magnezitipar Rt. and Magyar Kerámiai Gyár Rt. "By the present agreement, the parties wish to regulate the domestic sales of their fireclay products and to facilitate the uninterrupted supply of the domestic market."[30]

The aim of the cartel agreement between the Hungarian machinery factories was to regulate the production of the participating factories in order to prepare and facilitate specialisation and to make production cheaper and of better quality. This was intended to ensure that "the prices of manufactured goods would not rise at the expense of consumers, but that the factories would be better able to defend themselves against foreign industry."[31]

4. Summary

To sum up, we can find out most about cartels is by examining the purpose for which they were created. Cartel agreements "usually identify rationalisation of production, avoidance of crises, production and consumption interests and similar well-meaning, even public interest objectives as being representative of the cartel's purpose."[32] But the true purpose of cartels is economic, since the cartel itself is an economic formation. Ratio-

[25] Kartell ügyek: Müselyem crepe de chine és müselyem marocain – egyezmény. In: HU BFL XI.515.C 2. kisdoboz [4].
[26] Kartell ügyek: Müselyem crepe de chine és müselyem marocain – egyezmény. In: HU BFL XI.515.C 2. kisdoboz [4].
[27] Szállító- és emelő berendezésekre kartell: levelezés, megállapodások, jelentések stb. 1927-1937. In: HU-MNL-OL-Z 425-6-32.
[28] Kartell szerződések, tárgyalások iratai, 1925-1933. In: HU BFL 419 3. kisdoboz [2].
[29] Kartell szerződések, tárgyalások iratai, 1925-1933. In: HU BFL 419 3. kisdoboz [2].
[30] Kartell vele kapcsolatos iratok, 1925-1947; Kartell-szerződés és kartell-bejelentési ügyek: Magnezit (1931-1947). In: HU-BFL XI. 822. 9 kisdoboz.
[31] Gépgyárak kartellmegállapodása. In: HU-MNL-Z 425-3. cs.
[32] A kartellek. In: *Építőmesterek Lapja – A munkadó,* Vol. 21, No. 29, 1934, p. 1.

nalisation, the regulation of consumption and production, the organisation of markets are economic ends, but these are only the means to that end. The primary aim of a cartel is to influence prices in a way that is advantageous to the cartel members and to secure the highest possible profit for them. The cartel restricted the free disposal of its members in order to achieve its objectives. "This objective is a natural one for a productive or commercial undertaking established for an economic purpose and, if kept within proper bounds, not objectionable either economically or from the point of view of public interest."[33]

[33] Ibid, p. 1.

The Right to be Defended: The Advocacy in the Reichskommissariat Ukraine and the Military Occupation Zone (1941–1944)

Alina Ivanenko, Andrii Ostrianko**, Oleksandr Ivanenko****

Abstract

This article explores the role of lawyers and legal institutions during the Nazi occupation of Ukraine in World War II. It examines the regulatory framework for legal practice, including regulations issued by the Reichskommissariat Ukraine and local German authorities. Lawyers were allowed to represent local residents in criminal and civil courts, though their work was heavily supervised and constrained by the occupation regime. Despite these challenges, some lawyers successfully defended individuals, including those wrongfully accused by the military administration. The study also discusses the ethical complexities of legal practice during the occupation, with some lawyers providing genuine assistance to the oppressed, while others exploited the system for personal gain. It also reflects on the broader context of the occupation, in which the National Socialist regime, despite its emphasis on violence and control, required the establishment of legal institutions to regulate daily life and maintain a semblance of order. Ultimately, the article provides an in-depth look at the role of legal professionals in navigating both the bureaucratic constraints and human rights challenges in the occupied territories of Ukraine, contributing to a better understanding of the nuanced legal and social dynamics of wartime governance. This research sheds light on the legal landscape in occupied Ukraine, emphasizing the importance of legal institutions in maintaining social order under Nazi control.

Keywords: *Occupation; Ukraine; lawyers; legal institutions; the Bar; advocacy; Reichskommissariat; legal aid; military administration; World War II.*

Introduction

While the World War II has been the subject of extensive scholarly research, certain aspects of civilian life under occupation – particularly the functioning of legal institutions and the role of the legal profession – remain significantly underexplored. In the territories of Ukraine occupied by Nazi Germany, legal structures operated under the direction of the occupation authorities. These structures existed within a regime that has been widely characterised as both a *totalitarian dictatorship* and an *Unrechtsstaat* (an unjust state in which the law was systematically used to serve ideological and racial objectives). The presence and professional activity of lawyers and notaries within this *rechtsförmige Verwaltung unter einem Unrechtsregime* (legally-structured administration under an unjust regime) may appear paradoxical, yet they played a functional role in the occupation system that merits critical and detailed scholarly analysis.

The study of the wartime occupation of Ukraine was first initiated by Soviet historians. In early 1942, a research group was set up at the Academy of Sciences of the Ukrainian SSR. This group was later reorganised as the Commission on the History of the Great Patriotic War at the Presidium of the Academy of Sciences (1945–1950). The commission's primary focus was collecting and publishing materials related to military units, partisan resistance, and the heroic efforts of Soviet citizens. Relying largely on press articles, reports from the Soviet Information Bureau and documents from state and party organisations, the commission's work laid the foundation for Soviet historiography driven by ideology, portraying the German occupation through the lens of propaganda and political utility.

During the post-war period, Soviet historiography continued to emphasise the Party's pivotal role in defeating fascism, frequently overlooking broader or more nuanced insights into life under occupation. However, during the Khrushchev Thaw of the mid-1950s, there were limited attempts to move beyond this, resulting in the publication of more generalised studies that began to address life in the occupied territories more broadly. While these works acknowledged the social hardships endured by the civilian population, they largely overlooked the legal aspects of occupation governance.

Following the collapse of the Soviet Union, Ukrainian historiography underwent a paradigm shift, moving away from meth-

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odological monism and embracing new sources and analytical frameworks. This enabled the exploration of previously taboo subjects, such as the administrative structures of occupation regimes, the policies of the occupation authorities, the experiences of Ostarbeiters, the economic exploitation of the region and Nazi racial and cultural ideology. Scholars such as O. Lysenko, O. Honcharenko, O. Potylchak, V. Shaykan, O. Salata, V. Kucher and I. Patryliak have made significant contributions to this field. However, despite these advances, the legal regime in occupied Ukraine and the activities of legal professionals during this period have not yet been the subject of focused research.

This article aims to address this gap by analysing the institutional structures, legal frameworks and everyday professional activities of lawyers and notaries operating under the *National Socialist dictatorship*. It examines the complex role of legal professionals within the occupation administration, contextualising their work within the broader framework of Legal policy of the German occupation authorities and the ideological constraints imposed by the *totalitarian regime*. This investigation contributes to a more nuanced understanding of how law functioned under occupation as more than just a tool of repression; it was also an element of administrative control and public interaction within the logic of an *instrumentalised legal system*.

A similar situation can be seen in European and American historiography, as demonstrated by the works of K.-D. Bracher, H. Mommsen, W. Conze, I. Kershaw, R. Evans, M. Mazower and T. Snyder. These authors have reconstructed the image of the State under National Socialism, its power and administrative structures, and the legal regime of the occupied territories. However, the legal status of the occupied population, particularly in Eastern Europe, has not received sufficient attention. Consequently, initial efforts are underway to catalogue this issue and evaluate methodologies and technologies for studying and resolving it.

Historically, the role of attorneys has been to ensure the right to a fair trial for the accused and to provide legal assistance to those involved in court proceedings. Attorneys have always played an active role in the social and political life of European societies, particularly in Ukraine. They have engaged in education, created professional, cultural and educational non-governmental organisations (NGOs) and provided a crucial impetus to economic life. Most importantly, in different historical periods, they have become active participants in socio-political transformations. The German occupation of Ukrainian territories during the Second World War was no exception. The National Socialists attempted to regulate social relations by establishing local legal institutions, yet they were also compelled to permit lawyers to practise.

1. Organization of occupation regime. Establishment of advocacy.

Between 1941 and 1942, Ukraine was occupied by Germany's armed forces and their allies. This resulted in Ukrainian society seemingly becoming an inexhaustible source of raw materials and human resources. The Nazi occupation regime established numerous administrative and territorial units within Ukrainian territory, including the military occupation zone, the Reichskommissariat 'Ukraine', the district of Galicia – an administrative region within the General Government (the territory of occupied Poland) – and the Transnistria governorate, which was under Romanian control. The easternmost regions of Ukraine, including Chernihiv, Sumy, and parts of Kharkiv, Donetsk and Luhansk, came under the jurisdiction of individual military field commandants' offices. These territories lacked a cohesive management system and were intended to be incorporated into the Reichskommissariat Ukraine as the front advanced eastwards. However, as history has shown, this did not come to fruition. There is no single term in historiography for these areas, but in this study they will be grouped together under the name 'Military Occupation Zone'. Each of these areas had an administrative hierarchy that put into practice all instructions from the political leadership of the Third Reich, working towards both tactical and strategic goals of the occupation. The largest administrative territorial unit in Ukraine from 1941 to 1944 was the Reichskommissariat 'Ukraine'.

The system of occupation authorities was predicated on the principle of unquestioning subordination and implementation of all administrative decisions. That is to say, it exhibited a pronounced authoritarian character. A clear hierarchy was established within the management system, with the local population occupying the lowest levels and being obliged to unquestioningly follow all orders from the occupiers.

The 'new order' structures primarily relied on the use of force, as well as repressive and punitive measures, to ensure their functionality. However, as the occupation progressed, it became clear that sustained governance of the civilian population could not be based solely on coercion. A functioning legal framework was needed to resolve everyday disputes, regulate property relations and maintain order.

At this initial stage, the Soviet judicial and administrative institutions that had existed prior to the war ceased to function across most of the Reichskommissariat Ukraine.

While some of the state apparatus, including courts and administrative staff, had been evacuated eastwards, the remainder were either disbanded or rendered inoperative by the German authorities. In isolated instances, remnants of Soviet legislation were temporarily employed by local authorities to regulate civil affairs in the absence of occupation directives. However, Soviet courts themselves did not operate under occupation, and their institutional continuity was broken. The resulting legal vacuum was addressed unevenly: in some areas, temporary judicial structures were formed under the auspices of local administrations or with the approval of the military, while in others, legal regulation was delayed due to a lack of personnel, legitimacy or clear legal norms. The abrupt disruption of pre-war legal institutions and the marginalisation or elimination of Soviet-trained legal professionals had long-term consequences, including the erosion of institutional memory and the fundamental restructuring of legal authority during and after the occupation. These changes directly influenced the post-war reconstruction of legal professions and practices in Soviet Ukraine. To regulate the local population's adherence to legal norms more effectively, the German administration established a structured system of

courts, legal advocacy and notarial services within the framework of occupation law.

The judicial system of the Reichskommissariat Ukraine operated under the authority of legal norms issued by the German occupying authorities, primarily in the form of decrees issued by the Reichskommissar. A key milestone was the 15 March 1942 decree titled *'On Jurisdiction and Judicial Proceedings in Civil Cases of the Local Community'*, which established a system of local civil courts. Initially, certain Soviet civil laws remained formally in force, but this legal continuity was short-lived. On 12 January 1943, the decree *'Rules for the Temporary Regulation of Personal, Family and Inheritance Law in the Reichskommissariat of Ukraine'* fully annulled Soviet civil law and introduced an occupation-specific legal framework. Civil proceedings before local conciliation courts (*Schlichtergerichte*) could be held orally, in writing, or in a simplified form, with a strong emphasis on resolving disputes through mutual agreement. Decisions could be appealed either to the cassation chamber or, in its absence, to the chief judge of the regional commissariat [1].

Under occupation, civil justice primarily involved property claims, inheritance disputes, confirmation of personal status and alimony-related litigation. A significant proportion of court cases were initiated by women seeking financial support for their children under the age of 18, and the courts generally ruled in favour of the plaintiffs, taking the family's economic circumstances into account. However, most private agreements were concluded orally, which complicated enforcement and evidentiary procedures. In May 1942, the Reichskommissariat enacted the central normative act regulating family law: *'On Temporary Regulations Regarding Marriage and Divorce'* [2]. Marriage procedures were placed under administrative control, while divorce was tightly restricted. Although the judiciary evaluated each divorce case individually, final approval was often subject to higher German courts. At times, courts issued illegal rulings – for example, granting divorces in cases of the long-term disappearance of a spouse – contrary to German legal policy. Marriages involving Soviet prisoners of war (POWs) and individuals under the age of 21 were explicitly forbidden.

At the same time as the establishment of civil courts, the Reichskommissariat administration developed a structure for criminal jurisdiction. The basis of criminal law in the occupied territory was the German Imperial Penal Code of 1871, which was applied selectively, primarily through the 8 May 1942 decree *'On the Punishment of Minor Offences and Violations within the Reichskommissariat of Ukraine'* [3]. This legislation defined criminal liability for minor offences and enabled the establishment of local criminal courts (*Schöffengerichte*). These courts were authorised to impose penalties such as fines, short-term detention and imprisonment for up to two years. Although local judges were formally granted extensive powers, in practice they remained subordinate to German prosecutors and the *Gebietskommissare*. Criminal proceedings were conducted according to codified rules: hearings were held in Ukrainian, with interpreters provided when necessary, and the accused had to be notified at least three days in advance. Trials included the examination of witnesses and evidence, with the judge issuing a written, reasoned decision. Nevertheless, despite the procedural formality, the overarching framework remained subordinate to the goals of control, surveillance and enforcement of occupation policies.

From the outset of the Nazi occupation, the military authorities granted the bar permission to resume its operations as a form of legal aid to the local population. This process was most organised in Ukraine's large administrative centres, whereas in the ration centres, it was less active. The evaluation of this phenomenon is facilitated by the analysis of contemporary newspaper articles. In particular, the organisational bureau of the Kyiv Regional Bar Council announced the start of admission to the bar in November 1941. Aspiring lawyers were asked to submit documentation attesting to their educational qualifications and prior experience in the legal field, as well as a comprehensive autobiography [4]. Alongside their application, candidates for advocate positions were required to pay a standard administrative fee [5].

The reopening of legal practices in Ukraine has been indicated by the resumption of legal activities in other regions of the country, as reported in various periodicals. It is evident that the military and civilian occupation authorities were unable to permit the independent professional practice of lawyers and their corporate associations. Additionally, there was an absence of a suitable regulatory framework that would have enabled lawyers to provide legal aid to the local population. It is important to note that this process was accompanied by certain idiosyncrasies, which are generally characteristic of the resumption of work by courts and notary institutions. While the military, albeit in a chaotic and inconsistent manner, did open law offices and allow their free practice, the situation underwent a dramatic transformation with the transfer of authority over the relevant territories to the administration of the Reich Commissariat Ukraine. Consequently, such practices were subjected to stringent restrictions.

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[1] Central State Archive of the Highest Government Authorities of Ukraine, Kyiv, Fund 2077, Generalkommissar of Volhynia and Podolia, City of Lutsk, Inventory 1, File 13: Service sheets of the Generalkommissar of Volhynia and Podolia, Nos. 3, 7–10, 1–11, September 15, 1942 – July 1, 1943, p. 135-135v (in Ukrainian); State Archive of Volhynia Region, Fund R-71, District Court Lutsk, Inventory 1, File 478: Circulars of the Generalkommissariat, December 22, 1942 – June 2, 1943, pp. 4, 9 (in Ukrainian).

[2] State Archive of Poltava Region, Fund R-8676, Collection of periodicals, decrees, ordinances, leaflets, posters, and brochures from the period of the German-fascist occupation of Ukraine, City of Poltava, Poltava Region, Inventory 2, File 5: Ordinances of the Generalkommissar of the General District Kyiv on jurisdiction and procedure in civil cases of the native population, 1942, sheet. 29-32.

[3] State Archive of Poltava Region, Fund R-8676, Inventory 2, File 5: Ordinance of the Reichskommissar for Ukraine on the punishment of minor offenses in the territory of the Reichskommissariat Ukraine, May 8, 1942; State Archive of Volhynia Region, Fund R-71, File 492: Ordinances of the Reichskommissar on the application of punishments towards the population of the Eastern territories, May 8, 1942, 48 sheets.

[4] Announcement of the organising bureau of the Kyiv Regional Bar Council. In: *Ukrainske slovo*. (*Ukrainian word)*. 18 November. 1941, p. 4. (In Ukrainian)

[5] The fee amounted to 50 rubles, according to occupation-era regulations.

Documentary evidence pertaining to this matter can be found in the testimony of participants in these trials, with particular reference to the account given by the former city judge of Vinnytsia, Flor Sadkevych. In his testimony, given to a Soviet investigator in the aftermath of the war, F. Sadkevych addressed the particularities of the resumption of work by lawyers during the initial period of occupation. In an attempt to justify his actions during the occupation, the former judge emphasised that the Vinnytsia City Council was approached by numerous unemployed lawyers who 'imposed' their professional assistance. The purpose of the lawyers' appeals, as stated by F. Sadkevych, was to "calm down" the local population and to establish a secure and peaceful environment through their actions. According to the former judge, the 'new authorities' granted permission to establish a defense bar[6]. The establishment of the Bar was initiated in August 1941, with the mayor of Vinnytsia, Professor O. Sevastianov, granting approval and consenting to the decision with the military authorities, who at that time exercised control over the region. However, with the establishment of the Reich Commissariat Ukraine in autumn 1941, the work of the Bar as a corporate association was terminated by the decision of the District Commissioner (*Gebietskommissar*), and private practice of law was permitted[7]. Consequently, despite the transition of power to a civilian administration, the practice of law was maintained, albeit in a restricted capacity.

One such form of legal aid provided to the local population was legal advice centres, which were opened by the authorities and provided services to the population of the occupied country, including representation in local courts and authorities. The majority of legal clinics were established in major urban areas; for instance, a law firm commenced operations in Kharkiv in December 1941. The objectives of this legal entity, as delineated in a local publication, encompassed the provision of specialised legal services to the populace, organisations, and commercial entities within the city[8].

In certain regions of Ukraine, legal advisers were incorporated into the personnel of local governments. For instance, the 'Consultation Bureau' was a functioning institution in Zaporizhzhia during the first quarter of 1942, as evidenced by the city council staff list[9]. In March 1943, a legal bureau was established at the Poltava City Council, in accordance with the German military authorities, while the private legal advice was terminated[10].

In the aftermath of the German occupation, the practice of law was permitted, but those employed in the relevant structures were subjected to rigorous scrutiny by the German authorities. It is noteworthy that virtually all those who had practised law in the pre-war period were subjected to a thorough check by the German secret services. It is evident that a number of former Soviet legal professionals who, due to a variety of reasons and life circumstances, remained in the occupied territories, encountered German repression, imprisonment, or even physical destruction. This matter primarily concerned party members, who were representatives of the so-called 'Soviet asset'. Moreover, former Soviet lawyers who self-identified as Jewish were effectively precluded from engaging in human rights practice.

Following the allowance of private advocacy by the relevant occupation authorities, a patent had to be obtained from the local authorities. A fee was charged for the issue of this permit, which was allocated to the local budget[11]. Furthermore, the process of obtaining this document involved a thorough check of the applicant's identity.

During the initial period of occupation, under differing conditions and in different regions of Ukraine, regulations were issued which regulated the practice of law. The formulation of these regulations was primarily initiated by the heads of local governments and necessitated either approval or coordination with the German authorities. It is evident that a significant proportion of the subjects utilised the terms 'lawyer' and 'legal adviser' in a consistent manner. These terms are evident within the records of both local authorities and German institutions. The content of their official activities was also of a similar nature, with their primary task being to provide various forms of legal assistance to the local population, including representation in court.

2. The legal and regulatory framework of the advocacy

Within the jurisdiction of the Reichskommissariat Ukraine, the primary regulatory instrument that governed the activities of advocates was the directive that was issued by the Reichskommissar on 9 July 1942[12]. The General Commissars drew upon the administrative practices of that era in order to adopt their own resolutions based on this document. The purpose of doing so was to regulate the operations of advocates within the territory under their jurisdiction. It is important to note that the execution of these regulatory functions was primarily entrusted to the personnel within the legal departments of the respective general commissariats. However, the German administrative apparatus was not adequately equipped to address these needs in a timely manner, and the speed of the creation of these regulations by the Commissars General was delayed. For instance, the head of the Zhytomyr General Commissariat only adopted the relevant resolution on 9 December 1942, a period of almost six months having elapsed since the issuance of the Reichskommissar's order on this issue. The comparison of the regulations at different levels reveals that the decisions of the

[6] Archive of the Security Service of Ukraine in Vinnytsia Oblast. Fund 6. File 13133. Sadkevych Flor Yakovych. sheet 17.
[7] Archive of the Security Service of Ukraine in Vinnytsia Oblast. Fund 6. File 27939. Garmashev Oleksii Petrovych. sheet 19.
[8] Law firm. *Nova Ukraina (New Ukraine)*. № 10. Kharkiv, 21 December 1941, p. 2. (In Ukrainian)
[9] State Archives of Zaporizhzhia Oblast. Fund P-1433. Zaporizhzhia City Administration. Inventory 3. File 1. Orders of the field commandant's office No. 679 on financial issues, correspondence. 9 October 1941 – 26 June 1942. sheet 34.
[10] State Archives of Poltava Oblast. Fund. P-2302. Schlichter of the 1st district of Poltava, Poltava, Poltava oblast (Poltava Hebbit of the Nazi occupation). Inventory 1. File 6. Lists of criminal cases and correspondence with Poltava institutions on economic issues. April – July 1943. sheet 54.
[11] Archive of the Security Service of Ukraine in Zaporizhzhia Oblast. Fund. 0. File 17082. Rudenko Porfirii Porfiriiovych. sheet 13.
[12] State Archives of Volyn Oblast. Fund P-71. Lutsk peace court. Inventory 1. File 481. Extracts from the German Penal Code. 1942. 40 sheets.

district commissars were often interpreted quite freely in the field and revealed particular approaches to the implementation of the district commissars' regulations on the activities of lawyers. O. Honcharenko, M. Kunytsky and O. Lysenko found that in the Zhytomyr district commissariat there were deviations from the norms prescribed in the order of the head of the general commissariat [13]. Thus, in November 1942, a project for the restoration of legal practice in this district appeared, which was somewhat different from the others. It was developed by Judge J. Lobachevsky on the basis of the pre-revolutionary legislation of the Russian Empire [14]. As a result, the project came into force on 18 November 1942, within the jurisdiction of the relevant order of the Reichskommissar. According to this document, local courts had lawyers who had the right to execute instructions from individuals to protect their interests. Judges also had the right to instruct lawyers to carry out various tasks. According to the regulations developed by Y. Lobachevsky, lawyers could be persons who had obtained a law degree and had at least two years of relevant professional experience. Persons under 25 years of age, civil servants, persons who had been disbarred for a crime, persons who had been dismissed from the bar for 'bad behaviour', and women could not hold such positions.

It is evident that lawyers were subject to the oversight of the judicial authorities and were bound by the stipulated procedural regulations. In the event of a breach of the rules, disciplinary sanctions were to be issued. Furthermore, the subjects had the right to professional secrecy.

Lawyers were responsible for defending the rights and interests of an individual in criminal proceedings in private, i.e. by agreement with the accused. Concurrently, the courts possessed the prerogative to appoint them to execute such responsibilities. Lawyers received financial remuneration for the performance of their professional duties, with the amount of remuneration being determined by pre-established rates. It was a prerequisite for all individuals entitled to practise law to hold an official certificate. Information pertaining to individuals who had been granted the right to practise law was published in the local press.

In instances where there was a paucity of legal professionals, the courts had the power to authorise the performance of relevant activities in criminal or civil proceedings by private attorneys. Private attorneys were subject to a higher set of requirements than their professional counterparts. In addition to holding a law degree, it was necessary for individuals to have a minimum of three years of practical legal experience. Candidates for the status of private attorney were required to pass the relevant examinations in substantive and procedural law, as well as in the area of pre-revolutionary (non-Soviet) legislation and the rules of the district commissar before the court [15]. Private lawyers were granted a certificate that entitled them to practise within a specific district for a period of one year. This licence was issued upon payment of a licensing fee to the occupation administration's accounts [16].

In accordance with the regulations stipulated by the Reichskommissar, applicants for the position of lawyer were obligated to demonstrate their professional training, their 'personal qualities and political attitudes', their academic or practical work, and their willingness to undertake the duties assigned to them. A mandatory requirement for future lawyers was their defence of the interests of the government of the day.

In accordance with the established protocol for employees of legal institutions, the district commissioner was responsible for establishing the identity of the applicant for the practice of law. He then submitted an application to the legal department of the General Commissariat. The ultimate authority for the appointment of an advocate resided with the head of the legal department of the General Commissariat. The district commissars, in conjunction with the legal departments of the general commissariats, were responsible for the oversight of the practical work of lawyers.

The Regulation of the District Commissar endowed legal professionals with the authority to advocate for the interests of local residents within the context of civil and criminal courts, as well as administrative institutions. Individuals lacking the requisite authorisation were prohibited from providing legal defence or representing the interests of others in any capacity [17].

It is hypothesised that a significant method by which to establish law and order in the occupied regions of Ukraine was the establishment of legal departments at city and district governments, as well as legal consultancies. These entities provided legal services to both the population and local authorities, thereby contributing to the regulation of social relations in society, which persisted even after the occupation of the country.

3. The advocacy in the military occupation zone

The resumption of legal practice in the military zone of occupation was an area of particular complexity. Documentation from local authorities indicates that field and local commandant's offices were responsible for authorising regulations on the activities of lawyers, which were adopted by district and city administrations. At the same time, the military also adopted separate acts in this regard, frequently including legal advisers alongside advocates. Notably, that the latter's service activities were comparable to the powers of advocates and essentially indistinguishable. Legal consultancies thus became the predominant form of corporate lawyer associations in the military zone

[13] GONCHARENKO, O., KUNYTSKYI, M., LYSENKO, O., *The system of local self-government in the territory of the Reichskommissariat "Ukraine" and the "military zone". 1941–1944*. Kyiv, 2014, p. 71-72 (In Ukrainian).

[14] Archive of the Security Service of Ukraine in Zhytomyr Oblast. Fund OF. File 7815. Lobachevsky Mykola Oleksandrovych. 65 sheets.

[15] The trial was conducted under the rules of ‚Russian law', which had nothing to do with Soviet law.

[16] State Archives of Zhytomyr Oblast. Fund. P-1152. Zhytomyr Gebitscommissariat. Inventory 1. File 3. Regulations on the Bar. Order of the Gebitscommissar. News of the Commissar General. 4 March 1942 – 9 July 1943. sheets 1-4.

[17] State Archives of Zhytomyr Oblast. Fund. P-1152. Zhytomyr Gebitscommissariat. Inventory 1. File 3. Regulations on the Bar. Order of the Gebitscommissar. News of the Commissar General. 4 March 1942 – 9 July 1943. sheets 31-32.

of occupation. In a purely official capacity, lawyers' associations were subordinate to local authorities directly or through the legal departments of district and city administrations. The military administration underwent a period of frequent reorganization of these services, often suspending them temporarily, only to subsequently resume them under a different designation or with altered powers after a designated period.

For instance, the earliest documented reports of the establishment of the Bar in Sumy date back to December 1941, indicating that the Bar became operational in the city two months after the occupation. However, in September 1942, it was disbanded by a decision of the military[18]. It was not until the beginning of May 1943 that the local authorities' documentation once again included a notification of the admission of lawyers to participate in the legal department of the city government's proceedings, which, as previously mentioned, effectively assumed the functions of a judicial institution[19]. Evidently, the military commandant's office, which oversaw the Sumy region, reconsidered the prior decision to suspend the Bar's operations. Evidence of the resumption of the Bar's work was provided by a meeting of the legal department of the Sumy City Council held on 18 May 1943, during which the employees present were introduced to the newly adopted Provisional Rules on the Bar. This document determined the procedure for the establishment and powers of not only the Bar, but also the legal office organised within the legal department of the city council[20].

The act delineated the specific conditions for applicants and established a collegial procedure for the appointment of advocates. Individuals aspiring to the role of advocate were required to submit documentation attesting to their possession of the requisite education or previous experience in relevant positions. The application was then submitted to the head of the legal department, who convened a general meeting of advocates to reach a collective decision. The head of the legal department then prepared an official submission, which included all the important circumstances that characterised the applicant's personality, including his social status and background, and his previous professional experience. This submission was then sent to the mayor for approval. Only after the mayor's approval did the head of the legal department issue an order appointing the applicant to the position of an advocate and provide him with the relevant official certificate. The newly appointed individual became a constituent of the bar association; an assembly of 4-9 members presided over by a starosta[21].

It is important to acknowledge the impact of the occupation on the process of appointing lawyers. Indeed, the authorities introduced the principle of collective responsibility, given that individuals with a 'dark Soviet past' or those of Jewish nationality who were appointed to the position could face severe legal sanctions themselves, as well as the participants of such meetings, the head of the legal department and the mayor. Consequently, these individuals were compelled to exercise caution before making decisions.

Notwithstanding the collegial and multi-stage character of the appointments, it was the lawyers who were tasked with the functions of officials of the legal department of the city government. Their work was subject to supervision by the head of the department, who also had the right to submit a proposal to the mayor for their dismissal. The head of the department was responsible for establishing the schedule of the advocates' duties and their attendance at meetings of the relevant structural subdivision of the city council. Concurrently, members of the bar corporation were permitted to engage in private practice[22].

In addition to their responsibilities within the legal department, lawyers were also obliged to be on duty in the legal office established within the department. This office was established to provide legal services to individuals with limited financial means and to pensioners, in addition to handling straightforward legal applications. The occupation administration regulated the fees for remunerated legal services, specifying different charges depending on the type of service rendered[23]. It is noteworthy that certain lawyers sought to provide legal aid on a paid, private basis rather than offering free legal advice. According to the internal documentation of the legal department, there was

[18] State Archives of Sumy Oblast. Fund P-1841. Sumy City Administration of Sumy, Sumy oblast. Inventory 7. File 1951. Minutes of the meeting of the legal department employees on the rights and duties of the bar, on the relationship between the bar and the legal department. 18 May – 17 July 1943. sheet 11.

[19] State Archives of Sumy Oblast. Fund P-1841. Sumy City Administration of Sumy, Sumy oblast. Inventory 2. File 17. Orders on the legal department. 9 January – 20 July 1943. sheet 13.

[20] State Archives of Sumy Oblast. Fund P-1841. Sumy City Administration of Sumy, Sumy oblast. Inventory 7. File 1951. Minutes of the meeting of the legal department employees on the rights and duties of the bar, on the relationship between the bar and the legal department. 18 May - 17 July 1943. 18 sheets 1-3; State Archives of Sumy Oblast. Fund P-1841. Sumy City Administration of Sumy, Sumy oblast. Inventory 2. File 17. Orders on the legal department. 9 January – 20 July 1943. sheets 9-10.

[21] State Archives of Sumy Oblast. Fund P-1841. Sumy City Administration of Sumy, Sumy oblast. Inventory 7. File 1951. Minutes of the meeting of the legal department employees on the rights and duties of the bar, on the relationship between the bar and the legal department. 18 May - 17 July 1943. sheets 5, 7-14, 18.

[22] State Archives of Sumy Oblast. Fund P-1841. Sumy City Administration of Sumy, Sumy oblast. Inventory 7. File 1951. Minutes of the meeting of the legal department employees on the rights and duties of the bar, on the relationship between the bar and the legal department. 18 May - 17 July 1943. sheets 4, 6, 7, 9; State Archives of Sumy Oblast. Fund P-1841. Sumy City Administration of Sumy, Sumy oblast. Inventory 2. File 17. Orders on the legal department. 9 January - 20 July 1943. sheets 26-26 reverse, 28.

[23] For example, oral legal advice ranged from 10 to 50 rubles, drafting non-property claims from 20 to 50 rubles, property claims from 50 to 100 rubles, and private complaints from 25 to 75 rubles. It should be noted that, within the occupation budget policy, average monthly salaries did not exceed 500–600 rubles for teachers, doctors, and similar professions, while management personnel in district administrations and the police earned up to 1,000 rubles or more. Chernihiv Oblast State Archives. Fund P-3120 Korop District Administration, Korop village, Korop district, Chernihiv oblast. 1942. Inventory 1. File 43. sheet 38.

no desire to work for free, and so employees often negligently performed their duties[24]. The department's internal documentation includes numerous instances of management conducting internal investigations into misconduct by lawyers, forcing persons seeking free legal aid to provide it privately[25].

In certain regions of the military zone of occupation, lawyer corporations functioned as components of the legal departments of city administrations. Structures of this kind were established in other regions of the military zone of occupation. For instance, in the Sumy region, judicial commissions were constituted within local governments, with lawyers included in their staffing lists. Their duties included receiving individuals, drafting applications to the judicial commission, and representing interests at its meetings. It is important to note that for the provision of these legal services, a fee was levied, the amount of which was obligatory to be recorded in a designated journal. Typically, fees for legal services were nominal and standardized according to the type of procedure[26].

4. Legal consultations as another way of legal assistance

Legal consultations were a common occurrence in both the Reichskommissariat Ukraine and the military zone of occupation. In mid-November 1941, an 'Information Desk' was established within the administrative department of the Chernihiv City Administration at the suggestion of the head of the department[27]. This was later reorganised into a legal consultation, the main task of which was to provide legal assistance to the local population by offering consultations and drafting various types of contracts and charters. The Regulation 'On Legal Consultation at the City Council' was approved on 23 March 1942, and according to the regulation adopted by the city council, the legal consultation was to operate on a self-supporting basis, with the local population paying for the legal assistance provided being the main source of funds. The financial department of the city council was responsible for determining the staff of the legal aid centre and the level of salaries of its employees. Concurrently, the financial records of the city council demonstrated that the legal aid centre generated revenues that exceeded its maintenance costs[28].

In the spring of 1942, a reorganization of the legal advice system took place, resulting in its transfer to the administrative department of the city administration. The department was placed under the leadership of A. Reva-Mazepa, the former head of the legal advice system[29]. Consequently, the legal advice system was situated in the same building as the administrative department, thereby facilitating collaborative work between employees of both structures on fundamental issues[30].

In the aftermath of the reorganisation, the Chernihiv City Council proceeded to adopt a new regulation, entitled 'On Legal Advice at the City Council'. This document served to confirm a substantial reorganisation of the legal advice centre, encompassing a notable expansion of its authority. Employees of the legal advice centre were granted the prerogative to dispense counsel in German. In addition to the drafting of various contracts and charters, these employees were also permitted to partake in court proceedings. The city council was granted the prerogative to dissolve the legal advice centre by resolution, should the necessity arise[31].

The legal clinic operated on the basis of providing paid services. However, indigent persons were eligible for exemption from payment for legal advice, provided they had the prior authorisation of the head of the administrative department. Consequently, approximately one quarter of visitors received legal services free of charge[32].

According to the regulatory documents, the majority of funds received were allocated to employee remuneration, with the remainder set aside as a reserve fund. A three-tiered salary structure was established, categorizing legal aid workers based on education, qualification level, and length of service. Additionally, resources were allocated to cover the operational expenses of the legal advice centre. Disbursements from the reserve fund to the centre's director and consultants were made semi-annually, with consultant allocations increasing signifi-

[24] State Archives of Sumy Oblast. Fund P-1841. Sumy City Administration of Sumy, Sumy oblast. Inventory 7. File 1951. Minutes of the meeting of the legal department employees on the rights and duties of the bar, on the relationship between the bar and the legal department. 18 May - 17 July 1943. sheets 4, 6, 7, 9, 15; State Archives of Sumy Oblast. Fund P-1841. Sumy City Administration of Sumy, Sumy Oblast. Inventory 2. File 17. Orders on the legal department. 9 January – 20 July 1943. sheets 24, 26, 28.

[25] State Archives of Sumy Oblast. Fund P-1841. Sumy City Administration of Sumy, Sumy oblast. Inventory 7. File 1980. Disciplinary file on lawyer Petrov. 9 - 16 July 1943. 8 sheets.

[26] For example, drafting an application cost approximately 30 rubles, while filing a cassation appeal amounted to around 50 rubles; Archive of the Security Service of Ukraine in Sumy Oblast. Fund 0. File 4685. Nakonechnyi Petro Pavlovych. sheet 57.

[27] State Archives of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 2. Estimates for the maintenance of the Legal Advice for the first and second half of 1942, report on the activities of the Legal Advice for the first half of 1942. 1942. sheet 3.

[28] State Archives of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 3. Regulations of the Chernihiv City Council on the Legal Advice. Salary statements for the Legal Advice staff. January-December 1942. sheets 1-10.

[29] State Archives of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 213. Lists of employees of the Chernihiv City Administration and their dependents for food coupons. January-December 1942. sheet 3.

[30] State Archives of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 2. Estimates for the maintenance of the Legal Advice for the first and second half of 1942, report on the activities of the Legal Advice for the first half of 1942. 1942. sheets 3 reverse.

[31] State Archives of Chernihiv Oblast. Fund P-3001. Chernihiv City Administration, Chernihiv. Inventory 1. File 112. Regulations on legal advice at the Chernihiv City Council. No date. sheet 3.

[32] State Archives of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 4. Book of visitors to Chernihiv Legal Advice. 11 September 1942 – 7 August 1943. 90 sheets.; State Archives of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 7. Book of visitors to Chernihiv Legal Advice. 26 May – 11 September 1942. 53 sheets.

cantly over time[33]. It is noteworthy that the salaries of consultants were not uniform, exhibiting fluctuations over time[34]. The provision outlined the financial arrangements for legal assistance to the population, specifying different fee ranges for various services rendered[35]. In cases of a particularly challenging nature or where the subject of the dispute carries significant value, the remuneration for legal assistance is to be agreed upon by the parties involved[36].

Concurrently, the municipal administration implemented stringent oversight measures over the funds received by its personnel in compensation for the services rendered, in accordance with the prevailing regulations. These funds were to be remitted to the accounts of the financial department. It was only in March 1943 that the institution attained relative financial autonomy, at which point it initiated the establishment of its own bank account. On a daily basis, the institution transferred varying amounts of revenue. In 1943, its income from legal counsel services experienced a substantial increase, largely due to the registration of bicycles by the district's population[37].

The primary functions of legal counsel employees can be summarised as follows: the provision of oral advice, the documentation of complaints and statements, and the facilitation of material assistance, the return of property, the establishment of property rights, and the renewal of various documents that identify a person[38].

The regulatory documentation stipulated that the legal consultation was to comprise three officials: a manager and two consultants. However, by June 1942, the legal consultation's staff complement had increased to two, comprising a manager and a consultant. This development followed the legal consultation's relocation to the district administration, which led to an expansion of its workforce. The primary function of the legal consultation branch was to deliver suitable services to the population of the Chernihiv district[39]. The head of legal advice was granted the authority to make independent decisions regarding the expansion of staff, although the city administration retained the right to revoke the appointment of any designated employee[40].

A total of five officials were employed in the legal advice office, all of whom had obtained a higher legal education. The inaugural manager, M. Makii, served in the role from the office's establishment until 22 July 1942, at which point he was succeeded by V. Shchemelinov. The remaining officials, E. Lashkarev, V. Shchemelinov, M. Nikiforov and G. Kosheva, functioned in the capacity of consultants[41].

The services provided by legal advice workers were in fairly wide demand among the population. It is estimated that approximately 7–12 people received appropriate legal assistance on a daily basis[42].

It is evident that the functions of legal advice encompassed oral counselling, the drafting of complaints, contracts and statutes, and if required, the representation of individuals' interests in court. The provision of legal advice was predicated on the principle of self-sufficiency, whereby each legal action was re-

[33] For reference, 80% of the received funds were used for salaries, with wages ranging from 1,000 to 2,000 rubles according to staff qualifications and experience. Furthermore, 150 rubles per month were designated for operational expenses, and payments from the reserve fund to centre personnel were made twice yearly, increasing during the centre's period of operation.; State Archives of Chernihiv Oblast. Fund P-3001. Chernihiv City Administration, Chernihiv. Inventory 1. File 112. Regulations on legal advice at the Chernihiv City Council. No date. sheets 1, 2.

[34] State archive of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 3. Regulations of the Chernihiv City Council on Legal Consultation. Information on the payment of salaries to employees of the Legal Consultation. January – December 1942. sheets 2-3, 4, 10; State archives of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 9. Application of the inspector for printing matters on the clarification of legal relations between the Diocesan Administration and religious communities. Staff, files and salary funds of the personal composition of the Legal Consultation. 1942. 3 sheets.; State archives of Chernihiv Oblast. Fund P-3465, Chernihiv legal consultation. Inventory 1. File 11. Detailed note to the chairman of the City Administration on the increase of rates for the service of the Legal Consultation. 1943, 1 sheet.

[35] The fees for legal services varied as follows: drafting written complaints ranged from 10 to 50 rubles; drafting contracts and statutes, from 25 to 150 rubles; drafting written statements, from 5 to 10 rubles; and oral consultations, from 5 to 15 rubles. Additionally, fees for carrying out various assignments ranged between 10 and 30 rubles, court proceedings and representation cost between 50 and 300 rubles, while drafting complaints for verdict verification and case representation ranged from 50 to 200 rubles.; State Archives of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 2. Estimates for the maintenance of the Legal Advice for the first and second half of 1942, report on the activities of the Legal Advice for the first half of 1942. 1942. 13 sheets.

[36] State Archives of Chernihiv Oblast. Fund P-3001. Chernihiv City Administration, Chernihiv. Inventory 1. File 112. Regulations on legal advice at the Chernihiv City Council. No date. sheet 2.

[37] The daily transferred sums ranged between 100 and 250 rubles; State archive of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 10. Legal advice desk money book, 15 November 1941 – 1943. sheet 7.

[38] State Archives of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 4. Book of visitors to Chernihiv Legal Advice. 11 September 1942 – 7 August 1943. 90 sheets.; State archives of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 9. Application of the inspector for printing matters on the clarification of legal relations between the Diocesan Administration and religious communities. Staff, files and salary funds of the personal composition of the Legal Consultation. 1942. 3 sheets.

[39] State Archives of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 2. Estimates for the maintenance of the Legal Advice for the first and second half of 1942, report on the activities of the Legal Advice for the first half of 1942. 1942. sheet 3-3 reverse.

[40] State Archives of Chernihiv Oblast. Fund P-3001. Chernihiv City Administration, Chernihiv. Inventory 1. File 112. Regulations on legal advice at the Chernihiv City Council. No date. sheet 3.

[41] State Archives of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 3. Regulations of the Chernihiv City Council on the Legal Advice. Salary statements for the Legal Advice staff. January-December 1942. sheets 2-10.

[42] State Archives of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 4. Book of visitors to Chernihiv Legal Advice. 11 September 1942 – 7 August 1943. 90 sheets; State archives of Chernihiv Oblast. Fund P-3465, Chernihiv Legal Advice. Inventory 1. File 9. Application of the inspector for printing matters on the clarification of legal relations between the Diocesan Administration and religious communities. Staff, files and salary funds of the personal composition of the Legal Consultation. 1942. 3 sheets.

munerated in cash, with the exception of instances wherein the administrative department requested the provision of services on a pro bono basis for individuals experiencing financial insolvency[43].

It is evident that a significant aspect of the establishment of law and order in the occupied regions of Ukraine was the establishment of legal departments within city and district administrations, in addition to the provision of legal consultations. These consultations were instrumental in providing legal services to both the population and local administration bodies, thereby contributing to the regulation of social relations in society. It is noteworthy that these legal consultations persisted even after the occupation of our country, underscoring their enduring significance.

5. The main elements of lawyers' activities

In addition, it is imperative to emphasise the pragmatic undertakings of legal professionals during the period of Ukraine's occupation. The primary function of these professionals encompassed the provision of diverse forms of legal assistance to the local populace, with a particular emphasis on the representation and protection of their interests within the context of civil and criminal proceedings. Notably, these legal professionals were able to serve as representatives of the civilian population in the presence of both local and German authorities. It has been documented that P. Rudenko, while assuming various roles within the city administration, obtained a patent for establishing a law office. A significant aspect of his practical work involved the collection of documents necessary for the release of prisoners of war of Ukrainian nationality[44]. It is evident that, in numerous instances, individuals were unable to obtain permits to release their relatives from German military captivity without the expert intervention of legal professionals.

In addition, it should be noted that lawyers were permitted to defend the interests of their clients in a German court. Furthermore, if necessary, the protection procedure was carried out with the assistance of an interpreter[45]. However, it is interesting to note that most cases involving lawyers were heard in local courts. In particular, former lawyer O. Garmashev testified that he had 10–12 cases pending every month and was responsible for defending the interests and rights of representatives of the local population in court[46].

In instances where appeals were deemed necessary, legal representatives were authorised to petition the administration of district commissioners. This prerogative can be attributed to the fact that it was this German leader who had the authority to approve the sentences handed down by local criminal courts. Indeed, legal representative O. Garmashev attested to frequent visits to the district commissariat, during which he filed, through an interpreter, certain complaints against court decisions or sentences, as well as statements from his clients. However, the district commissioner invariably denied him permission to meet in person[47]. In other cases, county commissioners held appointments for both judges and attorneys. Subsequently, following the restoration of Soviet power, this fact was utilised by the prosecution to substantiate the mythical recruitment of these individuals for the role of "agents".

Defending people, lawyers entered into a certain conflict with local judges, some of whom used their status for personal enrichment, and in purely professional activities allowed abuse, especially in civil proceedings. It is important to note that the decision of the civil courts was approved not by the district commissariats, but by the chambers of the chiefs (Schöffen) or personally by a senior judge. This level of the judicial system gave rise to a certain absence of oversight of the work of judges. Frequently, senior judges expressed their support for the court decisions of their colleagues, apparently «agreeing to a common position on these issues». Indeed, the district commissioners approved the verdicts in criminal cases at the request of the senior judge. Therefore, it was important for the populace that lawyers also participate in court proceedings.

In certain locations, legal professionals who endeavoured to assist individuals adversely affected by the capricious actions of individual local judges or their groups encountered a genuine threat to their personal safety. For instance, H. Kruhliachenko, who assisted convicted individuals in reviewing the sentences of one of the judges of Bila Tserkva, subsequently attested that the city judge I. Tolstopiatov and senior judge V. Kraievych had urged him to desist from these actions on the grounds that, in their estimation, they were «undermining the authority of the court». In the event of refusal, senior judge V. Kraievych threatened to fabricate a criminal case against him and transfer it to the "Gestapo"[48].

There are documented cases of lawyers successfully defending the interests of their clients. For example, in November 1941, when Vinnytsia was under the control of the military administration, three local residents, S. Maslov, A. Tumko, and V. Trenenko, robbed a coffee shop owned by a local Jew. Representatives of the field commandant's office (Feldkommandantur) apprehended the offenders and proceeded with an extrajudicial, or 'absentee', conviction. Consequently, all three offenders were sentenced to various terms of imprisonment. At the behest of the offenders' relatives, lawyer O. Garmashev

[43] IVANENKO, A., Functioning of local legal institutions in the area of responsibility of the Military Administration of occupied Ukraine (1941–1943). Naukovi zapysky Vinnytskoho derzhavnoho pedahohichnoho universytetu imeni Mykhaila Kotsiubynskoho. In: *Zbirnyk naukovykh prats. Seriia: Istoriia (Scientific notes of Mykhailo Kotsiubynskyi. Vinnytsia State Pedagogical University. Collection of scientific works. Series: History)*. Vinnytsia, 2019, Vol. 29, p. 19-26. (In Ukrainian).

[44] Archive of the Security Service of Ukraine in Zaporizhzhia Oblast. Fund 0. File 17082. Rudenko Porfyrii Porfyriiovych. sheet 13-13 reverse.

[45] Archive of the Security Service of Ukraine in Vinnytsia Oblast. Fund 6. File 27939. Garmashev Oleksii Petrovych. sheets 29-30.

[46] Ibid, sheet 24.

[47] Ibid, sheet 32.

[48] The Branch State Archive of the Security Service of Ukraine. Fund 5. The Archival Criminal Affairs Fund. File 56878. Tolstopiatov Ivan Mykhailovych. sheet 30 reverse.

petitioned the leadership of the military commandant's office to transfer the case to the local court for review. Following the receipt of the necessary authorisation, the local criminal police conducted further investigative actions, the results of which were submitted to the court. During the court hearing, the individuals who had already served their sentences as per the decision of the commandant's office were acquitted. The lawyer employed a compelling argumentation, which served as the foundation for the successful resolution of the case. The attorney contended that his clients had not committed robbery against Jewish property, but had assisted in the apprehension of Jews, acting on orders from the German authorities. Consequently, they were immediately released from custody[49].

It is important to note that some lawyers exhibited human qualities. Due to their close relationship with the authorities, they possessed a wealth of information that was often not available to ordinary citizens. In his capacity as a lawyer, the aforementioned O. Garmashev endeavoured to assist individuals facing genuine peril. In 1946, R. Shrayer, a Jew by nationality, provided testimony in which she stated that she sought documents purporting to prove that her husband was allegedly Ukrainian. In her request for assistance, she approached O. Garmashev, who not only refrained from turning her over to the German authorities, but also counseled her to abandon her efforts and promptly seek refuge in the Romanian occupation zone. O. Garmashev's timely counsel proved instrumental in ensuring her own survival as well as that of her children[50].

However, while some lawyers sought to provide assistance to their clients, there were also those who sought to exploit the suffering of others for their own personal gain, leveraging the opportunities provided to satisfy their own interests. In the aftermath of the war, allegations of collaboration with the German authorities were made against certain lawyers. An investigation revealed that some of them had accepted bribes from their clients, with former lawyer P. Nakonechnyi being cited as an example, having repeatedly demanded bribes for his services. These lawyers demanded both food and money from people, and having received what they wanted, did not appear at court hearings[51]. Former judge F. Sadkevych said that lawyers charged people significant amounts of money for their services[52].

Conclusions

In the context of the establishment of a 'new order' in the occupied territories of Ukraine, the National Socialist authorities, despite an emphasis on violence and the total imposition of a system of legal, administrative, ideological, ethical restrictions and prohibitions to regulate people's behaviour, faced the objective need to find effective means to ensure law and order. This was driven by the need to protect the occupiers from attacks by local residents and partisans in areas distant from the front line, as well as to establish and regulate new principles and rules of life, to overcome the wave of negative. Consequently, the German authorities granted authorisation for the establishment of the bar and legal consultancies on the territory of the Reichscommissariat Ukraine and the military zone of occupation. As the documentation reveals, this process occurred with differing degrees of intensity across various regions of the occupation zone. The challenges encountered by these legal professionals extended beyond the scope of collaboration with the German administration, personnel recruitment, and the conscientious performance of duties by colleagues in the bar and judiciary. Nevertheless, legal aid was still provided to the local population, albeit to a limited extent, and in numerous cases, as the study demonstrated, it was instrumental in determining the fate of individuals subjected to occupation. The success of these lawyers in defending the interests of citizens in court is irrefutable evidence of the immense dedication of these legal professionals. The primary rationale for the closure of law firms and the curtailment of legal defence services was the restrictions and reluctance of the German administration to develop legal aid for the local population. Furthermore, the examples of human rights activities cited in the text do not mitigate the atrocities perpetrated by the National Socialist authorities in Ukraine during the Second World War.

[49] Archive of the Security Service of Ukraine in Vinnytsia Oblast. Fund 6. File 27939. Garmashev Oleksii Petrovych. sheets 25, 26, 28, 30.
[50] Archive of the Security Service of Ukraine in Vinnytsia Oblast. Fund 6. File 27939. Garmashev Oleksii Petrovych. sheet 42.
[51] Archive of the Security Service of Ukraine in Sumy Oblast. Fund 0. File 4685. Nakonechnyi Petro Pavlovych. sheets 26, 28.
[52] Archive of the Security Service of Ukraine in Vinnytsia Oblast. Fund 6. File 13133. Sadkevych Flor Yakovych. sheet 18-18 reverse.

Annex 1:
The Age of Empires – Trends in the Development of Europe and Its Empires in the Mirror of a Hundred Years (1814–1914) – Preface to a Thematic Conference Research and its Studies

The century between 1814 and 1914 is frequently referred to as the age of imperialism and empires. In the previous century, the efforts of the enlightened monarchies of Europe to unify their country and law, and the modernization processes, despite their successes and partial results, left many social issues and tensions unresolved. The rivalry and alliances of dynastic states striving for a balance of power traditionally aimed at acquiring territories and parts of Europe, which thus led to continuous armed struggles and cabinet wars.

The political alliances of the era and the belief in the continuity of monarchies were fundamentally overturned by the French Revolution (1789), which was followed by the wars associated with Napoleon Bonaparte and a series of coalitions against the French. Although all its efforts were to maintain the old empires, the Congress of Vienna (1814-1815) redesigned the geographical and political map of Europe, leading to a significant rearrangement of the great power lines and diplomatic management. The ideological emphasis shifted from the principles of liberalism to conservatism and the rejection of revolutionary changes, as a balancing system of the congress, was able to guarantee the political stability of the continent until the radical changes of 1848. Although there was agreement on the restoration of monarchies and dynasties and their continuity, the points of dispute and then the fixed peace terms served to equalization the differing territorial interests and expansionist intentions of the congress participants. The European Concert of the Holy Alliance was created, which aimed at the cooperation of the larger states within the alliance and the creation and preservation of balance.

By the second half of the 19th century, the monarchies, which were becoming civilized, modernized in their legal systems, and becoming constitutional, found themselves confronted with the challenges of the industrial revolutions, the age of national transformation - nation-states, and redefined territorial demands and expansionist aspirations within and outside Europe. The redefined goal became the continuation of expansion, the great power rivalry for colonies, and the deepening of administrative, legal, and cultural rule over the territories under their influence.

In the decades preceding the First World War, the major European powers became rulers of vast overseas territories, often at the expense of declining former empires. For the European elite, the leaders of politics and economics, it was natural to formulate expansionist goals, which were accepted and even supported by the wider public. Public opinion at the time was shaped and faithfully reflected by reports in the modern press about distant lands, analyses of regions and countries that were distant but had come within the sphere of vision and interest of the European powers, as well as literary works intended for a wide audience, such as the adventure novels that were very popular at the time.

The history of empires in the 19th century was closely interwoven with the processes of intensified globalisation and the emergence of nationalism. Expansion and empire-building programs therefore took on a variety of forms within a diverse framework, as they depended on the characteristics of the state acting as the imperial center. At the same time, almost all of the emerging, growing, or transforming empires faced similar challenges: how to operate these large, geographically disconnected empires consisting of territories located far apart from each other, i.e., what logistical, military, and legal solutions would be necessary to govern the colonies or peripheries, and how the existence of the empire would affect the center itself. What changes in the spheres of law, culture, and economics would the establishment of an imperial structure bring to the state in question? Finally, how could the goals formulated within the framework of the imperial idea be reconciled with the ideas about the future of the nation in question and with nation-building efforts?

In November 2024, speakers at a conference organized by the Department of Legal History at the Széchenyi University of Győr entitled *„Age of Empires I – Europe and its Empires 1814–1914"* sought answers to the above questions in their presentations. We would like to express our gratitude to the authors for their participation and preparation of the studies, to the editorial board of the Journal on European History of Law for accepting the project and for the exceptional care of the texts.

In addition to the challenges of legislation, the difficulties and pitfalls of codification, the presentation of different models represented by individual empire-building centers, and an economic history-based analysis of empire-building within the empire, the following studies also examine and present specific problems and individuals. Together, they contribute to a deeper understanding of the multifaceted nature of imperial governance and its enduring legacies. The presentations, which covered a wide geographical and temporal range, examined the different layers, aspects, and problems of the empire phenomenon, an edited version of which is now available to readers.

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Imperiale Gesetzgebung und Kaiserliche Selbstverteidigung - Kodifikationstendenzen im europäischen und ungarischen Strafrecht an der Wende des 18. und 19. Jahrhunderts

(Imperial Legislation and Emperor's Self-Defense - Codification Efforts and Tendences in European and Hungarian Criminal Law at the Turn of the 18th and 19th Centuries)

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Abstract

The primary protection of the existence of the state, its fundamental institutions, and fundamental values from direct attacks has always been one of the most important tasks of the state. Since these protected institutions and values depend on the historical era and social system, it can be said that the definition of crimes against the state is always determined by the current, valid conception and structure of the state.

The strict but often unregulated and outdated requirements for the crimes of treason and insult to the monarch, as well as the broad interpretation and application of procedural rules, which were often interpreted as royal prerogatives, ultimately led to an uncontrollable and arbitrary situation, with extraordinary jurisdictions and harsh punishments for extraordinary crimes.

The legislature of the 18th and 19th centuries attempted to create modern rules that incorporated the doctrines of the Enlightenment and natural law, and were expected to precisely regulate political crimes.

Keywords: *high treason; political crimes; codification; Enlightenment; monarchical power, Congress of Vienna (1815)*

1. Einführung – Definition des Begriffs politisches Delikt im 19. Jahrhundert

Der vorrangige Schutz der Existenz des Staates, seiner Grundinstitutionen und Grundwerte vor direkten Angriffen gehört seit jeher zu den wichtigsten Aufgaben des Staates. Da diese geschützten Institutionen und Werte von der historischen Epoche und dem Gesellschaftssystem abhängen, kann man sagen, dass der Begriff der Verbrechen gegen den Staat immer durch die aktuelle, gültige Konzeption und Struktur des Staates bestimmt wird. Die Gefährlichkeit Straftaten gegen den Land und gegen den souveränen Herrscher, und die besondere Bedeutung des Staates als Schutzgegenstand werden auch dadurch deutlich, dass die Vorschriften zur Regelung dieser Straftaten an prominenter Stelle, meistens in den Eröffnungskapiteln des Sonderteils moderner Strafgesetzbücher der 19. Jahrhundert enthalten sind.

Daher ist es schwierig, eine einheitliche und dauerhafte Definition für die politischer oder staatlicher Straftaten zu schaffen. *„Es gibt im materiellen Strafrecht keine heiklere, unsicherere und unklarere Frage als den Begriff der politischen Straftaten. – schrieb der ungarischer Strafrechtler Ferenc Finkey."* [1] Die Konzeptualisierung wird noch dadurch erschwert, dass im Gegensatz zu Verbrechen nach dem Gewohnheitsrecht, die von der Gesellschaft (praktisch) als Ganzes verurteilt werden, die Situation bei politischen Verbrechen, bei denen es um Ideen und Werte geht, die einen Zusammenprall mehrdeutiger gesellschaftlicher Ideologien und Urteile darstellen.

2. Die Trennung von Hochverrat und Majestätsbeleidigung in der Geschichte der europäischen Regulierung

Die mittelalterlichen germanischen Volksgesetze erkannten Majestätsbeleidigung nicht als eigenständiges Verbrechen an, sondern regelten sie als Fall von Verrat. Auch die Constitutio Criminalis Carolina (1532) erwähnte den Tatbestand der Majestätsbeleidigung nicht [2], da die Fürsten die Majestätsbeleidigung nicht, allein als einen die Person des Kaisers schützenden Tatbestand in das Gesetzbuch aufnehmen wollten. Die detaillierte Regelung der Majestätsbeleidigung wurde in den Hintergrund gedrängt und der Übernahme des römischen Rechts Platz gemacht. Konzepte, die im erhaltenen römischen Recht existierten, wie z. B. perduellio und crimen laesae maiestatis

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1 FINKEY, F., *A politikai bűncselekmények és a büntetőtörvénykönyv [Politische Verbrechen und das Strafgesetzbuch]*, Budapest, 1927, S. 1.

2 So der gefragt verreterey bekent - 49. Item bekent der gefangen verreterey, man soll jn fragen, wer jn dar zu bestelt, vnnd was er darumb entpfangen, auch wo, wie, vnnd wann solchs beschehen sei, vnd was jn darzu verursacht habe. - *Transkript der Peinliche Halsgerichtsordnung Kaiser Karls V. (Constitutio Criminalis Carolina) von 1532*., Landesarchiv Fürstentum Liechtenstein – Verfügbar unter: https://e-archiv.li/ [Zugriff am 7. Juni 2025], S. 19.

imminutae[3], gewannen als wirksame Rechtsinstitutionen im praktischen Leben die Vorherrschaft.

Der Begriff der Majestätsbeleidigung (Hochverrat) im deutschen Recht lässt sich auf das Delikt der perduellio (Feindseligkeit gegen den römischen Staat) zurückführen.[4] Während der Zeit des Heiligen Römischen Reiches ging es den Herrschern viel mehr um die Verfassung ihrer eigenen Person und ihres Staates, als um den Schutz ihres Territoriums, weshalb sie begannen sich auf die Rechte der römischen Kaiser zu berufen.[5] Crimen laesae maiestatis[6] wurde nach den Formeln der Kaiserzeit angewendet, ohne dass seine Grenzen genau gezogen wurden. Das Verbrechen war – insbesondere in den österreichischen Ländern – weit verbreitet und wurde auf alle Angriffe auf die Staatsverwaltung angewendet, wodurch der Begriff des Verrats (Verräterei, Verrath – Infidelitas)[7] in den Hintergrund gedrängt wurde.[8]

Zum ersten Mal in der Geschichte der deutschen Gesetzgebung unterschied das Allgemeine Landrecht für die Preußischen Staaten (1794) zwischen Hochverrat und Landesverrat[9] und schuf damit die Grundlage für dogmatische Debatten, die bis heute andauern. Nach der Definition des preußischen Landesrechts ist Landesverrat ein Angriff auf die äußere Sicherheit des Landes, Hochverrat hingegen ein Angriff auf die innere Sicherheit des Landes.[10]

3. Vertreter der Aufklärung und der Begriff des Verbrechens und des Hochverrats

Durch die Integration der römischen und kanonischen Rechtsinstitutionen und Elemente in das europäische Strafdogma, wurde die Lockerung der Rahmentatbestände Majestätsdelikt (crimen laesae maiestatis) und Landesverrat – Hochverrat (perduellio – nota infidelitatis) deutlich sichtbar, was dogmatisch und im Hinblick auf die ursprüngliche Bedeutung der begangenen Taten auf längere Sicht verwirrend wirkte, und führte zu einer unsicheren Situation.[11]

Sowohl im Hinblick auf den Schutzgegenstand als auch auf den persönlichen und territorialen Geltungsbereich haben sich die Tatsachen zum Schutz der Majestät von Herrschern und Staaten gelockert und eine Vielzahl unterschiedlicher Verhaltensweisen vermischt, die die Begriffe Herrscher und Majestät (göttlich, souverän, territorial) weit interpretieren.[12]

„Es ist ein schwerer Fehler, eine Tat als Majestätsbeleidigung zu bezeichnen., welche es nicht ist. […] Aber bedeutet das nicht eine völlige Gedankenverwirrung? Verringert die Benennung eines anderen Verbrechens mit dem Namen Verrat nicht die Abscheulichkeit des Verbrechens Hochverrat?“ - Montesquieu schreibt über den Prozess, der in ganz Europa stattfindet.[13]

Regeln zur Durchsetzung von Rationalität, Gerechtigkeit und zur Humanisierung des Strafrechts waren bereits im Sinne der Aufklärung in den Strafgesetzentwürfen des 18. Jahrhunderts erkennbar, und die nachfolgende Werke sind noch stärker von den Ideen der Aufklärung beeinflusst. Parallel zur kritischen Auseinandersetzung mit der Rolle des Staates entwickelten sich im 18. Jahrhundert Diskussionen über die Strafpolitik zu Modethemen. Initiiert wurden sie vor allem von Philosophen und Intellektuellen, die auf prinzipieller Ebene große Bedeutung besaßen, in Detailfragen der Strafpolitik jedoch weniger Einfluss hatten.[14] Es ging um die Durchsetzung von Ideen, auf die wir in den Ausschuss- und Parlamentsdebatten der modernen Strafgesetzentwürfe zahlreiche Bezüge finden.

John Locke, der Philosoph des 17. Jahrhunderts, weist auf das Recht des Einzelnen hin, nur mit seiner Zustimmung regiert zu werden und sich ungerechter Autorität zu widersetzen. In seinen Schriften beginnt er in den 1680er Jahren, seine Theorie des Widerstandsrechts auszuarbeiten und gelangt von einer subtilen Unterscheidung zwischen aktiver und passiver Unterwerfung und Gehorsam, zur Idee des offenen Widerstands und seiner Rechtfertigung. In seinen früheren Werken stellte er fest, dass Gott derjenige sein wird, der beim Jüngsten Gericht über einen Herrscher richtet, der einen Befehl erlässt, der dem

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[3] MOMMSEN, T., *Römisches Strafrecht*. Aalen, 1990, S. 537-538.

[4] SARDINHA, C., Die letzte Periode der römischen Verfassungsgeschichte – Das spätrömische Reich und der Dominat oder Periode der Absoluten Monarchie. In: *Journal on European History of Law*, Vol. 15, Nr. 1, 2024, S. 27-28.

[5] WÄCHTER, C. G., *Lehrbuch des Römisch-Teutschen Strafrechts I-II*. - 12. Kapitel Majestätsverbrechen, Stuttgart, 1825-26, II. S. 505-507.

[6] Bambergische Peinliche Halsgerichtsordnung (*Constitutio Criminalis Bambergensis*) von 1507. Strafe auf Majestätsbeleidigung, auf Schmähschriften. Verfügbar unter: https://mateo.uni-mannheim.de/desbillons/bambi.html [Zugriff am 25. Juni 2025].

[7] CXXXII. Straff der jhenen, so die Romischen Keyserlichen oder koniglichen maiestat lestern. vs. CXLIX. Straff der verretterey. – Siehe: Bambergische und die Brandenburgische Halsgerichtsordnung. In: *Die Peinliche Gerichtsordnung Kaiser Karl's V.: nebst der Bamberger und der Brandenburger Halsgerichtsordnung […] mit den Projecten der peinlichen Gerichtsordnung Kaiser Karl's V. von den Jahren 1521 und 1529*, Heidelberg 1842, S. 50.

[8] KAHN, F., *Der Hochverrat*. München, 1929, S. 3.

[9] Vom Hochverrathe. §. 92. Ein Unternehmen, welches auf eine gewaltsame Umwälzung der Verfassung des Staats, oder gegen das Leben oder die Freyheit seines Oberhaupts abzielt, ist Hochverrath.
Landesverrätherey §. 100. Ein Unternehmen, wodurch der Staat gegen fremde Mächte in äußere Gefahr und Unsicherheit gesetzt wird, heißt Landesverrätherey. – *Allgemeines Landrecht für die Preussischen Staaten*, Berlin 1794, Verfügbar unter: https://repertorium.at/img/1794_preussalr/original/p1_0002.html [Zugriff am 7. Juni 2025] S. 1187-1188.

[10] KERN, E., *Der Strafschutz des Staats und seine Problematik*. Tübingen, 1963, S. 7.

[11] Siehe: BARNA, A., *Az állam elleni bűncselekmények szabályozása a 19. századi Magyarországon, különös tekintettel a büntettekről és vétségekről szóló 1878. évi 5. törvénycikk előzményeire és megalkotására*, [Die Regelung von Verbrechen gegen den Staat im Ungarn des 19. Jahrhunderts, insbesondere im Hinblick auf die Vorgeschichte und Entstehung des Artikels 5 des Gesetzes von 1878 über Straftaten und Vergehen]. Győr, 2015.

[12] MONTESQUIEU, *A törvények szelleméről* (I-II. kötet) [Vom Geist der Gesetze], Budapest, 1962, S. 364., MONTESQUIEU, *A törvények szelleméről*. Budapest, 2000.

[13] MONTESQUIEU, S. 364.

[14] KOCH, A., *Adalékok a német büntetőjog történetéhez* [Ergänzungen zur deutschen Strafrechtsgeschichte]. In: *Jogtörténeti Értekezések* 65., (Hrsg. Mezey Barna). Budapest, 2024, S. 48.

Naturrecht widerspricht. Später in seiner Abhandlung über die Zivilregierung von 1689, schreibt über den offenen Konflikt zwischen dem Herrscher und dem Volk oder einem seiner Mitglieder: Gott wird der einzige Schiedsrichter sein, es gibt keinen anderen Richter auf Erden, der den Streit entscheiden kann.[15] Loyalität, sagt er, sei nichts anderes als Gehorsam gegenüber dem Gesetz, und wenn der Inhaber der höchsten Exekutivgewalt das Gesetz bricht, kann er keinen Gehorsam mehr beanspruchen. „Wo das Gesetz endet, beginnt die Tyrannei." [16] Wenn eine mit Macht ausgestattete Person die ihr gesetzlich verliehene Autorität überschreitet, verliert sie ihre Vorgesetztenrolle. Da sie ohne Autorität handelt, kann man sich ihr genauso widersetzen wie jedem anderen, der die Rechte anderer gewaltsam verletzt. Locke hält Widerstand gegen die unrechtmäßige Ausübung von Macht stets für gerechtfertigt. Seiner Meinung nach sind gesetzesbrechende Gesetzgeber die „wahrsten" Rebellen, d. h. sie begehen die schwerwiegendste Form der Rebellion, wenn sie durch ihre Verstöße den Menschen den Schutz ihrer Freiheit und ihres Eigentums nehmen.

Laut Locke ist es zulässig, sich einem König zu widersetzen, wenn dieser einen Treuebruch begangen hat und infolgedessen verliert Majestät zu sein. Der Autor fand zwei Fälle, in denen er ipso facto aufhört, König zu sein: wenn er versucht, die Regierung zu stürzen, d. h. sein Ziel und seine Absicht ist es, das Königreich und den Staat zu zerstören; und wenn der König zum Vasallen eines anderen Herrscher wird. Auf diese Weise verliert er seine höchste königliche Würde, das Recht, in seinem Königreich neben Gott das höchste Amt zu bekleiden. Indem er sein Volk verrät dessen Freiheit er eigentlich schützen sollte, verliert er seine Macht und führt sein Volk in den natürlichen Zustand der Freiheit und Selbstbestimmung, unter der Führung des Volkes zurück.[17]

1748 erschien Montesquieu's Werk „Vom dem Geist der Gesetze - De l'Espirit des Lois" – das Ergebnis von Montesquieus zwanzigjähriger Arbeit. Im zwölften Buch formuliert er Grundprinzipien zum Verbrechen der Majestätsbeleidigung, die auch als Leitfaden für die spätere Gesetzgebung dienten. Im zweiten Kapitel stellt er fest, dass die Freiheit des Bürgers in erster Linie von der „Güte der Strafgesetze" abhängt. Er unterteilt Verbrechen in vier Gruppen: gegen Religion, Moral, öffentlichen Frieden und öffentliche Sicherheit. Die Todesstrafe betrachtet er als eine Art Talion-Prinzip bei Verbrechen gegen die öffentliche Sicherheit. Die Gesellschaft verweigert einem Bürger, der die Sicherheit der Gesellschaft oder einer anderen Person verletzt hat, die Sicherheit.

Er hält es für einen schwerwiegenden Fehler – und begründet dies mit historischen Beispielen –, einen Akt der Majestätsbeleidigung als Verbrechen zu bezeichnen, das keines ist. Er verurteilt Gesetze, nach denen Verbrechen, die die Person der Minister des Fürsten betreffen, das gleiche Gewicht haben wie solche, die die Person des Herrschers betreffen.[18] Ebenso hält er es für eine völlige Gedankenverwirrung, wenn Geldfälscher der Majestätsbeleidigung für schuldig befunden werden. Er beweist mit einer Vielzahl von Beispielen, dass die größte Gefahrenquelle ein Gesetz mit unbestimmtem Inhalt ist, das der politischen Macht ausgeliefert ist und dessen Unberechenbarkeit selbst willkürliche Macht jederzeit in Gefahr bringen kann. Die klare Verwendung von Begriffen ist auch deshalb wichtig, weil Majestätsbeleidigung mit einer Reihe strenger Strafen und anderer Konsequenzen einhergeht, wie etwa der Meldepflicht, die sogar mit dem Tod geahndet werden kann, und dies kann nur auf Fälle von Majestätsbeleidigung erster Ordnung.[19]

Er stellt fest, dass dort, wo aus vom Geschwätzworten Verrat wird, nicht einmal ein Schatten von Freiheit besteht. Laut Montesquieu kann Respektlosigkeit gegenüber dem Herrscher, nicht als Verrat eingestuft werden, weshalb er anstelle einer Strafverfolgung eine einfache polizeiliche Bestrafung empfehlen würde. Wer hingegen seine Untertanen an einem öffentlichen Ort zum Aufstand aufruft, begeht das Verbrechen des Verrats, da seine Worte mit Taten verbunden sind und Teil dieser sind. In diesem Fall werden seiner Ansicht nach nicht mehr die Worte bestraft, sondern die Tat, für die sie verwendet wurden.

Gaetano Filangieri, ein bedeutender Denker der italienischen Aufklärung, betonte bei seinen Ausführungen zur Strafrechtslehre die historische Dimension des Rechts im Gegensatz zur reinen Gesellschaftsvertragstheorie. Filangieri, der sich ausführlich mit dem Tatbestand der Majestätsbeleidigung auseinandersetzte, hatte maßgeblichen Einfluss auf die europäische Strafrechtsgestaltung.[20] Seiner Auffassung nach kann das Vergehen des Hochverrats nur gegen eine Amtsträger begangen werden, die die höchste Macht ausübt. Dieser souveräne Machtinhaber kann jedoch auf verschiedene Weise gefährdet werden. Jemand, der nur versucht, den Herrscher zu töten, ist weniger schuldig als jemand, der auch die Ausübung der Macht anstrebt.

Die schwerwiegendste Form des Hochverrats (die Filangieri der Klasse 1 zuordnet) ist daher das Verbrechen gegen die

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[15] EUCHNER, W., *Naturrecht und Politik bei John Locke*. Frankfurt am Main, 1969, S. 214.

[16] LOCKE, J., *Második értekezés a polgári kormányzatról [Zwei Abhandlungen über die Regierung]*. Kolozsvár, 1999, S. 177.

[17] Locke nennt vier Fälle despotischer Herrschaft, in denen er Widerstand für legitim hält: Eroberung, Usurpation, Tyrannei und Auflösung der Regierung – HÖNTZSCH, F., Gewaltentrennung und Widerstandsrecht. Komplementäre Konzepte zum Schutz von Leben, Freiheit und Besitz im politischen Denken von John Locke. In: *Der Staat des Liberalismus – Die Liberale Staatstheorie von John Locke*. Baden-Baden, 2010, S. 176.

[18] „Es ist gleichfalls ein starker Mißbrauch, eine Handlung als Majestätsbeleidigung zu bezeichnen, die es nicht ist. Ein Gesetz der römischen Kaiser verfolgte als Sakrileg, wenn jemand das Urteil des Herrschers in Frage zog oder an dem Verdienst derer zweifelte, die er für irgend ein Amt ausgewählt hatte. Dies Verbrechen hatten wohl der kaiserliche Rat und die Günstlinge ausgeklügelt." - *Von dem Geist der Gesetze*, Gutenberg Edition, Verfügbar unter: https://www.projekt-gutenberg.org/montesqu/schrifte/chap004.html [Zugriff am 20. Juni 2025], S. 16.

[19] Das mittelalterliche französische Recht unterschied zwischen Hochverrat ersten Grades (der den König direkt betraf) und Hochverrat zweiten Grades (Attentate auf Minister und hohe Beamte, Verbreitung diffamierender Dokumente gegen den König und seine Regierung usw.). - MONTESQUIEU, 2000, S. 308, 328.

[20] BECCHI, P. – SEELMANN, K., *Gaetano Filangieri és az európai felvilágosodás*, Jogtörténeti Értekezések 32., Budapest, 2005, S. 20; BECCHI – SEELMAN, *Gaetano Filangieri und die europäische Aufklärung,* Frankfurt am Main 2000.

Souveränität. Die Ermordung des Staatsoberhaupts würde in Klasse 2 des Hochverrats fallen, während er Verbrechen, die Hochverrat darstellen, als Hochverrat einstuft: das Ausspielen des Landes oder der Armee in die Hände des Feindes in Klasse 3. Bewaffneten Widerstand gegen die legitime Macht, d. h. Rebellion oder Meuterei, Parteinahme stuft er in Klasse 4 ein. Filangieri ordnet die sogenannte Majestätsbeleidigung, die gegen den Herrscher begangene Verleumdung oder Diffamierung ein. Der Begründung zufolge könne der Machthaber von seinen Untertanen nicht nur Schutz und Gehorsam, sondern auch Respekt verlangen. Um richterliche Willkür zu verhindern, sollte das Gesetz seiner Ansicht nach im Voraus und klar definieren, welches Verhalten Verleumdung darstellen kann.

Neben der Definition der verschiedenen Arten von Verleumdung schlug er auch entsprechende Strafen vor. Seiner Ansicht nach sollten Täter von Straftaten, die in verschiedene Verleumdungsklassen eingeordnet werden, nicht mit der gleichen Strafe belegt werden.

Aus gesellschaftlicher Sicht sind die Straftaten der Klasse 1 die schwerwiegendsten; der Täter sollte mit dem Verlust aller Rechte (Leben, Ehre, Eigentum) bestraft werden. Für die anderen Klassen sollte die Strafe jedoch milder ausfallen. Filangieri sieht darin die Forderung der Aufklärung konkret, dass das Verhältnis von Tat und Strafe für die Verbrechensprävention und die Entwicklung eines humaneren Strafrechts von entscheidender Bedeutung ist.[21]

Bei der Entwicklung mehrerer Strafgesetzbuchvorschläge des 19. Jahrhunderts lieferte jedoch Filangieris Zeitgenosse Cesare Beccaria, mit seinem 1764 erschienenen Werk „Über Verbrechen und Strafen“ ideologische Munition.[22] Aus diesem klassischen Werk werden wir hier nur einige inhaltliche Auszüge besprechen, die für den Sachverhalt des Hochverrats relevant sind.

Im Zusammenhang mit der Einteilung der Verbrechen nach Schweregrad erklärt Beccaria, dass es Verbrechen gibt, die die Gesellschaft direkt oder die Person, die sie repräsentiert zerstören. Dies sind diejenigen, die als die schädlichsten Verbrechen gelten und als Hochverrat bezeichnet werden. Er versäumt es auch nicht, die Abwertung des Begriffs Hochverrat zu erwähnen, der nun allgemein genannt werden kann.

„Nur tyrannische Willkür und Unwissenheit, die Worte und die klarsten Begriffe verwirren, sind imstande, Verbrechen verschiedenster Art mit diesem einen Namen zu benennen und folglich mit den schwersten Verbrechen zu bestrafen und folglich, wie bei hundert anderen Gelegenheiten, Menschen zu Opfern eines einzigen Wortes zu machen. Jedes Verbrechen, auch wenn es sich gegen Privatpersonen richtet, schadet der Gesellschaft; doch nicht jedes Verbrechen zielt auf ihre direkte Vernichtung ab.“[23]

Er kritisiert scharf die Institution der geheimen Anklage als Grundinstitution der Tyrannei: Was ist das für eine Regierung, in der der Herrscher in allen seinen Untertanen Feinde vermutet und mit dieser Institution den Bürgern den Frieden raubt?[24] Missbilligt das weit verbreitete System der Geldstrafen, da es die Staatskasse des Herrschers bereichert und seine Majestät sowohl für Verbrechen als auch für schwere Strafen interessiert. Der Richter ist in diesem System eher ein Anwalt der Staatskasse als ein unparteiischer Ermittler der Wahrheit. In diesem Sinne lehnt er auch die Beschlagnahmung von Eigentum ab, einerseits, weil er es nicht für richtig hält, dass die dem Verurteilten abgenommenen Güter den Herrscher bereichern, und andererseits, weil unschuldige Familienmitglieder durch das Verbrechen des Familienoberhaupts betroffen sein sollten.[25]

Für unser Thema ist es wichtig, dass Beccaria zwar die üblichen Standpunkte gegen die Todesstrafe, geht hier aber darüber hinaus und untersucht sie auf der Grundlage von Zweckmäßigkeit und Notwendigkeit.[26] Er hält es für zulässig, einen Bürger zum Tode zu verurteilen, wenn der Verurteilte aus Sicht der Nation über eine so große Macht verfügt, dass er eine „Revolution auslösen kann, die die legitime Regierungsform bedroht“, insbesondere in kritischen anarchischen Situationen oder Situationen, die die Freiheit der Nation bedrohen.

Trotz aller Errungenschaften wäre es naiv zu behaupten[27], die Lehren der Aufklärung, die damals in Mode kamen, und erreichten sogar die herrschenden Kreise, hätten das Strafrecht ein für alle Mal verändert und alle unmenschlichen und illegalen Züge der jahrhundertealten Praxis beseitigt. Viele bestreiten die vereinfachende Halbwahrheit über den Siegeszug der sogenannten Modernisierung. „Das Strafrecht, das die Revolution von 1848 verhindern und dann anwickeln will, ist ein polizeiliches Unterdrückungngsunternehmen. Die Strafrechtsgeschichte des Kaiserreichs 1871 bis 1918 ist kein einheitliches Ruhmesblatt in der geschichte der human-rationalen Strafrechts.“[28]

Festzuhalten bleibt, dass die Ideologie der Aufklärung einige Formen des Begriffs der feudalen Majestätsbeleidigung nicht mehr als crimen laesae maiestatis werten wollte, sondern sie je nach Art des unmittelbar bedrohten Rechtsgegenstands, als Verbrechen gegen die Justiz oder die öffentliche Ordnung oder als Verbrechen gegen das Eigentum (z. B. Geldfälschung, die auch die Interessen des Staates verletzt und den Kredit gefährdet) einstufte.

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[21] Hajdu zitiert Filangieris Werk Die Wissenschaft der Gesetzgebung [La scienza della legislazione, Venezia, 1813] – HAJDU, L., *Az első (1795-ös) magyar büntetőkódex tervezete.* Budapest, 1971, S. 294.

[22] STIPTA, I., *Cesare Beccaria és kora [Beccaria und seine Zeitalter]*. In: 250 éves a Dei delitti e delle pene – Tanulmányok Cesare Beccariáról (Hrsg: TÓTH J. Zoltán), Budapest 2015, S. 14.

[23] BECCARIA, C., 1967, S. 109.

[24] BECCARIA, 1967, S. 68.

[25] BECCARIA, 1967, S. 95, 132.

[26] WEIS, E., *Cesare Beccaria (1738-1794), Mailänder Auflklärer und Anreger der Strafrechtsreformen in Europa*, Bayerische Akademie der Wissenschaften, 1992/5., München, 1992, S. 15.

[27] „Die rechtshistorische Literatur ist noch immer vom optimistischen Geist und rhetorischen Feuerwerk der Aufklärung geprägt.” – KOCH, S. 38.

[28] Naucke geht sogar noch weiter, indem er Beccarias Werk bewertet und die Frage stellt: Die Modernisierung des Strafrechts ist nichts weiter als eine Alternative „Milde oder Härte im Strafrecht nach politischem Bedarf?”, NAUCKE, W., *Die Modernisisierung der Strafrechts durch Beccaria*, In: DEIMLING, G. [Hrsg.] Cesare Beccaria - die Anfänge moderner Strafrechtspflege in Europa, Heidelberg, 1989, S. 39-40.

4. „Furcht vor Strafe und Hoffnung auf Belohnung."[29] – Die Reformversuche des aufgeklärten Absolutismus

Die Eroberung der absolutistischen Macht in Europa ging einher mit der Abschaffung des territorialen Partikularismus und der Intensivierung der Bemühungen um eine Vereinheitlichung und Zentralisierung der Rechtspflege.[30] Neben den klassischen königlichen und politischen Fällen wie Majestätsbeleidigung, Verrat, unerlaubter Privatkrieg und Geldfälschung begann der Staat mit der mit staatlicher Verfolgung einer breiten Palette von öffentlicher Delikte. Die Staatslogik und der Führungsstil wahrhaft großer Persönlichkeiten, die von Herrschern nach dem Prinzip des legibus solutus geführt, aber mit stärkeren und größeren Beinamen und Titeln als zuvor ausgestattet wurden, nehmen im 18. Jahrhundert Gestalt an und entwickeln sich. Sie setzen die Meilensteine der Epoche entsprechend den modischen Werten und Ideologien der Zeit, mit scheinbaren Widersprüchen. Die große Herausforderung dieser Zeit bestand darin, alte Regeln zu revidieren, überlieferte Kodizes und fragmentarische Gewohnheitsrechtsvorschriften zu überschreiben, jedoch auf eine Weise, die die Macht und die Stellung des Herrschers nicht ungeschützt lässt. Friedrich-Christian Schroeder weist auf die Besonderheiten der Gesetzgebung des 18. Jahrhunderts, vergleichte die drei fast gleichzeitig geltenden Rechtsquellen der verschiedenen deutschen Staaten (Preußisches Landrecht 1721; Codex Juris Bavarici Criminalis 1751; Constitutio Criminalis Theresiana 1768) und kommt zu dem Ergebnis, dass die Regulierung und der konzeptionelle Hintergrund des ähnlichen Straftaten auffällig sind, zeigt viel Ähnlichkeit. Alle drei Gesetzesbücher unterteilen die Tatbegehungen des Crimen Maiestatis danach, ob der Täter den Fürsten direkt oder indirekt angreift.[31]

Im Preußisches Königreich, Friedrich II. beginnt seine Herrschaft mit dem Programm eines aufgeklärten Monarchen, das sich durch die Abschaffung der Folter und naturrechtlichen Liberalismus auszeichnet.[32] Es ist zu beachten, dass die Abschaffung der Folter nicht für Fälle von Majestätsbeleidigung und schwerem Mord gilt.[33] In einem seiner königlichen Briefe geht Friedrich ausführlich auf Strafen und Belohnungen ein und erklärt: „Preußens Herrscher haben zum Glück selten Strenge nötig. Nur Hochverrat verdient harte Bestrafung."[34]

Das Allgemeine Landgesetz für die Preußischen Staaten (1794) war in die erste Reihe der naturrechtlichen Kodifikationen, die allgemeine deutschsprachige Regelungen enthielt, die die alten Regeln (damit die Institutionen des römischen Rechts) ersetzen sollten. In seinen strafrechtlichen Bestimmungen erscheint ein Verbrechen als freiwillige, widerrechtliche Schädigung, Verbrechen und seine Verhütung als allgemeine Verpflichtung. Unter den Verbrechen gegen die äußere Sicherheit des Staates regelt das Gesetzbuch die Handlungen des Landesverrats (den Staat in äußere Gefahr und Unsichercheit bringen), unterteilt in drei Klassen. Es behandelt dann Verbrechen gegen den inneren Frieden und die Sicherheit des Staates (z.B. Verhinderung der Veröffentlichung von Gesetzen, Aufstachelung zur Unzufriedenheit gegen der Regierung usw.) und dann (fünfter Abschnitt), somit klar abgetrennt im Kapitel über die Verletzung der Staatsehre („Von Verletzungen der Ehrfurcht gegen den Staat"), das Verbrechen der Majestätsbeleidigung (§ 196.). Darunter ist vor allem die Verletzung der Würde des Staatsoberhauptes zu verstehen (z.B. leichte Körperverletzung, ehrverletzende Beleidigungen, Respektsbeleidigungen etc.), ohne jedoch in offensichtlicher Landesverrat oder landesverräterischer Absicht zu handeln.

In der zweiten Hälfte des 18. Jahrhunderts[35], sind in der Habsburgermonarchie zwei umfassende „Strafrechtsreformgesetze" in Kraft getreten. Die Constitutio Criminalis Theresiana[36], (1769) der in erster Linie eine auf die Rechtseinheit des Reiches ausgerichtete Strafprozessordnung war, behandelte die Fälle des abscheulichen Verbrechens der „beleidigt-weltlichen Majestätsbeleidigung und des Landesverrätherey"[37] gemeinsam. Es listete in einer Zeile Verhaltensweisen auf, die – meist vorsätzlich – den Monarchen oder den Gesamtstaat bedrohten, und zwar ausführlich und zahlreich, und mit Schaffung einer gewissen Abstufung und qualitativer Unterschiede.[38] Als weni-

[29] „Zwei Hauptbeweggründe regieren die Menschen: Furcht vor Strafe und Hoffnung auf Belohnung. Wer sie recht leiten will, hindert sie durch Androhung strenger Justiz an der Übertretung der Gesetze der Gesellschaft, in der sie leben, ermuntert sie aber zu löblichen Handlungen und feuert sie an mit der Lockspeise der Glücksgüter. Preußens Herrscher haben zum Glück selten Strenge nötig." - *Die Werke Friedrichs des Großen: in deutscher Übersetzung,* (Hrsg. Gustav Berthold Volz, Reimar Hobbing, Berlin (1913 – 1914), Das politische Testament von 1752, S. 150.

[30] VÉGH, Z., Römisches Recht und Nationalsozialismus. Gedanken zur Universalität des Römischen Rechtes. In: *Journal on European History of Law*, Vol 2. Nr. 2, 2011, S. 3.

[31] SCHROEDER, F. C., *Der Schutz von Staat und Verfassung im Strafrecht – Eine Systematische Darstellung, entwickelt aus Rechtsgeschichte und Rechtsvergleichung.* München, 1970, S. 19, 32.

[32] KUHLI, M., *Wann muss der Herrscher schweigen? - Zur Behandlung königlicher Machtsprüche in der Preußischen Rechtsreform*, In: BRGÖ, 1, 2013, S. 457.

[33] *„Se. Königl. Majestät in Preußen, unser allergnädigster Herr haben aus bewegenden Ursachen resolviret, in dero Landen bei den Inquisitionen die Tortur gänzlich abzuschaffen, außer bei dem Crimen laese majestatis und Landesverrätherei, auch den großen Mordthaten, wo viele Menschen ums Leben gebracht oder viele Deliquenten, deren Connexion herauszubringen nöthig, implicirt sind."*- 1740. Kabinetsordre wegen Aufhebung der Tortur, In: RÖDENBECK, K. H., Tagebuch oder Geschichtskalender aus Friedrich's des Großen Regentenleben (1740 - 1786). Bd. 1, 1740-1749, Digitale Ausgabe der Universitätsbibliothek Trier. Verfügbar unter: https://friedrich.uni-trier.de/de/roedenbeck/toc/ [Zugriff am12. August 2025].

[34] *Die Werke Friedrichs des Großen* - Das politische Testament von 1752.

[35] SAVULIAK, R., Codex Theresianus of 1766: Codification Works, Structure, main Content and Significance of Roman Law Reception during its Conclusion Process. In: *Journal on European History of Law*, Vol. 14, No. 2, 2023, S. 157.

[36] BÉLI, G. – KAJTÁR, I., *Az osztrák-német büntető jogszabályok hatása a magyar jogban a 18. században (A Praxis Criminalis) [Der Einfluss der österreichisch-deutschen Strafgesetzgebung auf das ungarische Recht im 18. Jahrhundert - Praxis Criminalis]*, In: Dolgozatok az állam- és jogtudományok köréből, Pécs, 1988. S. 36.

[37] Art. 61. §. - Constitutio Criminalis Theresiana - Peinliche Gerichtsordnung, Wien, 1769, S. 177-178.

[38] DRDA, E., *Die Entwicklung der Majestätsbeleidigung in der Österreichischen Rechtsgeschichte unter besonderer Berücksichtigung der Ära Kaiser Franz Josephs*. Wien, 1992, S. 71.

ger schwerwiegend erachtete Fälle (Beleidigung von Ministern und Provinzialen, Geldfälschung, Widerstand usw.) wurden als weniger schwerwiegend aufgeführt. Der Kodex legte großen Wert auf den Verlauf der Ermittlungen und die Verdachtsgründe, Beweismittel und Umstände, die die Folter rechtfertigten. Hinter der Rechtsentwicklung, die sich in der Festlegung von Regeln, vor allem Ermittlungsregeln für schwerere Formen der Begehung von Verbrechen („Majestäts- oder Hochverrath"), verbergen sich abschreckende und mittelalterliche Strafen. Für Männer neben dem Verlust von Leben und Eigentum die Vierteilung bei lebendigem Leib, für Frauen die Folter mit glühenden Zangen, und anschließend die Enthauptung.[39]

Im 1787 erließ Joseph II. das Allgemeine Gesetzbuch über Verbrechen und deren Bestrafung[40], die Sanctio Criminalis Josephina, das bereits in den österreichischen Erbländern sowohl in Ungarn als auch in Siebenbürgen das materielle Recht, vereinheitlichte. Aus der Sicht staatsfeindlicher Handlungen bestand die wichtige Neuerung der Sanctio Criminalis darin, dass die Todesstrafe nur im Standrechtsverfahren verhängt werden konnte[41], so dass diese Strafe auch in politischen Prozessen nicht anwendbar war.[42] „Und das war für Ungarn umso bedeutsamer, weil Hochverrat noch immer auf der Grundlage der weiten Definition aus der Zeit des Heiligen Stephan beurteilt werden konnte, die den jungen Staat vor heidnischen Aufständen schützen sollte", schreibt Fayer.[43] Das drittes Kapitel des Gesetzes regelte die Verbrechen, die in direktem Zusammenhang mit dem Landesfürsten und dem Staat standen. Dazu gehörten (§ 40.): beleidigte Majestät, Landesverrat, Aufruhr und Tumult, öffentliche Gewalt, Amtsmissbrauch, Urkundenfälschung, Münzfälschung, Fluchthilfe, Verstecken eines entflohenen Gefangenen und Beihilfe zur Militärdienstentziehung.

Laut dem Kodex kann Majestätsbeleidigung durch einen körperlichen Angriff auf einen rechtmäßigen Herrscher (der von Gott mit Hoheit und Würde ausgestattet ist), oder durch jede andere böswillige Methode begangen werden, solange die Tat keinen Schaden verursacht[44]. In diesem Fall besteht die Strafe in der zweiten Stufe einer langen und schweren Gefängnisstrafe und der Beschlagnahme von Eigentum, ohne Rücksicht auf die Kinder des Täters. In Übereinstimmung mit den modernen Lehren zählt die Tötung eines Herrschers nicht zu den politischen Verbrechen, befreit jedoch weder von der Beschlagnahme noch von der Pflicht der Familienangehörigen, das Verbrechen zu melden. Dies geschieht, obwohl das Gesetz über Strafen im Allgemeinen erklärt (§ 16.), dass die Bestrafung nur die Täter und Komplizen treffen sollte und dass andere (Kinder, Verwandte, Erben, Dritte) nicht benachteiligt werden dürfen. Im Gegensatz dazu behält es in diesen Ausnahmefällen die Beschlagnahme von Eigentum, das auch die Familie betrifft, und die Institution der Pflicht zur Anzeige des Verbrechens bei. Die Tat kann auch durch mündliche oder schriftliche Majestätsbeleidigung sowie durch Unterlassung der gebotenen Ehrerbietung begangen werden. (Sie wird mit leichter Freiheitsstrafe zweiten Grades bestraft.) Sie schließt Verwandte, Vertrauenspersonen und Hausgenossen des Herrschers vom Begriff des durch die Tat bedrohten Rechtsobjekts aus, und weicht damit vom Feudalrecht – und damit von ihrer unmittelbaren Vorgängerin, der Theresiana – ab.

Die Taten, die Landesverrat darstellten, wurden im Kodex weit gefasst und auf die gleiche Weise bestraft wie ein tätlicher Angriff auf den Souverän. Die indirekte oder direkte kriminelle Handlung konnte durch Rat oder Tat, mit oder ohne Waffen, allein oder in Absprache mit mehreren Personen ausgeführt werden. Hierauf sind Hochverrat, die Preisgabe von Staatsgeheimnissen, ein Bündnis mit dem Feind oder jede Art der Unterstützung desselben (z. B. Spionage) aufgeführt, und der Täter konnte alles sein, jeder undankbare Bürger, ob Einheimischer oder im Land lebender Ausländer. Bei Verrat – einem in seinen Folgen so gefährlichen Verbrechen – kann eine Person, die sich der hochverräterischen Absicht bewusst war, sie aber den höheren Behörden nicht meldete, als Komplize verurteilt werden.

Die Abschaffung der Todesstrafe, und auch die andere tiefgreifend gezielten Reformen brachten keine positiven Veränderungen mit sich[45], und die Zeitgenossen begründeten damit sogar den allgemeinen Anstieg der Kriminalität. Andererseits verunsicherten die oft zu strengen Strafen („Der Criminal-Richter ist an die buchstäbliche Beobachtung des Gesetzes gebunden")[46] nicht nur die Gerichte, sondern brachten auch die Stimmung der Bevölkerung gegen die Reformen des Monarchen auf.

5. Die Erfüllung der staatlichen Strafgewalt und der Entwurf des Strafgesetzbuches von 1795 im Königreich Ungarn

Die strengen, aber ungeregelten und überholten Voraussetzungen für Hochverrat, sowie die weite Auslegung und Anwendung der Verfahrensregeln[47], die oft als königliche Vorrechte anerkannt wurden, führten schließlich zu einer unkontrollierbaren Situation mit außergewöhnlichen Gerichtsbarkeiten und Strafen für außergewöhnliche Verbrechen. Durch die turbulente innenpolitische Situation des Königreichs Ungarn im 17-18. Jh., die Notwendigkeit die politische Verbrechen zu regulieren und aufzuklären, führte in der ungarischen Elite zu der Idee einer umfassenden und kodifizierten Regelung des Strafrechts.

[39] Art. 61.§. 8.
[40] Patent vom 13ten Januar 1787., Gesetze und Verfassungen vom Jahre 1787.
[41] „§. 20. Die Todesstrafe soll außer den Verbrechen, bey welchen nach dem Gesetze mit Standrecht verfahren werden muß, nicht statt finden."
[42] HAJDU, L., *Adalékok a jozefinizmus magyarországi jogi reformtörekvéseinek értékeléséhez* [*Beiträge zur Bewertung der Rechtsreformbemühungen des Josephinismus in Ungarn]*, In: Jogtörténeti Tanulmányok, Studia Iuridica Auctoritate Universitatis Pécs Publicata, 1980, S. 128.
[43] *Az 1843-iki büntetőjogi javaslatok anyaggyűjteménye IV.* [*Sammlung strafrechtlicher Vorschläge ab 1843],* (Hrsg. FAYER, L.), Budapest, 1902, S. LXXVI.
[44] „wenn gleich hieraus kein Schaden erseiget." – § 41.
[45] OGRIS, W., Joseph II.: Staats- und Rechtsreformen. In: *Elemente europäischer Rechtskultur: 1961-2003*. Wien, 2003, S. 151-152.
[46] BALOGH, E., Die Verdachtsstrafe als Erscheinungsform der Schuldvermutung. In: *Acta Juridica et politica*, XLIV/2, 1993, S.18.
[47] BÓNIS, P., War of Conquest and Defensive War in the Hungarian Thirteenth Century Legislation and the European Ius Commune. In: *Journal on European History of Law*, Vol. 15, No. 1, 2024, S. 111.

Nach dem Tod Josephs II. regelte das ungarische Parlament (1791:40-54. Artikeln) die Übergangssituation in der Gesetzgebung, in der es an mehreren Stellen das Außerkrafttreten des Strafgesetzbuches und des neuen Gesetzgebungsverfahrens sowie die Rückkehr des Landes zum alten Rechtszustand von 1780 erklärte. Ohne die von ihm in Angriff genommenen öffentlichen und rechtspolitischen Arbeiten abzuschließen, entsandte der Landtag Ausschüsse zur Regelung von Angelegenheiten, die längere Beratungen erforderten, wie etwa zur Durchführung allgemeiner Kodifizierungsarbeiten, einschließlich der Ausarbeitung des Strafgesetzbuches (1791:67 tc.).

Während der öffentlich-rechtlichen Verhandlungen vor dem Landtag (1790/91) und der Krönungsvorbereitung, forderten die ungarische Stände vom Leopold II. einen neuen (Gesellschafts)Vertrag. Das heißt, sie wollten unter Berufung auf die Unterbrechung der Thronfolge durch den Tod von Joseph II., die Souveränität des Königreichs Ungarn durch die Ausstellung eines neuen Beglaubigungsschreibens langfristig sichern. Sie verwiesen auf das gesetzeswidrige Verhalten der Habsburger gegenüber der adeligen Nation und die Notwendigkeit einer erneuten Krönungs-Kapitulation.[48]

Auch bei der Beilegung politischer Verbrechen konnte der ungarische Adel auf Zugeständnisse des neuen Monarchen hoffen, da Leopold II., noch als Großherzog der Toskana (zeitgleich mit den Reformen Josephs II.), die Regeln der Aufklärung noch entschiedener umgesetzt hatte als sein Bruder. Das toskanische Strafgesetzbuch aus dem Jahr 1786 spiegelte bereits die Ideen der italienischen Aufklärung wider. Es schaffte die Todesstrafe ab, verbot alle Formen der Folter und zugleich die sogenannten privilegierten Beweismittel, die in Hochverratsprozessen so häufig verwendet wurden. Die Leopoldina schaffte das Verbrechen des Hochverrats ab, dessen Begriff – so die Begründung – im Mittelalter übermäßig und ungerechtfertigt erweitert wurde, dessen Definition selbst in der barbarischen Zeit des Römischen Reiches entstand und dessen Fortbestand in einer gut organisierten Zivilgesellschaft nicht toleriert werden kann. In diesem Zusammenhang erklärte der Gesetzgeber die Beschlagnahme von Eigentum unschuldiger Familienmitglieder ein für alle Mal für verboten. Das gesamte Gesetzbuch ist geprägt vom Wunsch, die Bürger auch strafrechtlich zu schützen.[49]

In den politischen Stellungnahmen der Monate nach Josephs II. Tod, ragte neben allgemeinen strafrechtlichen, gesetzgeberischen und verfahrensrechtlichen Fragen das Thema der Landesverrat, sowie die Präzisierung und Erneuerung des damit verbundenen Regelwerks heraus. Während der Ausarbeitung der Krönungsartikel zum Verrat (und später in den fertigen Entwürfen) entstand die Forderung, dass nicht ein spezielles delegiertes Gericht, sondern das übliche Königliche Tafel-Gericht handeln soll und der Verdächtige (gemäß Artikel 7 des Gesetzes von 1715) innerhalb der Landesgrenzen vor Gericht gestellt werden sollte. Zu Beginn seiner Herrschaft, im Frühjahr 1790, stellte Leopold II. das vorherige Justizsystem von 1780 wieder her.[50] Wenige Monate später, im Juni 1790, bestand Leopolds erste Reformbemühungen in der Formulierung der königlichen Vorschläge, in denen er Strafrechtsreformen umsetzen wollte, die den Anforderungen der Aufklärung und der Menschlichkeit entsprachen (z. B. die Abschaffung der Folter[51]).

Die Stände übermittelten dem Monarchen gleichzeitig mit dem Entwurf des Krönungsdiploms, auch einen entsprechenden Antrag. Artikel 11. dieses Textes mit dem Titel „De crimine perduellionis", brachte die alten und neuen Forderungen in Bezug auf Majestätsbeleidigungs-verfahren zum Ausdruck. Der Gesetzesentwurf sah vor, dass diese verfahren nicht den ordentlichen Gerichten entzogen werden sollten, sondern dass der Königliche Tafel mit Berufungsrecht entscheiden sollte und dass die Einziehung von Vermögen nur das Eigentum des Schuldigen betreffen sollte (im Sinne von Gesetz 1715:7, der das Begnadigungsrecht der königlichen Majestät und Fälle von Majestätsbeleidigung regelte). Die Entscheidung des Monarchen ging jedoch über diese Forderung hinaus und verbot die Vermögensbeschlagnahme nicht nur in strengen Fällen von Hochverrat, sondern auch in anderen Fällen von Majestätsbeleidigung, sowie die Vollstreckung von Todesurteilen ohne die Zustimmung des Monarchen. Das Dekret des Monarchen vom kam dieser Forderung teilweise nach, und die ungarischen Stände dankten dem König mit größter Dankbarkeit für die Ausweitung seines in Florenz gefassten Beschlusses auf Ungarn. Der vom Parlament verabschiedete Text erweiterte den Anwendungsbereich des Gesetzes nicht nur auf Fälle von Hochverrat, sondern auch von Majestätsbeleidigung[52].

Strafrechtliche Fragen gehörten zu den Kritikpunkten in den für den Landtag 1790/91 erstellten Komitats-inschriften. Neben den Klagen über Verfahren und Gesetzgebung gewannen die Stimmen an Gewicht, die die Rechenschaftspflicht und Verurteilung der Diener des alten Regimes forderten. Der sich radikalisierende Adel forderte auf den nach dem Tod Josephs II.

[48] MARCZALI, H., Az 1790-91-diki országgyűlés II. [Das Parlament von 1790-91.]. Budapest, 1907, S. 217.

[49] *Legge criminale toscana 30 novembre 1786 - Codice Leopoldino*, (Hrsg. SANDONA', A.), Universitá Brescia – 2009, Verfügbar unter: http://www.antropologiagiuridica.it/leopoldina.PDF [Zugriff am 5. April 2025], S. 19-20.

[50] 1790/91. Gesetz XL über das Strafgesetzbuch und das neue Justizsystem - „Obwohl der verstorbene Kaiser und Erbkönig selbst die Wiederherstellung der Rechtspflege in den Rechtszustand des Jahres 1780 anordnete und dadurch nicht nur die alte Rechtsgewalt der ordentlichen Richter des Landes wiederhergestellt wurde, sondern auch die durch die Neuordnung der Gerichte erloschenen Justizbehörden wiederhergestellt und in ihre alte Rechtsform zurückversetzt wurden, erlosch auch die Kraft des allgemeinen Strafrechts und des neuen Justizsystems vollständig." – Corpus Juris Hungarici.

[51] Artikel XLII des Gesetzes von 1790/91 über Folter – „Folterverhöre sind schlicht verboten, solange das Parlament keine anderen Maßnahmen in Bezug auf die Strafverfolgung ergreift, da sie kein geeignetes und angemessenes Mittel zur Wahrheitsfindung darstellen, sondern eher als Strafe betrachtet werden." – CJH.

[52] Artikel LVI des Gesetzes von 1790/91 über das Verbrechen der Parteinahme und Hochverrat - Seine Majestät hat auf die demütige Bitte der Orden gnädig zugestimmt, dass in Zukunft, jedoch nicht in den Fällen, die vor Inkrafttreten dieses Gesetzes entstanden sind, das Verbrechen des Majestätsbeleidigung und Hochverrats nicht mehr den ordentlichen Gerichten des Landes vorbehalten bleibt, sondern vom königlichen Gericht verhandelt wird, wobei die Berufungsmöglichkeit unberührt bleibt. Im Falle des Majestätsbeleidigung selbst soll der Verlust von Eigentum auf den Anteil des Verbrechers beschränkt bleiben, wobei die Begnadigungsbefugnis Seiner Majestät unberührt bleibt und im Übrigen die Bestimmungen von Artikel VII des Gesetzes von 1715 unberührt bleiben. – CJH.

abgehaltenen Kreistagen und später während des Landtags die Bestrafung „böser Ratgeber“. Sie wollten die gleiche Strafe für diejenigen, die die Grundrechte des Landes verletzten, oder diese in Frage stellten und ihre Abschaffung anstrebten. Indem sie die von Adel und Monarch gemeinsam ausgeübte Gesetzgebungsgewalt umgingen und eine Vielzahl unrechtmäßiger Gesetze erließen, verletzten diese Hofräte die Souveränität der gesamten Adelsnation.[53] Nach der Argumentation des Adels ist die gesetzgebende Gewalt, d. h. die Souveränität, gemäß der Lehre der Heiligen Krone zwischen dem gekrönten König und der Nation aufgeteilt. Daher schlugen sie vor, dass jeder, der die Souveränität der Nation verletzt, genauso bestraft werden sollte wie jemand, der Verrat am Monarchen begeht.

In der Anfangszeit des Landtags forderten die Radikalen die Bestrafung der Berater Josephs II. und die Durchführung von Verfahren, später nur noch die strafrechtliche Verfolgung derjenigen, die dem Monarchen gefährliche Ratschläge gaben oder solche Ratschläge ausführten. Unter dem Einfluss der Französischen Revolution und der sich zugunsten der Habsburger verändernden außenpolitischen Lage gab der Adel später seine Bemühungen zur Schwächung der Zentralmacht allmählich auf. Trotz der militanten Vorbereitung und der Benennung der Schuldigen verabschiedete der Landtag noch immer kein Gesetz über das Crimen laesae nationis, die nationale Beleidigung.

6. Die Arbeit der Parlamentsausschüsse – Regelung des Verbrechens des Hochverraths im Entwurf (1795)

Das Gesetz LXVII von 1791, das Josephina aufhob, entsandte Königliche Deputationen (Ausschüsse), mit der Durchführung der allgemeinen Kodifizierungsarbeiten. Nach fast vierjähriger Arbeit des Rechtsausschusses waren die Entwürfe, einschließlich des Strafgesetzbuches, bereits 1795 fertig.[54] Der lateinischsprachige Strafgesetzentwurf (Codex de Delictis eorumque Poenis)[55] beginnt mit der Definition der für die bürgerliche Freiheit und Sicherheit notwendigen Strafgrundsätze (Principia). Anschließend werden die Verfahrensregeln, die einzelnen Straftaten und ihre Bestrafung beschrieben. Dies ist der erste ungarische Strafgesetzentwurf, der auf die Sicherheit der modernen Gesellschaft und aller ihrer Bürger abzielt und das gesamte Strafrecht umfasst, einschließlich der Regelung aller wichtigen materiellen und verfahrensrechtlichen Institutionen.[56]

Das Vorwort zum Kodex hingegen betrachtet nur Verbrechen gegen den Staat, Verbrechen gegen die Ordnung der Verwaltung und der Justiz als öffentliche Straftaten und betrachtet andere Verbrechen in erster Linie als Gefährdung der privaten Sicherheit. Dieser Abschnitt – der erklärte, dass es sich nicht um den zuvor erörterten Fall von handele – hätte neben der Usurpation königlicher Rechte auch diejenigen bestraft, die versuchten, die Autorität des Königs, die rechtmäßige Ausübung der gesetzgebenden oder vollziehenden Gewalt, die Regierungsform oder die offenkundigen Rechte der Waffen und Befehle des Landes durch Worte, Schriften oder sonstige Handlungen ohne Gewalt oder Waffen zu zerstören. Der Vorschlag schloss auch den aktiven (wahrscheinlich auch gewaltlosen) Widerstand gegen diese Rechte ein.

Der Entwurf konzentriert sich auf Verhaltensweisen, die die Person des Königs und den grundlegenden Rechtsschutz des Landes gefährden. Das Verbrechen der Hochverrat ist als erster Abschnitt im Kapitel über Verbrechen gegen die öffentliche Sicherheit aufgeführt.[57] Die Absicht des Verfassers ist klar: er trennt die Majestätsbeleidigung, die aus dem Feudalrecht (auf Loyalität beruhend) stammt, scharf von anderen Verstößen gegen den Staat. Er beschreibt nicht nur die beiden Klassifikationen, sondern benennt sie auch. Das Verbrechen, das die Person des Königs als Staatsoberhaupt, d. h. seine persönliche Majestät („Persona Regia tanquam status publici capitis aggressio“), betrifft, ist das Verbrechen der Majestätsbeleidigung („Criminis Laese Majestatis“), das andere ist die Kategorie der Verbrechen gegen den Staat. In Bezug auf Letztere unterscheidet er zwischen externen und internen Formen rechtswidrigen Verhaltens, die den Staat bedrohen.

Er unterteilt das Verbrechen der Hochverrats in zwei Kategorien: Majestätsbeleidigung und Handlungen, die die Sicherheit des Staates verletzen, und definiert Majestätsbeleidigung somit als Unterkategorie der Verrat. Dies war nicht neues, da auch schon das Tripartitum (1514) regelte es so, unterscheidet sich jedoch von der Praxis, die sich damals in Europa bereits entwickelte (z. B. Preußisches Strafgesetzbuch 1794[58]), die Majestätsbeleidigung und Hochverrat voneinander unterschied.[59]

Wir können feststellen, dass die Liste der Verbrechen, die die äußere Sicherheit des Staates beeinträchtigen („Contra externam Respublica Securitatem“) in diesem Abschnitt nicht als erschöpfend angesehen werden kann, sondern lediglich illustra-

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[53] HAJDU 1971, S. 58.

[54] HEIL, K. M., Strafrechtliche Kommissionstätigkeiten im Lande und im Komitat (1791–1832). In: *Journal on European History of Law*, Vol. 14, No.1, 2023, S. 136.

[55] Codex de Delictis eorumque Poenis pro Tribunalibus Regni Hungaria Partimque ei adnexarum per Regnicolarem Juridicam Deputationem Articulo 67:1791. ordinatam elaboratus – Ung. Staatsarchiv N117 Archivum Regni, Lad. NNN 18/1, 87.

[56] STEINBERG, G., *Aufklärerische Tendenzen im ungarischen Strafrecht.* Budapest, 2006, S.15.

[57] Abschnitt I. Hochverrat - § 1. Wer die Treuepflicht gegenüber König und Land verletzt oder die äußere Sicherheit des Staates feindselig angreift, begeht grundsätzlich das Verbrechen der Illoyalität. Ausländer und Botschafter ausländischer Mächte fallen daher nicht unter die Bestimmungen dieses Gesetzes, da sie in solchen Fällen als Feinde zu betrachten sind. Es gibt verschiedene Arten dieses Verbrechens.
§ 2. Anders verhält es sich, wenn der Angriff die Person des Königs, des Staatsoberhauptes, betrifft, da dies als Verbrechen, das die persönliche Souveränität des Königs beeinträchtigt, einen eigenen Namen verdient: das Verbrechen der Majestätsbeleidigung. Darüber hinaus ist es ein anderer Sachverhalt, wenn jemand ein Verbrechen gegen die äußere Sicherheit des Staates begeht, als wenn jemand ein Verbrechen gegen die innere Sicherheit des Staates begeht.

[58] Siehe: Von den Verbrechen und deren Strafen, II.20. 2-5.- Allgemeines Landrecht für die Preußischen Staaten von 1794. (Hrsg. Hans Hattenhauer), Frankfurt a. M., 1970.

[59] *A bűntettekről és azok büntetéséről szóló 1795-ös kódex-tervezet* [Entwurf des Strafgesetzbuches von 1795] HAJDU 1971, S. 387-512.

tiver Natur ist und die wichtigsten Tatbestände auflistet, die den Richtern bei der Urteilsfindung als Richtlinie hätten dienen können.

Der Entwurf von 1795 gilt als von großer Bedeutung für die ungarische Rechtsgeschichte – nicht nur, weil er erstmals das gesamte Strafrecht umfasste, sondern auch, weil er als erster ungarischer Strafgesetzentwurf ausdrücklich die Aufhebung aller gesetzeswidrigen schriftlichen oder gewohnheitsmäßigen Quellen vorschrieb. Wäre er in Kraft getreten, hätte er die Vereinheitlichung des ungarischen Strafrechts erheblich erleichtert. Der Kodex-Entwurf hatte großen Einfluss auf die Reformgeneration vor 1848 und auf die Strafgesetzentwürfe von 1843.

Zu den Reformbemühungen dieser Zeit gehörten die Vereinheitlichung der öffentlichen Verwaltung, die Trennung von Verwaltungs- und Strafvollzugsgewalt sowie die Notwendigkeit, die Strafmittel zu zivilisieren. Es wurde ein systematisches Programm zur bürgerlichen Umgestaltung entwickelt, dessen Ausrichtung von den Adelskreisen über die Gesetzgebungsarbeit der Reformversammlungen ausging. Für die fortschrittlichen Kräfte schien die Schaffung von Gesetzen und Vorschriften die Arena des öffentlichen Lebens zu sein, in der der Kampf gegen die Regierung des unterentwickelten Konservatismus zum Erfolg geführt werden konnte.

7. Schlusswort

Die zentralistischen europäischen Monarchien der Aufklärung förderten die Schaffung von Strafgesetzen, da sie diese als Mittel zur Wahrung der Interessen und der Sicherheit des Staates betrachteten. Moderne Strafgesetzbücher waren in der Regel das Werke anerkannte Rechtsgelehrte[60], die oft über praktische und juristische Erfahrung verfügten. Daher ist es ein charakteristisches Merkmal der Entwicklung des modernen Strafrechts, dass neue wissenschaftliche Ansätze sehr schnell – zumindest auf der Ebene von Entwürfen – in materiellen Rechtsnormen Eingang gefunden haben.[61]

Die Französische Revolution und die napoleonischen Eroberungen veränderten Konzept und Ausmaß der Gefahr, die Monarchen und ihre Staaten bedrohte. Die Regulierung von Landesverrat und Hochverrat war nicht länger eine Diskussion über die modischen Ideen der Aufklärung, sondern eine direkte Bedrohung für das Herrscherhaus, sowie für Imperien und Länder, einschließlich derer, die Bündnisse mit den Franzosen schließten, und Mächte, die nach königlichen Thronen strebten.

Mit dem Ende der Napoleonischen Kriege wurde „Im Namen der allerheiligsten Dreieinigkeit" in der Wiener Kongreß-Akte (1815) das neue Prinzip der Reichserhaltung zur Kraft der Restauration, der Idee des Konservatismus. Die Großmächte planten ein umfassendes System von Garantien, damit der Konservatismus anstelle revolutionärer Bewegungen und Ideen der bürgerlichen Reform das Leitprinzip in Europa sein und die Herrschaft der wiederhergestellten Großmächte und Dynastien ungebrochen bleiben würde. Neue Bündnisse und ihre Instrumente wurden zu Hütern der europäischen Weltordnung, die weniger Rechtsreformen, insbesondere in Bezug auf Staat, Monarchie und Untertanentreue, als vielmehr die alten Regeln und traditionellen Rechtsauslegungen bevorzugten.

[60] PRÜMM, H. P., Friedrich II. von Preußen und das Recht - Das Interpretationsverbot im ALR, der Prozess des Müllers Arnold und der Überfall auf Sachsen, In: *Zeitschrift für das Juristische Studium,* 1/2012, S. 27.

[61] BALOGH, E., A magyar büntetőjogi dogmatika kezdetei [Die Anfänge der ungarischen Strafrechtsdogmatik]. In: *Jogtörténeti Szemle* [Rechtsgeschichtliche Rundschau], 2008/2, S. 2.

From Colonial Action to Imperial Thought: Admiral Aube (1826–1890)

*Martin Motte**

Abstract

Admiral Aube (1826–1890) played an important part in French colonialism. His books raised key questions: why and how to expand and defend the French Empire? With what implications? Aube portrays colonial policy as a vital necessity for French economy. Moreover, it will promote reconciliation among the French after decades of civil conflict, stretching from the 1789 Revolution to the Paris Commune of 1871. According to Aube indeed, one of the essential goals of French colonization is to suppress slavery: however, both Catholic conservatives and Republican progressives can agree on this goal. Regarding the land defense of French colonies against a British aggression – for Aube writes in a context of fierce colonial rivalry between Paris and London – he relies on native troops who, he thinks, see France as an emancipatory power. As for the maritime defense of the colonies, Aube intends to entrust it to torpedo boats who will not just attack the Royal Navy, but also enemy maritime trade in order to paralyze British economy and to terrorize British public opinion. He justifies these measures with three reasons : first, everything is legitimate against the enemy in a struggle for life; second, England has never cared about justice; and finally, the fear of total war will have a deterrent effect, thus pushing nations toward establishing perpetual peace. Thus Aube's colonial thought leads to a general theory of international relations supporting the perspective of total war.

Keywords: *French colonialism; abolition of slavery; colonial rivalry; torpedo boats; war on trade; struggle for life; deterrence; perpetual peace; total war.*

Although Admiral Aube remains known to historians for his contributions to the renewal of naval strategy, his colonial actions and imperial thought have attracted much less attention [1]. Yet, the two aspects of his persona are inseparable. Both lend themselves well to the two questions posed by the organizers of the *Age of Empires* conference: How were vast empires administered? What were the political, legal, economic, and cultural implications for each state during a time of colonial competition? In Aube's specific case, these questions may be reformulated as follows: How to expand and defend the French Empire? With what implications for international relations, the law of war, maritime economy, and the relationship between colonizers and colonized? I will address these questions in three parts: first, I will recount Admiral Aube's colonial career; second, I will present his ideas on colonialism; and finally, I will discuss his views on the defense of the French Empire.

1. The Colonial Career of Admiral Aube

In the 19th century, the navy underwent a triple transformation: a sociological shift due to the French Revolution, an operational shift due to colonial conquests, and a technological shift due to the Industrial Revolution. Théophile Aube's life fits squarely within this threefold dynamic. Born in 1826 in Toulon, he was the son of a modest civil servant. Two of his uncles were officers – one in the army, the other in the navy – but neither rose above the rank of junior officier. Aube thus belonged to the middle classes, which would have made it nearly impossible for him to become an admiral two generations earlier. But the Revolutions of 1789 and 1830 had occurred. The latter led notably to the creation of the *École navale* (Naval School), which admitted students via competitive exams, thus opening the navy to meritocracy – where previously entry into the officer corps relied heavily on aristocratic networks. Aube was admitted to the Naval School in 1840 at age 14, two years ahead of the average. He distinguished himself through remarkable intellectual talents, excelling not only in mathematics – an essential skill for naval officers – but also in history, literature, English, Spanish, and Italian, all of which were invaluable to anyone seeking higher command responsibilities, for, as General de Gaulle would later say, "General culture is the true school of leadership." [2]

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[1] I have nevertheless attempted to highlight them in my dissertation: MOTTE, M., *Une Éducation géostratégique – La pensée navale française, de la Jeune École à 1914*. Paris, 2004 (2005 Grand Prize of the Académie de Marine), pp. 159–253, as well as in a number of articles.

[2] DE GAULLE, Ch., *Vers l'Armée de métier* [1934], reprinted in Le Fil de l'épée et autres écrits. Paris, 1994, p. 322.

Aube's naval and colonial career was very rich, and I will only highlight its most prominent episodes[3]. In 1845, while patrolling the Philippine Sea, he experienced his first combat in a fight against Malay pirates. From 1846 to 1849, he was cruising in the Mediterranean, especially off the Italian coasts, where he closely observed the standoff between the Papal States and supporters of Italian unification. He distinguished himself by fighting a fire in the Genoa arsenal and received a plenary indulgence from Pope Pius IX for himself, his father and mother, brothers and sisters, and extended kin. Yet his attachment to Catholicism did not prevent Aube from already espousing republican view: this was a rather unusual ideological cocktail in a French society where Catholics were mostly monarchist and republicans largely anti-clerical.

From 1850 to 1854, Aube took part in the fight against the slave trade on the West African coast. This marked the beginning of a long-standing interest in Africa and an anti-slavery commitment, which continued during a lengthy stay in Senegal (1859–1865). There, Aube led riverine operations against jihadist and slave-trading factions, using small but heavily armed gunboats – foreshadowing his later theories on the value of small-tonnage units. During these years in Senegal, he developed ties with Louis Faidherbe, the colony's republican governor, and married his sister-in-law, which helped advance his career.

During the Franco-Prussian war of 1870-1871, Aube served in the army –as did many naval officers– because many army officers had been killed or captured in the early stages of the invasion. Then, from 1875 to 1877, he commanded a cruiser in the Pacific, where he was involved in colonial rivalries between France, the United Kingdom, the United States of America, and Germany. This period ended with a diplomatic blunder in German Samoa, where Aube stormed a house believed to belong to criminals who had attacked the American consul; but it turned out to belong to a British subject, who filed a complaint and triggered a scandal that led to Aube's dismissal from command. However, this punishment may also have stemmed from political tensions between the republican officer and a still-conservative naval hierarchy.

In any case, the Republican victory in the 1879 senatorial elections and the resignation of conservative President Patrice de MacMahon revived Aube's career: he was promoted to rear admiral and appointed governor of Martinique, a post he held until 1881. His time there was difficult on two fronts: he failed to defuse ethnic tensions between Whites, Blacks, and mixed-race populations (drawing heavy criticism), and both he and his wife contracted yellow fever; she died, and he was repatriated in poor health.

In 1883, Aube, recovered from illness, was assigned to the Toulon fleet, the largest and most prestigious formation of the French Navy, soon becoming its deputy commander. For an officer more used to colonial flotillas, this was a chance to rediscover large squadron ships but also to get to know the new coastal torpedo boats which, despite their small size, had high lethality and reminded him of the gunboats he had used overseas. These small ships became central to the strategic ideas Aube laid out in his popular books: *La Guerre maritime et les ports militaires de la France* (*Naval Warfare and France's Military Ports*, 1882), *Italie et Levant* (*Italy and the Levant*, 1884), and *À terre et à bord, notes d'un marin* (*On Land and at Sea: Notes of a Sailor*, 1884). These works tied naval tactics and strategy to reflections on the geopolitical importance of the French Empire. Well-written and grounded in rich colonial experience, they earned Aube a reputation as the leading thinker of the *Jeune École* ("Young School"), a group led by young torpedo boat commanders who challenged the dominance of battleships in a navy still ruled by conservative old admirals.

Beyond his influence among peers, Aube also won over an educated public with his reflections on the French colonies. He had powerful allies, including his brother-in-law Faidherbe and his friend, the journalist Gabriel Charmes, who was close to both Gambetta and Jules Ferry –key figures in the emerging link between republicanism and colonialism. This dual foundation, colonial and republican, helped Aube become Minister of the Navy in 1886–1887. Unfortunately, when his naval ideas were tested in large-scale maneuvers, they led to setbacks that cast a shadow over his final years. Before his death in 1890, he made clear that he did not want a state funeral.

2. Colonial Policy According to Aube

In his writings, Aube portrayed colonial policy as both a vital necessity and a way to reconcile the French after decades of civil conflict, stretching from the 1789 Revolution to the Paris Commune of 1871. The latter particularly traumatized Aube's generation, which made him wary of what he called "the experiments in high political and social metaphysics launched in 1789."[4] He criticized the French Revolution for its radical anti-Catholicism –despite his connections to anticlerical political figures – and its reckless belligerence, which left France weakened and isolated after 23 years of war (1792–1815). The same was true of the Second Empire, whose collapse in 1870 led to the loss of Alsace-Lorraine and a social crisis that culminated in the horrors of 1871: on the one hand, the execution of hostages and the burning of Paris by the Communards; on the other hand, the brutal repression by the Versailles government.

To emerge from this long decline and reconcile Catholic and Republican France, Aube advocated for a moderate republic based on "the advent of justice and liberty–that is, progressive development within order."[5] But order, he argued, required agreement between capital and labor, and such an agreement, under current conditions, required an ambitious colonial policy:

> "Labor is a capital –the worker's capital. […] Capital is accumulated labor. Labor and capital are therefore identical, or at least have a common origin. […] These interests are interdependent. […] The worker lives from his capital: labor. Who ensures him employment? Capital –without which no

[3] For the various aspects of this career, see Admiral Aube's papers held at the National Maritime Museum in Rochefort.
[4] AUBE, R., *À terre et à bord, notes d'un marin*. Paris-Nancy, 1884, p. 33.
[5] Ibid., p. 70.

industry is possible– but only on the condition that industrial products find profitable markets across the world. […] But by the force of things, by this now undisputed law – the law of humanity's forward march, *the struggle for life*, the battle for survival among individuals, peoples, and races alike – these markets are rapidly overcrowded. Supply exceeds demand. Then everything halts, or at least stagnates. Labor and capital, once allies, become antagonists, and the labor question, inflamed by misery and hunger, driven by ignorance and utopianism, becomes a social question, solvable only by the advent of absolute justice in societies sadly bound to the relative and contingent. This is the French solution."

"Other nations had found a different, more practical solution –though only relative, it met the needs of the moment. Markets open to human industry are overcrowded, production halts, and misery grows darker and more threatening. So, we must create and invent new markets : then production will resume, and the threat of misery will be lifted. That is what England is doing. That is what the United States of America is doing. And what are these new markets? They are the colonies with which England covers and transforms the world; they are the territories […] that the great American Republic conquers each year through peaceful expansion across the vast solitudes of the Far West." [6]

It is very revealing that Aube used the English phrase *"struggle for life"* – a sign of Darwin and Spencer's influence. To summarize his thought: class struggle pits two complementary forces against each other. Trying to eliminate class struggle through egalitarian revolution, as the French idealists sought, would also destroy this complementarity and thus be a bad solution : besides, past attempts led to the Terror of 1793–1794 and the Commune of 1871! Instead, colonial expansion creates new markets, ensures full employment, raises workers' living standards, and defuses revolutionary impulses. True, colonial rivalry could lead to foreign wars – but this was preferable to civil war.

Thus, for Aube, colonialism was a way to reconcile the working class with the rest of French society. But France was divided not only socially, but also religiously – between a Catholic-aligned right and an anticlerical left inheriting the Enlightenment. Here, too, colonialism could serve as common ground, particularly in Africa, where it was tied to the fight against slavery – a cause supported by both Catholics and republicans. Aube saw this convergence as no coincidence. Beneath political rivalries and ideological clashes, he perceived a shared spiritual heritage:

"The brotherhood of all human beings, of all human races, is the idea Jesus preached to his humble disciples in Galilee; it is the idea Christ bequeathed to the world from Golgotha. The world received it and never let it go. It is true; it is immortal. Thus, when Christian nations, denying the Gospel, accepted once again the shame and crimes of slavery and slid back into the ancient barbarism from which the Gospel had freed them, the immortal idea lived on. It took a new form, a new name, and under these, continued its work of salvation and redemption. It triumphed again, through conquests less outwardly brilliant perhaps, but more solid and, in truth, more glorious than those of the last two centuries." [7]

In other words, the Gospel's message – betrayed by classical, slave-based colonialism – resurfaced in the "philosophical movement of the 18th century," which, whether knowingly or not, had continued the interrupted religious movement [8]. This gave rise to a 19th-century colonialism that no longer aimed to enslave, but rather to liberate Africa from slavery.

Of course, modern critical historiography might doubt Aube's sincerity: was his anti-slavery stance just a cover for colonialism? But in his case, this seems unlikely. His private papers show a genuine concern for a spiritualist morality transcending the divide between Church and Enlightenment. He had developed a true mystique of the brotherhood of peoples, like his mentor Faidherbe, who had such a passion for Senegal that he took a local wife and had a son who later became a French army officer. Aube, for his part, developed a deep friendship with Tahar Bengaribe – an Arab or possibly Tuareg – whose bronze bust (by orientalist sculptor Émile Guillemin) was gifted to him in 1886.

To better highlight the uniqueness of French colonization during the 1880s (a time of mounting colonial tensions between London and Paris), Aube contrasted it with British colonization. The latter, he claimed, was driven by greed and relied mostly on violence. He cited Sir Charles Dilke, an imperialist British writer, who said that "the Anglo-Saxon race is the only extirpating race" – as the Native Americans had learned to their cost. By contrast, Aube said, "We did not exterminate the savages of Canada, nor the Arabs, nor the Kabyles of Algeria. They continue to grow steadily." More than that, he added – drawing from his own colonial experience – peoples colonized by France did not hesitate to fight under her flag:

« We affirm, with all those who lived among them, especially those who led them into battle, that the Wolofs of Senegal, the Annamites of French Cochinchina, the Tonkinese of French Tonkin, and finally the Kabyles and Arabs of French Algeria shed their blood for their new homeland, for France, with the purest devotion. […] Is it only our ability to assimilate that transforms them in this way? Perhaps; but where does this superior gift come from, and what is this mysterious force, characteristic of our national genius, if not the force of justice and law, of which we are often unconscious apostles, whose worship has been embodied in our homeland, and has created in each of us an invisible conscience – a mysterious yet truly great force – revealed in the peaceful conquest of these vast regions of equatorial

6 Ibid., p. 66-68.
7 Ibid., p. 78.
8 Ibid., p. 79.

Africa, where Brazza[9] and his peers have accomplished their marvelous epic thanks to it and to it alone? »[10]

This has long been a cliché of French political discourse, one that especially thrived during the Revolution and the Empire, though it could already be heard at the end of the Ancien Régime during the American War of Independence. From that moment, British and French colonization were destined to clash – as evidenced in 1882 by England's takeover of Egypt, a land of French influence since Bonaparte's famous expedition (1798–1799), Champollion's deciphering of the hieroglyphs (1822), and the construction of the Suez Canal by Ferdinand de Lesseps (1859–1869). Given this context, how can the security of the French empire be ensured? This is the third and final point of my presentation.

3. Defending the Empire

Defending a colonial domain that stretches from the Antilles and Guyana to Indochina via North Africa, sub-Saharan Africa, the French Somali Coast, and Madagascar is in itself a formidable task. It is made all the more difficult by the fact that, in the aftermath of the 1870–1871 defeat, France can dedicate only a small part of its military budget to the navy and overseas territories – the majority being consumed by the need to rebuild a powerful land army and to fortify the new Franco-German border created by the Treaty of Frankfurt. Aube understands this constraint all the more clearly because he fought on land in 1870–1871, as we have seen.

By contrast, the United Kingdom, France's main rival in the colonial race, is spared the need for large land forces by its insular position. It can therefore devote the bulk of its defense budget to the Royal Navy, which is indeed the world's premier fighting fleet. Hence, the challenge is to devise a colonial defense strategy that is both cost-effective and efficient. Two scenarios present themselves: either a land attack on a French colony from a neighboring British one, where the enemy would mainly deploy indigenous troops, or an attack by a British fleet transporting an expeditionary corps. Each scenario requires a different response.

„For the defense of our continental overseas provinces against an attack by a neighboring nation of the same race, the solution lies in an indigenous army heavily supervised by European officers. This principle has, in fact, been put into practice by all major colonial powers: the Spaniards in the Philippines, the Dutch in Batavia and their Malay possessions, and most extensively, the British in India. These armies have sufficed not only for defense but also for expanding these colonies. The British conquest of India is the most striking demonstration of this truth."[11]

On this point, the French have a real asset: the enlistment of Annamite riflemen by Brière de L'Isle and of Senegalese riflemen by Faidherbe has demonstrated "their complete assimilation into the warrior France. "[12] By contrast, Aube doubts that the inhabitants of British colonies would accept to sacrifice themselves in "a purely English war against a European naval power," as the selfishness their metropolis has always shown toward them offers no such incentive[13].

In the second scenario, however, Aube does not rely on indigenous troops, as he doubts they could stand up to European forces. He does not elaborate on the reasons, but they are easy to imagine: designed primarily for counterinsurgency operations, these troops lack the equipment, training, and discipline required for high-intensity warfare. In any case, he believes an invasion of French colonies by forces from Europe is unlikely, because "in the current state of naval affairs, transporting an expeditionary force is a militarily impossible operation; any such attempt would end in disaster."[14] Indeed, the troop transport convoy would be an easy prey for the famous torpedo boats on which Aube bases his entire naval doctrine.

These tiny vessels, which appeared in the late 1860 s, have a dual advantage over large warships: they are both highly stealthy and very economical. Since the 1870s, Aube has extolled their virtues. Then, in the mid-1880s, he became enthusiastic about long-range torpedo boats, which he believed would cease to be mere coastal guards and instead become units capable of operating far out in the ocean. Against these ships, a convoy transporting troops would stand no chance, as it would be limited to the speed of its slowest merchant vessels – about 8 knots (roughly 15 km/h). By contrast:

"The speed of autonomous torpedo boats exceeds 20 knots [37 km/h]. This speed – and their invisibility – give them irresistible power; finally, their low cost allows for their numbers to be increased indefinitely, and numbers give them ubiquity. Under these new conditions, one sees how immense the difficulties become in conducting an operation such as transporting a sufficiently large force to conquer a distant colony."[15]

But Aube doesn't stop at imagining the defense of a single colony against a naval invasion: he also considers the possibility of a total war between Paris and London stemming from colonial rivalries. In that case, autonomous torpedo boats would play a key role by attacking British commerce on all the world's seas, relying on a network of naval bases Aube seeks to establish in French colonies. From the Antilles, they would strike the routes between the United Kingdom and the Americas; from Bizerte, Obock, and Madagascar, they would intercept the route to India; from Dakar and Libreville, they would cut the Cape of Good

[9] Pierre Savorgnan de Brazza (1852–1905), a French officer of Italian origin, explored the Congo and founded Brazzaville there in 1880.
[10] AUBE, R., "Défense nationale, défense des colonies." In: MAGER, H. (ed.), *Atlas Colonial.* Paris, 1885, p. 3.
[11] Ibid., p. 6.
[12] Id.
[13] Ibid. p. 10.
[14] Ibid., p. 6.
[15] Ibid., p. 7.

Hope route; and from Saigon, they would disrupt communication between London and its Far Eastern trading posts.

These attacks would pose a far greater danger to the United Kingdom than the privateers of the sailing era, because British maritime trade in the 17th and 18th centuries was mostly about luxury goods. Since the Industrial Revolution, however, Britain's economy relies heavily on the export of manufactured products and the import of raw materials essential for their production (e.g., cotton for British spinning mills), as well as food supplies needed to feed the working masses (Canadian wheat, Argentine beef, etc.). In short, if the Merchant Navy is devastated by French torpedo boats, unemployment and famine will ravage British society – or so Aube believes.

This strategy of total war would mark a major shift in the laws of naval warfare, since operations against commerce had previously aimed at capturing, not sinking, enemy merchant ships. To capture a merchant vessel, one would send a catch crew aboard to bring it to a safe port. But the torpedo boat lacks sufficient officers and sailors to assign such a crew to every merchant ship it encounters. It would thus be forced to sink them – an outcome Aube contemplates without scruple, not only when the target is a freighter, but even when it is a liner:

> "An autonomous torpedo boat – two officers, twelve crew – spots one of these liners, carrying a cargo richer than the richest Spanish galleons; its crew and passengers number several hundred. Should the torpedo boat signal the liner's captain that it is there, watching him, able to sink him, and thus take him, his crew, and his passengers prisoner, asking them to surrender and head to the nearest French port? At such a declaration – foolish as the chivalrous 'After you, gentlemen of England' at Fontenoy[16] – the liner's captain would answer with a well-aimed shell, sinking the torpedo boat and its gallant captain, then continue calmly on his way."
>
> "Therefore, the torpedo boat will follow from afar, invisible, and at nightfall, silently and calmly, will send the liner, its cargo, crew, and passengers to the depths. With his soul not only at peace but fully satisfied, the torpedo boat captain will resume his patrol. All the sensitive souls inherited from the 18th century may lament. All peace congresses may hold their humanitarian assemblies. Diplomats may draft new codes of war. But the very fact that war breaks out between two naval nations, and because just as the lion is lion to tear its defenseless prey, the torpedo boat is torpedo boat to torpedo defenseless enemy ships, every night will witness such atrocities in every corner of the ocean. Others may protest; we see in them the supreme sanction of that higher law of progress in which we have ardent faith–whose final outcome will be the abolition of war."[17]

In essence, Aube proposes a shift from a predatory logic to a fully embraced terrorist logic. He justifies this with three arguments: first, "everything is legitimate against the enemy in a struggle for existence – it is a scientific law"[18] (echoing *struggle for life*); second, England must be defeated, since it has never "cared about justice"[19]; and finally, the fear of total war will have a deterrent effect, thus pushing nations toward establishing perpetual peace, as his earlier conclusion implies.

In reality, Aube is deluded in believing torpedo boats could operate on the high seas. Likely, this misjudgment stems from his colonial experience, where small units operating in coastal or riverine environments achieved easy victories against poorly equipped adversaries. The major naval exercises he conducted in 1886, during his tenure at the Ministry of the Navy, would later prove that torpedo boats lacked the range and endurance he imagined. But he would then pin his hopes on submarines – which, in fact, waged terrorist warfare against British commerce, dealing heavy blows in both World Wars (1914–1918 and 1939–1945). In this sense, Aube was indeed a prophet of the total wars of the 20th century.

4. Conclusion

Aube's life illustrates the link between the democratization of European societies, colonial conquest, and social mobility. The establishment of merit-based education enabled him to become an officer, distinguish himself in the colonies, and rise through the ranks. But he did not merely participate in imperialism: he also sought to theorize it using the concept of *struggle for life*. In his eyes, overseas expansion ensures civil peace by fueling economic development that can defuse class struggle – *i.e.*, the internal *struggle for life*. It also serves to transcend the political divide between the two Frances – Catholic and Republican – by offering a unifying ideal to which Aube seems to have firmly subscribed: the abolition of slavery. Thus, the colonization Aube envisioned is a comprehensive process – political, legal, economic, and cultural, to borrow the categories proposed by the organizers of the *Age of Empires* colloquium.

But the *struggle for life* will persist among nations engaged in the colonial race, especially between France and the United Kingdom. As the French navy lacks the means to build as many battleships as its rival, Aube advocates for an asymmetric war strategy, a naval guerrilla war waged by small vessels that avoid contact with the Royal Navy and focus instead on commercial targets. In doing so, Aube exemplifies a classic illusion among colonial strategists : extrapolating the methods of "small colonial wars" to "great wars" between developed powers, without recognizing the fundamental differences between the two.

Nevertheless, his strategic thinking did foreshadow the unrestricted submarine warfare of the two world wars, which once again brought about a complete break – political, legal, economic, and cultural – in naval warfare. The violence that colonization was supposed to export from Europe returned like a boomerang via colonial rivalries, which may not have been the immediate cause of the two world wars, but certainly helped pave the way.

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[16] A famous land battle between French and British in 1745, at the beginning of which a French officer invited the enemy to fire first.
[17] AUBE R., "Défense nationale, défense des colonies", op. cit., p. 12.
[18] Ibid., p. 11.
[19] AUBE, R., *À terre et à bord,* op. cit., pp. 56–57.

Großmacht zwischen Zerfall und Umbruch: Österreich 1848

(Great Empire between Decay and Upheaval: Austria 1848)

*Wilhelm Brauneder**

Abstract

As a result of the revolutions of 1848, numerous new constitutions were promulgated, particularly in Central Europe. The Swiss Confederation transformed from a loose confederation of states into a republican federal state modeled on the United States of America. Similarly, the German Confederation, as a confederation, was to be replaced by the „German Empire" as a federal state, but this ultimately failed. Individual German states, such as Bavaria and Hesse-Kassel, replaced their early constitutional constitutions with highly constitutional monarchical constitutions. Prussia received its first constitutional constitution. France also underwent a transformation: the monarchy was replaced by a republic.

The revolutions in Austria and Hungary had a very different effect: Here, the issue was not just constitutional changes, but rather the very existence of the entire state, which threatened to disintegrate into individual parts, and especially the statehood of Hungary.

Keywords: *Revolutions of 1848; German Confederation; Modernization plans; Constitutional development in Austria; Democratic principle; municipal constitution; state constitution; Personal union; Dualism Austria-Hungary.*

Allgemeines

Zufolge der Revolutionen von 1848 ergingen vor allem in Mitteleuropa zahlreiche neue Verfassungen. Die Schweizer Eidgenossenschaft verwandelte sich von einem lockeren Staatenbund in einen republikanischen Bundesstaat, nach dem Vorbild der Vereinigten Staaten von Amerika. In ähnlicher Weise sollte an die Stelle des Deutschen Bundes als Staatenbund das „Deutsche Reich" als Bundesstaat treten, was allerdings letztlich doch scheiterte. Einzelne deutsche Staaten ersetzten ihre frühkonstitutionellen durch hochkonstitutionelle monarchische Verfassungen wie beispielsweise Bayern und Hessen-Kassel. Preußen erhielt überhaupt erstmals eine konstitutionelle Verfassung. Auch Frankreich wandelte sich: an die Stelle der Monarchie trat die Republik.

Ganz anders wirkten die Revolutionen in Österreich mit Ungarn: Hier ging es nicht nur um Verfassungsänderungen, vielmehr um die Existenz des Gesamtstaates, denn er drohte in einzelne Teile zu verfallen, besonders auch um die Staatlichkeit Ungarns.

1. Die Situation vor 1848

Die Reform der Verfassungslage war in Österreich schon vor 1848 ein immer wieder diskutiertes Thema gewesen [1]. Der Deutsche Bund von 1815 hatte vorgeschrieben, seine Mitgliedstaaten müßten „landständische Verfassungen" einführen. Dem kam auch Österreich nach [2], verstand dies aber nicht im konstitutionellen parlamentarischen, sondern im altständischen Sinn mit der Gliederung und der Beschränkung auf eine Vertretung der Prälaten, des Adel, der Städte und nur allenfalls der Landgemeinden. Solche „Ständischen Verfassungen" mit einem Landtag begann es vorerst nur in einzelnen Ländern in Kraft zu setzten wie etwa in Tirol, aber auch in dem nicht zum Deutschen Bund gehörigen Galizien, beziehungsweise reaktivierte die altständischen Verfassungen wie in Österreich unter der Enns (Niederösterreich). In Ungarn und Siebenbürgen dauerten die bisherigen Landtage fort. Bald aber stockte die Entwicklung. Manche Länder wie etwa Salzburg erhielten keinen Landtag und die Gesamtmonarchie schon gar keine gemeinsame Vertretung. Jedoch gab es Modernisierungspläne [3]. So schlug selbst der Staatsrat vor, den Landtag von Krain um neue Ständevertreter der Bauern, der nichtadeligen Grundbesitzer und der Großindustrie zu erweitern. In Österreich unter der Enns suchte der Landtag seine Städtekurie als Vertretung des „Vierten Standes", also der Bürger – nach Prälaten, hohem Adel und niederem Adel – zu beleben. Pläne zu einer gesamtstaatlichen Verfassungsstruktur lagen sogar von Staatskanzler Metternich vor wie

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1 Im Detail BRAUNEDER, W., Die Verfassungsentwicklung in Österreich. In: RUMPLER, H. – URBANITSCH, P. (Hg.), *Die Habsburgermonarchie 1848–1918, Bd. VII/1*. Wien, 2000, S.71 ff.

2 BRAUNEDER, W., *Österreichische Verfassungsgeschichte*, 11. Aufl., 2009, S.101 f.

3 ENGEL-JÁNOSI, F., Die Theorie vom Staat im deutschen Österreich 1815–1848. In: *Zs. f. öffentliches Recht* 2, 1921, S. 360 ff.; BRAUNEDER, wie Fn. 1, S. 78 ff.

unter anderem 1817 zur Einführung von Reichsständen, auch mehrmals von Erzherzog Rainer. Im Wesentlichen waren alle diese und andere Vorschläge nicht konstitutionell-parlamentarischen, sondern ständischen Ideen verpflichtet. Zu Anfang 1848 enthielt die Zeitschrift „Die Grenzboten" einen besonders ausführlichen Verfassungsvorschlag für die Gesamtmonarchie: Die Landtage und eine von ihnen beschickte „Reichsvertretung" sollten aus den Kurien Großgrundbesitz, sonstiger Grundbesitz, „Kapitalisten", „geistige Capacitäten" bestehen, somit aus neuen Ständen als deren Interessenvertretung, allerdings nur in beratenden Funktionen. Als weitere Neuerungen wurden ein Grundrechtskatalog, Ministerverantwortung und Amtshaftung vorgeschlagen. Dies zielte aber doch auch nur auf eine neuständisch beschränkte, keine konstitutionelle Monarchie ab!

Seit der Proklamation des Römisch-deutschen Kaisers Franz II. als „Kaiser von Österreich" 1804 – als solcher nun Franz I. - bildete die habsburgische Gesamtmonarchie das „Kaisertum Österreich" unter bewußtem Einschluß Ungarns. Zeitgenössisch wurde das Verfassungssystem Österreichs etwa 1822 wie folgt charakterisiert: „In Ungarn und Siebenbürgen eingeschränkte, in den übrigen Staaten aber, deren Landstände keinen Einfluß auf Gesetzgebung und Regierung haben, uneingeschränkte Monarchie"[4] - also absolute Monarchie in den nichtungarischen Ländern.

Kenntnisse von der oft fortschrittlicheren Situation[5] in anderen Staaten besaß man in Österreich sehr wohl. Vorlesungen an der Rechtswissenschaften Fakultät der Universität Wien extemporierten über den Lehrplan hinaus über ausländische Verfassungen, dazu gab es Speziallehrveranstaltungen, weiters seit 1847/48 auch rechtshistorische Vorlesungen. Aktuell wurde beispielsweise die Annexion des Freistaates Krakau durch Österreich 1846 als „Mordfall" abgehandelt. Nicht nur nach den vorgeschriebenen Lehrbüchern wurde unterrichtet und studiert, sondern insbesondere nach dem „Staats-Lexikon" von Rotteck und Welcker, das allgemein als „Verfassungsbibel der Liberalen" galt. Hier fand man Informationen etwa unter folgenden Stichworten: Constitution, Demokratisches Prinzip, Gemeindeverfassung, Menschenrechte, Republik, Staatsverfassung, aber auch zur Verfassungssituation in konstitutionellen Staaten wie unter anderem in Baden und in Bayern, auch in England, in Frankreich, in Nordamerika und sogar die Verfassung der noch selbständigen Republik Texas war abgedruckt. Besucher Wiens fanden erwähnenswert, die Studenten „thäten nichts wie Zeitungen lesen, im *Staatslexikon* wühlen", sahen dieses wie ein „Orakel" in Wiener Haushalten aufliegen, obwohl es sehr teuer war. Jedenfalls stand weitere Literatur über ausländische Verfassungszustände, teils sogar mit Zensur belegt, den Mitgliedern von Lesevereinen zur Verfügung. Dies war in Wien besonders im Juridisch-politischen Leseverein der Fall, dem alle führenden Juristen und weitere Wissenschafter angehörten. Vorträge berichteten hier über Parlamentsbesuche in London und in Paris wie etwa der spätere Minister Alexander Bach. Von hier nahm auch die Historische Rechtsschule in Österreich um 1845 durch Emil Franz Rössler ihren Anfang mit der Germanistik und nach 1850 durch insbesondere Josef Unger die romanistische Pandektistik[6]. Zahlreiche Mitglieder des Lesevereins hatten am Revolutionsgeschehen von 1848 sogar in führender Stellung Anteil. Das Geistesleben Österreichs schloß insgesamt keineswegs eine Art chinesische Mauer vom Ausland ab[7]. Zensur bedeutete nicht Verbot von Literatur, sondern deren Zuteilen an bestimmte Bildungsschichten und Institutionen. Das geistige Potential von Trägern neuer Verfassungsideen war also schon vor 1848 reichlich vorhanden. Die kritischen Stimmen auch in Denkschriften und Broschüren mehrten sich jedenfalls zunehmend ab 1840. Der Dichter Eduard Bauernfeld sah in ihnen für Österreich die „Anzeichen eines herandrohenden Sturmes". Umfassender hielt knapp vor 1848 die Zeitung „Beobachter aus der östlichen Schweiz" fest, daß „selbst das blödeste [= einfachste] Auge einzusehen beginnt: …Deutschland ist am Vorabend einer Revolution"[8].

2. Vorrevolutionäre Verfassungsinitiative, revolutionäre Veränderung

Der Entschluß in Österreich eine Verfassungsänderung einzuleiten fiel noch vor dem Ausbruch der Revolution in Wien[9]. Nach Vorarbeiten ordnete am 12. März 1848 ein „Allerhöchstes Handschreiben" Kaiser Ferdinands an, es seien aus allen Provinzen aufgrund ihrer „unverändert gebliebenen Verfassungsurkunden" nach Wien „ständische Mitglieder" einzuberufen. Dies bedeutete die Einsetzung eines General- oder Ausschußlandtags aus den bisherigen – altständischen – Landtagen. Dies stand nicht nur im Einklang mit der historischen Entwicklung, denn derartige General- und Ausschußlandtage hatte es bereits im 16. und 17. Jahrhundert gegeben, es entsprach auch der erwähnten jüngsten Errichtung der Landtage etwa in Tirol und in Galizien und deckte sich mit den skizzierten Plänen und Forderungen der Jahre vor 1848. Ganz in diesem Sinn ordnete die Staatskonferenz am 14. März 1848 an, am 3. Juli 1848 einen Ausschußlandtag nach Wien einzuberufen zum Zwecke des „Beirathes" in „legislativen und administrativen Fragen". Damit stand die Staatsleitung noch ganz auf dem Boden des bisherigen ständischen Verfassungssystems; das Wort „Konstitution" wurde denn auch bewußt vermieden.

Mittlerweile war aber am 13. März die Revolution in Wien ausgebrochen. Auslösend war der Umstand, daß die Rede von Ludwig Kossuth vor dem ungarischen Landtag, der in der Nähe Wiens in Preßburg/Pozsony tagte, verlesen wurde, und zwar im Hof des Landhauses zu Wien, wo sich der niederösterreichische Landtag versammelte. In Preßburg hatte eben der ungarische Landtag den Erlaß einer konstitutionellen Verfassung für Un-

4 GALETTI, J. G.A., *Allgemeine Weltkunde*, 5. Aufl., 1822, S.137.
5 Zum Folgenden u. a. BRAUNEDER, W., *Leseverein und Rechtskultur*, 1992, S.52 ff.
6 BRAUNEDER, W., *Europäische Privatrechtsgeschichte*, 2014, S.127 ff., 137 ff.
7 So die mittlerweile überholte Ansicht u. a. bei OGRIS, W., Die historische Rechtsschule der österreichischen Zivilistik. In: *Festschrift Hans Lentze*, 1969, S. 59 ff.
8 BRAUNEDER, W., wie Fn. 5, S. 48; zur Situation 1848: ebda S.161 ff.
9 BRAUNEDER, W., wie Fn. 1, S. 84 ff.

garn beschlossen. Vielfach wurde nun auch in Wien der Ruf nach einer „Konstitution", einer „Konstitution des Vaterlandes" erhoben. Am 15. März erschien der Palatin Erzherzog Stephan in der Staatskonferenz zu Wien, berichtete von dem Beschluß in Preßburg und ließ den Entwurf eines Manifestes verfassen, der mit den Worten begann „Um die übrigen Länder der Monarchie mit dem konstitutionellen Ungarn [!] in Einklang zu bringen". Tatsächlich war die konstitutionelle Entwicklung in Österreich von Ungarn ausgegangen.

Nun erfolgte auch offiziell für das nichtungarische Österreich eine entscheidende Kehrtwendung. Dem Entwurf des kaiserlichen Manifestes, mit dem der angekündigte Ausschußlandtag einberufen werden sollte, gab eine leichte Modifikation des ursprünglichen Textes einen neuen Sinn: Eingefügt wurde das Wort „Constitution" sowie die fortschrittlichere Wendung „Abgeordnete aller Provinzialstände" und der auffallende Zusatz „mit verstärkter Vertretung des Bürgerstandes"[10]. Damit versprach der Text ganz anders als vorgesehen den Erlaß der Verfassung einer konstitutionellen Monarchie, an dem die Landtage über den bereits angekündigten Ausschußlandtag mitwirken sollten. Euphorisch sprach man bereits von der „Verleihung der Konstitution" wie sogar die Provinzial-Gesetzsammlungen. Als erster Schritt in Vorgriff auf die konstitutionelle Regierungsform erfolgte am 17. März 1848 die Einsetzung eines verantwortlichen Ministerrates durch den Kaiser. Allerdings fehlte zur verfassungsmäßigen Wahrnehmung dieser Verantwortlichkeit noch das Parlament.

Am 18. März 1848 wurden aufgrund eines Beschlusses vom 16. März die nichtungarischen Landtage einberufen – die Ungarns und Siebenbürgens tagten bereits - und traten sogleich zusammen. Am 28. März lud der Landmarschall von Österreich unter der Enns (Niederösterreich) Vertreter einiger Landtage nach Wien ein, die sich am 10. April als „Ständischer Zentralausschuß" konstituierten[11]. Er entsprach allerdings nicht dem angekündigten Ausschußlandtag, da er nicht von allen Ländern beschickt wurde. Beispielsweise fehlten Vertreter aus Ungarn, Böhmen und Galizien, die Niederösterreichs kamen zu einem Drittel vom Wiener Bürgerausschuß. Insgesamt standen den altständischen Mitgliedern ebenso viele „bürgerliche" gegenüber. Das gab dem Zentralausschuß den Charakter einer neuständischen Vertretung. Ihm kam, da weiterhin die gesetzgebende Gewalt beim Monarchen lag, nur beratende Funktion zu.

3. Der drohende Zerfall des Gesamtstaates

Das Fehlen einiger Ländern im Zentralausschuß fällt bereits auf. Allerdings stand das Zusammenwirken von Ministerrat und Zentralausschuß konstitutionellem Muster nicht fern, zumal dieser ein parlamentarisches Selbstverständnis entwickelte. Dies ergab sich aus seiner zwar provisorischen, aber parlamentsähnlichen Zusammensetzung und aus seiner ebensolchen Tätigkeit. Seine Mitglieder verstanden sich als „Abgeordnete" wie sie dann in ihrem Verfassungsentwurf auch die gewählten des vorgesehenen Parlaments nannten. Dieser stammt von Carl Ritter von Kleyle, einem Mitglied der niederösterreichischen Landstände, der übrigens auch dem Juridisch-politischen Leseverein angehörte[12]. Seine beiden Teile, jeweils „Referat" genannt, behandeln in nichtnormativer Sprache die „Constitution (des Reiches)" sowie die „Reform der Provinzial-Verfassung". Nur kurz sei erwähnt, daß erstere ein für damals modernes Zwei-Kammern-Parlament vorsah mit einer Kammer von geborenen und vom Kaiser ernannten Mitgliedern sowie einer weiteren, gewählt nach beschränktem Wahlrecht, ein Grundrechtskatalog fehlt. Anderes sah die „Provinzial-Verfassung" für die Landtage vor: Sie sollten neuständisch zusammengesetzt sein aus etwa Großgrundbesitz, Städten, Landgemeinden, Wissenschaft, jedoch keine Gesetzgebungsbefugnisse besitzen, sondern mit Verwaltungsaufgaben betraut sein, allenfalls mit dem Erlaß von Durchführungsverordnungen. Parallel dazu erstellte für den Ministerrat Innenminister Franz von Pillersdorf Verfassungsentwürfe. In einer ministeriell-zentralständischen Konferenz erfolgte am 13. April 1848 eine Koordination. So kam der Verfassungsentwurf nahezu auf einem konstitutionell-parlamentarischen Weg zustande. Nach weiteren Beratungen im Ministerrat trat mit kaiserlicher Sanktion die Verfassung am 25. April 1848 in Kraft[13].

Mittlerweile war aber, was den Gesamtstaat betrifft, Entscheidendes geschehen. In unterschiedlicher Weise wurde der Zusammenhalt einzelner seiner Teile fraglich. Dies betraf Ungarn, Böhmen allenfalls mit Mähren, Galizien und Lombardo-Venetien. Bereits Kleyles Verfassungsentwurf aus der ersten Aprilhälfte trug diesen Entwicklungen Rechnung[14]. Die „österreichische Monarchie" versteht er zwar ganz im umfassenden Sinne von 1804, ist aber für ihn nicht als ein Staat, sondern als ein lockerer „Staatsverband" zu organisieren. Sein zuvor skizzierter Verfassungsentwurf betrifft als „untheilbaren Kern" die „zum deutschen Bund gehörigen erbländischen Provinzen" samt Dalmatien. Dieser Kern bildet mit einem gemeinsamen Parlament „einen Staat und nicht Staatenbund". Die übrigen Teile sind mit diesem Staats-Kern nur in Personalunionen verbunden, so daß die „österreichische Monarchie" insgesamt eben einen „Staatenbund" bildet. Davon wird allerdings Lombardo-Venetien einem italienischen Staatenbund beitreten und Galizien in ferner Zukunft in einem polnischen Staat aufgehen. Da für Ungarn die konstitutionelle Regierungsform bevorstehe könne es in den geplanten Staats-Kern eintreten, da dieser eine ebensolche Verfassung erhalten solle.

Der auffallendste Zwiespalt zeigte sich dennoch beharrlich in Bezug auf Ungarn[15]. Am 11. April 1848 hatte Kaiser Ferdinand als König von Ungarn einunddreißig vom ungarischen Landtag beschlossene Gesetze sanktioniert, durch die Ungarn

[10] Ebda S. 85.
[11] HUGELMANN, K., Der ständische Zentralausschuß in Österreich im April 1848. In: *Jahrbuch für Landeskunde von Niederösterreich N.F.* 12, 1913, S.170 ff.
[12] Ebda S. 185, 194, 202, 207, 209.
[13] Zu ihr BRAUNEDER, W., wie Fn. 1, S.92 ff.
[14] Ebda S. 96.
[15] PÉTER, L., Die Verfassungsentwicklung in Ungarn. In: RUMPLER – URBANITSCH, wie Fn. 1, S.239 ff.

unter Einschluß von Siebenbürgen und Kroatien eine konstitutionelle Verfassung erhalten hatte. Mit eigener Regierung und eigenem Parlament konnte es sich als eigener Staat verstehen, der mit dem somit verkleinerten Österreich nur in Personalunion verbunden war. Die Regierung Lajos Batthyány begann sogleich die ungarische Staatsgewalt entsprechend auszubauen[16]. Die Regierung zu Wien stand allerdings nahezu stets auf dem Standpunkt, die ungarische Verfassung von 1848 sei als eine Landesverfassung zu werten und die ungarische Regierung als eine Landesregierung in Unterordnung unter den österreichischen Ministerrat. Dieser suchte einer „gänzlichen Trennung" Ungarns „von der übrigen Monarchie" entgegenzuwirken und sah sich in einer Formulierung von Innenminister Pillersdorf „nicht aufgefordert, die Funktionen aufzugeben, welche früher mit den verschiedenen Ministerien", gemeint die bisherigen zentralen Hofstellen, „verbunden waren, [und] beschloß, dieselben festzuhalten".

Dieselbe Haltung nahm der Ministerrat auch gegenüber den böhmischen Verfassungswünschen ein[17]. Auf diese hatte am 8. April 1848 ein kaiserliches Kabinettschreiben reagiert. Es machte eindeutig auch den künftigen Landtag Böhmens wie bisher lediglich für „Landesangelegenheiten" zuständig, stellte „Central-Behörden" „für das Königreich" Böhmen in Aussicht, faßte allenfalls die „Vereinigung der Länder Böhmen, Mähren und Schlesien unter einer Central-Verwaltung in Prag und unter einem gemeinschaftlichen Landtag" ins Auge. Es stellte jedoch dies alles unter den Vorbehalt des künftigen „Staats-Grund-Gesetzes", der „Konstitution" für den Gesamtstaat. Bereits der tschechische Historiker und Politiker Franz Palacky interpretierte dieses Kabinettschreiben sogleich als „Böhmische Charte", also in Anlehnung an die Charte Constitutionelle für Frankreich von 1830 oder die Charte Constitutionelle für Belgien von 1831 als Zusage einer Verfassung, wenn nicht überhaupt als eine solche für einen eigenen gesamtböhmischen Staat. Nicht nur der zitierte deutsche Wortlaut, sondern vor allem eine authentische Interpretation des Verfassers, des Innenministers Pillersdorf, vom 23. April 1848, also knapp vor Erlaß der Verfassung 1848, schuf Klarheit insbesondere mit den Feststellungen, der zugesagte Landtag könne keine „andere Bedeutung als die eines Provinzial-Landtages haben" und die „verantwortliche Zentralbehörde für Böhmen" würde nicht mit dem „Ministerium für die Gesamtmonarchie in Konflikt geraten". Übrigens sprach der ebenfalls authentische tschechische Text gar nicht von einer „Zentralbehörde", sondern einer „Höchsten Behörde" („nejwyssi ourady") für Böhmen.

Dieselbe Haltung wie gegenüber Böhmen nahm die Zentralregierung auch im Falle Galiziens ein[18]. Dessen Gouverneur, Franz Graf Stadion, teilte am 17. April 1848 nach Wien mit, daß es „unmöglich geworden sei, Galizien in seinen bisherigen Verhältnissen zur Monarchie zu erhalten", wofür er polenfreundliche Stimmungen innerhalb und außerhalb Galiziens verantwortlich machte. Pillersdorf vor allem wies ihn an, allenfalls sogar „exzeptionelle Maßnahmen" dagegen zu ergreifen. Die Abspaltung Galiziens sollte unbedingt vermieden werden.

Anders hingegen stellte sich die Situation hinsichtlich Lombardo-Venetiens dar[19]. Dies lag vor allem daran, daß hier nicht nur ein Bürgerkrieg zu bekämpfen war, sondern in diesen eine auswärtige Macht, nämlich Sardinien-Piemont, als Kriegsgegner Österreichs eingegriffen hatte. Der Abfall der Provinzen galt nahezu allenthalben als kaum zu verhindern, vor allem auch im Ausland, das diese Entwicklung zumindest moralisch unterstützte. Ministerpräsident und Außenminister Karl Ludwig von Fiquelmont ging jedenfalls von einem Verlust der Lombardei aus, sah aber seine „Wiedereroberung" als Aufgabe der Regierung an. Pillersdorf hingegen hielt sie definitiv für verloren, der Ministerrat sah auch Venetien als nicht haltbar an.

4. Das Ergebnis von 1848

Eine Umwandlung des Kaisertums Österreich in einen staatlichen Kern und in mit diesem in Personalunion verbundene Teile als Staatenbund, wie im April 1848 vom Ständischen Zentralausschuß als Tatsache für die Zukunft angenommen, hatte in dieser einschneidenden Weise doch nicht stattgefunden. Lombardo-Venetien galt jedenfalls im Augenblick als verloren, nicht aber Galizien und keineswegs Böhmen. Die österreichische Verfassung vom 25. April 1848[20] geht weiterhin von der Gesamtmonarchie „Österreich" im Sinne der Proklamation von 1804 aus (Artikel 1). Sie stellt aber fest, daß sie nur auf bestimmte, nämlich „auf folgende Länder des Kaiserreiches Anwendung" hat (Artikel 2), zu denen Ungarn und Lombardo-Venetien nicht aufgezählt werden. Im Gegensatz beispielsweise zur nachfolgenden Verfassung 1849 wird nicht gesagt, daß Österreich aus den aufgezählten Ländern „besteht". Anders als hier decken sich in der Verfassung 1848 das Staatsgebiet und der örtliche Geltungsbereich der Verfassung nicht: Dieser ist kleiner als jenes, die Verfassung gilt nur in einem Teil des Staates. Diese Situation wird sich fast genau einhundert Jahre später in Deutschland wiederholen. Die Verfassung der Bundesrepublik Deutschland und ebenso die der Deutschen Demokratischen Republik von 1949 verstehen „Deutschland" als Staat in den Grenzen des Deutschen Reiches von 1937, gelten aber jeweils nur in einem Teil davon. – In die österreichische Verfassung 1848 wird Galizien sehr wohl in die Geltung einbezogen, natürlich auch Böhmen, und zwar unterschiedslos wie die übrigen genannten Länder. Dies bedeutete allerdings nicht, daß die künftigen Landesverfassungen einander gleichen müßten. Die Verfassung enthielt für diese keine spezifischen Regelungen. Nicht in Kraft trat sie also in Lombardo-Venetien, und zwar hinsichtlich dessen ungewissen künftigen Schicksals, aber aktuell wegen des gegenwärtigen Ausnahmezustands zufolge von

[16] U. a. TÓTH, I.G., (Hg.), *Geschichte Ungarns*. Budapest 2005, S. 489 ff.
[17] URBAN, O., MALÍŘ, J., In: RUMPLER – URBANITSCH, wie Fn. 1, Bd. VII/2, S. 1991 ff.; BRAUNEDER, W., wie Fn. 1, S. 97 ff.; besonders HUGELMANN, K., Das kaiserliche Kabinettschreiben vom 8. April 1848 und das Ministerium Pillersdorff. In: *Jahrbuch für Landeskunde von Niederösterreich N.F.* 15 – 16, 1916 -1917, 492 ff., insbes. S. 499.
[18] GRODZISKI, St., In: RUMPLER – URBANITSCH, wie Fn. 17, S.2131 ff.; BRAUNEDER, W., wie Fn. 1, S.99.
[19] GOTTSMANN, A. – MALFER, S. wie Fn. 17, S.1593 ff.; BRAUNEDER, W., wie Fn. 1, S.100.
[20] Verfassungstexte 1848/49: BRAUNEDER, W., *Quellenbuch zur österreichischen Verfassungsgeschichte 1848–1955*. Wien, 2012, S. 1 ff.

Bürgerkrieg und Krieg in beiden Provinzen. Auch Ungarn blieb außerhalb des Geltungsbereichs der österreichischen Verfassung 1848, und zwar bewußt um eine Kollision mit der ungarischen Verfassung von 1848 zu vermeiden.

Aber die gegensätzlichen Auffassungen blieben[21]. Nach ungarischer Ansicht folgte aus den beiden Verfassungen von 1848 mit insbesondere jeweils einer eigenen Regierung und einem eigenen Parlament die Existenz zweier Staaten, Österreich und Ungarn, verbunden in Personalunion. Aus der Sicht Österreichs aber bestand das Kaisertum im Sinne von 1804 weiter fort, mit der österreichischen Verfassung von 1848 und einer ihr untergeordneten beziehungsweise ihr unterzuordnenden ungarischen Landesverfassung in noch nicht akkordiertem Verhältnis zueinander. Während die schließlich ausbrechenden kriegerischen Auseinandersetzungen sich nach ungarischer Auffassung als solche zwischen zwei kriegführenden Staaten darstellten, handelte es sich nach österreichischer um einen Bürgerkrieg zwischen der legalen österreichischen Staatsmacht und den ungarischen Rebellen. Die übrige Staatenwelt sah die ungarische Auffassung vielfach als eingetretene Realität an. Beispielsweise trafen die Vereinigten Staaten von Amerika sogleich 1848 Vorbereitungen um Ungarn als selbständigen Staat anzuerkennen[22]. Ähnliches geschah auch im Deutschen Bund im Zuge der Vorbereitungen, diesen aus einem Staatenbund in einen Bundesstaat als „Deutsches Reich" umzuwandeln[23]. In diesem Fall wäre in Staaten, die nur mit einem Teil dem Bundesgebiet angehörten, folgende Situation entstanden wie etwa in Österreich: Zu dessen Staatgewalt wäre im Bundesgebiet die sie einschränkende des Bundes getreten, also eine weitere Staatsgewalt, hingegen nicht in den anderen Gebieten. Damit hätte es im Kaisertum Österreich zweierlei, und zwar unterschiedliche Verfassungs- und Rechtsordnungen gegeben. Formell gab es diese Situation schon bisher insoferne als nicht alle Gebiete Cisleithaniens zum Deutschen Bund gehörten wie Teile des Guberniums Litorale/Küstenland mit insbesondere Triest – dieses somit eine Stadt des Deutschen Bundes -, dann besonders die Länder Galizien und Dalmatien. Bundesvorschriften wurden allerdings auch auf diese Gebiete Cisleithaniens erstreckt – nie allerdings auf Ungarn - und galten somit nicht nur in Bundesgebieten, doch waren dies eher wenige Vorschriften. Das aber war im Falle der zu erwartenden wesentlich stärkeren deutschen Reichsgewalt in Bezug auf die Gesamtmonarchie mit Ungarn für die Regierung zu Wien so schlechthin nicht vorstellbar. Trotz der im April 1848 unmittelbar bevorstehende Existenz zweier Verfassungen im Kaisertum Österreich lehnte die Wiener Regierung es am 21. April 1848 ab, ohne Sonderregelungen mit seinem Bundesgebiet am künftigen Bundesstaat „Deutschen Reich" teilzunehmen[24]. Genau am Tag des Inkrafttretens der österreichischen Verfassung am 25. April 1848, welche die durch Cisleithanien verlaufende Grenze des Deutschen Bundes völlig negierte, beschloß der Siebzehnerausschuß des Deutschen Bundes den „Entwurf des Deutschen Reichsgrundgesetzes" in dem Sinn, der später vom deutschen Verfassungsausschuß wie folgt formuliert wurde: „Kein Teil des deutschen Reiches darf mit nichtdeutschen Ländern zu einem Staat vereinigt sein" sondern nur in „einer reinen Personal-Union". Eben dies schien in Österreich mit Ungarn im Frühjahr 1848 für das Ausland und auch für Deutschland der Fall zu sein – und blieb es für dieses auch weiterhin.

Besonders augenfällig kamen die beiden unterschiedlichen Auffassungen über die Situation in der Habsburgermonarchie in nahezu symbolhafter Weise zum Ausdruck als im September 1848 eine Delegation des ungarischen Parlaments dem österreichischen Reichstag in Wien einen Besuch abstatten wollte[25]. Nach längerer Diskussion lehnte dieser ab jene zu empfangen. Es wäre dies der Anerkennung einer Gleichstellung der beiden Parlamente gleichgekommen wie von Ungarn gesehen, aber eben nicht vom österreichischen Reichstag akzeptiert. Dieser teilte vielmehr der ungarischen Delegation mit, man würde es sehr begrüßen, falls die ungarischen Abgeordneten in den – österreichischen – Reichstag als Kollegen eintreten und an der Seite der österreichischen Abgeordneten sitzen würden. Dies kam nicht von ungefähr. Der Gedanke der Ausdehnung der eben erlassenen österreichischen Verfassung 1848 auf andere, nämlich sogar nichtösterreichische Gebiete wurde gleich nach deren Erlaß wie ein Echo auf sie geäußert. Bereits am Tag danach, am 26. April 1848, schrieb die offizielle „Wiener Zeitung" zur Lage der rumänischen Fürstentümer Moldau und Walachei, man könne sich durch eine Übernahme der Verfassung 1848 „den Eintritt derselben in die große Völker-Familie des Kaiserstaates vorstellen", was auch späterhin geäußert wurde[26]. Da der „Kremsierer Verfassungsentwurf" des Reichstags von 1848/49 ebenso wie die österreichische Verfassung 1848 zwischen dem „Kaiserthum Österreich" im Sinne von 1804 einerseits (§ 1) und den Ländern, „für welche diese Constitution zu gelten hat" (§ 2) unterschied, nahm er den Gedanken der territorialen Verfassungserweiterung auf. Er enthielt daher eine Bestimmung[27] bezüglich der „Aufnahme eines neuen Landes in den Reichsverband, für welchen diese Constitution gilt" (§ 6). Gemeint war damit in erster Linie Ungarn. Die komplizierte Wendung „Reichsverband, für welchen diese Constitution gilt" war notwendig, da die Bezeichnung „Österreich" nicht dafür, also den kleineren im Entwurf noch vorgesehenen Geltungsbereich der künftigen Verfassung (§ 2), sondern wie bisher im Sinne von 1804 auch fernerhin gebraucht wurde (§ 1). Wie der Entwurf insgesamt blieb diese Konstruktion unrealisiert. Mit der Gesamtstaatsverfassung 1849 und dem Sieg in Ungarn behauptete sich in der nachfolgenden neoabsolutistischen Phase ab 1852 das Kaisertum Österreich nochmals im Sinne von 1804 bis es 1867 zum Dualismus Österreich-Ungarn kam.

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21 BRAUNEDER, W., wie Fn. 1, S.101 f.
22 DRIMMEL, H., *Die Antipoden*. Wien, 1984, 151; MOLTMANN, G., *Atlantische Blockpolitik im 19. Jahrhundert*, Düsseldorf ,1973, S. 342.
23 BRAUNEDER, W., wie Fn. 2, S.131 ff.; ders., wie Fn 5, S.204 ff.; ders., wie Fn. 1, S.102 ff.
24 BRAUNEDER, W., wie Fn. 1, S.103.
25 Das Folgende: Ebda S.101, 110, 115 f.
26 Ebda S.101.
27 Ebda S.111 ff.

Mirages and Illusions: The Prospects of Hungarian Imperial Ambitions during the Era of Dualism (1867–1918)

*Balázs Pálvölgyi**

Abstract

Although the Hungarian political elite recognized that it is the Austro-Hungarian Monarchy which provided the country with a position of great power, from the 1890 s onwards there was a noticeable increase in independent Hungarian expansionist efforts. Among the complex reasons for this were the results of the Hungarian state's modernization program, the economic development, and the emergence of a new elite of officials and politicians who had been socialised in the institutional system of Dualism, were au fait with the system, and were able to use it. The strengthening of Hungarian positions and the search for opportunities to assert the country's interests within the common institutional system of Austria-Hungary, a series of economic policy measures, efforts to gain ground economically, mainly in the south-east, and, to a certain extent and in certain points, the goal of creating a Hungarian nation state emerged as means of achieving expansionist goals.

Although the political elite could rightly feel that the country's room for manoeuvre, weight, and ability to assert its interests within the Monarchy had increased, giving rise to a certain optimism, this proved to be a kind of optical illusion. It is true that Hungary's clout within the Monarchy had increased, but the Austro-Hungarian Monarchy was steadily losing its importance compared to the other great powers, so the Hungarian elite could formulate its ambitious goals as a strengthening element of a weakening Empire.

Keywords: *Austria-Hungary (1867-1918); expansion; imperialism; nation-building.*

1. Introduction

The Hungarian political elite had been engaged in efforts to define the country's place and role within the Habsburg Empire long before the Compromise of 1867, while at the same time wishing to maintain the country's constitutional separation.[1] During the Dualist era, many believed that Hungary had a realistic chance of becoming the dominant power within the Monarchy – a great power capable of pursuing an expansionist policy, either independently or by leveraging the Monarchy's resources.

Throughout this period, efforts to secure the prerequisites for great-power status – or to achieve it directly – unfolded in several distinct phases and at multiple levels of governance. These efforts sometimes operated independently, sometimes overlapped, and often expressed themselves in a polyphony of voices, frequently with no small measure of dissonance. It is worth examining the development of three key areas that are closely tied to both the possibility and the framework for articulating Hungarian imperial ambitions. The existence of these areas – each in its own way – is both a precondition for and an expression of such aspirations. Among them, the institutional pillar – namely, the modernization of Hungary, the strengthening of its position within the Empire, and the use of the Monarchy's structures in accordance with Hungarian interests – was on the agenda from the moment of the Compromise. In contrast, more narrowly defined national policy initiatives only began to take clearer shape from the 1890s onward.

2. Internal modernisation programme and the Austro-Hungarian Monarchy as a "new" empire – the potential for expansion

After the Compromise of 1867, as was also perceived by contemporaries, it was necessary to clarify Hungary's position and room for manoeuvre within the evolving imperial framework. The governments that assumed office following the restoration of constitutionality were confronted with a multitude of challenges, ranging from the day-to-day administration of governance and the management of fiscal difficulties to the acceptance of the newly established dualist structure and the handling of concurrent economic, public health, and demographic crises. Consequently, explicit expansionist ambitions were largely absent during this period, and even the discourse surrounding the

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[1] ROMSICS, I., *A magyar birodalmi gondolat*. MTA Akadémiai Műhely 2002, p. 319-352; VARGA, B., A magyar birodalom koncepciói a hosszú 19. században. In: *Századok,* Vol.154, No. 6, 2020, p. 1187-1206.

formation and advancement of a greater Hungarian power appears to have receded into the background.[2]

Nevertheless, this was a formative era for future aspirations and actions – one in which foundational structures were established that would later prove indispensable for any reconfiguration of the power balance within the Monarchy.

This early phase of the Dual Monarchy, marked by systemic transformation, also represented the beginning of the construction of the modern Hungarian state. From 1867 onward, it became possible to implement a modernisation programme led by the Hungarian political elite, aiming to extend the authority of the modern state across the entirety of the national territory. This included the creation of a civil administration – comprising ministries, new regulation of municipalities – the integration of frontier military districts, the introduction of a modern tax system, and a series of initiatives to ensure fiscal sustainability.[3] This meant a path towards centralisation, i.e. the stages in the modernisation of public administration and government in the broader sense were set in motion towards centralisation, which for a long time provoked heated public debate.[4] By the 1880 s, however, the institutional foundations had largely been laid, and by the latter half of the decade, the most critical components were already established and operational.

During this period, the system of 1867 seemed to be developing and consolidating parallel with the Hungarian modernisation programme. It became increasingly evident that any transformation of Austria would be unfeasible without the consent of Budapest – particularly if such changes altered the structure of dualism and thereby affected Hungary's position within the Empire. In other words, it would not be possible to transform the Monarchy into a tri-centric one, nor would it be possible to implement a change in the relationship between the two halves of the Empire such as the annexation of Dalmatia to the Hungarian crown.[5]

The construction of dualism, however, concealed numerous uncertainties, arising both from unresolved details and from divergent conceptions of the 1867 system held by the Hungarian and Austrian political elites. While the Austrian approach maintained that the "common affairs" constituted the imperial level within the Austro-Hungarian Monarchy – implying that the unified empire, formally dissolved by the 1867 settlement, continued to exist through these common institutions – the Hungarian theoretical position differed markedly, if not contradicted this view. This fundamental divergence in principle, coupled with unresolved ambiguities in the internal relations of the empire, precipitated ongoing disputes and conflicts over the Monarchy's functioning until its eventual collapse in 1918.[6] It

[2] An exception to this was the question of Dalmatia's affiliation. Article 65 of the Croatian Act of Reconciliation included a claim for the annexation of Dalmatia to Croatia. This issue re-emerged in public debate at the outset of the period. – Some documents: Az uj „jeruzsálemi királyság." III. Magyar Polgár 1868. dec. 30. p. 650; Andrássy gróf és Oreskovics. A Hon 1871. aug. 26. p. 1; Kik osztják fel Magyarországot. A Hon 1872. márc. 17. p. 1; Dalmácia. Budapesti Hírlap 1889. aug. 7. p. 1-2; A dalmát tengerpart. Gazdasági Mérnök 1889. szept. 8. p. 421; A magyar Dalmácia. Pesti Napló 1898. feb. 2. p. 4; Dr. HAVASS, R., magyar Dalmácia. Pesti Napló 1898. feb. 13, p. 2; Dr. HAVASS, R., *Dalmáczia Magyarországhoz való vonatkozásaiban tekintettel Fiumére*. In: *Földrajzi Közlemények,* 1898. p. 52-78; Dr. HAVASS, R., *Dalmáczia visszacsatolása a Magyar Birodalomhoz*. Budapest, 1889; Dalmáczia. Magyarország 1900. ápr. 10. p. 1; A magyar imperium. Budapesti Hírlap 1901. feb. 24. p. 1-3; Barta Ödön - Képviselőházi Napló (hereafter KN) 1901. I. k. p. 196. (1901. nov. 25.); ROMSICS 2002; VARGA 2020, p. 1200-1202.

[3] LÓNYAY, M., Államköltségvetés 1868-ra. In: *Lónyay Menyhért nevezetesebb országgyűlési beszédei*. Pest, 1870. p. 158-199; MATLEKOVITS, S., *Magyarország államháztartásának története 1867-1893*. (1-2. k.) Budapest, 1894; SARLÓS, B., *Közigazgatás és hatalompolitika a dualizmus rendszerében*. Budapest, 1976; STIPTA, I., *A vármegyei szervezet átalakítása Tisza Kálmán miniszterelnöksége idején*. Szeged, 1995.

[4] STIPTA I., *Törekvések a vármegyék polgári átalakítására*. Budapest, 1995; PÉTERVÁRI, M., The History of Hungarian Civil Service from the Austro-Hungarian Compromise of 1867 to the First World War. In: *Journal on European History of Law,* Vol. 8, No.1, 2017, p. 116-120; PÉTERVÁRI, M., One Empire and Two Ways of Public Administration: The Second Level Administrative Division in Austria-Hungary. In: *Journal on European History of Law*, Vol. 8, No. 2, 2018, p. 133-139; BERTÉNYI, I., "Haza és haladás" – liberális nacionalizmus a reformkortól a 20. századig. In: *Modernizáció és nemzetállam-építés. Haza és/vagy haladás dilemmája a dualizmus kori Magyarországon*; CSIBI, N. – SCHWARCZWÖLDER, Á. (eds.) Pécs, 2018, p. 15-33; SZÉKELY, T., A közigazgatás átalakításának programja. Modernizáció és nemzetállam-építés a dualizmus korában. In: *Modernizáció és nemzetállam-építés.* 2018, p. 165-180. VARGA, N., Administrative Reforms in the Hungarian Municipalities after the Austro-Hungarian Compromise: The Introduction of the Office of Lord Lieutenant and the Applicable Rules in Hungary. In: *Journal on European History of Law,* Vol. 15, No. 2, 2024, p. 153-161; GOSZTONYI, G., Freedoms in the Hungarian April Laws of 1848. In: *Journal on European History of Law,* Vol. 15, No. 1, 2024, p. 138-142; DOMANICZKY, E., Historical Development of the Hungarian Regulation on Special Legal Order. In: *Journal on European History of Law,* Vol. 12, No. 1, 2021, p. 145-156; CSERVÁK, Cs. – FARKAS T. Gy., Development of the Nationality Law in Hungary. In: *Journal on European History of Law,* Vol.11, No. 1, 2020, p. 145-151.

[5] SOMOGYI, É., Az osztrák liberálisok és a dualizmus problémái az 1870-es évek második felében. In: *Történelmi Szemle*, Vol. 21, No. 1, 1978, p. 1-32; DIÓSZEGI, I., A délszláv kérdés és a Monarchia reformjának lehetőségei. In: *Kortárs,* Vol. 26, No. 10, 1982, p. 1621-1631; DIÓSZEGI, I., Az Osztrák-Magyar Monarchia föderatív átalakításának kísérlete és a nemzetközi politika. In: *Regio – Kisebbségi Szemle,* Vol. 6, No. 3, 1995, p. 135-180; DIÓSZEGI, I., *Bismarck és Andrássy. Magyarország a német hatalmi politikában a XIX. század második felében*. Budapest, 1998, p. 115-126; TEFNER Z., Beust, Hohenwart, Andrássy és a lengyelkérdés. In: *Valóság*, Vol. 47, No. 8, 2008, p. 37-62; CIEGER, A., *Lónyay Menyhért. Szerepek – programok – konfliktusok*. Budapest, 2008, p. 138-140; p. 285-286; SIMON, I., Cseh kiegyezési kísérlet a korabeli források alapján. *Levéltári Szemle*, Vol. 61, No. 1, 2011, p. 42-57; SOMOGYI, É., A dualizmus és a föderalizmus választóvonalán 1871 októberében. In: *Történelmi Szemle,* Vol. LII, No. 4, 2010, p. 559-569; GYÖRGY, L., Az 1871-es cseh államjogi reformkísérlet és a magyar politika. In: *Kelet-európai sorsfordulók. Tanulmányok a 80 éves Palotás Emil tiszteletére*. (JUHÁSZ József ed.) Budapest, 2016, p. 115-124.

[6] According to this, the relationship between Austria, i.e. the other countries and provinces of the sovereign, and Hungary is that of equal parties, and thus - in this construction - there can be no empire over Hungary, i.e. the common ministries administer only this common territory, and the common government, if its existence is accepted at all, cannot precede either the Hungarian or the Austrian government. – Pesti Napló 1869. jan. 23. p. 1; WERTHEIMER, E., *Gróf Andrássy Gyula élete és kora*. I. Budapest, 1910, p. 386; GALÁNTAI, J., Osztrák-magyar egyezkedés 1865-1867. In: *Századok*, Vol. 101, No. 6, 1967, p. 1265-1310; SOMOGYI, É., *Hagyomány és átalakulás. Állam és bürokrácia a dualista Habsburg Monarchiában*. Budapest, 2006, p. 112-118; JUDSON, P. M., L'Autriche-Hongrie était-elle un empire? In: *Annales. Histoire, Sciences Sociales*, Vol. 63, No. 3, May - Jun. 2008, p. 563-596; SZENTE, Z., *Kormányzás a dualizmus korában. A XIX. századi európai parlamentarizmus és Magyarország kormányformája a kiegyezés után 1867-1918*. Budapest, 2011, p. 82-98; SZABÓ, Sz., Magyarország nemzetközi jogalanyiságának kérdése az 1907. évi gazdasági kiegyezés kapcsán. In: *Jogtörténeti Szemle*, No. 1, 2012, p. 57-61; EGRY, G., Magyar birodalom? Regionális elitek, nacionalista politika, centrum-periféria küzdelem Magyarországon a dualizmus utolsó évtizedeiben. In: *Sic itur ad astra*, No. 76, 2022, p. 37-60. p. 37-41.

was clear to the Hungarian political elite that common affairs were the guarantee of the position of great power, and thus the common ministries, which handled the tasks arising from common affairs, were institutions of imperial action ensuring great power, i.e. they formed a kind of power pole. The question is therefore, if it is not possible to change the foundations of dualism, and if it is not advisable to strive to do so, how Hungarian interests can be asserted through common institutions, and what steps can be taken to strengthen positions within common institutions, i.e. how can common institutions serve Hungarian aspirations.

According to the Hungarian Act of Compromise, one of the means of common and united defence was the expedient management of foreign affairs, which required a community for those foreign affairs which necessitated the joint responsibility of the sovereign countries, and the other being the army, i.e. the military.[7]

Under the dualist system, the common army constituted a distinct domain in which the ruler firmly upheld his prerogatives. Thus, this area, which was handled by the parliaments of both sides of the Empire in the form of the budget and voting on the number of recruits, could at no time during the system's existence succumb to national ambitions or threaten to disrupt the unity of the common army.[8] Due to its traditions and status, the common army often appeared as an alien institution to the Hungarian political elite and public opinion. Whether in practical matters of symbolic importance, such as the language of command or the composition of the officer corps, in which Hungarian nationalities were under-represented until the end of the period, or in the matter of army orders, which was a sensitive economic issue that provoked constant debate.[9]

In contrast to the relatively inaccessible common army, the sphere of common foreign affairs held greater promise for Hungarian political aspirations. Foreign policy offered an institutionalised, albeit complex, mechanism through which Hungary could exert influence, despite the fact that, like the military, foreign affairs – an instrument of common defence – were formally outside the competence of the Hungarian government.[10]

The foreign minister, who was directly responsible to the monarch, played a pivotal role in shaping Austro-Hungarian foreign policy. Thus, the extent to which the minister was attentive to Hungarian interests and cooperated with the Hungarian prime minister was of considerable significance.[11]

In addition to the foreign minister, other actors in the field were the Joint Council of Ministers and delegation of the Hungarian Parliament. In this way, the Hungarian Parliament could become involved in the shaping of foreign affairs through the delegations elected from its members, the government through the prime minister, who was present in the joint council of ministers, and in certain periods through the Minister at his Majesty's Court. As far as the Hungarian political arena was concerned, the Hungarian government and parliament could, of course, and did, deal with foreign affairs issues, and finally, in the semi-periphery of the official political arena, government-linked interest organisations such as the Országos Magyar Gazdasági Egyesület (National Hungarian Economic Association) or the Gyáriparosok Országos Szövetsége (National Association of Industrialists) could formulate opinions and objectives related to the field.[12]

Regarding the practical management of common affairs, the Act of Compromise established the principle of parity as a guiding framework. This principle, which proved challenging to implement, required near-equal representation of the two halves of the empire in the shared institutions. As a result, certain positions were to be occupied by individuals of Hungarian nationality.

In addition to the aforementioned actors in foreign affairs, the apparatus became an integral component of the decision-making process. The central question was the degree to which Hungarian interests had been effectively represented within the respective institutions. Gyula Andrássy, who played a pivotal role in establishing the system, sought to ensure the appointment of

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[7] 1867. évi XII. tc. 8-9.§

[8] SOMOGYI, É., A hadseregfejlesztés és a birodalmi egység ellentmondásai a századfordulón (Honvédtüzérség 1904) In: *Hadtörténelmi Közlemények*, Vol. 29, No. 4, 1984, p. 638-643; SOMOGYI, É., A közös minisztertanács működése (1896-1907) In: *Századok*, Vol. 119, No. 5-6, 1985, p. 1105-1149. p. 1139; ALLMAYER-BECK, J. Ch., A császári és királyi haderő a soknemzetiségű Osztrák–Magyar Monarchiában. In: *Hadtörténelmi Közlemények*, Vol. 35, No. 4, 1988, p. 668-676; DIÓSZEGI, I., A véderő problémái a közös minisztertanács előtt, 1883–1895. In: *Hadtörténelmi Közlemények*, Vol. 35, No. 2, 1988, p. 295-335; DEÁK, I., *Volt egyszer egy tisztikar. A Habsburg-monarchia katonatisztjeinek társadalmi és politikai története 1848-1918*. Budapest, 1993, p. 230-234; SZALAI Miklós: Részletek ifj. Andrássy Gyula politikai naplójából (1907-1913). In: *Történelmi Szemle*, Vol. 44, No. 1-2, 2002, p. 165-203, p. 175; BALLA, T., A militarista birodalom mítosza. Az osztrák-magyar haderő az első világháború előestéjén. In: *Hadtörténelmi Közlemények*, Vol. 127, No. 3, 2014, p. 628-645.

[9] There is no doubt that, in matters concerning the army, steps were taken to favour the Hungarian side. For example, the construction of the battleship *Szent István* during the war, and the appointment of Miklós Horthy as a Hungarian officer to head the Monarchy's fleet in 1918. – HAJDU, T., A közös hadsereg magyarországi tisztjeinek nemzeti, vallási, szülőhely szerinti megoszlása a dualizmus korában. In: *Századok*, Vol. 131, No. 6, 1997, p. 1223-1264; KRÁMLI, M., Az S.M.S. „Szent István" Magyarország és az osztrák-magyar dreadnought-program. In: *Hadtörténelmi Közlemények*, Vol. 113, No. 1, 2000, p. 3-33; SIECHTE, E., F., Őfelsége Szent István nevű hadihajója II. rész. In: *Haditechnika,* Vol. 35, No. 3, 2001, p. 18-22.

[10] SZENTE 2011, p. 223.

[11] DIÓSZEGI, I., A magyar érdekek érvényesülése az Osztrák-Magyar Monarchia külpolitikájában. In: *Múltunk*, Vol. 42, No. 1, 1997, p. 3-27. p. 6-7; RESS, I., A közös minisztériumok szerepe a magyar államéletben (1867-1900) In: *Limes*, Vol. 11, No. 1, 1998, p. 21-69, p. 24-25.

[12] KOMJÁTHY, M., A közös minisztertanács kialakulása. In: *Levéltári Szemle*, Vol. 15, No. 3, 1965, p. 59-102; KOMJÁTHY, M., A közös külügyminiszteri állás kialakulása és funkciója. In: *Levéltári Szemle*, Vol. 15, No. 4, 1965, p. 37-74; SOMOGYI, É., A közös kormány 1867-1907. In: *Századok*, Vol. 127, No. 1, 1993, p. 70-88; SOMOGYI, É., A király személye körüli minisztérium. In: *Levéltári Közlemények*, Vol. 72, No. 1-2, 2001, p. 141-159; SZABÓ, Sz., A közös ügyek alkotmányos kérdései. In: *Jogtörténeti Szemle*, Vol, No. 3, 2004, p. 48-54; SOMOGYI 2006, p. 64-86; RESS, I., Birodalmi lojalitás és nemzeti érdekérvényesítés. A közös külpolitika magyar befolyásolásának alakulása az I. világháború előestéjén. In: *Varietas Europa Centralis. Tanulmányok a 70 éves Kiss Gy. Csaba tiszteletére*. ifj. BERTÉNYI, I. – GÉRA, E. – MÉSZÁROS, A. (eds.) Budapest, 2015, p. 315-333, p. 318.

as many Hungarian officials as possible to the joint ministries, aiming to achieve a more balanced representation of Austrian and Hungarian personnel.[13] As a result of the above, there were always two political department heads of the same rank, one Austrian and one Hungarian, and a third department head for trade policy matters in the Foreign Ministry, together with an increasing number of Hungarians in the joint ministries.[14] From the 1890s onwards, Budapest gradually intensified its efforts, which could be regarded as partly symbolic, to strengthen the Hungarian presence and the representation of its presence in the operation of the common foreign ministry and in foreign relations. This included further increasing the number of Hungarian officials in accordance with the principle of parity, advocating for the use of the Hungarian language, and pushing for changes in the formulas employed in the signing of international treaties.[15] However, the presence of Hungarian officials did not necessarily imply that these individuals represented Hungary within the joint institutions. The issue was not one of "taking possession" of these institutions, but rather of the presence of officials who had developed their professional careers within the joint framework by the latter half of the period.[16]

The predominance of the Hungarian perspective is also evident in the formulation of foreign policy guidelines and the practical steps taken by the Austro-Hungarian Monarchy. Beust, the common foreign minister who also held the title of imperial chancellor, initially regarded Germany as the primary threat to the Monarchy during the period of German unification. However, shortly thereafter, Andrássy succeeded in shifting the Monarchy's foreign policy orientation, which, under his influence, became resolutely anti-Russian. The strategic significance of the Balkan Peninsula, which offered a natural avenue for expansion, also played a crucial role in this reorientation. Members of the Hungarian elite in the joint ministries, including the aforementioned Gyula Andrássy, later Béni Kállay, Lajos Thallóczy and István Burián, played a pivotal role in shaping the Austro-Hungarian Empire's shift towards the Balkans and the subsequent steps taken in this region.[17]

The occupation and annexation of Bosnia and Herzegovina was not universally popular in Hungary. However, in seeking justifications for its (future) status, the Hungarian elite and public opinion were able to identify historical precedents and, importantly, Hungarian interests that provided a legal rationale. Key among these were the economic opportunities for expansion into the Balkans, followed shortly thereafter by the desire to annex the provinces to Hungary.[18] Thus, the integration of the provinces into the Empire and the (sometimes competing) steps to acquire economic positions also reveal the interests of Hungarian economic and political actors.

Nevertheless, what emerged during this period was that, although the system of dualism and traditional constraints prevented the establishment of a clearly dominant position in foreign affairs, the Hungarian government and elite gained the ability to influence foreign policy – something that had been impossible prior to the Compromise of 1867.

3. The Foundations and Drivers of Expansion: Economic Factors and Policy

According to the provisions of the Act of Compromise, issues such as the old Austrian public debt, trade and customs, banking, and contingent public debt were not governed by the Prag-

[13] SOMOGYI, É., Vezető magyar tisztviselők a Ballhausplatzon. In: *Aetas*, Vol. 16, No. 3-4, 2001, p. 115-139; SOMOGYI, É., Magyar diplomaták a közös külügyminisztériumban. In: *Századok*, Vol. 138, No. 3, 2004, p. 601-672, p. 654; SOMOGYI, É., Modern bürokrácia a közös külügyminisztériumban. In: *Századok*, Vol. 142, No. 1, 2008, p. 3-47, p. 14.

[14] SOMOGYI, É., A Külügyminisztérium újjászervezése 1867-68-ban. In: *Történelmi Szemle*, Vol. 31, No. 2, 1989, p. 179-191.p. 186; p. 699-700.

[15] Examples of debates concerning language use: the interpellation by Samu Bakonyi to Prime Minister István Tisza KN 1901 XXV.k. (1904. jún. 22.) 445. ülés 355-365; DIÓSZEGI 1997, p. 12-13; SOMOGYI 2004, p. 604-605; SZABÓ 2012.

[16] A notable example of the issue regarding the number and loyalty of the Ministry's officials, which also emerged during parliamentary debates, is the speech delivered by the highly qualified legal philosopher and sociologist, pro-government MP Ágost Pulszky, on 11 January 1896. In this speech, he emphasised that the number of Hungarians in the Ministry had increased and that they represented the interests of both sides of the Monarchy. In contrast, the speech of opposition lawyer Béla Komjáthy on 18 March 1898 criticised the small number of Hungarian officials working in the Ministry. He also argued that, in his view, the Hungarian government was not sufficiently concerned with foreign affairs, despite this being in line with the spirit of the Act of Reconciliation, and that Hungary lacked adequate influence in foreign policy. – KN 1892. XXVIII. k. (1896. jan. 9-jan. 25.) 530.ülés p. 60; KN 1896. XXI. k. (1899. márc. 13-ápr. 15.) 428. ülés. p. 114-115; Prime Minister Kálmán Széll on the use of languages by Austrian-Hungarian consulates: KN 1896. XXVIII.k. (1900. márc. 19-ápr. 26.) 565. ülés p. 304., on the number of Hungarian officials in the Ministry of Foreign Affairs 1901. jún. 15.: KN 1896. 1896. XXXVI. k. (1901. máj. 13-júl. 6.) 716.ülés p. 199; SOMOGYI 2001; SOMOGYI, É., Hivatalnokok a Habsburg Monarchia közös kormányzatában. In: *A horvát-magyar együttélés fordulópontjai. Intézmények, társadalom, gazdaság, kultúra*. FODOR, P., SOKCSEVITS, D., (eds.) TURKALJ, J., KARBIĆ, D., (eds.) Budapest, 2015, p. 411-418, p. 413-414.

[17] WERTHEIMER, E., Kállay Béni kiadatlan emlékirata Bosznia annexiójáról. In: *Történelmi Szemle*, Vol. 3, No. 3, 1914, p. 257-266; RESS, I., Kállay Béni bosnyák nemzetteremtési kísérlete. In: *Limes*, Vol. 13, No. 2-3, 2000, p. 277-286; DÁN, K., Kállay Béni és a magyar imperializmus. Egy bátortalan kísérlet maradványai. In: *Aetas*, Vol. 15, No. 1-2, 2000, p. 220-248; RESS, I., Andrássy Gyula a „birodalmi miniszterelnök"? In: *Történelmi Szemle*, Vol. 49, No. 4, 2007, p. 531-547; ARMOUR, I. D., Apple of Discord: Austria-Hungary, Serbia and the Bosnian Question 1867-71. In: *The Slavonic and East European Review*, Vol. 87, No. 4, 2009, p. 629-680; ROMSICS, G., A külpolitikai realizmus és a liberális nacionalizmus összefonódó hagyományai a késő dualizmus Magyarországán. In: *Századvég*, Vol. 3, No. 2, 2023, p. 101-128, p. 117-118; GRATZ, G., *A dualizmus kora. Magyarország története 1867-1918.* I. kötet. Budapest, 1992, p. 181-193.

[18] WERTHEIMER, E., *Gróf Andrássy Gyula Bosznia okkupációjáról*. Budapest, 1914, p. 18., p. 31; SZEGH, D., *Magyarország a Balkánon*. Budapest, 1908, p. 72; BENCZE, L., *Bosznia és Hercegovina okkupációja 1878-ban*. Budapest, 1987; SZABÓ, Sz., A dualista berendezkedés és Bosznia-Hercegovina közjogi helyzete 1878–1908. In: *Collega*, No. 2, 2005, p. 69-72; SZABÓ, Sz., Bosznia-Hercegovina közjogi viszonya Magyarországhoz és Ausztriához az okkupáció után. In: *Aetas*, Vol. 23, No. 3, 2008, p. 184-214; FÓNAGY, Z., Bosznia-Hercegovina integrációja az okkupáció után Hatalompolitika és modernizáció a közös minisztertanácsi jegyzőkönyvek tükrében. In: *Történelmi Szemle*, Vol. LVI, No. 1, 2015, p. 27-60; RESS, I., Bosznia-Hercegovina mint a magyar „impérium" része? Szemléletváltás az okkupációtól a századfordulóig. in: Modernizáció és nemzetállam-építés. p. 73-107; FODOR, P., A budapesti imám. Kísérlet a boszniai muszlimok integrációjára (1909-1911). *Történelmi Szemle*, Vol. LIX, No. 2, 2017, p. 315-323.

matica Sanctio and thus fell outside the scope of common affairs. However, as a set of affairs of mutual interest, they formed the framework for an independent Hungarian economic policy, which, while the subject of intense debate, permeated all sectors of the economy.[19]

After the Compromise, no independent Hungarian central bank was established, the monetary system remained unified. The Austro-Hungarian Bank, a private institution, was granted the right to issue banknotes in the Monarchy, by agreement between the two halves of the Empire. Parity also characterised the governance of the bank, which served as a central bank, with both governments represented on its board by a government commissioner and a deputy government commissioner.[20]

The possibilities of an independent Hungarian economic policy were largely determined by the group of commercial and customs matters of common interest, which, in addition to the latter, also included the joint management of areas such as communications, trade, the operation of rail transport, or consular affairs and consular jurisdiction.[21] Although, in principle, it was based on a ten-year agreement between independent parties, the arrangement resulted in a high degree of integration and regulatory harmonisation. For instance, it led to the establishment of a common system of metrology and the joint construction and maintenance of lighthouses to support shipping traffic to ports in both countries.

In addition to the factors mentioned above, the government's actual room for manoeuvre was largely determined by the state of the budget, which remained in deficit for much of the period following the Compromise, with the exception of 1868.[22] Until 1873, the government enjoyed a period of abundant capital, i.e. there were no major problems in financing public expenditure, but this changed completely during the economic crisis, and the country came close to bankruptcy.[23] The situation improved only gradually, and the budget was balanced again only from the late 1880s.[24] Austrian capital played a pivotal role in the subscription of government bonds and in the inflow of foreign investment into various sectors of the economy. This capital was instrumental in modernising the economy, restructuring the state's operations, and supporting infrastructure development.[25] However, after the 1890s, and especially after the turn of the century, Austria and foreign countries played a smaller role in the supply of capital, a much larger proportion of securities issued in Hungary were sold in Hungary, and the role of Austria itself in financing the Hungarian economy declined, while the role of the countries outside the Austro-Hungarian Empire, which were considered to be customs foreign countries, increased. Germany and France stood out, followed by Western European countries such as the Netherlands, England and Switzerland.[26] In the process, domestic capital accumulation, the dynamic development of the domestic economy and the fact that the rapidly developing domestic financial sector made it easier to channel foreign funds.[27]

In the field of economic policy, industrial development emerged as a clear priority for contemporaries, driving action and yielding remarkable results, and from the early 1880s a state policy of industrial promotion was developed.[28] The core focus of the modernisation programme was railway development (funded through loans), nationalisation and river regulation, which resulted in the expansion of domestic agricultural production opportunities and an explosion in passenger and freight

[19] 1867. évi XII. tc. 58.; BALOGH, J., Közös érdekű ügyek a dualizmus rendszerében. In: *Jogtörténeti Szemle*, Vol. 5, No. 3, 2007, p. 2-8.

[20] VARGHA, Gy., *A magyar hitelügy és hitelintézetek története*. Budapest, 1896, p. 399-410; KÖVÉR, Gy., A bankkérdés: két-bankrendszer vagy binacionális bank (1867-1878). In: *Századok*, Vol. 127, No. 1, 1993, p. 89-126; KÁRBIN, Á., Az Osztrák-Magyar Bank és az 1892. évi valutareform előzményei. In: *Történelmi Szemle*, Vol. 59, No. 1, 2017, p. 19-45.

[21] MATLEKOVITS, S., Közgazdasági viszony Magyarország és Ausztria közt. In: *Közgazdasági Lexikon* II. köt. p. 462-493; LERS, V., *A konzuli bíráskodás intézménye*. Budapest, 1904; ANTAL, T., A konzuli bíráskodás a dualizmus korában. Az 1891. évi XXXI. tc. létrejötte. In: *Acta Universitatis Szegediensis*, 2004, p. 5-52; TESCHMAYER, G., *A magyar konzuli tevékenység és bíráskodás az Osztrák-Magyar Monarchia alatt: szabályozás, szervezet és gyakorlat.* Budapest, 2019. Diss.

[22] VARGHA 1896, 346.

[23] PÓLYA, J., Magyarország államadósságai. In: *Nemzetgazdasági Szemle*, 1882/I. (jan.) 1882/II. (feb); MATLEKOVITS, S., *Magyarország államháztartásának története 1867-1893.* I. köt.1875-ig. Budapest, 1894, p. 511-513; ZAWADOWSKI, A., Állami pénzügyeink fejlődése 1867 és 1921 között. In: *Magyar Statisztikai Szemle*, No. 9, 1943, p. 493-528.

[24] MATLEKOVITS, S., *Magyarország államháztartásának története 1867-1893*. II. köt. 1893-ig. Budapest, 1894. p. 525-527, p. 532-551, p. 830-832; A magyar királyi állami számvevőszék jelentése, Országgyűlés képviselőházának irományai, 1896 1901, no. 802, vol. XXVIII; MILHOFFER, S., *Magyarország közgazdasága* 2. Budapest, 1904, p. 99-139., GRATZ 1992, p. 140.p. 151., p. 269.

[25] KOMLOS, J., *Az Osztrák Magyar Monarchia mint közös piac. Ausztria-Magyarország gazdasági fejlődése a tizenkilencedik században* Budapest,1990; KATUS, L., A Monarchia közös piaca. In: *Magyar Tudomány*, No.10-11, 1989, p. 808-820. p. 816; EDDIE, S. M., A pénzügyi függetlenség korlátai a vámunió szuverén államaiban: az Osztrák-Magyar Monarchia mint „adóunió" 1868 és 1911 között. In: *Aetas*, Vol. 19, No. 1, 2004, p. 202-217, p. 214.

[26] RÁNKI, Gy., A francia tőke Magyarországon 1914-ig. In: *Magyar Történeti Tanulmányok*, 9. 1976, p. 58-72; KATUS, L., *A modern Magyarország születése. Magyarország története 1711-1914*. Pécs, 2021. p. 479; TOMKA, B., A német tőke Magyarországon az első világháború előtti évtizedekben. In: *Századok*, Vol. 135, No. 5, 2001, p. 1053-1073.

[27] PÓLYA, J., *A budapesti bankok története az 1867-1894*. években. Budapest, 1895; PÓLYA, J. – HEGEDÜS, L., *A Pesti Magyar Kereskedelmi Bank keletkezésének és ötvenéves fennállásának története (1841-1892)* Budapest, 1892; TOMKA, B., A magyar bankrendszer fejlődésének sajátosságai nemzetközi összehasonlításban 1880-1931. In: *Századok*, Vol. 133, No. 4, 1999, p. 655-683; SÁRKÖZI, Z., *Magyar Általános Hitelbank Rt.* Budapest, 2005; KATUS 1989, p. 815; GÁL, Z., A magyar bankrendszer modernizációja és az egységes nemzetgazdaság kialakítása a századfordulón. In: *Modernizáció és nemzetállamépítés.* p. 181-211, p. 192.

[28] VARGA, L., Állami ipartámogatás a dualizmus időszakában a századforduló után. In: *Századok*, Vol. 112, No. 4, 1978, p. 662-703; BENEDEK, G., Adatok a dualizmus kori állami ipartámogatáshoz (1881-1914). In: *A mesterség iskolája. Tanulmányok Bácskai Vera 70. születésnapjára*. BÓDY, Zs. – MÁTAY, M. – TÓTH, Á. (eds.) Budapest, 2000, p. 406-425, p. 407.

traffic.[29] It was clear, however, that economic growth relied heavily on the opportunities offered by the Monarchy's common customs area, the common market, with internal sources of finance playing an increasingly important role in financing the economy. On the other hand, because of the specificities of the Austrian and Hungarian economies, the question of the common customs area, its maintenance and, more broadly, the scope of the economic agreement regarding the common market and trade policy, also because of its public law dimensions, became a source of recurrent conflict between Budapest and Vienna and generated lively debates between domestic interest groups.[30] As far as economic policy was concerned, Hungarian efforts to ensure parity in the common expenditure of the empire and thereby promote the development of domestic industry were noticeable. The most significant demand in this regard was for military orders, a sector not inherently aligned with the characteristics of the Hungarian economy.[31]

The Hungarian political elite generally opposed territorial expansion, viewing it as a traditional approach; however, they did not share the same resistance to the economic expansion advocated by the economic elite. In certain instances, this economic expansion was deemed feasible, owing to Hungary's position as a great power.[32] This was also most likely to happen towards the Balkans, so it is no coincidence that the Hungarian side was active in trying to influence the fate of the Monarchy's trade agreements.[33]

A key form of expansion during this period was the construction of railways, which had geopolitical implications extending beyond national borders, thus requiring careful consideration of conflicts at multiple levels. For Budapest, the primary challenge lay in asserting its interests vis-à-vis Vienna, particularly as the significance of rail links in the development of trade through Rijeka and Trieste could not be ignored. Moreover, the interests of the Hungarian and Austrian sides did not always align, particularly in relation to railway development in Bosnia-Herzegovina. In the broader Balkans, Hungary had to navigate its interests within a complex power structure, influenced by Russia, Italy, and Germany, while also working within the framework and resources of the Austro-Hungarian Monarchy.[34]

The development of the port of Fiume, the dissolution of the Monarchy's "common" shipping company, the Austro-Hungarian Lloyd, in 1891, and the establishment of the Adriatic Shipping Company all reflect the strengthening of Hungarian foreign trade policy – pursued with substantial state support and the involvement of domestic financial institutions. The demarcation of the areas of operation of the Austrian and Hungarian shipping companies was a significant element in this process: Adria's operations covered the western Mediterranean basin, while those of Oesterreichische Lloyd covered the eastern. Furthermore, Budapest established and consistently supported shipping companies such as the Hungarian Eastern Shipping Company and the Hungarian-Croatian Maritime Steamship Company.[35]

The country's economic growth, closely linked to the structural transformation of the economy, was spectacular, faster than Austria's and outstanding by European standards. During the period of dualism, Hungary followed a path of economic catch-up, and after the 1890s it reached a level of development that could provide the economic and political elite, which was now thinking in broader perspectives, with a basis for optimism aimed at creating a wider (international) scope for manoeuvre.[36]

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[29] MAJDÁN, J., Utasok a magyarországi vasutakon 1914-ig. In: *Rendi társadalom - polgári társadalom* 2. Kutatás-módszertan ERDMANN, Gy. (ed.) Gyula, 1989, p. 415-420; FRISNYÁK, Zs., *A magyarországi közlekedés krónikája 1750-2000*. Budapest, 2001; KALOCSAI, P., Városi közlekedés - hálózat - tömegközlekedés Nyugat-Magyarországon (Sopron, Szombathely). In: *Urbs – Magyar várostörténeti évkönyv* II. 2007, p. 153-199; MAJDÁN, J., A vasút társadalmi kapcsolatteremtő és polgári mentalitást közvetítő szerepe a Monarchiában. In: *Limes*, Vol. 21, No. 1, 2008, p. 45-58; VARGHA 1896, p. 346.

[30] SZABÓ 2012.

[31] BEREND, T. I. – RÁNKI, Gy., Nemzeti jövedelem és tőkefelhalmozás Magyarországon 1867-1914. In: *Történelmi Szemle*, Vol. 9, No. 2, 1966, p. 187-203. p. 194-195; KRÁMLI, M., Magyarország és a Cs. és Kir. Haditengerészet ipari megrendeléseinek kvóta szerinti megosztása 1890-1910. In: *Hadtörténelmi Közlemények*, Vol. 114, No. 1, 2001, p. 36-74; PAULINYI, Á., Iparpolitika Magyarországon és Ausztriában, és a gazdasági integráció problémája (1880-1914) In: *Aetas*, Vol. 17, No. 2-3, 2002, p. 271-293. p. 276-278.

[32] HALMOS, K., Empórium és impérium. Nacionalizmus az üzleti életben – Lánczy Leó. In: *Korall*, Vol. 13, No. 47, 2012, p. 61-78.

[33] DEMETER, G., A modernizációtól a kolonizációs törekvésekig. Magyar utazók, politikusok és gazdasági szakírók a balkáni feladatokról (a 19. századtól az annexiós krízisig) In: *Századok*, Vol. 152, No. 2, 2018, p. 285-316. p. 290; DEMETER, G., Külpolitikai alternatívák: a magyar politikai elit (Burián, Thallóczy, Tisza) véleménye a balkáni kérdés rendezéséről 1912-1915 között. In: *Hadtörténelmi Közlemények*, Vol. 130, No. 2, 2017, p. - 355-375, p. 357; NAGY, B., *Mercur a keleti végeken. Határszéli gazdasági környezet és üzleti modellek a dualizmus-kori Háromszéken (1867-1918).* I. Kolozsvár, 2021, p. 47-118.

[34] SZEGH, D., A Duna-Adria vasút. In: *Közgazdasági Szemle*, Vol. 43, No. 4, 1910, p. 221-260; WANK, S., Aehrenthal and the Sanjak of Novibazar Railway Project: A Reappraisal. In: *The Slavonic and East European Review*, Vol. 42, No. 99, 1964, p. 353-369; PALOTÁS, E., Az Osztrák-Magyar Monarchia balkáni politikája a berlini kongresszus után 1878-1881. Budapest, 1982, p. 18-23., p. 83-93; MAJDÁN, J., A fiumei vasút és annak város alatti szakasza. In: *Közép-európai Közlemények*, Vol. 6, No. 3, 2013, p. 39-46; HORVÁTH, Cs. S., Az Osztrák-Magyar Monarchia és az Oszmán Birodalom közötti vasúti összeköttetés létrejötte. In: *Aetas*, Vol. 32, No.1, 2017, p. 81-101; ERDŐSI, F., Trieszt – Fiume. Két szomszédos kikötő versengése az első világháborúig. Pécs, 2022, p. 45-63; ORDASI, Á., A fiumei elitcsoportok és a bosnyák vasúti összeköttetés dilemmái a dualizmus korában. In: *Századok*, Vol. 158, No. 3, 2024, p. 503-536.

[35] 1891. évi XXIX. tc; 1891. évi XXXI. tc; MILHOFFER 1904. p. 69-70; GONDA, B., A magyar tengerészet és a fiumei kikötő. In: *A Magyar Mérnök- és Építész-Egylet Közlönye,* Vol. XL, No. II, 1906, p. 61-104; GONDA, B., A Magyar Tengerészet és a Fiumei Kikötő. Budapest, 1906; KOHÁNYI, Z., Nemzeti tengerhajózási politikánk feladatai. In: *Közgazdasági Szemle*, Vol. 44, 1910, p. 741-774; HEGEDÜS, L., A Pesti Magyar Kereskedelmi Bank keletkezésének és fennállásának története 2. 1892-1917. II. köt. Budapest, 1917, p. 313-314; ZSIGMOND, G., Az Osztrák-Magyar Lloyd története. In: *Aetas*, Vol. 24, No. 1, 2009, p. 126-143; PELLES, M., Az Adria Magyar Királyi Tengerhajózási Rt. szerepe Fiume hajó- és áruforgalmában (1874-1914). In: *Közgazdasági Szemle*, Vol. 63, 2016. február, p. 188-208; PELLES, M., A fiumei kikötő és a magyar kereskedelmi tengerészet fejlődése (1868-1914). Pécs, 2021. Diss; BALOGH, Á. T., Epizódok az Osztrák-Magyar Monarchia és Brazília kereskedelmi kapcsolatainak történetéből. In: *Századok*, Vol. 156, No. 5, 2022, p. 1021-1057; ERDŐSI 2022.

[36] EDDIE, S., Mit bizonyítanak az 1882-1913-as export-statisztikai adatok: Magyarország valóban csak a Monarchia „éléskamrája" volt? In: *Történelmi Szemle*, Vol. 25, No. 3, 1982, p. 416-425; KATUS 2021, p. 531-535.

4. Mobility, National Policy, and Nation-Building: The Demographic Foundations of Expansion

By the 1890s, alongside the strengthening of the domestic economy, the effects of the demographic transition had become increasingly apparent.[37] The country's population experienced dynamic growth, and the proportion of Hungarians within this growing population also increased. In the first decade of the 20th century, many believed that Hungarians would maintain their status as the dominant nationality in the Carpathian Basin in the long term.

The generation responsible for the dynamic population growth entered adulthood in the 1890s. Despite the clear expansion of opportunities – driven by the growth of industrial production and the labour market created by new industries – many individuals still faced barriers to social advancement. This situation, coupled with transforming transport opportunities, the development of domestic railways, and improved access to European ports, created new prospects and led to an unprecedented rise in emigration. Although the diverse public debates surrounding emigration from Transylvania to Romania, the United States, Slavonia, Croatia, and Bosnia and Herzegovina may seem complex, the government's actions suggest that Budapest viewed emigration not only as a problem to be addressed but also as a means of nation-building, state-building, and, as seen in other contexts, an opportunity for expansion.[38] In mass emigration, ethnic minorities were typically represented in higher proportions than their Hungarian counterparts, leading government circles to conclude that emigration as a whole could be a process that would help to create a nation-state, maintain Hungarian dominance in the Carpathian Basin, and, simultaneously, allow Hungarian diasporas to become integrated into a network of economic benefits.[39] Thus, the populous Hungarian diaspora and its organisations abroad became both a focus of Hungarian government policy and a potential extension of its influence. The Hungarian communities in Croatia and Slavonia, and the management of emigration to these countries, also became a significant concern for the government. In Budapest's view, these areas across the border represented a natural opportunity for ethnic expansion, offering a potential solution for farmers seeking to establish their own land. In spite of the co-national status, it seems that this resettlement was by no means unproblematic. Croatian political circles and governmental ambitions intersected with Hungarian intentions, and thus Hungarian expansion based on emigrating settlers could not be easy, either because of this or because of the size of the resettlement. In Croatia, the presence of Hungarian settlers, the status of the Hungarian minority, and the provision of education and cultural services in Hungarian sparked ongoing debates. It is no exaggeration to say that, despite its dominance, Budapest faced a significant challenge in securing the position of the Hungarian ethnic group in this country.[40] The number of emigrants to this region remained far below the number of emigrants to the more popular Western destinations throughout the period, and it could not become a successful element of Hungarian expansionist efforts. Although there were no problems in Bosnia and Herzegovina or Romania comparable to the conflicts in Croatia, it would be difficult to report an increase in Hungarian influence due to the presence of Hungarian immigrants.[41]

Despite this, the Hungarian government launched a comprehensive programme aimed at preserving the national identity of emigrants, with the expectation that, in time, the Hungarian diaspora and the organisations established by emigrants would form a network capable of supporting the government's economic and political objectives. The government's support for individual associations, schools, and religious communities provided the foundation for this initiative. However, due to the sensitive nature of foreign relations, many aspects of this programme were concealed from the public. Nonetheless, this initiative under-

[37] *Magyarország történeti demográfiája. Magyarország népessége a honfoglalástól 1949-ig*. KOVACSICS, J., (ed). Budapest, 1963, p. 247; DEMENY, P., Early Fertility Decline in Austria-Hungary: A Lesson in Demographic Transition. *Daedalus*, Vol. 97, No. 2, 1968, p. 502-522; KATUS, L., A demográfiai átmenet kérdései Magyarországon a 19. században. In: *Történelmi Szemle*, Vol. 23, No. 2, 1980, p. 270-288.

[38] HEGEDÜS, L., A székelyek kivándorlása Romániába. I. In: *Budapesti Szemle*, Vol, 110, 1902, p. 394-416; A székelyek kivándorlás Romániába. II. In: *Budapesti Szemle*, Vol, 111, 1902, p. 31-72; A székelyek kivándorlása Romániába III. In: *Budapesti Szemle*, Vol. 111, 1902, p. 215-253; SZILI, F., *Kivándorlás Somogyból Horvátországba és Szlavóniába (1880-1914)* (Második rész). In: *Somogy Megye Múltjából*, 1992, p. 231-252; MAKKAI, B., Bosznia-Hercegovina mint magyar kivándorlási, avagy expanziós célterület. In: *Pro Minoritate*, No. 1, 2013, p. 135-146; KIRÁLYFI, Á., *Bosznia szerepe kivándorlási politikánkban.* Budapest, 1908; THIRRING, G., *A magyarországi kivándorlás és a külföldi magyarság*. Budapest, 1904, p. 272-315; ifj. BERTÉNYI, I., Kérlelhetetlenül. Báró Bánffy Dezső nemzetiségi politikája. In: *Pro Minoritate*, No.1, 2003, p. 69-104; CHOATE, M. I., Sending States' Transnational Interventions in Politics, Culture, and Economics: The Historical Example of Italy. In: *The International Migration Review*, Vol. 41, No. 3, Fall 2007, p. 728-768; LOIDL, S., Colonialism through Emigration: Publications and Activities of the Österreichisch-Ungarische Kolonialgesellschaft (1894–1918). In: *Austrian Studies*, Vol. 20, 2012. p. 161-175; STEIDL, A., *On Many Routes. Internal, European, and Transatlantic Migration in the Late Habsburg Empire*. West Lafayette, 2021; CSAPLÁR-DEGOVICS, K., *„Nekünk nincsenek gyarmataink és hódítási szándékaink". Magyar részvétel a Monarchia gyarmatosítási törekvéseiben a Balkánon (1867-1914).* Budapest, 2022; CSEPREGI, J. J.: Az Osztrák-Magyar Monarchia kolonizációs politikája a megszállt Bosznia-Hercegovinában. In: *FONS*, Vol. XXXI, No. 2, 2024, p. 163-201.

[39] HEGYI, J., *A magyarországi kivándorlás állapota és rendezése*. Fiume, 1902, p. 21-32; *A Magyar Szent Korona országainak kivándorlása és visszavándorlása. 1899-1913*. Budapest, 1918, p. 18.

[40] Access to mother tongue education has become a recurrent problem. An example of this is the case of the Slavonia (MÁV) schools: Magyarországi Református Egyház Zsinati Levéltára (Archives of the Synod of the Reformed Church in Hungary) (hereafter MREZSL) 44. a. fond Tisza István iratai 2. dob. 7. 16; Magyar Nemzeti Levéltár Országos Levéltára (National Archives of Hungary) (hereafter MNL OL) K26-701-1907-XVI—1028-4452; MNL OL K26-701-1907-XVI-1028-4988; MNL OL K26-748-1908-XXIV-4924; MNL OL K26-701-1907-XVI-1028-5377; MAKKAI, B., Kormányakció a horvátországi magyar kisebbségért. In: *Valóság*, No. 1, 1996, p. 28-34.

[41] It is important to note that providing education in Hungarian was not without challenges in Romania either. An example is the case of the authorisation of the Hungarian school in Braila, and the issue of elements of Romanian legislation that also affect Hungarian schools: MNL OL K26-742-1908-XVIII-5136; MNL OL K26-742-1908-XVIII-5711

scores Hungary's efforts to expand its economic and political influence and to advance the agenda of the "nation-state."

The financial foundation for the cultural and economic expansion linked to emigration was provided by the more stable budget and economic development of the 1890s, and the legal and institutional framework was provided by measures aimed at supporting the domestic economy, addressing emigration issues, and through government-sponsored or government-created organisations such as the Eastern Trade Academy (Keleti Kereskedelmi Akadémia), the St. László Society (Szent László Társulat), and the Julián Association (Julián Egyesület).[42] The domestic church leadership was also actively involved in the implementation of these government goals. The participation of associations and churches in the cultivation of the identity of the settlers and emigrants, and in influencing their associations, seemed indispensable, since these were the actors who, if not always inconspicuously and without problems, could more or less do the work that would have been impossible for the official representatives of the Hungarian government or members of the diplomatic missions.

5. Beyond the Horizon: The Distinct Trajectories of Austro-Hungarian Colonialism

While the opportunities for economic positioning or expansion arising from mass emigration were recognised by the wider public, the government launched programmes aimed at engaging with and leveraging the Hungarian diaspora abroad. In contrast, the classic colonial acquisition campaigns targeting more distant regions – such as Africa or Asia – typical of the period, attracted far less interest from both the government and the public. Traditionally, Vienna, as a member of the concert of powers, had been involved in decisions regarding colonial territories prior to the Compromise of 1867, or had taken steps that could have paved the way for the acquisition of such territories. This practice continued after 1867.[43]

The scientific exploration voyages of the period, sponsored or organised by governments, sometimes served such purposes, as could the trade treaties with various countries outside Europe and the Western world. The Austro-Hungarian Monarchy also had spectacular expeditions with real scientific results, in which Austro-Hungarian warships were involved. Expeditions of a primarily scientific nature, or presented as such, also visited various regions of Africa, Asia and the oceans, in addition to the Balkans.[44] In the context of such actions, there was scarcely any clear formulation of colonial objectives on the Hungarian side, nor is there evidence to suggest that Budapest was interested in the possibilities of colonial acquisition, which, from the 1890s onward, remained primarily the domain of initiatives from Ballhausplatz.[45] One of the Monarchy's unfulfilled colonial endeavours was the plan to purchase the Spanish colony of Río de Oro, a proposal in which the Hungarian government remained inactive. Austrian circles, particularly the Austro-Hungarian Colonial Society (Österreich-ungarische Kolonial-Gesellschaft), founded in 1895, were involved in the steps leading to the development of these plans.[46] The Hungarian government and the public were more focused on the status of the territory of Tientsin, which had been seized by the Austro-Hungarian Monarchy following the defeat of the Boxer Uprising.[47]

The Monarchy had already benefitted from the penetration of Western powers into China. Following its expedition to East Asia in 1868, to the costs of which Hungary contributed its quota share, the Monarchy concluded a series of advantageous trade and shipping agreements. These 'unequal treaties' ensured that the Austro-Hungarian Monarchy could send dip-

[42] In a letter to the minister of commerce dated March 1904, the prime minister stated that the Julian Association would act on behalf of the Government in areas where it was unable to intervene. - MNL OL K26-701-1907-XVI-916 The Julian Association, for instance, also sought to promote the acquisition of land by Hungarians, which led to the consideration of establishing a bank. - MNL OL K26-701-1907-XVI-1668; A summary of the association's work: MREZSL 44. a. fond Tisza István iratai 3. dob. 10. 25; MAKKAI Béla: A kivándorolt magyarság anyaországi támogatása a 20. század elején – Ploieşti példáján. *Századok*, Vol. 136, No. 2, 2002, p. 3-30; MAKKAI, B., Önvédelem vagy expanzió? Magyar „nemzetgondozási" program a délszláv régióban a 20. század elején. In: *Századok*, Vol. 137, No. 1, 2003, p. 101-122; ERDÉLYI, M., A Keleti Kereskedelmi Akadémia és az orientalisták: a tudomány, a gazdaság és a politika interakciója. In: *Korall*, Vol. 21, No. 80, 2020, p. 32-53; MAKKAI, B., A magyar kormányzat „Bosniai actio"-ja (1909-1919) In: *Századok*, Vol. 130, No. 2, 1996, p. 341-381.

[43] SAUER, W., Schwarz-Gelb in Afrika. Habsburgermonarchie und koloniale Frage. In: *K.u.k. kolonial. Habsburgermonarchie und europäische Herrschaft in Afrika*. SAUER, W. (Hrsg.) Wien-Köln-Weimar, 2007, p. 17-78; SAUER, W., Habsburg Colonial: Austria-Hungary's Role in European Overseas Expansion Reconsidered. In: *Austrian Studies*, Vol. 20, Colonial Austria: Austria and the Overseas 2012, No. 5, p. 23. p. 22; GASSNER, M., The Habsburg Monarchy and the South-American Question 1815–1842. In: *Journal on European History of Law*, Vol. 13, No. 2, 2022, p. 2-12.

[44] SAUER 2012. 8; CHANGLU, L., Gróf Széchenyi Béla kínai expedíciója a kínai tudomány szempontjából. In: *FUT. Földrajz-Utazás-Történelem*, LENDVAI TIMÁR, E., – BERTA, E., – LEHOCZKI, Zs. (eds.) Budapest, 2018, p. 89-98; CSÍKÓS, Zs., Magyar utazók Latin-Amerikában a XIX. század második felében: Rosti Pál és Bánó Jenő Venezuela képe. In: *FUT*, p. 97-104; BOTTLIK, Zs. – KŐSZEGI, M., A magyar földrajztudomány Balkán képe a XX. század elején. In: *FUT*, p. 115-122; NAGY, M. M., Az Osztrák-Magyar Monarchia hadiflottájának expedíciói. In: *Közlekedés a Kárpát-medencében. Újabb kutatási eredmények*, KATONA, A. (ed.) Budapest, 2003, p. 121-139; HILBERT, B., A földrajztudomány intézményesülése és szellemiségének fejlődése az Osztrák-Magyar Monarchiában. In: *Földrajzi Közlemények*, Vol. 143, No. 3, 2019, p. 223-235.

[45] CSAPLÁR-DEGOVICS, K., Austro-Hungarian Colonial Ventures. In: *The Hungarian Historical Review*, Vol. 11, No. 2, 2022, Austria-Hungary and the Balkans – from the Perspectives of New Imperial History (2022), p. 267-304; CSAPLÁR-DEGOVICS, K., Discovering the Colonial Past of the Habsburg Monarchy. A Report. In: *Historical Studies on Central Europe*, 4. No. 2, 2024, p. 249-263.

[46] Meghiúsult gyarmatosítás. *Magyarország* 1902. dec. 10. 2; LOIDL 2012; SZABÓ, A. A., Osztrák-magyar kolonizációs kísérlet Nyugat-Afrikában – 1899/1900, Rio de Oro. In: *Levéltári Szemle*, Vol. 68, No. 1, 2018, p. 45-60; BESENYŐ, J., Az Osztrák-Magyar Monarchia lehetséges afrikai gyarmata: Rio de Oro. In: *Hadtörténelmi Közlemények*, Vol. 131, No. 4, 2018, p. 856-884; LOIDL, S., *„Europa ist zu eng geworden" Kolonialpropaganda in Österreich-Ungarn 1885 bis 1918.* Wien, 2021, p. 56; FÁLSER, M., *Habsburgs Going Global. The Austro-Hungarian Concession in Tientsin/Tianjin in China (1901-1917)*. Vienna, 2022, p. 32-40.

[47] GOTTELAND, M., L'Allemagne et l'Autriche-Hongrie en Chine, 1895-1918. In: *Revue d'Allemagne et des pays de langue allemande*, Vol. 48, No.1, 2016, p. 43-55; LEHNER, G. –LEHNER, M., Österreich-Ungarn und der „Boxeraufstand" in China. Mitteilungen des österreichischen Staatsarchivs. Sonderband 6. Herausgegeben von der Generaldirektion. Wien, 2002, p. 439-444; GOTTELAND, M., Austro-Hungarian Informal Imperialism in China, 1869–1917. In: *Journal of Austrian Studies*, Vol. 56, No. 2, 2023, p. 31-40.

lomatic representatives to the relevant countries and establish consulates. In addition to several of these states, the Monarchy also negotiated such treaties with China, which granted special rights, including the jurisdiction of a consular court, to subjects of the Monarchy.[48] The Monarchy sent an expeditionary force to China as part of the coalition forces that put down the rebellion, so it could sit at the negotiating table after the coalition's victory. The most prominent aspect of the solution developed in this context was the leased land, or 'settlement', acquired in Tianjin. A clear indication of the Hungarian attitude towards Chinese interests is that, when the issue of the Monarchy's military involvement and the subsequent acquisition of the Tianjin territory arose, the Hungarian government appeared to view the emphasis on economic interests as the only acceptable justification, and – almost traditionally – sought to deny any intention of conquest.[49] The economic aspects were also stressed by the joint foreign minister in his presentation to the Delegations, and the Hungarian government took steps to expand opportunities for Hungarian economic operators.[50] Yet, despite significant investment in its development, the settlement has scarcely featured in the Hungarian public debate. A few parliamentary speeches, interpellations, and occasionally ironic articles questioning the rationale behind maintaining the colony, alongside some inquiries into the public law aspects of the Monarchy's presence in China, revealed that the Hungarian political elite largely failed to see any potential in the otherwise limited economic significance of the Chinese presence.[51]

6. Conclusion

The reasons for the increase in expansionist ambitions from the 1890s onwards are highly complex. The decade witnessed the specific intersection of several processes. The transformation of society, the modernisation of state administration and the integration of Hungary into the system of dualism were the overarching, intensely debated goals of the period following the Compromise. The two decades or so following 1867 saw a remarkable programme of modernisation, which transformed the functioning of the state and established the mechanisms of governance that had already been set in motion by the centralisation process. In many instances, Budapest was able to assert its views and interests within the Austro-Hungarian Empire, and as a result was able to take advantage of the resources of the dualist empire, the functioning of which was well understood by the Hungarian elite. By the 1890s, a cadre of politicians and officials had also emerged, already socialised in the common institutional system, marking a generational shift. The authors of the Compromise, who had also experienced the events of 1848, had by then been replaced by a generation socialised in the consolidating dualism, with a different perception of the country's resources and opportunities.

As far as the financial and economic foundations of expansion were concerned, by the 1890s Hungary had undergone significant and confidently optimistic development. Although the influx of foreign capital and investment still seemed essential to the functioning of the economy, there were domestic actors seeking opportunities on the other side of the empire and beyond the borders, who found their way into the political leadership, so that purely economic aspirations and goals could be brought into line with the wider public opinion.

Thanks to demographic trends, the evolution of the nationality question, and migration patterns, the government's goals of creating a nation-state became more direct and pronounced. Issues related to the nation's future had, of course, been present in public debates for generations. By the time of this shift, it seems that, alongside – rather than independently of – the sense of threat that influenced foreign policy aspirations and decisions, the idea of expansion had also taken its place among the goals. The Hungarian government, focusing on the Hungarian ethnic group, sought to create as homogeneous a nation-state as possible, a goal closely linked to the aim of supporting the Hungarian diaspora beyond the borders. The diversity of debates on the future of Hungarians in the Carpathian Basin and beyond is well illustrated by the fact that opinions and demands for expansion, framed in response to the perceived threat to Hungary's future, appeared simultaneously at various levels. These included the press, parliamentary debates, and government documents, all reflecting growing self-confidence and optimism. This sentiment was reflected and reinforced by Hungarian participation in world exhibitions and the events of the millennium celebrations, and by the steps taken to promote, establish and strengthen cultural presence, relations and influence, especially in Bosnia.[52]

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[48] 1871. évi XXXV. tc. a chinai császársággal 1869. évi szeptember 2-án kötött kereskedelmi szerződésről XXXIX-XL. cikk; JÓZSA, S., Kína és az Osztrák-Magyar Monarchia. Budapest, 1966, p. 19-35.

[49] Megyünk-e Chinába. *Pesti Hírlap* 1899. ápr. 11; A külügyminiszter Budapesten. *Pesti Hírlap* 1899. ápr. 25; A kínai gyarmatosítás *Hazánk* 1900. márc. 1; Széll Kálmán a tien-csini settlementről. *Magyar Nemzet* 1901. máj. 19; Trade minister on the exploitation of our settlement in China for the benefit of Hungarian economic interests – MNL OL K26-1902-3104-4044-99

[50] The minister for trade to the joint foreign minister. MNL OL K26-1902-3104-1910-XLI-2869-63471/VI; MNL OL K26-1902-3104-1910-XLI-2869-63471/VI.

[51] Major Ferenc KN 1896. XXXV. k. 151. 1901. ápr. 18-máj. 11. 697.ülés 1901. ápr. 26; MNL OL K26-1902-3104-1910-XLI-2869-3986; *A Magyar Szent Korona országainak 1911. évi külkereskedelmi forgalma.* Budapest, 1912, p. 56-58.

[52] Magyarország a párizsi világkiállításon. Budapest, 1900; MIKLÓS, Ö., Magyarország és társországai az 1900-ik évi Párisi Nemzetközi Kiállításon. Budapest, 1903; GRATZ 1992. p. 347; LŐVEI, P., Magyarország világkiállítási pavilonjai. In: GÁL, V. (ed.) *Magyar expo sikerek 1851-2021*. Budapest, 2022, p. 15-28; HOUZE, R., National Internationalism: Reactions to Austrian and Hungarian Decorative Arts at the 1900 Paris Exposition Universelle. In: *Studies in the Decorative Arts*, Vol. 12, No. 1, Fall-Winter 2004-2005, p. 55-97; N. SZABÓ, M., Adatok a hazai háziipar reprezentációjához az országos és a világkiállításokon (1872-1900). In: *A Móra Ferenc Múzeum Évkönyve – Néprajzi tanulmányok*. Szeged, 2008, p. 309-330; SZÉKELY, M., Az ország tükrei. Magyar építészet és művészet szerepe a nemzeti reprezentációban az Osztrák-Magyar Monarchia világkiállításain. Budapest, 2012; MAKKAI 2013, p. 138-139; FÓNAGY 2014, p. 42; CSISZÁR, E., Bosznia-Hercegovina a magyar nyelvű írások tükrében az okkupáció és annexió között (1878-1908). In: *Kisebbségkutatás*, Vol. 27, No. 4, 2018, p. 90-136; ALBERT, S.D., Austria and Hungary at the 1904 St. Louis World's Fair: A Hint of the End. In: *Journal of Austrian-American History*, Vol. 7, No. 2, 2023, p. 109-137.

However, the limits of Hungarian expansion or empire-building were clearly defined in all three areas. The further extension of Hungarian influence, or the transformation of the Austro-Hungarian Empire into a "Hungarian empire," was not considered realistic, either due to the logic of the institutional system, internal relations, or the balance of power between the two halves of the empire. Any alteration of the 1867 system seemed risky for the Hungarian political elite, as it held the potential to undermine Hungarian positions whenever it was proposed. Consequently, during this period, Budapest sought to capitalise on existing opportunities and focused on asserting its interests primarily within the framework of the 1867 system. This did not imply that, at certain points – such as in the series of steps taken regarding Hungarian foreign trade – there was no apparent need for a shift in emphasis or an improvement of positions. Rather, it indicated that the assertion of interests within the empire could not be fundamentally linked to a transformation of its institutional framework.

In addition to the factors mentioned above, the idea of expansion and the steps taken in relation to it were also influenced by Hungary's evolving position within the empire. The political elite correctly perceived that the country's opportunities within the Monarchy were expanding. However, this proved to be somewhat illusory, akin to an optical illusion, for although the shift in power relations between Hungary and Austria – primarily of an economic nature – could indeed give cause for optimism, the Austro-Hungarian Empire was steadily losing influence compared to the other great powers. In other words, the Hungarian elite could frame the objectives outlined above as strengthening elements within an overall weakening empire. Toward the end of the era, particularly during the First World War, the Hungarian imperial vision and the steps taken to realise it became increasingly ambitious. New trends and perspectives emerged, and the political elite responded receptively to the wide-ranging imperial aspirations and ideas expressed in intellectual and academic debates.[53]

[53] ifj. BERTÉNYI, I., A „magyar birodalmi gondolatról"- az I. világháború előtt. In: *Kommentár*, Vol. 2, No. 4, 2007, p. 40-56; ROMSICS 2012, p. 12-14; DEMETER, G., Expanzió vagy önvédelem? Az Osztrák-Magyar Monarchia diplomáciai köreinek tervei Szerbiával kapcsolatban (1913-1915). In: *Világtörténet*, Vol. 37, No. 3, 2015, p. 391-407; ABLONCZY, B., *Keletre, magyar! A magyar turanizmus története*. Budapest, 2016.

Das Beispiel Schleswig: Integration von „Zwischenräumen“ in das Imperium durch Zivilrechtsvereinheitlichung

(The Example of Schleswig: Integration of „Intermediate Spaces“ into the Empire thought the Unification of Civil Law)

*Martin Löhnig**

Abstract

The Prussian-dominated German Empire strove (in the age of colonial empires) to expand its own European sphere of influence. „Intermediate areas,“ which, due to their cultural traditions, eluded clear national classification – such as the Duchy of Schleswig – were annexed for this purpose, as were neighboring states (or parts thereof), and the task then arose of integrating them into the state. The Empire strove to create a unified national legal area, for example, based on a uniform, modern codification of civil law. For regions such as Schleswig-Holstein, Alsace-Lorraine, and Posen, the resulting modernization of the law also formed part of the Germanization policy pursued on many levels. This legal unification took place gradually, the entry into force of the Code of Civil Procedure (1879) or the Civil Code (1900) did not bring about an abrupt change in the applicable law. Rather, the civil law that had been in force up to that point had been gradually changed and standardized over the course of decades by numerous particular and pan-Prussian legislations, which will be demonstrated here using the example of the Duchy of Schleswig.

Keywords: *Integration; Legal unification; Schleswig; Civil Code; Peace of Vienna; Civil procedural law; inheritance law; Real estate law; Family law; civil status law; Germany.*

Einleitung

Preußen bzw. ab 1871 das preußisch dominierte Deutsche Kaiserreich, die nicht bzw. nur in geringem Maße über außereuropäischen Kolonien verfügten, strebten im Zeitalter der Kolonialimperien nach einer Erweiterung des eigenen europäischen Herrschaftsbereichs. „Zwischenräume“, die sich aufgrund ihrer kulturellen Tradition einer eindeutigen nationalstaatlichen Zuordnung entziehen – wie das Herzogtum Schleswig –, wurden hierzu ebenso annektiert wie Nachbarstaaten (oder Teile davon) und es stellt sich dann jeweils die Aufgabe ihrer Integration in den Staat bzw. das Reich. Anders als im Falle außereuropäischer Kolonien operierten Preußen bzw. das Kaiserreich nicht mit der Schaffung eines Corpus kolonialer Sondergesetze, sondern strebten die Schaffung eines einheitlichen nationalstaatlichen Rechtsraumes an, zum Beispiel auf Grundlage einer einheitlichen, modernen Zivilrechtskodifikation. Für Gebiete wie Schleswig-Holstein, Elsaß-Lothringen oder Posen bildete die hierdurch erfolgte Modernisierung des Rechts freilich gleichzeitig einen Teil der auf vielen Ebenen verfolgten Germanisierungspolitik. Diese Rechtsvereinheitlichung erfolgte schrittweise, das Inkrafttreten der Zivilprozessordnung (1879) oder des Bürgerlichen Gesetzbuchs (1900) brachten also keinen abrupten Wechsel des geltenden Rechts; vielmehr war das bisher geltende Zivilrecht über Jahrzehnte hinweg durch zahlreiche partikulare und gesamtpreußische Einzelgesetzgebungen Stück für Stück verändert und vereinheitlicht worden, was vorliegend am Beispiel des Herzogtums Schleswig gezeigt werden soll.

1. Schleswig wird preußische Provinz

Im Wiener Frieden (1864)[1] musste der dänische König Christian IX. die Herzogtümer Schleswig, Holstein und Lauenburg und damit zwei Fünftel des Territoriums und ein Drittel der Einwohner seines Herrschaftsbereichs an Österreich und Preußen gemeinsam abtreten. Der multi-ethnische dänische Gesamtstaat (helstaten) fand damit sein Ende. Nur wenig länger als zwei Jahre (und damit viel kürzer als das österreichisch-ungarische Kondominium über Bosnien-Herzegowina) währte jedoch das preußisch-österreichische Kondominium, die von den beiden Siegermächten ausgeübte gemeinsame Verwaltung in den Herzogtümern, denn schnell entstand zwischen Österreich und Preußen Streit um die staatsrechtliche Stellung der Herzogtümer.

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1 Friedenstractat zwischen Oesterreich, Preußen und Dänemark vom 30. October 1864, Reichsgesetzblatt für das Kaiserthum Oesterreich 1864, S. 278 ff.

2 Vgl. dazu insgesamt BOHN, R., *Geschichte Schleswig-Holsteins*. München, 2006, S. 94 f.; HANSEN, H.S., *Die Bevölkerung, die nationalen Bewegungen und der Kampf um die Zukunft Schleswigs im Jahre 1864*. In: HERING, R., SCHULTZ HANSEN, R. (Hg.), 1864: *Menschen zwischen den Mächten/1864: Mennesker mellem magterne*. Hamburg, 2015, S. 275 ff.

Die österreichische Politik zielte auf ein selbständiges Herzogtum im Deutschen Bund (Schleswig-Holstein war weit weg), Preußen strebte hingegen nach einer Vergrößerung seines Staatsgebietes durch Eingliederung Schleswig-Holsteins in das angrenzende Königreich Preußen.[3] Zunächst wurde die preußisch-österreichische Gemeinschaftsregierung[4] durch das Gasteiner Abkommen[4] vom 14. August 1865 aufgelöst. Hiernach verwaltete nun Preußen Schleswig, Österreich Holstein.[5] Doch bereits ein Jahr später musste Österreich nach dem Deutschen Krieg im Prager Frieden[6] (1866) auf seine Ansprüche verzichten, und Preußen annektierte die Herzogtümer durch das „Einverleibungsgesetz" vom 24. Dezember 1866.[7] Am 12. Januar 1867 wurde im Kieler Schloss die Inkorporation der Herzogtümer Schleswig, Holstein und Lauenburg als Provinz Schleswig-Holstein des Königreichs Preußen proklamiert. Das bedeutete das Aus für die schleswig-holsteinischen Hoffnungen, als selbständiger Bundesstaat mit einem eigenen Herzog an der Spitze dem Deutschen Bund (oder einem deutschen Bundesstaat) anzugehören.[8] Die Annexion war mit Eingliederung des Gebietes in die preußische Verfassungsstruktur zum 1. Oktober 1867 auf Grundlage von § 2 Abs. 1 des Einverleibungsgesetzes abgeschlossen.

Vor allem Otto von Bismarck war daran gelegen, die Einbindung Schleswig-Holsteins behutsam zu betreiben. In der Literatur wird auf die Flexibilität der preußischen Administration gerade Schleswig-Holstein gegenüber hingewiesen, ohne die Schwierigkeiten bei der und die Widerstände gegen die Etablierung der neuen Herrschaft zu verharmlosen.[9] Erforderlich war eine doppelte Integration, denn die Eingliederung Schleswig-Holsteins in den preußischen Staat war zur selben Zeit zu leisten, in der es durch die Reichsgründung 1871 in Deutschland insgesamt zu einem grundlegenden Wandel der Strukturen kam.[10] Die wirtschaftliche Entwicklung Schleswig-Holsteins (allerding weit mehr Holsteins als Schleswigs, dessen Entwicklung bereits seit den 1840er Jahren stagniert hatte[11]) profitierte dabei nach Einführung der Gewerbefreiheit (1867) erheblich von der Integration zunächst in den preußischen und anschließend in den deutschen Staat.[12] Auf der anderen Seite bildete sich gerade im Norden Schleswigs als Gegenbewegung ein starkes nationalbewusstes Dänentum[13] heraus.

Mit der Landgemeinde- und Kreisordnung[14] und der Provinzialverfassung vom 22. September 1867[15] erhielt die neue Verwaltungsstruktur der preußischen Provinz Schleswig-Holstein ihre rechtlichen Grundlagen. Die Einführung von Ortsgemeinden mit Selbstverwaltungsrecht nach preußischem Vorbild vereinheitlichte die Kompetenzen. Bei der Diskussion der neuen Verwaltungsstruktur soll es, so wird zum Teil behauptet, möglich gewesen sein, zahlreiche historisch bedingte Besonderheiten vorzutragen, die Preußen auch berücksichtigt habe.[16] Insgesamt wurde jedoch die aus dem Mittelalter und der frühen Neuzeit stammenden Vielfalt unterschiedlicher Verwaltungsformen, Sonderrechte und Privilegien radikal[17] zugunsten einer Einteilung der Provinz in zwanzig gleichberechtigte Kreise beseitigt.[18] Die Schleswig-Holsteinische Gemeinde- und Städteordnung,[19] die Selbstverwaltungsrechte und gleiche Kompetenzen für alle Gemeinden brachte,[20] wird als die liberalste in ganz Preußen angesehen.[21] Allerdings standen dem Provinziallandtag[22] nicht die gleichen Kompetenzen zu wie den alten Landtagen (insbe-

[3] Vgl. dazu RATHJEN, J., *Die Zivilkommissare und die Oberste Zivilbehörde.* In: HERING, R., SCHULTZ HANSEN, R. (Hg.), S. 103 ff.
[4] Konvention von Gastein, abgedruckt der Ernst Rudolf Huber, *Dokumente zur deutschen Verfassungsgeschichte, Band 2*. Stuttgart, 1964, S. 181 ff.
[5] HENNINGSEN, L.N., *Ejendomshistorie i Sønderjylland*. Aabenraa, 1996, S. 51.
[6] Friedensvertrag zwischen Oesterreich und Preußen vom 23. August 1866, Reichsgesetzblatt für das Kaiserthum Oesterreich 1866, S. 247 ff.
[7] Vgl. „Einverleibungsgesetz" vom 24. Dezember 1866, Verordnungsblatt für Schleswig-Holstein 1867, S. 51 (Nr. 9 vom 19. Januar 1867) und zugehöriges „Patent wegen Besitznahme der Herzogthümer Holstein und Schleswig" vom 12. Januar 1867, Verordnungsblatt für Schleswig-Holstein 1867, S. 55 (Nr. 11 vom 25. Januar 1867).
[8] VOSGERAU, H., LUBOWTIZ, F., *Zwischen Dänemark und Preußen – zwischen Nationalismus und Modernisierung*: Schleswig-Holstein 1815-1920. In: WITT, J. M., VOSGERAU, H. (Hgg.), *Geschichte Schleswig-Holsteins: anschaulich – spannend – verständlich*. Heide, 2010, S. 255.
[9] OPITZ, E., *Schleswig-Holstein: Das Land und seine Geschichte*. Hamburg, 2003, S. 207.
[10] Vgl. BOHN, R., *Geschichte Schleswig-Holsteins*, S. 95.
[11] Vgl. CLAUSEN, T., *Institutionel stagnation i hertugømmet Slesvig 1840-1860*, temp. 8, 2017, S. 30 ff.; zur weiteren Entwicklung KRIEGER, M., Die *wirtschaftliche Entwicklung Schleswig-Holsteins nach 1864: Kontinuität und Wandel.* In: HERING, R., SCHULTZ HANSEN, R. (Hgg.), S. 417 ff.
[12] BOHN, R., *Geschichte Schleswig-Holsteins*, S. 96 f.
[13] Ebd. S. 99 f.
[14] Vgl. Verordnung, betreffend die Organisation der Kreis- und Distriktsbehörden, sowie die Kreisvertretung in der Provinz Schleswig-Holstein, vom 22. September 1867, GS 1867, 1587 ff. und Verordnung, betreffend die Landgemeinde-Verfassungen im Gebiete der Herzogthümer Schleswig und Holstein, vom 22. September 1867, GS 1867, S. 1603 ff.
[15] Verordnung, betreffend die provinizalständische Verfassung im Gebiete der Herzogthümer Schleswig und Holstein, vom 22. September 1867, GS 1867, 1581 ff.
[16] OPITZ, E., *Schleswig-Holstein: Das Land und seine Geschichte*, S. 209.
[17] BOHN, R., *Geschichte Schleswig-Holsteins*, S. 95.
[18] VOSGERAU, H., LUBOWITZ, F., *Zwischen Dänemark und Preußen – zwischen Nationalismus und Modernisierung: Schleswig-Holstein 1815–1920*. In: WITT, J. M., VOSGERAU, H. (Hgg.), *Geschichte Schleswig-Holsteins: anschaulich – spannend – verständlich.* Heide, 2010, S. 256.
[19] Gesetz, betreffend die Verfassung und Verwaltung der Städte und Flecken in der Provinz Schleswig-Holstein, (Städteordnung Schleswig-Holstein) vom 14. April 1869, GS 1869, 589 ff.
[20] BOHN, R., *Geschichte Schleswig-Holsteins*, S. 96.
[21] OPITZ, E., *Schleswig-Holstein: Das Land und seine Geschichte*, S. 210.
[22] ECKERT, J., Schleswig-Holstein auf dem Weg zum BGB. In: Förderverein der gerichtshistorischen Sammlung des Landgerichtsbezirkes Flensburg e.V. (Hg.), *Das Bürgerliche Recht – von der Vielfalt zur Einheit: Vortragsreihe anläßlich einer Sonderausstellung des Landgerichts Flensburg zum 100. Geburtstag des Bürgerlichen Gesetzbuches*. Flensburg, 2000, S. 34 f.

sondere nicht das Steuerbewilligungsrecht), so dass das ständische, des Partikularismus verdächtigte Element eine Schwächung erfuhr.[23] Neugeordnet wurde auch die Rechtspflege,[24] die nun vollständig von der Verwaltung getrennt war. Privilegierte Gerichtsstände wurden beseitigt[25] und das Land gleichförmig in Amts- und Landgerichtsbezirke eingeteilt; höchstes in der Provinz belegenes Gericht war das Appellationsgericht (seit 1879 Oberlandesgericht) Kiel. Die überkommenen Regelungen und Privilegien im Bereich der Rechtspflege waren einer Entwicklung des Landes auf der Grundlage der Rechtsgleichheit im Wege gestanden, so dass die Schaffung eines modernen Rechtswesens liberalen Reformpostulaten weit entgegenkam und begrüßt wurde.[26]

2. Die Entwicklung der Privatrechtsordnung Schleswigs

Nach der Annexion durch Preußen (wie auch in den beiden vorangegangenen Jahren des Kondominiums) galt in der Provinz Schleswig-Holstein, deren Teil Schleswig uns hier interessieren soll, zunächst das bisherige Recht unverändert fort. Das Recht Schleswigs unterschied sich vom dänischen Recht insoweit deutlich, als dort nicht das Danske Lov (1683) galt, sondern vor allem das Jütische Recht (Jyske Lov[27]), denn Dänemark gliederte sich in der Vormoderne in unterschiedliche Rechtskreise:[28] Jütland (mit Schleswig, Fünen und Langeland), Seeland (mit Lolland) und Schonen (mit Halland und Blekinge).[29] Waldemar II. Sejr (1202-1241) hat diese Sammlung Jütischen Rechts auf dem Reichstag zu Vordingborg im März 1241 beschließen lassen.[30] Sie zeigt deutliche Einflüsse des kanonischen (und damit auch des römischen) Rechts.[31] Daneben traten zahlreiche andere Partikularrechte, beispielsweise das Nordstrander Landrecht, das Eiderstädter Landrecht oder die Stapelholmer Constitution. Diese Rechte wurden bis 1864 sukzessive und nach den jeweiligen Bedürfnissen durch eine speziell für Schleswig geltende dänische Rechtssetzung ergänzt und verändert. Die Fortgeltung[32] dieses uneinheitlichen und regional zersplitterten Rechts fügte sich in die Rechtsentwicklung Preußens, das zu dieser Zeit ebenfalls nicht (oder jedenfalls nicht durchgängig in allen Bereichen) über eine einheitliche Rechtsordnung verfügte, ebenso ein wie in die Rechtslage im neugegründeten Reich, dessen innerer Ausbau durch (unter anderem) Schaffung einer einheitlichen Privatrechtsordnung noch zu leisten war. Trotzdem: Die Rechtszersplitterung war, wie *Werner Schubert* diagnostiziert, in „kaum einem anderen Teil des Deutschen Bundes bzw. Dänemarks […] so groß wie in den Herzogtümern Schleswig und Holstein, als diese 1867 als eigene Provinz zu Preußen kamen".[33] Die wissenschaftliche Aufbereitung und Systematisierung des Rechts in Dänemark hatte sich im 19. Jahrhundert an der deutschen Pandektenwissenschaft orientiert. Umfassende Gesetzgebungen entstanden allerdings nicht, bevor Schleswig von Preußen annektiert wurde.

Bereits bestehendes deutsches Einheitsrecht wurde nach der Annexion in Schleswig zügig eingeführt, so etwa das Allgemeine Deutsche Handelsgesetzbuch und die Allgemeine Deutsche Wechselordnung. Nach der Reichsgründung traten dann sukzessive die zur Rechtsvereinheitlichung im Deutschen Reich geschaffenen Gesetzbücher in Kraft. Das fortgeltende Zivilrecht war zuvor jedoch durch zahlreiche partikulare und gesamtpreußische Einzelgesetzgebungen Stück für Stück verändert und vereinheitlicht worden. Bevor Schleswig also zivilrechtlich in den Verband des Deutschen Kaiserreichs integriert wurde, erfolgte eine Integration in den preußischen Rechtsraum, die hier mit Blick auf einige wichtige Gesetzesvorhaben beleuchtet werden soll.

3. Einzelne Rechtsgebiete

3.1 Zivilprozessrecht

Das Zivilverfahrensrecht wurde zeitgleich mit der Gerichtsverfassung neugeregelt. Für Schleswig-Holstein, Nassau und Kurhessen erging am 24. Juni 1867 eine Verordnung[34], die den reformierten preußischen Zivilprozess, letztlich ein schriftliches Verfahren mit mündlicher Schlussverhandlung, in diesen neuen Landesteilen einführte.

Preußen hatte sich mit dem Corpus Iuris Fridericianum vom 26. April 1781[35] eine neue Prozessordnung gegeben, deren Instruktionsverfahren mit dem gemeinrechtlichen Verfahren gründlich brach. Dieses neue Verfahren mit einer vom Streit über Rechtsfragen streng geschiedenen gerichtlichen Tatsachenermittlung diente zuvorderst dazu, unabhängig vom Handeln der Parteien die materielle Wahrheit zu ermitteln.[36] Rechtsanwälte wurden infolgedessen zu staatlich besoldeten Assistenzrä-

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[23] OPITZ, E., *Schleswig-Holstein: Das Land und seine Geschichte*, S. 210.

[24] Verordnung über die Trennung der Rechtspflege von der Verwaltung, die Aufhebung der Privatgerichtsbarkeit und des eximirten Gerichtsstandes, sowie über die Gerichtsverfassung in den Herzogthümern Schleswig und Holstein vom 26. Juni 1867, GS 1867, S. 1073 ff.

[25] VOSGERAU, H., LUBOWITZ, F., *Zwischen Dänemark und Preußen – zwischen Nationalismus und Modernisierung: Schleswig-Holstein 1815 – 1920*. In: WITT, J. M., VOSGERAU, H.(Hgg.), S. 257.

[26] OPITZ, E., *Schleswig-Holstein: Das Land und seine Geschichte*, S. 209.

[27] SEE, K. v. (Hg.), *Das Jütische Recht, aus dem Altdänischen übersetzt und erläutert*. Weimar 1960.

[28] STRAUCH, D., *Skandinavisches Recht: Einführung und Überblick*. Göttingen, 2008, ergänzte und erweiterte Fassung, 2017, S. 13.

[29] FENGER, O., JANSEN, C.R., *Jydske Lov 750 Ír*. Viborg, 1991, S. 38.

[30] STRAUCH, D., *Skandinavisches Recht*, S. 14.

[31] FENGER, O., *L'influence du droit romain dans la Scandinavie mediévale*. Mediolani, 1981, S. 13 ff, 29 ff, 51 ff.

[32] Vgl. STRAUCH, D., *Skandinavisches Recht*, S. 65.

[33] SCHUBERT, W., Recht und Gerichtsverfassung in Schleswig-Holstein vor 150 Jahren. In: *SchlHAnz*, 2014, S. 79 (79).

[34] Verordnung über das Verfahren in Civilprozessen für die durch das Gesetz vom 20. September 1866 und die beiden Gesetze vom 24. Dezember 1866 der Preußischen Monarchie einverleibten Landestheile, mit Ausnahme des Gebietes des vormaligen Königreichs Hannover, sowie der vormaligen freien Stadt Frankfurt, des vormaligen Oberamtsbezirks Meisenheim und der Enklave Kaulsdorf vom 24. Juni 1867, GS 1867, S. 885 ff.

[35] Corpus Iuris Fridericianum. Erstes Buch von der Prozeßordnung, Berlin 1781.

[36] Vgl. hierzu einen Brief Svarez' aus dem Jahre 1785, abgedruckt bei STÖLZEL, A., SVAREZ, C. G., *Ein Zeitbild aus der zweiten Hälfte des achtzehnten Jahrhunderts*. Berlin, 1885, S. 19.

ten.[37] In einem absolutistischen Staatsmodell dient der Zivilprozess eben nicht allein der Durchsetzung privater Ansprüche, sondern hat vor allem die Funktion der Durchsetzung bestimmter staatlicher Ordnungs- und Gerechtigkeitsvorstellungen.[38] Allerdings konnte sich das preußische Instruktionsverfahren nicht durchsetzen und die Geschichte seiner fast hundertjährigen Geltung muß als Geschichte zahlreicher Reformen und Reformversuche[39] erzählt werden.[40] Mit Verordnungen aus den Jahren 1833[41] und 1846[42] ist Preußen dann nach Einschätzung von *Martin Ahrens* „in den gemeinrechtlich geprägten, aber durch neuere französische Einflüsse gelockerten prozessualen Verbund" zurückgekehrt.[43] Friedrich Wilhelm III. hatte bereits in den 1820er Jahren eine Revision der Prozessordnung in Auftrag gegeben. 1831 forderte der angesehene Justizkommissar *Marchand*[44], dass man die Beibringung des Prozessstoffs den Parteien selber überlassen müsse, um anschließend in einem mündlichen Verfahren darüber zu verhandeln.[45] Und tatsächlich: Zwei Jahre später erging die preußische Verordnung den summarischen Mandats- und Bagatellprozess betreffend, die mit den Grundsätzen des reformierten preußischen Prozesses brach.[46] Diese Verordnung betraf zum einen die „Verfolgung von Rechts-Ansprüchen, welche auf Urkunden beruhen", zum anderen von „solchen Ansprüchen, welcher ihrer Beschaffenheit oder ihrer Geringfügigkeit wegen als Gegenstände des gewöhnlichen Verkehrs eine besondere Beschleunigung verdienen".[47] Dieses Verfahren fand großen Anklang[48] und es wurde vermutlich versucht, es so oft wie möglich anzuwenden. Dieses Nebeneinander zweier Verfahrensarten war kein befriedigender Zustand. Deshalb beauftragte Friedrich Wilhelm IV. seinen Justizminister *Friedrich Carl von Savigny* mit dem Entwurf zu einer weiteren Prozessrechtsreform. *Savigny* wollte das bisherige preußische Zivilverfahren zugunsten einer von vier Schriftstücken vorbereiteten mündlichen Verhandlung vor dem Gerichtskollegium beseitigen.[49] Wenn *Savignys* Entwurf auch scheiterte, so wurde doch 1846/47 das summarische Bagatell-Verfahren auf weitere – letztlich nahezu alle[50] – Prozesse ausgedehnt[51] und neben der Mündlichkeit des Verfahrens eine weitere zentrale rechtspolitische Forderung in der ersten Hälfte des 19. Jahrhunderts, die Öffentlichkeit des Verfahrens, eingeführt.

Aufgrund der Tatsache, dass Preußen in Schleswig also letztlich ein modernisiertes gemeinrechtliches Verfahren eingeführt hatte, bedeutete diese Verordnung – anders als die Neuorganisation der Gerichtsbarkeit – keine ganz grundlegende Änderung. Für *Rudolf Brinkmann*, der 1867 den schleswig-holsteinischen Zivilprozess gemeinrechtlicher Prägung[52] vor der Neuregelung durch die geschilderte Verordnung darstellt, war dieser Prozess keineswegs so reformbedürftig wie der Zivilprozess in anderen deutschen Staaten. „Von uralten Zeiten her hat sich […] Mündlichkeit und Öffentlichkeit des Prozeßganges erhalten",[53] auch wenn in der gemeinrechtlichen Praxis die Schriftlichkeit eine allzu starke Rolle eingenommen habe. Gleichwohl fand *Brinkmann* mit seinem Vorschlag, den geltenden gemeinrechtlichen schleswig-holsteinischen Prozess unter konsequenter Anwendung der Grundsätze der Mündlichkeit und Öffentlichkeit beizubehalten,[54] kein Gehör. Denn der gemeine Prozess, wie er in Schleswig praktiziert wurde, begegnete durchaus auch Kritik. *Esmarch* führte etwa aus, das Beweisverfahren sei „sehr langwierig, und wo von den Zwischen- und Endurtheilen an die höheren Gerichte appellirt wird, können bis zur endlichen Erledigung der Sache mehrere Jahre hingehen".[55] Hierdurch werde auch die Behandlungen der Konkurse und Erbteilungen erheblich verzögert, weil alle streitigen Verhältnisse im Wege der ordentlichen Verhandlung zu erledigen seien. Überdies entstünden unverhältnismäßig hohe Prozesskosten.[56] Mit der Ver-

[37] Vgl. LÖHNIG, M., *Werden Rechtsanwälte noch gebraucht oder können die weg? Zur Geschichte der Anwaltschaft im 19. Jahrhundert*. In: BEDNAREK, A. et al. (Hg.), Justiz und Baukultur im 19. Jahrhundert, Beiheft zum Neuen Lausitzischen Magazin 19, 2018, S. 86 ff.

[38] Vgl. LÖHNIG, M., *Der Zivilprozeß zwischen Staat und Gesellschaft bei Grolman*. In: EISFELD, J., OTTO, M., PAHLOW, L., ZWANZGER, M. (Hgg.), *Naturrecht und Staat in der Neuzeit*. Tübingen, 2013, S. 417-429, S. 420 f.

[39] Hierzu NÖRR, K.N., *Reinhardt und die Revision der allgemeinen Gerichts-Ordnung für die Preußischen Staaten*. Tübingen, 1975.

[40] Eingehend hierzu AHRENS, M., *Prozeßreform und einheitlicher Zivilprozeß: Einhundert Jahre legislative Reform des deutschen Zivilverfahrens vom Ausgang des 18. Jahrhunderts bis zur Verabschiedung der Reichszivilprozeßordnung*. Tübingen, 2007, S. 83 ff.

[41] Verordnung vom 1. Juni 1833 über den Mandats-, summarischen und Bagatellprozeß, GS 1833, S. 27 ff.

[42] Verordnung über das Verfahren in Zivilprozessen vom 21. Juli 1846, GS 1846, S. 291 ff.

[43] AHRENS, M., *Prozeßreform und einheitlicher Zivilprozeß: Einhundert Jahre legislative Reform des deutschen Zivilverfahrens vom Ausgang des 18. Jahrhunderts bis zur Verabschiedung der Reichszivilprozeßordnung*. Tübingen, 2007, S. 202.

[44] MARCHAND, C.W., *Ueber einige Haupthindernisse, welche der Verfolgung des Rechts vor den Gerichtshöfen nach der Preußischen Prozeß-Ordnung entgegenstehen. Bonn, 1831.*

[45] WEISSLER, A., *Die Geschichte der Rechtsanwaltschaft*. Halle, 1905, S. 365.

[46] BORNHAK, C., *Preußische Staats- und Rechtsgeschichte*. Berlin, 1903, S. 455.

[47] Vorspruch der Instruktion zur Ausführung der Verordnung. In: MANNKOPFF, A. J., *Die Verordnung vom 1. Juni 1833. über den Mandats-, summarischen und Bagatellprozeß*. Berlin, 1837, S. 1.

[48] Vgl. SCHERING, A. F., *Der Mandats-, summarische und Bagatell-Prozeß*. Berlin, 1843, S. III.

[49] WEISSLER, A., *Die Geschichte der Rechtsanwaltschaft*, S. 367.

[50] DAHLMANNS, G., In: COING, H. (Hg.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, Band III/2.* München, 1982, S. 2651.

[51] GS 1846, S. 291 ff.; zur Entstehung dieser VO SCHUBERT, W. In: SCHUBERT, W., REGGE, J. (Hgg.), *Gesetzrevision*, II 11. Vaduz, 1991, S. XXXVII ff.

[52] Vgl. dazu FRANCKE, A.W.S., *Der gemeine Deutsche und Schleswig-Holsteinische Civilprozeß*. Hamburg/Kiel, 1839-1843.

[53] BRINKMANN, R., *Ueber das Justizwesen in den Elbherzogthümern in Vergleich mit dem Preußischen*. Kiel, 1867, S. 10.

[54] Ebd. S. 7 ff.

[55] ESMARCH, H. C., *Ueber die Reform der Gerichtsverfassung im Herzogthume Schleswig*. Königliches Taubstummen-Institut, Schleswig, 1884, S. 8.

[56] Ebd. S. 9.

ordnung vom 24. Juni 1867 existierte nunmehr erstmals ein geschriebenes Zivilverfahrensrecht in Schleswig, nachdem zuvor Reform- und Kodifikationsversuche bezüglich des Prozessrechts gescheitert waren.[57]

3.2 Erbrecht

In den Jahren um die Reichsgründung herum sind im Bereich des Zivilrechts in Preußen verschiedene Gesetze ergangen, die Teile der unterschiedlichen, im preußischen Staat geltenden Zivilrechtsordnungen aufgehoben und diese Bereiche neu geregelt haben. Diese Rechtsvereinheitlichung erfüllte auch Modernisierungsdesiderate, die insgesamt oder zumindest mit Blick auf einzelne Teilrechtsordnungen bestanden; dies gilt für Teile des als „Rheinisches Recht" fortgeltenden französischen Rechts[58] ebenso wie für das unübersichtliche und vielfach vormoderne Recht der Provinz Schleswig-Holstein. Diese Teilreformen hatten immer wieder das Bedürfnis nach einem gesteigerten Verkehrsschutz in einer industrialisierten und mobilen Gesellschaft zum Gegenstand, dem beispielsweise durch Einführung eines Erbscheins und oder die Anlegung von Grundbüchern als amtlichen Dokumenten, die öffentlichen Glauben genießen, Rechnung getragen werden sollte.

Die Erbschaft wurde nach dem Erbrecht Schleswigs, wie es sich aus der Darstellung von *Esmarch* ergibt, nicht von selbst erworben, sondern die Erben mussten die Erbschaft antreten.[59] Man arbeitete also mit dem gemeinrechtlichen Modell der *hereditas iacens*.[60] Bei Eintritt eines Erbfalls hatte die zuständige Behörde erforderlichenfalls die Erben von Amts wegen zu ermitteln und dann den inventarisierten Nachlass zu regulieren, also in Form eines entsprechenden Rechtsakts auseinandersetzen;[61] nicht vorgesehen war demgegenüber ein konstitutiver Einantwortungsakt, wie er etwa im österreichischen Zivilrecht bis heute besteht. Dagegen erfolgte der Anfall der Erbschaft im Geltungsgebiet des Preußischen Landrechts mit dem Tod des Erblassers, I 9 § 367 ALR, und der Erbe musste ggf. die Erbschaft ausschlagen, I 9 § 383 ALR. Es bedurfte also keiner Besitzergreifung durch den Erben, I 9 § 368 ALR. Damit wich das preußische Recht vom Pfad des gemeinen Rechts und älterer deutscher Partikularrechte, auch des Landrechts für das Herzogtum Preußen von 1620,[62] ab, die einen Erwerb der Erbschaft nur durch ausdrückliche Annahme (Antretung) vorsahen. Das ALR folgte dem gemeinrechtlichen Modell aus praktischen Erwägungen nicht,[63] weil oftmals Streitigkeiten darüber entstanden waren, ob der Erbe Handlungen vorgenommen hatte, die einen Rückschluss darauf zuließen, dass er Erbe sein wolle (pro herede gerere).[64]

Unabhängig von der Regelung des Erbschaftserwerbs muss ein Erbe seine Rechtsstellung im Rechtsverkehr erforderlichenfalls nachweisen. In Deutschland kannte im 19. Jahrhundert lediglich Preußen und auch dies nur im Geltungsbereich des Allgemeinen Landrechts ein „Erbeslegitimationsverfahren" (I 9 § 482 ff. ALR), das jedoch nur unvollständig geregelt war und von der Rechtspraxis fortgebildet wurde. Ein Legitimationsattest konnten allerdings nur die Intestaterben erhalten, weil letztwillige Verfügungen beurkundungspflichtig waren und in diesen Fällen eine Ausfertigung erteilt werden konnte, die als Attest diente.[65] In den anderen Teilen Preußens wurde das Fehlen einer solchen Bescheinigung als Mangel angesehen, zum Teil betrieb die Rechtsprechung deshalb Rechtsfortbildung in Anlehnung an die Praxis zum Allgemeinen Landrecht.[66] In Schleswig bestand keine geschriebene Rechtsgrundlage für ein derartiges Erbeslegitimationsverfahren. Es soll jedoch die Ausstellung entsprechender Atteste üblich gewesen sein, unabhängig davon, ob die Nachlassregulierung durch ein Gericht oder durch die Erben selbst erfolgt ist; im Falle der Intestaterbfolge hätten die Kirchenbücher zum Nachweis der Verwandtschaft herangezogen werden müssen.[67]

Am 12. März 1869 erging in Preußen das Gesetz betreffend die Ausstellung gerichtlicher Erbbescheinigungen,[68] das einheitliche und die bisherige Praxis aufgreifende Regelungen für das gesamte preußische Staatsgebiet enthielt. Hiernach kann „[j]eder gesetzliche Erbe (Intestaterbe) […] auf Ausstellung einer Erbbescheinigung" antragen, § 1. Gewillkürte Erben konnten hingegen lediglich eine die letztwillige Verfügung ergänzende Bescheinigung beantragen, falls die letztwillige Verfügung die Erben nicht mit der erforderlichen Bestimmtheit (sondern beispielsweise unter Gattungsbezeichnungen wie „meine Kinder") benennt, § 9 Abs. 1. Sollte eine Bescheinigung unrichtigen Inhalts ausgestellt worden sein, muß der wahre Erbe „die von dritten Personen redlicher Weise mit dem in der Erbbescheinigung benannten Erben über den Nachlaß vorgenommenen Rechtsgeschäfte, insbesondere auch die demselben von Nachlaßschuldnern geleisteten Zahlungen, gegen sich gelten lassen", § 5 Abs. 1.

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[57] SCHUBERT, W., *SchlHAnz*, 2014, S. 79 (79 ff.).

[58] Dazu LÖHNIG, M., *Droit local – Deutsches Recht in Frankreich zum Beginn des 20. Jahrhunderts: Zivilrecht, Gerichtsverfassungsrecht und Zivilprozessrecht*, Berlin, 2023.

[59] ESMARCH, H.C., *Handbuch des Erbrechts im Herzogthume Schleswig*. Schleswig, 1842, S. 220.

[60] Vgl. dazu zuletzt SCHMIDT, J. P., Von Monstern, Nebelgestalten und Seelenwanderungen: Die hereditas iacens in Rechtsgeschichte, Rechtsvergleichung und Rechtsdogmatik. In: JANSEN, N., MEIER, S. (Hgg.), *Iurium Itinera: Historische Rechtsvergleichung und vergleichende Rechtsgeschichte – Historical Comparative Law and Comparative Legal History. Reinhard Zimmermann zum 70. Geburtstag am 10. Oktober 2022*. Tübingen, 2022, S. 1055 ff.

[61] Vgl. nur ESMARCH, H. C., *Handbuch des Erbrechts im Herzogthume Schleswig*, S. 258 ff.

[62] DERNBURG, H., *Familienrecht und Erbrecht des Privatrechts Preußens*. 1896, S. 306.

[63] Eingehend KOCH, C. F., *Das Preussische Erbrecht aus dem gemeinen deutschen Rechte entwickelt*, Bd. 2. Berlin, 1866, S. 1141 ff.

[64] Vgl. RUSCHEL, M., *Das Preußische Erbrecht in der Judikatur des Berliner Obertribunals in den Jahren 1836 bis 1865*. Potsdam, 2019, S. 75 f.

[65] HIRSCH, M. P., *Von der Erbbescheinigung des preußischen Rechts zum Erbschein des Bürgerlichen Gesetzbuchs*. Frankfurt/Main, 2004, S. 30.

[66] WACHLER, P., *Gesetz, betreffend die Ausstellung gerichtlicher Erbbescheinigungen vom 12. März 1869 nebst den die Kostenerhebung und das Erbschaftsstempel-Wesen regulierenden Bestimmungen*. Berlin, 1869, S. 6 ff.

[67] Ebd. S. 8 f.

[68] GS 1869, S. 473 ff.

Die Stoßrichtung der Regelungen ist klar; *Wachler*,[69] der den ersten umfassenden Kommentar zu dem Gesetz herausgegeben hat, zitiert hierzu den Abgeordneten *Bähr*, der als Berichterstatter im Preußischen Abgeordnetenhaus ausgeführt hat: „Der vorliegende Gesetzentwurf gehört in die Kategorie derjenigen Gesetze, welche der in dem allgemeinen Zuge der Neuzeit liegenden Tendenz Folge geben, Formen zu schaffen, innerhalb deren sich der Verkehr frei und sicher bewegen kann, indem er von den Gefahren befreit wird, welche die Rechtsunsicherheit bisher ihm gebracht hat. Der Entwurf geht in dieser Beziehung parallel mit dem uns gleichzeitig vorliegenden Entwurf über den Eigenthumserwerb. Wie es dort heißt: der als Eigenthümer Eingetragene ist Eigenthümer insofern, als er Dritten Rechte an dem Eigenthum überträgt, so heißt es in diesem Entwurfe: der als Erbe bescheinigte ist Erbe insofern, als er Dispositionen über den Nachlass oder Theile desselben vornimmt. In dieser Bestimmung liegt der Schwerpunkt des ganzen Gesetzes."

3.3 Grundstücksrecht

Grundstücksveräußerungen bedurften in Schleswig eines schriftlichen, in einigen Gebieten auch eines gerichtlich ausgefertigten Dokuments; zum Teil genügte die bloße Umschreibung im Kataster.[70] Zur stets erforderlichen Übergabe trat in einigen Gebieten die Lachbietung oder Verschötung hinzu.[71] Dies bedeutete, dass der beabsichtigte Eigentumsübergang an drei Gerichtstagen öffentlich proklamiert werden mußte; wurden keine Einwendungen erhoben, war dem Erwerber das Eigentum zuzusprechen und er erhielt ein entsprechendes gerichtliches Dokument, den Schötebrief. Es existierten Realfolien in einigen Gebieten Schleswigs.[72]

In Preußen markierten kurz nach der Annexion Schleswigs das preußische Eigentumserwerbsgesetz[73] von 1872 und die preußische Grundbuchordnung[74] aus dem gleichen Jahr den Abschluss eines jahrzehntelangen Reformdiskurses[75] und zugleich den Ausblick auf ein gesamtdeutsches Grundstücksrecht.[76] Allerdings galt dieses Gesetz nicht für Schleswig. Das Eigentumserwerbsgesetz unterschied – anders als die in Preußen geltenden Partikularrechte – bei Grundstücksgeschäften schuldrechtliche und dingliche Ebene und regelte die Auflassung als Eigentumserwerbsvorgang mit Einigung und obligatorisch-konstitutiver Eintragung, § 1 f. prEEG. Hinzukam die materielle Publizität des Grundbuchs mit einer etwas versteckten Regelung zum Gutglaubensschutz, § 9 Abs. 2 prEEG („Es bleiben jedoch die in der Zwischenzeit [bis zur Berichtigung des Grundbuchs] von dritten Personen gegen Entgelt und im redlichen Glauben an die Richtigkeit des Grundbuchs erworbenen Rechte in Kraft"). Hypotheken und Grundschulden konnten ebenfalls nur aufgrund einer Eintragung in das Grundbuch erworben werden, § 18 prEEG. Die Grundbuchordnung sah ein Verfahren vor, in dem das neugeschaffene Grundbuchamt die Eintragungsbewilligung des Voreingetragenen und die Auflassung prüfte, nicht aber das zugrundeliegende Kausalgeschäft, § 46 prGBO.

Alsbald nach Inkrafttreten wurden diese Gesetze durch Einführungsgesetze, die jeweils für eine Harmonisierung mit dem dort geltenden Zivil- und Verfahrensrecht sorgten, auf die annektierten Provinzen ausgeweitet und auf diese Weise ein einheitliches Grundstücksrecht in Preußen erreicht. Nach den Motiven[77] zum Gesetz vom 27. Mai 1873 über das Grundbuchwesen und die Verpfändung von Seeschiffen in der Provinz Schleswig-Holstein[78] bestand „das dringendste Bedürfniß, unverzüglich mit der Reform des Immobilarsachenrechts vorzuschreiten, […] unter den neu erworbenen Provinzen für die Provinz Schleswig-Holstein", wie sich schon an den entsprechenden Anträgen der Provinziallandstände zeige. Die Regelungen des Jütischen Rechts seien „mehr und mehr außer Gebrauch gekommen". Die neueren gesetzlichen Regelungen in Schleswig zum Erfordernis der Schriftform für Grundstücksgeschäfte hätten „eine verschiedene Auslegung erlitten". Deshalb herrsche „in der Praxis eine große Ungleichförmigkeit, vielfach auch Unsicherheit über die Bedingungen des Eigenthumserwerbs." Dem Hypothekenrecht, das wesentlich auf der Grundlage des römischen Rechts beruhte, fehlten „die für die Sicherung des Realkredits unentbehrlichen Prinzipien der Publizität und Spezialität. Gesetzliche und stillschweigende Hypotheken bestehen noch, ebenso können durch Vertrag Generalhypotheken bestellt werden. […] Mehr noch als die materielle Seite des Rechts ist seine formelle in einem durchaus ungenügenden, unsicheren und selbst lokal abweichenden Zustande."[79] Die vorhandenen Realfolien seien nicht zur Fortführung geeignet, schon weil sie auf Grundlage unterschiedlicher gesetzlicher Regelungen und deshalb unterschiedlich geführt worden seien.

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69 WACHLER, P., Gesetz, S. 12 f.

70 ESMARCH, H. C., *Das im Herzogthume Schleswig geltende Bürgerliche Recht*, S. 140 f.

71 ESMARCH, *Das im Herzogthume Schleswig geltende Bürgerliche Recht*, S. 142 f.

72 SCHUBERT, W., *SchlHAnz*, 2014, S. 79 (85).

73 Gesetz über den Eigenthumserwerb und die dingliche Belastung von Grundstücken, Bergwerken und selbständigen Gerechtigkeiten vom 5. Mai 1872, GS 1872, S. 433 ff.

74 Grundbuchordnung vom 5. Mai 1872, GS 1872, S. 446 ff.

75 NOSSEK, V., *Das Konzept „Grundbuch" – Der Streit um das Grundregister in Deutschland, Frankreich und England zwischen 1652 und 1900*. Tübingen, 2019, S. 277 ff.

76 Vgl. SCHUBERT, W., JAKOBS, H. H., *Die Beratung des Bürgerlichen Gesetzbuchs, Sachenrecht I*. Berlin/New York, 1985, Einleitung.

77 Stenographische Berichte über die Verhandlungen, Herrenhaus, Session 1871/73, Bd. 2 (Anlagen), Nr. 29, S. 122 ff. (Gesetzentwurf), S. 125 ff. (Motive). Zu den Beratungen: Stenographische Berichte über die Verhandlungen des Preußischen Hauses der Abgeordneten 1873 Anl. Bd. 2 Nr. 275 = S. 1170; Stenographische Berichte über die Verhandlungen des Preußischen Herrenhauses 1872/73 Bd. 1, Sitzung v. 22. Februar 1873 = S. 177; die Aussprache über das Gesetz ist nur ganz kurz, weil vermutlich die Argumente schon zu den Gesetzen für andere Provinzen ein paar Tage vorher getauscht worden sind.

78 GS 1873, S. 241 ff.

79 Alles Stenographische Berichte über die Verhandlungen, Herrenhaus, Session 1871/73, Bd. 2 (Anlagen), Nr. 29, S. 125.

3.4 Familienrecht/Personenstandsrecht

Am 1. Juni 1874 trat das preußische Gesetz über die Beurkundung des Personenstandes und die Form der Eheschließung[80] vom 9. März 1874 in Kraft. Das Gesetz brachte einen Reformdiskurs zu einem Abschluss, der allerdings so nicht zwingend zu erwarten war. Zunächst ließen sich im protestantisch geprägten Preußen keine Mehrheiten für die Einführung von Zivilstandsregistern und einer zwingenden staatlichen Eheschließung finden. Allerdings veränderte sich die Situation im Zuge der kulturkämpferischen Auseinandersetzung des preußischen Staates mit der katholischen Kirche. Den letzten Anstoß dürfte die Gründung der altkatholischen Kirche, die das von Papst Pius IX. verkündete Dogma über die Unfehlbarkeit des Papstes ablehnte, gegeben haben. Denn die Mitglieder dieser sicherlich politisch willkommenen Abspaltung von der römischen Amtskirche hatten nun Schwierigkeiten eine gültige Ehe zu schließen, da ihnen dies von katholischen Priestern verwehrt wurde.[81] Als Ursache wurde vom Gesetzgeber jedoch eindeutig der Umstand benannt, dass „die zeitige Auflehnung des römisch-katholischen Klerus gegen die Staatsgesetze und die Anordnungen der Staatsbehörden ein Vorgehen im Wege der Gesetzgebung“[82] erfordere. Hinzukomme, daß in den annektierten Gebieten, auch in Schleswig, vielfach ein „konfessionell ausgebildetes und gesondertes Eherecht“ galt.[83] Vor diesem Hintergrund ordnete zum einen § 1 des Gesetzes an, dass die „Beurkundung der Geburten, Heirathen und Sterbefälle […] ausschließlich durch die vom Staate bestellten Standesbeamten“ erfolgt. Zum anderen konnte nach § 24 Abs. 1 im Geltungsbereich des Gesetzes „eine bürgerlich gültige Ehe nur in der durch dieses Gesetz vorgeschriebenen Form geschlossen“ werden. § 24 Abs. 2 normierte ein strafbewehrtes Voraustrauungsgebot. Damit wurde in Schleswig die bisher erforderliche Eheschließung durch den „competenten Prediger“[84] durch die obligatorische Zivilehe ersetzt.

3.5 Vormundschaftsrecht

Während in weiten Teilen Dänemarks die Vormundschaft über Personen, die aufgrund von Alter oder Erkrankung unmündig sind, im Danske Lov von 1683 geregelt war, galt in Schleswig auch insoweit Jütisches Recht. Dort finden sich Regelungen zu Personen, die Vormund sein bzw. nicht sein können (I 28 ff.) und zur Auswahl des Vormunds („Die Verwandten des Vaters sind immer näher, Vormund zu sein, als die der Mutter, wenn sie gleich verwandt sind und gute Vormünder sein werden“, I 28). Hinzukommen Regelungen zur Vermögensverwaltung bei Kindern alleinerziehender oder wiederverheirateter Mütter (I 29) oder zum Schutz des Kindesvermögens bei Vormundschaft des Stiefvaters, die jedoch nur eintreten kann, „wenn die nächsten Verwandten es wollen“ (I 30). Als Aufsichtsbehörde fungiert der König, „denn der König ist Vormund für alle die, die selbst keinen rechten Vormund haben“ (I 28).

1742 trat die Vormünder-Verordnung für das Herzogtum Schleswig[85] in Kraft, die einige Ergänzungen und Veränderungen brachte. Dort war zunächst geregelt, daß „die Väter, nach dem Absterben der Mütter, natürliche Vormünder ihrer beyderseitigen unmündigen Kinder, ohne Confirmation der Obrigkeit, verbleiben“ (§ 1), wobei besondere Regelungen zum Schutz des Kindesvermögens vorgesehen waren, wenn dem Minderjährigen eine Erbschaft von mütterlichen Verwandten anfällt (§ 2) oder der Vater erneut heiratete (§ 3). Starb der Vater, so sollte „die nachlebende Wittwe aber mit denen Kindern in ungetheilten Gütern zu verbleiben befugt seyn“ (§ 4) und bei einer Erbschaft von seiten der väterlichen Verwandten oder Wiederverheiratung besonderen Regeln unterworfen werden (§ 5 und 6). Beim Tod beider Eltern waren zunächst vorläufige Maßnahmen zur Vermögenssicherung und zur Abwicklung des Nachlasses angeordnet (§ 8 ff.). Wenn die Eltern nicht letztwillig einen Vormund bestimmt hatten, war aus den „nechsten Anverwandten der Pupillen, nach Ordnung der Landes-Rechte, daß nemlich die Väterlichen Bluts-Freunde in gleichem gradu denen Mütterlichen vorzuziehen“ ein Vormund zu bestellen (§ 12) und in das gerichtlich geführte Vormünder-Buch einzutragen (§ 17). Der Vormund unterlag Pflichten im Hinblick auf Person und Vermögen des Mündels, deren er sich „getreulich anzunehmen“ (§ 13) hatte. Gelder waren sicher anzulegen (§ 13), Grundstükke durften nur ausnahmsweise veräußert werden (§ 14) und jährlich war „gerichtliche Rechnung“ abzulegen (§ 15), die das Gericht „genau und sorgfältig“ (§ 16) zu untersuchen hatte. Eine Eheschließung zwischen Vormund und Mündel war untersagt (§ 18). Weitere Regelungen betreffen Gerichtsgebühren und „Honorarium“ (§ 22) des Vormunds.

Abgelöst wurde das ergänzte Jütische Vormundschaftsrecht durch die preußische Vormundschaftsordnung von 1875,[86] die ab 1. Januar 1876 für alle preußischen Länder eine Rechtsvereinheitlichung brachte.[87] Der Erlass dieser Ordnung wurde angestoßen durch die preußische Annexion zahlreicher deutscher Staaten in den 1860er Jahren, die eine weitere Rechtszersplitterung in Preußen brachte und so den seit Jahrzehnten bestehenden Reformbemühungen in Preußen den letzten Schub gab.[88] Die Vormundschaftsordnung sollte mit der Regelung einer unter

[80] Gesetz über die Beurkundung des Personenstandes und die Form der Eheschließung, GS 1874, S. 95 ff.
[81] SCHÄFER, J.P., *Die Entstehung der Vorschriften des BGB über das persönliche Eherecht*. Frankfurt/Main, 1983, S. 18 ff.
[82] HINSCHIUS, P., *Das Preußische Gesetz über die Beurkundung des Personenstandes und die Form der Eheschließung vom 9. März 1874 mit Kommentar in Anmerkungen*. Berlin, 1874, S. 10.
[83] Ebd. S. 6.
[84] ESMARCH, H.C., *Das im Herzogthume Schleswig geltende Bürgerliche Recht, § 18*, S. 30.
[85] Text in Vormünder-Verordnung für das Herzogthum Schleswig. De dato Christiansburg zu Copenhagen, den 19ten Martii Anno 1742, Schleswig 1742, https://dibiki.ub.uni-kiel.de/viewer/image/PPN1016527411/5/.
[86] GS 1875, S. 431 ff.
[87] Dazu vgl. auch Stenographische Berichte über die Verhandlungen, Herrenhaus, Session 1874/75, Bd. 2 (Anlagen), Nr. 7, S. 15 ff. (Gesetzentwurf), S. 23 ff. (Motive).
[88] DERNBURG, H., Das *Vormundschaftsrecht der preußischen Monarchie nach der Vormundschaftsordnung vom 5. Juli 1875*. Berlin, 1886, S. 16.

Aufsicht (§ 51 und 54 ff.) des Vormundschaftsrichters (§ 1 ff.) stehenden Vormundschaft zudem „einen tüchtigen Baustein zum Gebäude deutscher Rechtseinheit“ liefern.[89] Dieser Vormund preußischer Prägung handelte selbstverantwortlich und war – anders als noch der Vormund nach Preußischem Landrecht (II 18 § 235 ff. ALR) – nicht etwa weisungspflichtiger Bevollmächtigter des Staates; er hatte also eine selbständige, eher dem Vormund französischen Rechts vergleichbare Stellung.[90] Der nach französischem Muster[91] zusammengesetzte (§ 72) Familienrat war nur unter engen Voraussetzungen (§ 71) einzuberufen und an die Stelle des Vormundschaftsrichters zu setzen (§ 75); diese Regelung verdankt sich den Beschlüssen des Herrenhauses,[92] dessen Mitglieder wohl die sachlich anspruchsvolle Verwaltung von familiären Gütern oder Industriebetrieben vor Augen hatten. Hinzukam der gemeindliche Waisenrat (§ 52 ff., eine Vorform des Jugendamtes), der insbesondere erforderlichenfalls zur Auswahl des Vormunds berufen war und die Aufsicht über das persönliche Wohl und die Erziehung des Mündels führte (§ 53); charakterisiert wurde er als Hilfsorgan des Vormundschaftsgerichts und „bleibender Gegenvormund“.[93] Durch die Neuregelung des Vormundschaftsrechts erlangten Vormünder auch in Schleswig eine deutlich freiere Stellung als bisher.

4. Ausblick

Nach der zivilrechtlichen Integration in den preußischen Staat erfolgte die zivilrechtliche Integration in das 1871 gegründete Deutsche Kaiserreich. Sukzessive traten die zur Rechtsvereinheitlichung im Deutschen Reich geschaffenen Gesetzbücher in Kraft, das Personenstandsgesetz (1875), die Reichsjustizgesetze (1879), das GmbHG (1892), das Bürgerliche Gesetzbuch, das adaptierte Handelsgesetzbuch, das FGG, das ZVG und die GBO (1900) oder das Versicherungsvertragsgesetz (1908), um nur die wichtigsten zu nennen. Schleswig war also mit Blick auf das geltende Zivilrecht, Handelsrecht und Zivilverfahrensrecht weitgehend in das Deutsch Reich integriert, als nach der Niederlage Deutschlands im Ersten Weltkrieg der Friedensvertrag von Versailles[94] (Art. 109–114) bestimmte, dass die Grenzfrage zwischen Dänemark und Deutschland durch eine Volksabstimmung im Landesteil Schleswig zu lösen sei. Diese Volksabstimmung wurde 1920 unter Aufsicht der Interalliierten Abstimmungskommission für Schleswig (Commission Internationale de Surveillance du Plébiscite Slesvig, CIS) durchgeführt, die bis zu einer endgültigen Zuweisung von Gebieten an Dänemark oder Deutschland kommissarisch das Hoheitsrecht über Schleswig ausübte. In den Gebieten Nordschleswigs sprachen sich zum Teil deutliche Mehrheiten der Abstimmungsberechtigten für eine Wiederangliederung an Dänemark aus; diese Gebiete wurden am 15. Juni 1920 an Dänemark abgetreten und mit dem Lov om indlemmelse af de sønderjyske Landsdele i kongeriget[95] vom 9. Juli 1920 in den dänischen Staat eingegliedert. Das historische Herzogtum Schleswig wurde nun also nach nationalen/ethnischen Kriterien geteilt, was freilich aufgrund der Geschichte des Herzogtums nicht trennscharf möglich war, sodass bis heute dänische bzw. deutsche Minderheiten im jeweils anderen Nationalstaat leben.[96]

Ebenso wie nach der Annexion Schleswigs durch Preußen dort zunächst das bislang geltende dänische bzw. jütische Recht weitergegolten hatte, veränderte sich die Rechtslage in Nordschleswig nach der Wiedervereinigung des Gebiets mit Dänemark zunächst nicht. Es galt vielmehr weiterhin eine Mischung aus (weit überwiegend) deutschem, preußischem und dänischem Recht, letzteres zum Teil in einer Form, die in Dänemark selbst aufgrund inzwischen erfolgter Gesetzesänderungen nicht mehr anzutreffen war. Allerdings strebte Dänemark eine zügige Inkraftsetzung dänischen Rechts an, denn in Dänemark war zwischen 1864 und 1920 ein massiver Umbau der Zivilrechtsordnung erfolgt, vor allem im Zuge der seit 1872 etablierten nordischen Zusammenarbeit zwischen Schweden, Norwegen und Dänemark, sodass nach der Wiedervereinigung Nordschleswigs mit Dänemark zwei etwa zur gleichen Zeit entstandene, moderne Zivilrechtsordnungen miteinander konkurrierten. Aber das ist eine andere Geschichte.[97]

[89] ANTON, O., *Vormundschaftsordnung vom 5. Juli 1875 für den Umfang der preußischen Monarchie*. Berlin, 1879, S. 1.
[90] Vgl. ebd., § 51 Nr. 140, S. 132.
[91] OTTE, E., *Die Preussische Vormundschaftsordnung vom 5. Juli 1875*, vor § 71 ff., S. 84.
[92] Ebd., vor § 71 ff., S. 84.
[93] ANTON, O., *Vormundschaftsordnung*, § 52 Nr. 142, S. 136.
[94] RGBl. 1919, S. 688 ff.
[95] Lov af 9. 7. 1920 om indlemmelse af de sønderjyske Landsdele i kongeriget (Gesetz über die Eingliederung der nordschleswigschen Landesteile in das Königreich), Statstidende 1920, S. 479.
[96] Vgl. dazu ROSENBAUM, K., *Südschleswig versus Sønderjylland: Zum gegenwärtigen Verhältnis der Minderheiten im deutsch-dänischen Grenzraum*. In: THOSS, H. (Hg.), *Mitteleuropäische Grenzräume*. Berlin, 2006, S. 139 ff.
[97] Dazu LÖHNIG, M., Nordschleswig/Sønderjylland: Zur neueren Privatrechtsgeschichte eines „Zwischen-raums“. In: *ZRG* (Germ) 142, 2025, [im Erscheinen].

Comparison of the English and German Concepts of Contract

*Judit Beck**

Abstract

This paper focuses on the English and German concepts of contract. Among other things, our aim is to examine the relationship between the concept of contract and imperial imperialism. In the course of the study, we examine the development and evolution of contract concepts, as well as some similarities and differences between English and German contract law. Among our aims is to show that there is a link between the development of the field of contract law and imperialism.

In the course of the study, we will primarily apply the historical and comparative legal methodologies.

Keywords: *contract, English law, German law, empire, imperialism.*

Introductory thoughts

In this paper we examine the concepts of contract in English law and German law. In addition to analysing and comparing the definitions, we will seek to highlight the impact of imperial imperialism on the formation and development of contractual concepts. Even before examining the concept of treaty in detail, it is necessary to point out that there are fundamental differences in the concept of treaty in English and continental law. In continental law, the essential element of a contract is the unanimous expression of the will of the parties, whereas in common law, a contract is the result of a 'bargain'.[1]

The structure of the present paper is as follows, following the introductory reflections: first, we will examine the rules of English contract law. Within this chapter, we will analyse the foundations of English contract law, the antecedents of its development, and the various contract theories and schemes that are still in force today and that can be related to the development and evolution of the conceptual elements of contract. In the next chapter, following the logical sequence of the previous chapter, we will first analyse the details of the development of German contract law and then examine the contractual schemata that can be used to help define the concept of contract. In the third chapter, we carry out an overwhelming comparison of English and German contract law. This chapter is mostly based on our own findings, the focus of which is the thesis that English and German contract law are fundamentally different. In the fourth chapter, we specifically seek to unravel and analyse the concept of imperialism and to examine its impact on contract. Finally, we conclude my paper with concluding thoughts including a summary and a conclusion.

In the course of the study, we will mainly apply the methodology of historical and comparative law. Historical analysis is a qualitative method in which the main sources of observation and analysis are the so-called historical documents. In the historical method, source analyses are both related to the past and indispensable for understanding and assessing the present situation.[2] A fundamental advantage of the historical method is that it helps to identify, through the chronology of time, the milestones that triggered paradigm shifts that may be useful in the present and in the future.[3] We argue that the application of the historical method can lead to a synthesis of theorems and principles that still influence legal systems and the structure and purpose of certain norms today. We also believe that the application of the historical method can also be useful in the process of defining and redefining, because we are convinced that the legal techniques used in the past can also be of assistance to the system in force today, while, of course, taking account of the challenges of the present. We believe that the historical method, with the inherent advantages of source analysis and chronological analysis, can provide a comprehensive picture of how certain areas of research have developed. It should be stressed that the historical method can also serve as a basis for legal comparison. In some cases, moreover, the analysis, which is primarily based

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1 EÖRSI, Gy., *Összehasonlító polgári jog (Comparative Civil Law*). Budapest, 1975, p. 306.

2 MAJOROS, P., *A kutatásmódszertan alapjai (Foundations of Research Methodology)*. Budapest, 2004, p. 25.

3 *Historical Method*. Available at: https://metodologiasapiens.com/hu/metodos/metodo-historico/ (Accesed 2 February 2025).

on historical analysis, is complemented by the use and application of the taxonomic method of legal interpretation.

Comparative law is a comparison of different legal systems, based on their spirit and style. Comparative law is also a comparison of different institutions and approaches to problems. Perhaps the greatest advantage of the legal comparison method is its problem-orientation, which is closely linked to the fact that it focuses on the questions to be answered.[4] Comparative law can be described as a quasi newer critical method in the legal sciences, and therefore, due to its so-called auxiliary nature, the methodology of comparative law need not be understood as what is most commonly understood in the guidelines of the theory of science as a sui generis methodology. In this context, it may be mentioned that legal comparison itself does not have a history of having a developed theoretical methodology, justified by empirical evidence, which would not be compatible with its nature.[5]

In the course of this study, we will also use the method of comparative legal analysis to answer the question: how similar or how different is the definition and perception of contract in English and German law? Finally, it is important to underline that we am convinced that the development of the concept of contract has been influenced by imperial imperialism, which we will try to analyse and justify in the course of this study.

1. The development of contract law in English law

The origins of English contract law can be traced back to the 13th and 14th centuries.[6] Modern contract law developed from the common law writ system. A writ was in fact a short document in which the rulers gave orders to their officials, specifying the obligations they had in a particular matter. Some of these consisted of administrative instructions, while others related to court cases (for example, the order of examination of witnesses). The writ system was maintained and extended by the Normans to a large part of court proceedings, specifying how a particular case or group of cases, overwhelmingly property matters, should be dealt with.[7] Among the writs, covenants and debts deserve special mention, as they are the forms that most closely correspond to the predecessors of the contract. A covenant is a promise that has not been fulfilled, while a debt is a promise to recover unpaid money.[8]

In the Middle Ages, English contract law dogmatics already followed a strict system of conditions, based on the need for the content of the contract to be clear and unambiguous, so that the parties' intentions had to cover the essential points of the contract.[9]

The case-law of the 17th century is clear evidence that even in this period a promise made to the party who had entered into a contract with him was binding and enforceable. Some English writers defined a contract in this period as an agreement to do or not to do a specified thing in return for consideration.[10] To sum up, we cannot speak of a mature law of contract before the 19th century. Indeed, the development of modern English contract law dates from the mid-19th century, which was heavily influenced by Roman law, despite the long-held perception that Anglo-Saxon legal development was free from Roman legal foundations.[11] The latter idea is correct in so far as a number of basic Roman contract law provisions in English contract law are lacking, for example, the distinction between pactum and contractus, but it should be stressed that, in my view, the influence of Roman law is nevertheless perceptible.[12]

1.1 English contract theories

In the United Kingdom, there is no private law code in force, so there are a number of difficulties in defining the contract law regime. Scholars, including Beale, have argued that there is no generally accepted definition of contract in English law.[13] Furthermore, English contract law is characterised by a so-called general contract law system, as there is a lack of specific types of contract.[14]

Also in English law, the offer and its acceptance create the contract. This basic idea was already expressed in the Roman Law Digesta. It follows, therefore, that in English law, like in continental law, a simple contract requires an offer and acceptance. In English contract law, the parties may impose their obligations only on themselves, which derives from the general freedom of contract.[15]

Some understand a contract in English law to mean an agreement which is legally binding on the contracting parties, usually involving a promise by both parties, but sometimes only one party may be bound by a promise. The latter is what English law calls a unilateral contract.[16]

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[4] HORVÁTHY, B., *A jogösszehasonlítás főbb tézisei és az európai integráció (The main theses of comparative law and European integration)* p. 3. Available at: https://mek.oszk.hu/03400/03435/03435.htm#3 (Accesed 2 February 2025).
[5] HORVÁTHY, B., p. 1-2.
[6] PAUL, R., *Law of Contract*. London, 2017, p. 3.
[7] JANY, J., *A világ jogrendszerei. Civilizációelmélet és jogtudomány*. *(Legal systems of the world. Theory of Civilization and Jurisprudence.)* Budapest, 2021, p. 85.
[8] OLDHAM, J., *English Common Law in the Age of Mansfield.* Brooks Hall, 2004, p. 79-80.
[9] GORDLEY, J., *Contract.* In: MARK, T. – CANE, P (eds.), *The Oxford Handbook of Legal Studies,* Oxford, 2003, p. 8.
[10] GYURIS, Á., A szerződés fogalma az angol jogban *(The conception of contract in English law)* In: *Glossa Iuridica*, Vol. XII, No. 1-2, 2025, p. 328. BLACKSTONE, W., *Commentaries on the Laws of England.* Chicago, 1979; PREST, W. (ed.), *Blackstone and his Commentaries Biography, Law, History,* Oxford and Portland, Oregon, H, 2009, p. 125.
[11] ANDREWS, N. H., *Contract Law*. University of Cambridge Press, Cambridge, 2015. p. 3. GYURIS, Á., p. 329.
[12] FÖLDI, A. – HAMZA, G., *A római jog története és institúciói (History and Institutions of Roman Law)*. Budapest, 2011, p. 469-475.
[13] TÖRÖK, G. (ed.), *A Polgári Törvénykönyv magyarázata. III. kötet Kötelmi Jog, Általános rész. (Explanation of the Civil Code. Volume III. Law of Obligations, General Part.* Budapest, 2008, p. 13-14.
[14] VÉKÁS, L., *A szerződési rendszer fejlődési csomópontjai. (The developmental nodes of the contract system*.), Budapest, 1977, p. 39.
[15] GYURIS, Á., p. 325.
[16] BURROWS, A., *A Casebook on Contract* (7th edition). Oxford, 2020, p. 3-4.

Charman has undertaken to define a contract under English law as an agreement between two parties, creating rights and obligations that are enforceable in law.[17]

Catherine Elliott and Francis Quinn argue that a contract is an agreement that creates a legal obligation, whether it is made orally or in writing.

Chris Monaghan and Nicola Monaghan argue that a contract is an agreement that requires an offer and its acceptance.[18]

1.2 The role of relational contract and consideration theories in English contract law

Macneil's relational contract theory is one of the most analysed contract theories in the English literature. In order to fully understand the relational contract theory, it is worthwhile to analyse the concept of default rules analysis. The importance of default rules is due to the fact that the relational contract is typically an incomplete contract. One of the decisive factors in the conclusion of such a contract is that the parties do not know exactly what changes may occur in the future. The function of default rules is that the contract may in fact contain parts which are not filled in with regard to possible future changes, so that the parties, because of future uncertainties, deliberately do not wish to fill in certain points, i.e. gaps, in the contract. Consequently, in the event of a dispute, the court must find and apply a rule which will facilitate the conclusion of the contract on the basis of what a rational party wishing to defend his interests would wish. The latter is what we might call a relational contract, which has a strong social embeddedness. Accordingly, one of the close elements of relational contact theory is social cooperation, and the other is the relationship itself. It is certainly different from the classical or even neoclassical concept of contract in that it somewhat overshadows the self-interest in the narrow sense. Relational contract theory expresses a certain balance, namely between cooperation and competition - in Macneil's terms, reciprocity and the limitation of power. Relational contract theory has thus made a significant contribution to the development of general contract theory.[19]

In addition to relational contract theory, the role of consideration in English contract law must also be examined. Consideration means that in a contract something is given to both parties, so that each party expects something from the other.[20] The function of consideration in English contract law is primarily to assist in the evaluation of agreements, i.e. to decide whether the agreement has reached the stage of enforceability, i.e. whether it can be given legal effect.[21]

2. The development of contract law in German law

The German area of law is a highly diverse and rapidly developing segment, which in many cases has had a significant impact on and served as a model for other legal systems. German law provides an excellent basis for examining a number of traditional or special legal institutions or legal techniques.[22] We have chosen German contract law as the target of my present research, also in order to draw attention to the fact that not only can German law have an impact on other areas of law, but that imperialism has also been a driving force in the field of German contract law.

The historical antecedents of German contract law go back not only to Roman law but also to the creation of the BGB. Let us begin with the relevant Roman law provisions, since it cannot be emphasised enough that the continental legal family, including German law, has been significantly influenced by Roman law provisions. A major driving force in the development of law, which began in the 11th century, was the Corpus Juris Civilis. In fact, Roman law functioned as a system of case law until the fall of the Western Roman Empire 476 AD. In the 6th century AD, the Emperor Iustinian ordered the compilation of the large body of law that had been accumulated in a single book. The result of this work was the Corpus Juris Civilis, which comprised imperial decrees, the opinions of jurists and a textbook by Gaius.[23]

In Roman law, consensus between the parties was a fundamental concept of contract.[24] Indeed, the contract was the most important instrument of obligation and the legal form of the commodity contract under Roman law. Roman law did not recognise the general binding nature of contracts, except where certain types of contract were available to Roman citizens who wanted their agreement to give rise to enforceable rights. Praetorian and imperial law recognised the binding force of an ever-widening range of contracts. Nevertheless, even the glossators of the 12th and 13th centuries held that obligations arising from non-typical contracts entered into in informal agreements were not actionable. By contrast, canon law, based on moral theological principles, took the view that simple informal promises, while not giving rise to a legal obligation, did morally bind the promisee. By the 15th century, ecclesiastical courts were already adjudicating actions based on such agreements, but this had no effect on secular courts. In the field of commercial transactions, however, this was not an issue. Even in Roman law, the general principle of contract law, which still applies today for the pur-

[17] CHARMAN, M., *Contract Law.* Cullompton, 2007, p. 12.
[18] MONAGHAN, C. - MONAGHAN, M., *Beginning Contract Law*. London and New York, 2013, p. 22.
GYURIS, Á., p. 335.
[19] MEINMAN, M. J., Relational Contract Theory in Context. In: *Northwestern University Law Review*, 2000, p. 737-748.
[20] CABRILLAC, R., *Droit européen comparé des contrats*, Paris, LGDJ, 2012, p. 26-29.
[21] MCKENDRICK, E., *Contract law.* Oxford, 2022, p. 70.
[22] BALOGH, E., Medieval Ecclesiastical Jurisdiction (The Role of the iurisperitorum in the German and Hungarian Case Law). In: *Journal on European History of Law*, Vol. 14, No. 1, 2023, p. 123.
[23] KELEMEN, K. – MEZEI, P., *A kontinentális jogrendszerek. (The Continental Legal Systems)*. In: JAKAB, A. – KÖNCZÖL, M. – MENYHÁRD, A. – SULYOK, G. (editors) Available at: http://ijoten.hu/ szocikk/a-kontinentalis-jogrendszerek (2023) (Accesed 8 July 2025).
[24] FÖLDI, A. – HAMZA, G., p. 470. *A szerződés fogalma (The concept of contract).* Available at: https://majt.webtmp.elte.hu/Tanszekek/Majt/Magyar%20JogtorteNET/magyarazatok/szerzodesfogalma.htm (Accessed 8 July 2025).

pose of traffic safety, that agreements must be honoured (pacta sunt servanda), was already in force. Hence a precise maxim of private law: the contract imposes the law on the contractor (contractus contrahentibus legem ponit). This principle was also incorporated into the Code Civil, which stated that „contracts lawfully made have the force of law between the parties."

The next section of the analysis will turn to the specific rules of the Pandecist law. Pandecta jurisprudence distinguished between contract and transaction. The contract thus became the legal embodiment of the basic structure of the whole civil order, just like the social contract. The basic principle of civil society is that everything flows from contract. Free competition and private property, individual-liberalism, promoted freedom of contract, the theory of which was developed in the 19th century. Law supported private initiative as widely as possible. Property turnover was not allowed to be artificially restricted. Price relationships are generally unique, two-party and mostly random. Individual contract types were modelled primarily on small businesses. Bargaining usually preceded the conclusion of the contract. The individual, in the exercise of his subjective right, was seen as a separate end in himself, with no regard for anyone else. The law set only the outer limits of the possibilities of action, within which the free will of the parties could prevail. Freedom of contract does not imply freedom of content, because the state imposes limits on the arbitrariness of individuals. If this were not the case, all private law rules would be laid down by the parties and there would be no need for generally binding rules of conduct (laws). Therefore, freedom of contract means freedom from coercion. Parties are free to decide whether they want to enter into a contract. Freedom to choose a partner meant that they could decide with whom they wanted to enter into a contract. Freedom of contract type ensured that the parties could decide what type of contract they wanted to enter into - perhaps a mixed contract or a contract with no specific content. Under the principle of dispositivity, the parties were free to fill in the framework of the chosen contract with whatever content they wished. The economic situation of the parties was irrelevant to the freedom of contract. The parties to the transaction were considered to be of equal capacity. No assessment was made of the need to conclude the contract. They were based on the principle of freedom of will, but from the outset they applied the principle of declaration in order to ensure the security of commercial relations.[25]

The State therefore intervened in legal relations only in very exceptional cases: coercion, threats, deception, material error, incapacity, etc., or in order to protect variously formulated public interests. These include contracts which are contrary to the law or to good morals. Anything beyond that is a private matter for the parties. The consequences of a regular contract freely entered into were to be met by each at his own risk. This kind of restriction of contractual freedom, with state intervention, began in the early 20th century.

The abandonment of the strict application of the Roman law thesis and a parallel change of approach took place at the time of the beginnings of natural law thinking. Grotius argued that the existence of all contracts in law is determined by the good faith of the parties to the contract. The emphasis was thus on the clearly expressed intention of the contracting parties to satisfy their needs. This understanding made and makes it possible for agreements to become not just promises but enforceable contracts with state enforceability. The nature of the contract was that the conduct of the parties, acting within a lawful framework, towards the satisfaction of their needs, which were not prohibited by law, created an obligation between them by consensus, irrespective of its form or type, in accordance with the principle of good faith and fair dealing.

Thus, a decisive and important paradigm shift occurred in Pandecism with regard to the so-called Willenserklärungsmodell, and Savigny also gave a general notion of contract, according to which a contract always requires several parties who make a concordant declaration of will, which also affects the legal relationship between them. It is necessary to add to the above definition of contract by noting that Savigny intended to apply the concept of contract set out above not only to the law of obligations but also to the law of property and family law. To sum up, it may be pointed out that Savigny had already laid down the essential elements of the German concept of contract, which is part of contract law and is of course not only applicable in German contract law, namely that a contract creates an obligation between the parties.[26]

German contract law is also based on the German Civil Code, the BGB. In the context of the development of German contract law, it is necessary to examine briefly the circumstances in which the BGB came into being, since the provisions of the BGB have had a significant influence on the development of German law and on German contract law. The position adopted after the founding of the Second German Reich in 1871 had a major impact on the field of law and contract law, as the legal fragmentation that had prevailed until then was abolished and a uniform private law was introduced for the whole of Germany. The differences were the result of the different codes in force in the various German territories, and the aim was to create a uniform private law for the whole of Germany. At the beginning of 1874, a preliminary committee was first entrusted with the task of drawing up the foundations of the BGB and the procedure for its enactment. After a lengthy preparatory process, in 1890, once all the questions had been clarified as to how the legislative work should proceed, a second committee, chaired by Gottlieb Planck, was convened for a final major codification consultation. Finally, as a result of a long process, the Federal Assembly adopted the bill on 1 July 1896 by 222 votes

[25] FRÝDEK, M., Influence of Roman Law on the Law of Obligations according to ABGB – the Comparison of Selected Contract Types. In: *Journal on European History of Law*, Vol. 2, No. 2, 2011, p. 158.

[26] BELLING, D. W. – SZŰCS, T., *A német BGB kötelmi jogi szabályai (Das Recht der Schuldverhältnisse des Bürgerlichen Gesetzbuchs)*, Avaible at http://acta.bibl.u-szeged.hu/30714/1/juridpol_forum_002_001_033-072.pdf (Accessed 15 July 2025), p. 33.

in favour, which was approved by the Federal Council a few days later. The law was promulgated in August 1896 and came into force on 1 January 1900, fundamentally changing German contract law.[27]

It is important to note the cardinal role attributed to the German courts in the development and evolution of contract law, which should be complemented by the detail that the German courts did not develop theories questioning the validity of a contract on the basis of its consensual nature, but rather focused on the anomalies of the stage of performance. Nevertheless, as already explained, the BGB also stipulates that the relevant conceptual element of a contract is consensus.[28]

2.1 German contract theories

German contract law is generally considered in the vernacular to be less complex than English, Anglo-Saxon contract law. German contract law can be divided into two main parts: a general part and a special part, which is identical to the domestic contract law system.

The versprechen, promise, also plays a relevant role in the definition of the German contract. From the 19th century onwards, the recognition of the freedom to contract increased the importance of the principle. With the completion of the equality of rights and the abolition of distinctions between the orders, almost anyone was given the opportunity to conclude a contract. The only obstacle to his will was the obligation to reach an agreement with the other party, and as long as the content of the contract, which could otherwise be freely determined, was not illegal or contrary to public morality, the courts had no power to intervene.[29]

In evaluating the function of the doctrine of contractual justice within the contract (Vertragsgerechtigkeit), a comparison with American law may provide the proper perspective. The doctrine of Vertragsgerechtigkeitfulfills in German law a function not dissimilar to the common law doctrine of consideration which has no German counterpart. In the heydays of freedom of contract, at the time where courts were most reluctant to strike down contract clauses in the name of public policy, the doctrine that consideration has to be bargained for to make a promise enforceable was frequently used to carry out or to enlarge notions of public policy. While it is true that the adequacy of consideration will, as a rule, not be looked into, the doctrine of nominal consideration has become a formality and has been cut back by the Second Restatement. It is therefore not surprising that Llewellyn always regarded the consideration doctrine as one of the chief weapons in the fight against obnoxious clauses in form pad contracts. This is also the function that the doctrine of Vertragsgerechtigkeit performs in German law.[30]

3. Comparison of the concept of contract in English and German law

In our view, English law does not have a generally accepted definition of a contract that is found in continental contract law systems or specifically in German contract law. Nonetheless, a number of authors in English contract law have attempted to provide definitions of contract which summarise the essential conceptual elements of contract with great precision, but we believe that the concepts are not followed by a general social acceptance and thus do not rise to a level of definition which is generally accepted and applied.

In the various definitions found in English contract law, agreement is included as an identical conceptual element. In our opinion, it is certainly acceptable and consistent in German law as a conceptual element, but at the same time a contract, an agreement, is more than an agreement. This was already recognised and proclaimed in Roman law, that contracts must be distinguished from nudum pactum, i.e. mere agreements. The fundamental distinction between contracts and nudum pactum was that only contracts were enforceable by the state, and that a contract contained the so-called civilis causa, i.e. the additional element which elevated the agreement to the status of a contract.[31]

In the various English contractual concepts, bargaining and promise are prominent, but binding force is also present. In relation to bargaining, it should be pointed out that, unlike in continental legal systems, in common law legal systems the contract is the result of a bargaining process which, in practice, may in substance be a matter of a degree of consensus. In our view, the case law approach is clearly the reason why bargaining is so strongly represented in English contract law as a dominant representation of freedom of contract.

The promise as a presumed contractual conceptual element is as important in the study of modern contract law as it was at the turn of the 17th century. This demonstrates the importance of the historical study of and the impact it can have up to the present day. We believe that the promise is, in any case, an important defining element, best described by the consideration theory analysed above.

In conclusion, We believe that it is necessary to add to the notion of contract in English law that a contract is created by agreement of the parties, but is not just an agreement, but much more than that. Henceforth, in my view, it is important to link agreement with the theory of intention, because an essential part of Anglo-Saxon contract law is the so-called theory of intention, that is, the idea that contract law reflects the will or choice of the contracting parties. In common law, this idea

[27] CSÉCSY, A., A szerződési jog alapelveinek értelmezése és funkciói a német polgári jogban (Functions and interpretation of principles in the German contract law). In: *DEBRECENI JOGI MŰHELY* (online), Vol. 3, No, 2., 2006. Avaible at https://ojs.lib.unideb.hu/DJM/article/view/6499, (Accessed 15 July 2025).

[28] BELLING, D.W. – SZŰCS,T., p. 54-55.
LOOSCHELDERS, D., *Law of Obligations, Special Part, Schuldrecht Besonderer Teil, 1013*. Avaible at: https://majt.webtmp.elte.hu/Tanszekek/Majt/Magyar%20JogtorteNET/magyarazatok/szerzodesfogalma.htm (Accessed 15 July 2025).

[29] CSÉCSY, A., p. 15.

[30] CSÉCSY, A., p. 16-18.

[31] FÖLDI, A. – HAMZA, G., p. 470.

remains influential and controversial. Almost all legal practitioners, whether practising lawyers or legal theorists in any profession, accept that the will of the parties must play some role in explaining contract law. However, there is debate about the complexity and acceptability of this role, the extent to which the theory of the will fits in with the legal doctrine it seeks to explain, and whether it provides a satisfactory justification for the institution of contract.[32]

Finally, it should be pointed out that, despite the perfect and complete collection of the conceptual elements of contract in English law, it is not possible to produce a generally accepted definition of contract, for reasons that can be attributed to the lack of codes and, unlike German contract law, English contract law does not have a general definition of contract.

It should also be emphasised that the influence of Roman law on the development of contract law is much more noticeable in German law than in English law, and that German contract law is generally considered to be a clearer area of law with a codex and generally accepted definitions than English contract law.

4. The impact of imperialism on the development of English and German contract law

In the following, we will examine the relevance, substance, history and impact of imperialism on the field of contract law. It can be argued that imperialism can be seen as the more advanced specialist of capitalism. Capitalism is an economic as well as a social system in which economic life is governed by the market. In this context, it should be pointed out that the vast majority of the means of production are in private hands. Another characteristic of capitalism is that economic enterprise is based on market exchange. Marx considers that capital can be any means (whether money or real estate) by which commodities can be produced for sale or investment on the market with a view to making a profit. Today, almost all industrial societies are capitalistically oriented, their economic system being based on free enterprise and economic competition.[33] So imperialism can in fact be seen as a more advanced stage of capitalism, a thesis which we believe is generally accepted without professional debate.

We are convinced - and this is supported by a number of sources in the literature - that imperialism - with the exception of the thesis above that imperialism is a more advanced form of capitalism - is a controversial segment of political science and history in particular. First of all, the very concept of imperialism requires explanation. By empire, we mean a complex political entity, usually created by conquest, with a dominant centre and subordinate peripheries, that is large in scale, encompassing several peoples or even nations.[34] For the second time, it is necessary to clarify what exactly we mean by imperialism, since there are countless definitions of imperialism, whether from a Marxist, liberal, conservative or other ideological point of view.[35] Some understand imperialism as the set of activities and behaviours by which large-scale empires and political entities are created and maintained, but it also includes more indirect forms of domination of people over others. Imperialism, in some views, has referred to despotic methods of government, the search for investment opportunities and markets for surplus capital and productive capacity, 'empire building', and the expansion of capitalism to include industrialisation and commercial development on the periphery of empire.[36] It is therefore clear that imperialism, like the English concept of treaty, does not have a universally accepted definition, but is referred to in many senses and contexts.

Imperialism is defined by 19th century theorists as the spread and expansion of industrial and commercial capitalism, so for our purposes we will take and refer to imperialism in this context. Many authors make it clear that the impact of imperialism was embodied in the English property, contract and civil law rules of the 19th century, which are closely linked to colonialism. There is therefore a close link between imperialism and colonialism. The purpose of exploring the link between imperialism and colonialism is twofold, firstly, to show that the international legal doctrines surrounding the British protectorates in the 19th century did not distinguish between imperialism, as represented by the introduction of English private and business law rules and practices in the colonies, and colonialism, particularly as exemplified by the rules governing the acquisition of territorial property rights. Secondly, it must be appreciated that the introduction of colonial rule went hand in hand with the introduction of English rules of civil law and contract law, which facilitated the expansion of industrial and commercial capitalism.[37]

4.1 The concrete impact of imperialism on the world of contract law

We believe that it is clear at several points that imperialism was able to influence, or even force, a new development of law, and specifically a new stage in the development of contract law. As has been explained in detail above, the concept of imperialism does not enjoy a generally accepted definition. Nevertheless, as far as we are concerned, we can accept the thesis formulated by 19th century theorists as a kind of concept of imperialism, that imperialism can be understood as the spread and expansion of industrial and commercial capitalism. It is well known that imperialism has a significant economic impact, since it carries with it a certain economic and financial

[32] ANDREWS, N., *Contract Law.* Cambridge, 2015, p. 87.
[33] ANDORKA, R., *Bevezetés a szociológiába (Introduction to Sociology)*. Budapest, 2006, p. 52-53.
[34] GERŐ, A., Birodalom gyarmat nélkül. (Empire without a colony.) *In: Közép-Európai Közlemények*, Vol. 6, No. 1–2., 2013.
[35] BÚR, G., *Imperializmus, az eltérő interpretációk legfelsőbb foka (Imperlialism, is the highest degree of different interpretations)* In*:* ÖT KONTINENS – *Five Continents (Az Új- és jelenkori Egyetemes Történeti Tanszék Tudományos Közleményei,* ELTE BTK, No 2018/2, Budapest 2022, p. 15-29.
[36] GATHII, J., *Imperialism, Colonialism and International Law* p. 4. Avaible at: https://law.bepress.com/cgi/viewcontent.cgi?referer=&httpsredir=1&article=6026&context=expresso (Accessed 18. July 2025).
[37] GATHII, J. *Imperialism, Colonialism and International Law* p. 6. Avaible at https://law.bepress.com/cgi/viewcontent.cgi?referer=&httpsredir=1&article=6026&context=expresso (Accessed 18. July 2025).

dominance. At this point, it is necessary to stress that when economic expansion occurs, law must also adapt to this type of development and progress. We believe that economic development is directly proportional to the development of law, contract law. In order to increase economic results and to create more economic results, it is important to have a stable contractual background, based on the development of contract law in a proportional way. Indeed, in the era of imperialism, some of the existing rules on contract law institutions have in some cases served as a solution to the problem where the contract has made the parties' commodity relations rigid and inflexible.[38] Consider that the highly complex economic life could be more effectively managed by complex laws. In addition, the development of law and contract law was also forced by the need for more types of legal solutions due to the impact of imperialism in the economic segment.[39]

To sum up, it should be pointed out that, in our view, in many cases not enough emphasis is placed on the impact of imperialism on the field of law, specifically contract law. In fact, it was imperialism, and specifically the progressive imperialist economic life, that forced law to take a firm stance in the field of contracts and to endow them with the power of enforceability and enforceability. We believe that, without the influence of imperialism, the results which would have appeared in contract law would still have had to wait, since life itself gave rise to the need for the development of contract law and its more complex rules.

Concluding thoughts

In this paper, we have examined the foundations of English contract law, the antecedents of its development, and analysed some of the contract theories and schemas that are still in force today and that can be related to the development of the conceptual elements of contract. In addition to English contract law, we have examined the details of the development of German contract law, as well as the norms applicable to certain German contract law. In addition to the examination of German contracts, we have taken the liberty of making a small Roman law excursus in this study for the reason that many German legal sources emphasise that it is the legacy of Roman law that provides the link between the different legal systems, since its rules are still in use today because of their highly developed nature. The roots of Roman law offer a suitable basis for defining European continental law.[40]

In the following we will summarise the results of the comparison of English and German contract rules. For the first time, it can be observed that the so-called crutch rule is less noticeable in English contract law, a mentality that is fully present in German contract law. Secondly, it can be stated that Anglo-Saxon contract law has not been able to develop a concept of contract that has been generally accepted, unlike German contract law. Thirdly, we believe that it may be necessary to add to the notion of contract in English law that a contract is created by agreement of the parties, but is not just an agreement, but much more than that. Henceforth, in our view, it is important to link agreement with the theory of intention, because an essential part of Anglo-Saxon contract law is the so-called theory of intention, that is, the idea that contract law reflects the will or choice of the contracting parties.

It should also be emphasised that the influence of Roman law on the development of contract law is much more evident in German law than in English law, and that German contract law is generally considered to be a more clear-cut area of law with a codex and generally accepted definitions than English contract law.

Finally, we would like to analyse the relationship between contract law and imperialism. In our view, imperialism, and specifically the progressive imperialist economic life, has forced law to take action in the field of contracts and to endow them with an enforceability clause. We believe that, without the influence of imperialism, the results that would have appeared in contract law would still have had to wait, since life itself gave rise to the need to develop contract law and its more complex rules, we are thinking here, for example, of the definition of the conceptual elements of the contract or the declaration of the principle of pacta sunt servanda.

[38] Avaible at: https://real.mtak.hu/183329/1/Eörsi%20Gyula%20-20A%20szerződés%20elméleti%20alapjai.pdf, p. 20. (Accessed 18. July 2025).

[39] SÁRKÖZY, T., A magyar gazdasági jog jövőképéről, fejlesztési stratégiájáról, (On the vision and development strategy of Hungarian economic law). In: *Állam- és Jogtudomány,* no. 2, 2006, p. 240.

[40] GYURIS, Á., *Az Európai Unió hatása a magyar szerződési jogra (különös tekintettel a fogyasztói szerződés tisztességtelen feltételei szabályainak meghatározására a magyar magánjogi kódexekben (The impact of the European Union on Hungarian contract law, with special regard to the definition of unfair terms in consumer contracts in Hungarian private law codes).*
Avaible at: https://jak.ppke.hu/storage/tinymce/uploads/Gyuris_A_dolgozatv-1-.pdf?u=1blNLG (Accessed 18. July 2025).

Dilemmas of Child Protection in Hungary During the Austro-Hungarian Monarchy: Addressing the Issue of Morally Abandoned Children

*Enikő Kovács-Szépvölgyi**

Abstract

Following the Austro-Hungarian Compromise (1867), Hungary underwent significant legal modernization, which extended to the regulation of endangered children. Within the evolving framework of state-led child protection, administrative and judicial branches constituted the core mechanisms aimed at safeguarding vulnerable minors. In the case of morally abandoned, delinquent, or at-risk children – those operating on the fringes of petty criminality – the state sought appropriate interventions, alternating between administrative and judicial approaches. The placement of materially abandoned children in state-run children's shelters became possible under Decree No. 60.000 issued by the Ministry of the Interior in 1907, which, according to archival sources, was implemented in practice. The Juvenile Court Act (Act VII of 1913) allowed for the temporary or permanent removal of children from their original environments through specific measures: temporary decisions for non-punishable children and definitive rulings for juveniles. As a result, morally neglected children came to occupy the intersection of administrative and judicial state-led child protection systems.

Keywords: *administrative child protection; endangered children; judicial child protection; juvenile court; legal modernization; materially abandoned children; morally abandoned children; state-led child protection.*

Introduction

From the final decades of the 19th century, the scientific community – both in Hungary and abroad – began to pay increasing attention to children living under conditions of so-called moral neglect.[1] The rising rate of juvenile delinquency, as well as the growing number of children raised in morally compromised environments, demanded urgent state intervention. In Hungary, at the beginning of the 20th century, nearly 19% of released convicts had not yet reached legal adulthood.[2] By the end of the 19th century, Hungarian law already provided a legal basis for declaring children abandoned due to financial hardship, with this, administrative child protection became part of social policy within the emerging system of social administration.[3] However, this did not include cases in which guardians neglected the moral upbringing of children and failed to provide a suitable moral environment for healthy psychological development. Special attention was required for children exposed to depravity and moral decay, as observations from reformatory education revealed that during the critical developmental period between the ages of 12 and 15, these youths did not receive adequate moral education.[4]

By the end of the first decade of the 20th century, the child protection system of the civil state was grappling with the consequences arising from the division of responsibilities between the emerging administrative and judicial branches of child protection. The cross-disciplinary nature of child protection – spanning multiple areas of law – was already evident during this period. In the case of morally neglected and delinquent children, a key difficulty lay in determining whether their situations should be addressed within the framework of administrative or judicial child protection.

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1 SZAKOLCZAY, Á., A gyermekvédelem Magyarországon tekintettel az 1898. évi XXI. törvényczikkre. *Magyar Jogászegyleti Értekezések*, 1900, p. 18–19; KÁRMÁN, E., A fiatalkorú bűntettesek tanulmányozásának módszerei. *A Gyermek. A Magyar Gyermektanulmányi Társaság Közlönye*, 1914, no. 7, p. 514–532; LISZT, F., A jövő büntetőjoga. In: *Magyar Jogászegyleti Értekezések*, 1893, p. 140–154.

2 KUN, B. – LÁDAY, I. (eds.), *A fiatalkorúak kriminalitása ellen való küzdelem Magyarországon.* Budapest, 1905, p. 6–8.

3 About social administration see: KELEMEN, R., A polgári kor társadalombiztosítása – Társadalombiztosítási bíráskodás a polgári korban. In: MOLNÁR, A. – SZÉPLAKI, L. (eds.), *Tanulmányok a győri felsőbíráskodás történetéből a XIX–XX. század fordulóján*. Győr, 2019, p. 149–174; HOMICSKÓ, Á. O., The History of the Hungarian Social Security Regulation until the Present Day. In: *Journal on European History of Law*, Vol. 10, No. 1, 2019, p. 126–133.

4 BALOGH, J., Adalékok a fiatalkorú bűntettesek psychológiájához. In: *Magyar Filozófiai Társaság Közleményei*, 1909, No. 3, p. 145–146; MEGYERI-PÁLFFI, Z., A javítóintézetek szervezeti-építészeti vonatkozásai a Csemegi-kódextől az I. Büntetőnovelláig. In: KOVÁCS-SZÉPVÖLGYI, E. (ed.), *Kihívások a büntetőjogi jogalkotás terrénumában a 19–21. században: Külföldi minták és nemzeti megoldások*. Budapest, 2022, p. 113–143.

During the period in question, an official determination of abandonment due to financial hardship conferred a legal entitlement to state care. However, alongside this material dimension of abandonment, considerably less attention was paid to the moral aspects of neglect during the first years after the compromise. By the end of the 19th century, the necessary tools were not yet available – neither in terms of legal regulation nor institutional infrastructure – to address the needs of those children who, although not legally classified as abandoned, were nonetheless deprived of care and raised in neglectful conditions.[5]

Neglect in upbringing is a criminogenic factor, it goes hand in hand with moral decline and social deviance. "Only a narrow wall separates crime from abandonment, and whether social shipwreck occurs sooner or later depends on external, accidental, and entirely unpredictable circumstances."[6] Franz von Liszt argued that the determination of the age of criminal responsibility is indispensable, and that individuals who fall within the legal definition of childhood should be subject solely to child protection measures rather than punitive sanctions. Such child protection measures also applied to morally depraved minors, who were often led to a state of moral abandonment due to the absence of adequate supervision. In this context, overcrowding in elementary schools in the capital and the perceived harmful influence of cinema were dominant concerns. According to contemporary literature, it was a well-documented observation that young offenders – particularly those apprehended as members of juvenile theft rings – frequently attended screenings of crime and detective films, which were believed to have a negative impact on their behavior.[7]

In addition to representatives of legal science and judicial practice, morally at-risk children were also the subject of attention within the child study movement, where they were categorized among children who deviated from the norm. According to sources in the history of education, the pedagogical professional press of the Dualist era treated it as an established fact that, alongside children with disabilities, children displaying signs of moral deterioration or deviance were also to be included among those considered atypical.[8]

The Child Protection Committee of the Budapest Bar Association repeatedly addressed the issue of morally neglected children. It made efforts to provide a conceptual definition of neglect; however, the categories outlined below did not exhaustively cover all instances of moral abandonment. Children subjected to abuse, psychological endangerment, or drawn into criminal behavior because of paternal authority being exercised abusively were considered morally neglected. Other victims of psychological endangerment included children who begged, wandered the streets, consumed alcohol, skipped school, exhibited undisciplined or unruly behavior, or suffered from degenerative conditions or mental illness, as well as those deemed to possess criminal tendencies. The committee regarded the care of morally neglected children as a state responsibility, to be carried out with the collaboration of local administration and civil society organizations. It recommended the establishment of observation institutions modeled on the French system. Even in the case of delinquent children, the committee preferred upbringing within a family setting and consistently emphasized the importance of considering the child's individual personality when determining the appropriate form of placement. The upbringing of delinquent or at-risk children could take place in their original family environment, provided they lived under close supervision and received moral guidance from their guardian. Alternative options included placement with other family members, with foster families, or in institutions.[9]

Gyula Andrássy Jr., Minister of the Interior, supported the work of the National Child Protection League (*Gyermekvédő Liga*), which aimed to fulfill the responsibilities of state-led child protection through civil initiatives. He particularly endorsed the placement of delinquent and at-risk children in in special facilities designated for children officially classified as delinquent and abandoned. In 1906, however, the Minister of the Interior saw no possibility for the state to establish such institutions. Although the text of the child protection law expressed the original legislative intent to create special educational institutions or boarding schools for delinquent and morally endangered children,[10] no such state-run institutions had been established within the framework of state-run children's shelters by 1907, likely due to a lack of financial resources. That year, the transformation of the state children's shelter in Nagyszőllős into a new institution led to the founding of the first boys' reform school.[11] Until then, as a temporary solution, the government relied on existing institutions –state-run children's shelters and reformatories – as well as on the active participation of society through the efforts of the National Child Protection League.

[5] SZAKOLCZAY, Á., A gyermekvédelem Magyarországon tekintettel az 1898. évi XXI. törvényczikkre. In: *Magyar Jogászegyleti Értekezések*, 1900, p. 18–19; RIGÓ, B., Human Needs in Early Modern Theory of State: The Pyramid of the Legitimacy of the Power. In: BOERSMA, K. – SELDERHUIS, H. J. – BROWN, C. B. – FRANK, G. – MAHLMANN-BAUER, B. – RASMUSSEN, T. – SOEN, V. – TÓTH, ZS. – WASSILOWSKY, G. – WESTPHAL, S. (eds.), *Wellbeing in Early Modern Christianity: Perspectives and Practices for a Happy Life*. Göttingen, 2024, p. 163–198.

[6] LISZT, F., A gyermek a büntetőjogban. In: *A Gyermekvédelem Lapja*, 1912, No. 1, p. 5.

[7] GEGUS, D., Gyermekek a rendőrségen In: *A Gyermekvédelem Lapja*, 1911, No. 12, p. 201–203.

[8] SZABOLCS, É. – HEGEDŰS, J., A gyermekről való gondolkodás differenciálódása a dualizmus korában. In: *Iskolakultúra*, 2008, No. 5–6, p. 81–85.

[9] SZILÁGYI, A. K., A Budapesti Ügyvédi Kör gyermekvédelmi bizottsága. In: *Gyermekvédelmi Lap*, 1905, No. 7, p. 112–114; SZILÁGYI, A. K., Oly szülőtől, ki a gyermek kellő ápolásáról és neveléséről nem gondoskodik, vagy a kinél a gyermek erkölcsileg veszélyeztetve van, fennálló törvényeink és kormányhatósági rendeleteink alapján elvehető-e a gyermek és elhelyezhető-e egy állami gyermekmenhelybe? In: *Gyermekvédelmi Lap*, 1907b, No. 5, p. 69–70.

[10] Act VIII of 1901 on state children's shelter; Act XXI of 1901 on the care of children over the age of seven in need of public assistance; Circular Decree No. 1 of 1903 of the Minister of the Interior to all municipal authorities – except fiume – on the issuance of the regulation concerning the protection of abandoned children.

[11] Circular Decree No. 78,048/IX–b. of 1907 of the Ministry of the Interior on the Closure of the State's Children' Shelter in Nagyszőllős and Its Conversion into a Boarding School. In: *Belügyi Közlöny*, 1907, No. 43, p. 395.

In practice, children who were delinquent or at risk of delinquency were placed either in detention centers or within the framework of state-run children's shelters. In the latter case, however, various challenges often arose, stricter disciplinary measures, for instance, frequently led to escape attempts.[12] In certain cases, the court of wards (exercising powers of the guardianship authority) was also able to order admission to a shelter if it was deemed necessary for the child's welfare, even if the child was not declared abandoned.[13] Deportation (*toloncolás*) was an applied measure in the case of delinquent children, and thus the Budapest detention center played an important role in child protection efforts. Since 1900, minors under the age of 16 were placed in a special school established by the Chief of Police within the detention facility. Typically, vagrant and begging children were sent to this school for the duration of detention as ordered by the petty offenses authority.[14] In 1907, the National Child Protection League established homes for delinquent children in Rákoskeresztúr and Szeged.[15] As Minister of the Interior, Andrássy supported the founding of these institutions, with the condition that delinquent children already under the care of state shelters be given priority for admission.[16] Experience showed, however, that neither placement in shelters nor foster families led to the successful "rehabilitation" of these children. Their education proved more effective when carried out in closed institutional settings under the stricter regulations implemented by the League's facilities.[17]

1. "The Sixty-Thousand Children" and the State of Moral Abandonment

The state of moral abandonment was a subject of concern for the committed supporters of state-led child protection. Some professionals believed that the regulations of children's shelters implied that children who were morally degraded or at risk of moral decay could also be declared abandoned. This interpretation of the regulations was seen as a preventive intervention, wherein children at risk of moral degradation would be placed with foster families rather than in institutions.[18] However, this broad interpretation of the regulations did not align with the original intent of the legislation, which was based on material abandonment.

The term "sixty-thousand children" appeared in press sources and academic works.[19] It originates from the 1907 ministerial circular issued by the Minister of the Interior, which allowed for the state care and upbringing of children exposed to the risk of moral corruption or those already on the path to moral degradation.[20] The "sixty-thousand children" referred to those who were considered delinquent or morally abandoned, but who could not be legally declared abandoned for material reasons. These children and young people could only be held accountable for offenses related to petty infractions.[21]

In the case of children who were delinquent, at risk of delinquency, exposed to moral corruption, and not liable for criminal responsibility, education became the primary tool for preventing a criminal lifestyle and managing behavior at the edge of petty criminality. "From every line of the decree [the sixty-thousand decree] we can feel the idealistic enthusiasm of human compassion and the sincere intention to save the innocent child. There, in the whirlpool, there, in the flood, the unfortunate child is drowning! Let us hurry, let us save him for an honest life!"[22] Ideally, education took place within the family, but in certain cases, those who were responsible failed to properly fulfill their duties. In such cases, the removal of the child from their environment was seen as a partial success on the path to becoming a useful member of society.[23]

"Unfortunately, I have observed that up until now, the authorities have treated most of the children under the age of 15 who were exposed to moral corruption or at risk of delinquency as common criminals, dealing them with the harshness and indifference of officialdom, instead of applying the provisions of the Child Protection Act to them."[24] The Minister of the Interior believed that the state child protection system, in practice, failed to protect delinquent or morally endangered children. With the sixty-thousand decree, the government expressed its intention to include these children within the framework of state-led child protection, particularly under administrative child protection.

In the ministerial circular, Andrássy Gyula clearly expressed that "the admission of a child to the state children's shelter, or placement in its auxiliary institutions, does not stigmatize either the child or their family in any way." The Minister of the Interior placed special emphasis on the issue of morally abandoned children within state child protection, placing the authorities' operation under the Ministry's close supervision in the cases of the "sixty-thousand children." In a directive issued

[12] Decree No. 110460/1906 – V-c. Ministry of the Interior. In: *Gyermekvédelmi lap*, 1906, No. 11, p. 154.
[13] § 25 Circular Decree No. 1/1903 of the Minister of the Interior to All Municipal Authorities – Except Fiume – on the Issuance of the Regulation Concerning the Protection of Abandoned Children.
[14] URS, S., A gyermekvédelem és a toloncház. In: *Gyermekvédelmi Lap*, 1905, No. 6, p. 91–92.
[15] K.Ö., A züllött gyermekek otthona. In: *Gyermekvédelmi Lap*, 1907, No. 1, p. 11–13.
[16] Decree No. 1336/IX-b. of 1907 of the Ministry of the Interior. In: *Gyermekvédelmi lap*, 1907, No. 2, p. 22.
[17] RADÁK, G., A Büntető Novella második fejezete a gyakorlatban. In: *A Gyermekvédelem Lapja*, 1911 b, No. 2, p. 26.
[18] EDELMANN, M., Züllött gyermekek. In: *Gyermekvédelmi Lap*, 1906, No. 2, p. 26–27; SZILÁGYI, A. K., *A* Budapesti Ügyvédi Kör gyermekvédelmi bizottsága. In: *Gyermekvédelmi Lap*, 1905, No. 7, p. 112–114.
[19] TÁBORI, K., A hatvanezresek. In: *Az Érdekes Újság*, 1914, No. 1, p. 14–16; SZOKOLAY, L., *Jogi alapismeretek a szociális munkában.* Budapest, 1937, p. 155.
[20] Circular Decree No. 60,000 of 1907 of the Royal Hungarian Ministry of the Interior on the protection of children exposed to moral decay or depravity in their previous environment within the framework of administrative child protection. MRT, 1908, p. 1294–1306.
[21] Erkölcsi gyermekvédelem. In: *Gyermekvédelmi lap*, 1907, No. 7, p. 99.
[22] RUFFY, P., Fiatalkorúak patronage-a. In: *A Jog*, 1907, p. 318–322.
[23] Gyermekvédelem. In: *Jogtudományi Közlöny*, 1907, No. 32, p. 265–266.
[24] Circular Decree No. 60,000 of 1907 of the Royal Hungarian Ministry of the Interior.

to the gendarmerie district commands, Andrássy prescribed a reporting obligation for the gendarmerie to notify the competent administrative authority if, directly or indirectly, any child exposed to moral corruption or delinquency came to the attention of the patrol officers.[25]

From the perspective of the personal scope of the ministerial circular, morally abandoned children could be classified into three groups. The first group consisted of "delinquent children," defined as those under the age of twelve who had committed criminal acts but could not be held criminally responsible due to their age. The second group included morally endangered minors under the age of fifteen who had not committed any criminal offenses. The third group comprised juveniles who had reached the minimum age of criminal liability but were still under fifteen and were subject to administrative proceedings for minor offenses. In the case of the latter group, the legal consequences depended on whether the individual had the mental capacity to recognize their guilt at the time of the offense. If so, temporary admission to a children's shelter became possible only after applying a sanction, but only when it was necessary. Thus, the proper upbringing of morally abandoned children, as deemed appropriate by the state, could be carried out in state-run children's shelters. However, a child could not be declared abandoned solely based on moral abandonment. The group of children considered morally abandoned was heterogeneous, and there was no universally accepted definition in the literature.

The declaration of children as abandoned and the application of the "sixty-thousand" decree were based on the parents' unsettled, wandering lifestyle.[26] The court of wards of Budapest considered it justified to admit a minor, L.I., to the state-run childre's shelter on the grounds of moral abandonment and deterioration. Following this, the court examined whether the legal conditions for declaring the child abandoned were met.[27] The director-chief physician of the shelter could temporarily admit the child into the shelter's care in urgent cases.[28] After the child was admitted, a decision had to be made based on individual considerations, determining whether the child should be placed with stricter foster parents or in an institution. "The decree thus serves a dual purpose. One aim is to make short-term prison sentences and the serving of pre-trial detention in prison unnecessary for minors. Its main objective, however, is to establish direct contact through the temporary placement in the children's shelter between the authorities, the shelters, and the stricter educational institutions of charitable organizations (such as the National Child Protection League), and to offer more rigorous education without the character of punishment to those children who, if left in their previous environment, would become offenders."[29] For the morally abandoned children, it was also an accepted practice to send them to the countryside, separating them from the urban and large-city environment. "The following day, the boy set off with his selected foster parent to a distant village – far from the city, away from the atmosphere of vagrancy and crime that enticed him, in order to save the morally abandoned child for society."[30]

The "sixty-thousand decree" undoubtedly sought to provide a remedy for a significant social issue. However, sources from the Dualist era indicate that the proposed solution suffered from fundamental flaws. The institutional system of administrative protection was not adequately prepared to effectively care for the "sixty-thousand children."[31] Nevertheless, the decree was applied in practice: within a year and a half of its entry into force, more than six hundred children were admitted.[32] The Minister of the Interior closely monitored the implementation of the decree and regularly required the completion of a questionnaire with content he had prescribed.[33]

The court of wards of Budapest provided guidance regarding the procedures. The investigation had to uncover both the facts indicating the child's moral decline and the causes of such decline. In this regard, understanding the child's living conditions and personal history became particularly important. Subsequently, the responsibility and potential negligence of the parents needed to be examined. If parental neglect was identified, it had to be determined whether the degree of neglect justified the revocation of parental rights or guardianship. A parent or guardian who refused to hand over the child to the state-run children's shelter could only be compelled to do so if stripped of such rights. Finally, the investigation sought to identify those legally obligated to support the morally depraved child and to assess their potential financial contribution.[34]

On April 9, 1909, the *Pesti Hírlap* – a newspaper – reported in its daily news section on a "strange thieves' alliance" in Magyaróvár. According to the article, the local gendarmerie and city police uncovered a theft ring composed entirely of children and led by a woman.[35] The Ministry of the Interior took notice of the article and, in 1910, instructed the court of wards of Moson County to verify the truth of the report within a short

[25] Züllött gyermekek védelme s a csendőrség. In: *Jogtudományi Közlöny*, 1908, No. 31, p. 243.
[26] Final Decision No. 2425/908 of the Court of Wards of Pest-Pilis-Solt-Kiskun County. In: *Gyermekvédelmi lap*, 1908, No. 3, p. 39.
[27] Final Decision No. 2715/908 of the Court of Wards of Budapest Capital. In: *Gyermekvédelmi lap*, 1908, No. 3, p. 39.
[28] Circular Decree No. 60,000 of 1907 of the Royal Hungarian Ministry of the Interior; § 11 Circular Decree No. 1/1903 of the Minister of the Interior.
[29] ZERKOVITZ, Z., A gyermekvédelem legújabb fejezete. In: *Gyermekvédelmi Lap*, 1907, No. 8, p. 116.
[30] EDELMANN, M., Züllött gyermekek megmentése. In: *Gyermekvédelmi Lap*, 1907, No. 7, p. 105.
[31] THÓBIÁS, L., *A gyermekvédelemről.* Miskolczi Napló, 1914, No. 8, p. 2–3.
[32] BALOGH, J., *Fiatalkorúak és büntetőjog.* Budapest, 1909, p. 29–30.
[33] Decisions of the Court of Wards. In: *Gyermekvédelmi Lap*, 1908, No. 1, p. 9–10.
[34] Budapest Székesfőváros Árvaszéke. In: *Gyermekvédelmi Lap*, 1908, No. 10, p. 137–138; Elvi jelentőségű határozatok. In: *Gyermekvédelmi Lap*, 1908, No. 10, p. 138; 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, No. 1, 2020, p. 126–137; 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, No. 2, 2020, p. 95–103.
[35] Furcsa tolvajszövetkezet. In: *Pesti Hírlap*, 1909, No. 84, p. 12.

deadline and, if necessary, to apply the provisions of the "sixty-thousand decree."[36] Archival documents reveal that the woman mentioned in the article, was sentenced to two days detention by the district court of Magyaróvár, which she appealed. A 16-year-old minor received a similar sentence. No charges were brought against the remaining children – either because they were under the age of twelve at the time of the offense or because the criminal proceedings were subsequently terminated.[37] In 1909, the second chapter of the criminal amendment that would later establish material criminal law for juveniles had not yet entered into force, and thus its provisions could not be applied regarding criminal liability and sanctions. As a result of the leading woman's appeal, the second-instance court found that the "gang of thieves" had stolen vegetables of minor value, and in light of this, replaced her custodial sentence with a monetary fine, the execution of which was also suspended.[38] At the ministry's request, the city authorities conducted a background investigation on sixteen minors to assess whether they were exposed to moral corruption or moral decline. It is likely that, in preparing these reports, the authorities based their approach on the sample questionnaire annexed to the implementation decree of the juvenile penal amendment.[39] This template contentwise matched the guidelines issued by the Budapest Orphan Authority in 1908. The local authorities' inquiries covered the child's family status, financial situation, education, any physical or mental disabilities, bad habits, and harmful addictions. Officials also examined whether the child maintained regular contact with individuals who might pose a threat to their moral development. The study explored the child's way of life and sought to identify potential causes leading to criminal behavior.[40] The investigation extended to home conditions, including whether the parent or guardian led a drunken, vagrant, or immoral lifestyle or mistreated the minor. Authorities could offer suggestions to parents regarding child-rearing practices, which were recorded in the background reports. In some instances, officials explicitly urged parents to impose stricter discipline. One such report concluded that "the individuals involved were under the mistaken impression that removing the vegetables was permitted – that is, they believed the produce had been left behind as unusable on the plot in question."[41]

The investigation ordered by the Ministry of the Interior indicates that during the years of the Austro-Hungarian Dual Monarchy, governmental efforts in the field of state child protection were not merely rhetorical gestures.

2. Protection of Depraved Children within the Framework of Judicial Child Protection

Judicial child protection also addressed the safeguarding of children exposed to moral corruption, already depraved, or at risk of becoming depraved. According to the amendment modifying the Criminal Code of 1878 and introducing special substantive legal provisions concerning juveniles, the court could order the supervision at home of minors who could not be held criminally liable, or, in cases of a morally harmful environment, mandate their reformatory education. In the case of children, the latter could only be ordered by the court of wards, while the juvenile courts were limited to ordering temporary placement in a state children's shelter.[42]

The provisional procedural rules coordinated the activities of the courts and actors within state child protection in cases where the proceedings revealed that the juvenile in question had been raised in an immoral environment and was beginning to show signs of moral decay.[43] The regulations applicable to administrative authorities and criminal courts of the police were defined by the Minister of the Interior,[44] who specifically emphasized the importance of examining whether the juvenile in question had already begun to deteriorate morally or had been exposed to a corrupting environment.[45]

The implementing regulation of the amendment also addressed children in the legal sense of the term, as well as juveniles not subject to criminal liability.[46] In the case of the latter, the public prosecutor could propose measures such as placing the minor under home supervision, subjecting them to domestic or school discipline, or ordering their corrective education. However, the court conducting the proceedings could also impose any of these measures even in the absence of such a proposal.[47] The practice of the Danube District Police Headquarters during the first ten months following the entry into force of the amendment suggested that a connection existed between administrative and judicial child protection, as the data indi-

[36] MNL-GyMS-Gyl-MFI, Árvaszéki iratok 1910. 1301-4000. 49517/1909. IX. b. sz; Circular Decree No. 60,000 of 1907 of the Royal Hungarian Ministry of the Interior.
[37] § 83 of Act V of 1878 on the Hungarian Criminal Code.
[38] MNL-GyMS-Gyl-MFI, Árvaszéki iratok 1910. 1301-4000. 5416/1909. b.
[39] Decree No. 27,100/1909 of the Royal Hungarian Minister of Justice on the Implementation of the Provisions Concerning Juveniles Contained in the Second Chapter of Act XXXVI of 1908 on the Supplement and Amendment of the Criminal Code and the Criminal Procedure Code. In: *Igazságügyi Közlöny*, 1909, No. 12, p. 29–31.
[40] MNL-GyMS-Gyl-MFI, Árvaszéki iratok 1910. 1301-4000. 1244. sz./1910.
[41] MNL-GyMS-Gyl-MFI, Árvaszéki iratok 1910. 1301-4000. 1244/1910. sz.
[42] § 15–16 of Act XXXVI of 1908 on the Supplement and Amendment of the Criminal Code and the Criminal Procedure Code
[43] § 11 of Decree No. 20,003/1908 of the Royal Hungarian Minister of Justice on the Handling of Criminal Cases Involving Juvenile Defendants.
[44] HELLER, E., A fiatalkorúak bíróságáról szóló törvény életbelépéséhez. In: *Jogtudományi Közlöny*, 1914, No. 1, p. 8–9.
[45] § 2–6 of Decree No. 160,000/1909 of the Royal Hungarian Minister of the Interior to all municipal authorities, guardianship authorities, the chief state police, the director of the state children's shelter in Budapest, and the chief medical directors of other state children's shelters, on the Implementation of the provisions concerning juveniles contained in the second chapter of Act XXXVI of 1908 on the supplement and amendment of the Criminal Code and the Criminal Procedure Code.
[46] Decree No. 27,100/1909 of the Royal Hungarian Minister of Justice on the implementation of the provisions concerning juveniles contained in the second chapter of Act XXXVI of 1908 on the supplement and amendment of the Criminal Code and the Criminal Procedure Code.
[47] § 34 of Decree No. 27,100/1909 of the Royal Hungarian Minister of Justice.

cated that in numerous cases, children were handed over to the shelter.[48] The Danube District Police Headquarters also took part in child protection: for example, the runaway child N. L., classified as a vagrant and previously residing at the Veszprém children's shelter, was admitted to the state children's shelter in Budapest on the basis of request no. 7911/1915 issued by the police.[49]

The law on the Juvenile Court prescribed the procedures to be followed not only for individuals who had committed a punishable act but were not criminally liable due to their age, but also for minors under the age of eighteen who had not committed any offense but were deemed to be at risk of moral corruption or showing signs of moral decline.[50] Accordingly, in the case of a child who committed an act contrary to criminal law before reaching the age of twelve, the juvenile judge gathered informative data, established the facts, and could hand the child over "for disciplinary purposes to a person entitled to exercise domestic authority or to the school authorities." If the child had been exposed to moral degradation or had begun to deteriorate in their current environment, the juvenile judge notified the guardianship authority and, if deemed urgently necessary in the interest of the child, arranged for the child's transport to the nearest state children's shelter for temporary placement.

The juvenile court could also act in urgent cases involving children not suspected of committing any crime but exposed to a morally harmful environment or showing signs of degradation. In such cases, the judge could warn the parent, legal guardian, or caretaker to adopt stricter and more careful educational measures, instruct them to discipline the minor, ensure school attendance, or keep the child away from environments, occupations, or lifestyles that threatened their moral development. The court could temporarily appoint a probation officer to supervise and monitor the child's upbringing and, if the child's physical or moral condition was at risk, remove them from their environment and place them temporarily in a state children's shelter or entrust them – until a decision was made by the guardianship authority – to a reliable relative, another suitable person, or a child protection or patronage organization. The court could also order removal from the home if domestic or school discipline had proven ineffective. In cases where a minor was removed from their environment, the court was obliged to immediately notify the court of wards with jurisdiction over the child's place of residence. The court's measures lost their validity either upon a final decision from the guardianship authority or when the minor reached the age of eighteen.[51]

In this new child protection role, the courts found themselves in an unfamiliar position. Within professional circles, opinions were divided regarding this jurisdiction. Some questioned the legitimacy of this new role, arguing that "granting juvenile judges child protection authority in the absence of criminality would lead royal courts entirely and exclusively into foreign territory and would burden them with such additional work that could only be carried out to the detriment of their proper judicial functions."[52] In contrast, other professional circles fully supported this expansion of jurisdiction, believing that the legislator had thereby complemented the child protection laws of 1901 and most accurately followed the American model.[53] Béla Melly, who worked in administrative child protection, also opposed granting child protection authority to juvenile judges and, at the Hungarian Jurists' Association, proposed instead the development of guardianship administration.[54] In his 1917 work, criminal law scholar and criminologist Rusztem Vámbéry argued that the principle of the separation of administrative and judicial protection did not justify the guardianship authority having to duplicate the court's actions. He therefore proposed that judicial measures should become final. Leó Szokola extended this line of reasoning further, suggesting – on grounds of expediency –that cases involving morally endangered children and juveniles should be handled exclusively by the juvenile court.[55]

Conclusion

"In order to effectively prevent the development of criminal behavior, state intervention also became possible in the so-called pre-delinquent stage."[56] Reflecting on the development trends of juvenile justice and the area he considered youth protection, András Szabó noted that "in contrast to delinquent children, children who were morally corrupted or at risk of moral degradation were classified as 'pre-delinquents,' meaning those who could potentially become delinquents."[57] The regulation concerning morally neglected or depraved children regarded state intervention as an act of crime prevention. At the same time, there was another important driver behind such intervention: the protection of the child. In many cases, inadequate family circumstances and the neglect of a child's upbringing justified removing the child from their original environment. In the absence of material abandonment, the sixty-thousand decree only offered limited possibilities for temporary placement. Within governmental policy, following the establishment of administrative child protection – or in parallel with it – the focus

[48] RADÁK, G., A Büntető Novella második fejezete a gyakorlatban. In: *A Gyermekvédelem Lapja*, 1911a, No. 1, p. 8.
[49] HU-BFL-IV.14116-27198/1916.
[50] § 65–67 of Act VII of 1913 on the Juvenile Court.
[51] § 65–67 of Act VII of 1913 on the Juvenile Court.
[52] DOLESCHALL, A., A fiatalkorúak bűnügyeinek eljárási kódexe. In: *Jogtudományi Közlöny*, 1912, No. 36, p. 311.
[53] FINKEY, F., Kritikai megjegyzések a fiatalkorúak bíráiról és a fiatalkorúak bűnügyeiben követendő eljárásról szóló törvénytervezetre. In: *Jogtudományi Közlöny*, 1912, No. 47, p. 410–411.
[54] Különfélék. Vitaest a Jogászegyletben. *Jogtudományi Közlöny*, 1913, No. 5, p. 43.
[55] SZOKOLA, L., Árvaszék, iskola és gyermekvédelmi törvény. In: *A Gyermekvédelem Lapja*, 1917, No. 9, p. 177–184.
[56] KEREZSI, K., Büntetve gondozni? A javítóintézeti nevelés helye a fiatalkorúak büntető igazságszolgáltatási rendszerében. In: *Esély*, 2007, No. 3, p. 37.
[57] SZABÓ, A., A Fiatalkorúak Bírái Nemzetközi Egyesületének VII. kongresszusa. In: *Jogtudományi Közlöny*, 1966, No. 10, p. 557.

shifted toward the creation of judicial child protection. Unlike the North American model that served as an example, where there was no doubt that juvenile courts could also assume the functions of guardianship and child protection, the underlying legal-political rationale of the regulation becomes clearer. As noted earlier regarding the court of wards, their collective nature rendered them less suitable for urgent action due to time constraints, while juvenile courts were able to act more swiftly. The justification of the legislative act on juvenile courts also reveals that due to the limited capacity of administrative child protection, the state extended judicial child protection to include morally endangered children as well. "The very fact that state child protection only extends up to the fifteenth year of life, and that its tools are particularly ineffective against minors who are beginning to go astray, points to the necessity of developing protective regulations."[58]

The examination of the regulation reveals the established intersection between administrative and judicial child protection. This category included morally neglected but not materially abandoned children – that is, morally depraved or delinquent children and juveniles. In their cases, the delineation of authority between the guardianship authority acting at first instance and the juvenile court judge is of particular importance.

A partial solution was reached during the Dual Monarchy regarding the situation of children at risk of moral corruption. The 60,000 B.M. decree of 1907 regulated the temporary placement of children at risk of moral degradation but not officially declared abandoned, thereby seeking a solution within the framework of administrative child protection. The official recognition of moral abandonment only became possible in 1925. From this time onward, the guardianship authority could declare a child under the age of fifteen to be abandoned regardless of their material situation if the neglect of upbringing or the harmful influence of their environment exposed them to the risk of moral degradation, or if due to these reasons – or personal tendencies – they had already begun to become morally depraved. According to this Decree the child whose corrective education had been ordered by a court could not be declared morally abandoned by the authority.[59] The Hungarian model excluded such an overlap by maintaining a clear separation between administrative and judicial child protection. The parallel, yet – according to legislative intent – coordinated operation of these two systems stems from the development of Hungarian law and its traditions, traceable back to Act IV of 1869.[60]

Based on the above legal provisions, it is evident that judicial and administrative child protection developed separately from one another. However, this did not imply a lack of mutual influence between the two systems, and the state's intention to establish cooperation between them can also be observed through a detailed examination of the regulations. In the context of judicial child protection, during the professional debates prior to the enactment of the Juvenile Court Act, it was raised that, according to domestic regulation, guardianship matters were placed under the jurisdiction of administrative authorities, rather than the courts. This fact and tradition held significant importance for the establishment of the juvenile court, as the legislator explicitly delineated the jurisdiction of the juvenile judge from the matters falling under the guardianship authority, including cases involving endangered children, with the clarification that the special court could, however, take temporary measures in cases involving morally depraved or morally endangered children. For children and juveniles who could not be held criminally responsible and could not be declared materially abandoned, but who nevertheless had to be removed from their original environment, the final decision was made by the court of wards, as the guardianship authority.

[58] Indokolás a fiatalkorúak bíróságáról és a fiatalkorúak bűnügyeiben követendő eljárásról szóló törvényjavaslathoz. Melléklet a 732. számú irományhoz. Az 1910. évi június hó 2-ére hirdetett Országgyűlés Nyomtatványai. Képviselőházi Irományok. XXIV. kötet. Budapest, 1913. Pesti Könyvnyomda–Részvény–Társaság.

[59] Decree No. 2,000/1925 of the Royal Hungarian Minister of Public Welfare and Labour on the amendment of the provisions regarding the admission to the Royal Hungarian state children's shelter, the bearing of the care costs for admitted children, the method of cost recovery, and the exceptional extension of the duration of child care. MRT, 1926, p. 669–674; PETTKÓ-SZANDTNER, A., *A Magy. Kir. Állami gyermekvédelem.* Budapest, 1926, p. 7.

[60] See: BARNA, A. (ed.), *A bírói hatalom gyakorlásáról szóló 1869. évi IV. törvénycikk megalkotásának 150. évfordulója.* Budapest, 2019, HVG-ORAC; Act IV of 1869 on the exercise of judicial power.

Military-Legal Foundations of Maintaining an Empire. The Development of Hungary's Defence System in the Austro-Hungarian Empire

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Abstract

This study hypothesizes the gradual emergence of a defence and security constitution within the broader constitutional and state-building processes of the Hungarian part of the Austro-Hungarian Empire. While the 1867 Compromise established a dualist constitutional framework for political governance, it also triggered a parallel institutional and legal evolution in the field of state defence and security. The evolution of this defence and security constitution and the modernization of Hungary's defence system - beyond their historical significance - might offer a valuable framework for addressing today's security challenges. The research draws on primary sources, including legal texts and historical documents, as well as secondary literature and employs a historical-legal approach, analyzing the development of Hungary's defence institutions and their constitutional framework.

Keywords: *defence constitution; security constitution; institutional development; security governance; Hungary.*

1. Introduction

In Hungarian history, the Austro-Hungarian Compromise of 1867 marked the beginning of the first extended period defined by civil constitutionalism. Although rarely emphasized, the proper legal regulation of military issues and the resolution of remaining disputes between Vienna and Buda following the suppression of the 1848–49 revolution and war of independence were of fundamental importance to the Compromise. The reinstatement of the Royal Hungarian Noble Guard or the resolution of political disputes surrounding conscription [1] highlighted the fact that the defence system played a key role in both the formation and the maintenance of power within the Austro-Hungarian Monarchy.

Considering that the essence of the Compromise was that a great power was constitutionally built up from two parts of the empire, as an independent constitutional monarchy, the military dimension of the Compromise was the beginning of a new period, which essentially laid the framework of the defence system of the modern Hungarian state in a way that continues to have influence to this day, that followed the Common Law [2], i.e. the articles on the Common Defence Forces [3], Royal Hungarian Army [4] and the national militia [5] which were renewed several times. These laws can be interpreted as the foundations of the defence constitution, as they regulated essential state institutions vital for its survival, as well as citizens' obligations related to national defence, due to which they could rightfully claim the fundamental law status. The regulation, much like the institutional structure of the Monarchy itself, was dual in nature. The Common Defence Forces were the common army of the Austro-Hungarian Monarchy, while the Royal Hungarian Army functioned as the Hungarian national (auxiliary) force, and the national militia served as an additional component. The Austrian counterparts to the latter two were the Landwehr and the Landsturm.

The development of the security constitution, however, was only just the beginning, since the late 19th and early 20th centuries were the decisive period in the history of the Hungarian state when the state's defence institutions differentiated from military dominance into a complex armed defence system and essentially took on the present-day framework of the institutional division of the military, law enforcement and intelligence services, which

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1 FARKAS, Á., Adalékok egy rendszerváltást követő politikai gesztus megítéléséhez. In: SZOBOSZLAI-KIS, K. – DELI, G., (ed.), *Tanulmányok a 70 éves Bihari Mihály tiszteletére*. Győr, 2013, p. 148-161.

2 Act XII of 1867 on the relations of common interest between the countries of the Hungarian Crown and other countries under the rule of His Majesty, and on the manner of their settlement.

3 Act XL of 1868 on the Armed Forces ("Véderő").

4 Act XLI of 1868 on the Royal Hungarian Army ("Honvédség").

5 Act XLII of 1868 on the National Militia ("Népfelkelés").

had been dominant since the 20th century. This process is closely linked to the significant legal developments of the late 19th and early 20th centuries, which prevailed in many areas of the Hungarian legal system.[6] In this process, alongside the armed forces considered as the archetype, the internal security services – particularly law enforcement bodies – also underwent a process of gaining autonomy, becoming subject to statutory regulation, and eventually being organized into nationwide institutions under state monopoly. A characteristic feature of the period in this regard – partly due to the desire to replace Austrian regulations, and later due to the "habitual" nature of regulation – is that certain organizations were not regulated at the statutory level, or only with delay. Therefore, in a formal sense, these cannot be included in the differentiation of the security constitution, but they are to be understood as part of its material interpretation– that is, the development of the armed defence system.

This dichotomy made national defence legislation essentially pioneering, because of its weight and tradition[7] and constitutional significance the armed defence became a key legislative area, within which essentially comprehensive legislative steps were taken between 1867 and 1944. By comparison, the regulation of the police and the 'secret service', which was still in the process of developing its independence, and in particular the legislation governing them, appeared to be only partial and incipient. However, this partial nature was to be found throughout Europe in the 19th and 20th centuries, as the great powers steadily strengthened these capabilities alongside their armies. However, despite the fact that the weight of legislation outside the field of defence, which could be interpreted as part of the security constitution, was not as significant at that time as it is today, it is important to review the organisational and functional differentiation in order to understand the processes. It was during this period that the police and intelligence services began to become independent, and thus, viewed in conjunction with the constitutional regulation of the Royal Hungarian Army, they were able to lay the constitutional and functional foundations to which Hungary was later able to return in part when the civil state was reestablished[8] in 1989.

In the present study, therefore, it is necessary to examine not only military defence, but also the organizational changes through which the system of armed defence in Hungary could take shape – that is, the emergence of a complex matrix of defence institutions that replaced the security paradigm based on the exclusivity of the army.

2. The foundations of the modern Hungarian defence and security institutional system

In addition to the establishment of the defence system in conjunction with the Austro-Hungarian Compromise, the first such milestone was the "Hungarianization" of the Finance Guard, by taking over the tasks of the former Imperial and Royal Finance Guard in Hungary and renewing the organization. "In 1867, the Royal Hungarian Treasury Guard was set up to enforce the financial order within the Kingdom of Hungary. At the same time, the Imperial and Royal Treasury Department Headquarters were gradually abolished. The financial organisations were not, however, eradicated, because the continued operation of the Austrian tax system and the collection of income, consumption taxes, duties and other indirect taxes were necessary to maintain the economic life of the country. The new organisation was subordinated to Department XIII of the Ministry of Finance. This department was responsible for customs and treasury matters, the remission by pardon of fines for offences against customs regulations, and personal and retirement matters."[9] The organisation of the treasury and the treasury administration was thus established in 1867 in a somewhat half-hearted way, with a partial continuation of the Austrian heritage, which, however, does not diminish the role of the Treasury in the differentiation of armed defence from the point of view of Hungarian constitutionality.

Similarly important in the development of law enforcement was the Act XXXVI of 1872 on the formation and settlement of the Buda-Pest Metropolitan Municipality. This foreshadowed the unification of the police authorities, which were still assumed to be the internal affairs[10] of the "municipalities" under the framework of Article XLII of 1870 on the organisation of public law enforcement authorities, but were placed under the professional control of the Minister of the Interior. The first step in this process was to give the police force of the capital a different status from that of the police forces of the other jurisdictions. Article 20 of Act XXXVI of 1872 stipulated that the police force in the capital was to be organised in a single body under the name of the Capital City Police and under state control[11], which was far more than the municipal police model

[6] TÉGLÁSI, A., Historical Development of the Constitutional Social Rights in the Hungarian Constitutional System in the 20th Century. In: *Journal of European History of Law*, Vol. 15, No. 1, 2024, p. 150–157; PALLO, J., Military Criminal Sanctions and the Peculiarities Related to Their Execution in Hungary (1930–1948). In: *Journal of European History of Law*, Vol. 15, No. 1, 2024, p. 158–165; VARGA, N., Administrative Reforms in the Hungarian Municipalities after the Austro-Hungarian Compromise: The Introduction of the Office of Lord Lieutenant and the Applicable Rules in Hungary. In: *Journal of European History of Law*, Vol. 15, No. 1, 2024, p. 153–160.

[7] FARKAS, Á. (ed.), *Corpus Iuris Militaris Hungarici I.* Budapest, 2016; FARKAS, Á. – KELEMEN, R. (ed.), *Corpus Iuris Hungarici II.* Budapest, 2017.

[8] CSERVÁK, CS., The Constitutional History of the Democratic Transition. In: *Journal of European History of Law,* Vol. 15, No. 2, 2024, p. 132–142.

[9] PRUKNER, A., A magyar vám- és pénzügyőr szervezetek tevékenysége 1867-2010 között. Budapest, 2013, p. 20.

[10] Article 64. § reads as follows: „In other respects, the municipalities vested with the right of jurisdiction shall determine the organization by which they wish to conduct their own internal affairs and exercise municipal government, and consequently the powers of the council and of the individual officials, including the chief of police, in relation to municipal government, and the organization of the departments, the number and salaries of the officers, the auxiliary staff, the management staff, the police and the servants, as well as the manner of appeal against decisions taken by the individual officers in the municipal administration, in accordance with local conditions and within the limits of this Act, by means of a regulation to be approved by the Minister of the Interior (91. §)." Article XLII of Act of 1870 on the organization of public law authorities.

[11] Article XXXVI of Act of 1872 on the formation and organization of the Buda-Pest metropolitan municipality (hereinafter referred to as: Bptc.), 20. §.

previously established by the Public Police Act. In addition to this statement, the second paragraph is of a guarantee nature, stating that "The right of the jurisdiction to make rules on local police matters remains unaffected."[12] The law already stipulated that the organizational and police-judicial issues of the nationalized capital police must be regulated by law.[13] This was supplemented by a temporary provision that if the law was not enacted until the unification of the capital, the police bodies of the capital would be under the control of the Minister of the Interior until the law was enacted, thus also establishing the regulatory responsibility of the Minister of the Interior. The model developed at that time in connection with the metropolitan police thus already reflected a possible approach to establishing a state-organized law enforcement system under central governmental control, operating according to standardized requirements. This also made visible the development of a complex armed defence system that shifted from the predominance of military force within the state institutional system.

A further significant step in the consolidation of the law enforcement sector's autonomy soon followed, with the advancement of organizing public order protection at the national level, beyond the jurisdiction of local authorities. This stage was marked by the Act III of 1881 on the organisation of the public security service, which established the gendarmerie. The gendarmerie was an unquestionable step forward in the development of domestic law and order and, with it, of the armed defence system. However, the establishment of the gendarmerie was also part of the development of the defence constitution, since Article 1 of the referred Act states that "A militarily organised Hungarian Royal Gendarmerie shall be established to provide public security."[14] In this spirit, the gendarmerie was essentially a paramilitary law enforcement agency, over which the Minister of Defence and the Minister of the Interior shared control, and with which the legislature in the civilian era established the tradition of a military hierarchy of agencies exercising the monopoly of violence of the state.

In addition to the divided powers and military-style organization, the Act reinforced the connection to the defence constitution at several points–for example, in the organization of gendarmerie districts, it stipulated that these must align with the system of military districts.[15] Within this framework, the law assigned organizational and public order responsibilities to the Minister of the Interior, while in matters related to personnel, in order to preserve the military character, it designated the Minister of Defence as the competent authority. As the Act states: "Gendarmerie officers and all gendarmes, in matters of personnel, promotion, and discipline, shall fall under the authority of the Minister of Defence; all personal matters shall be handled by the Ministry of Defence, and in disciplinary and criminal matters committed by the gendarmerie, only the Royal Hungarian Military Courts shall have jurisdiction; in terms of administrative and police service relations, the gendarmerie shall be under the authority of the Minister of the Interior."[16] To reinforce the principle of divided authority, the organizational and service regulations of the gendarmerie could only be issued jointly by the two ministers, thereby enabling them to explicitly define the tasks, structure, and character of the organization.[17] Following the regulation of the gendarmerie, Act XXI of 1881 on the Budapest Metropolitan Police was enacted, as had been proposed by Act XXXVI of 1872. According to the law, "the task of the metropolitan police is to safeguard personal and property security within its area of operation, to maintain peace and public order, to prevent - as far as possible - violations of criminal laws, decrees, and regulatory ordinances, as well as dangers and damages arising from accidents or any kind of negligence; to restore disturbed peace and order; to detect those who violate these, and to report or hand them over to the competent court or authority for punishment; and, in general, to fulfill the duties of surveillance, prevention, and detection within the framework of the law."[18] The Act confirmed that the Budapest Metropolitan Police was placed directly under the control of the Minister of the Interior[19], which made the subordination of law enforcement to central governance, or "nationalization" if you like, even more explicit. On one hand, this marked a new stage in the competition between the government and the municipalities; on the other, it was a significant step toward unified development, organization, training, and operation, ultimately contributing to the establishment of a systematic model of a police force. Beyond defining its scope of responsibilities, the Act on the Metropolitan Police regulated in considerable detail – by the standards of the time – the partial duties, obligations, and operational procedures and frameworks of the police. In the context of the differentiation of the security constitution, a particularly important provision stated that:

"The Chief of Police or their deputy shall have the right, if necessary, to call upon the assistance of the conscripts or the Royal Hungarian Army. Such assistance may be used only as a last resort, when the police is entirely inadequate to maintain order and peace."[20] In addition to the legal reference to the use of military force, this section of the law also made it clear that the suppression of disturbances that exceed the police's forces would be considered an extraordinary event, but would not require any other - higher public law - approval for the use of armed force. In this way, the legislator has also made

[12] Bptc. 20. §
[13] Cf. Bptc. 21. § (1) section.
[14] Article III of Act of 1881 on the Organization of the Public Security Service (hereinafter referred to as: Ksztc.) 1. §.
[15] Cf. Ksztc. 2. §.
[16] Ksztc. 8. §
[17] For more information, see: The organizational and service instructions issued by the Hungarian Royal Minister of the Interior and National Defence on October 1, for the Royal Gendarmerie, Hungarian Collection of Regulations (hereinafter: MRT), 1881.
[18] Act XXI of 1881 on the Budapest Metropolitan Police (hereinafter: Bfrtc.) 2. §.
[19] Bfrtc. 4. §
[20] Bfrtc. 34. §

it clear that, in developing the security constitution, it does not intend to abandon the domestic use of the armed forces, i.e. the possibility of using the armed defence capabilities of the state as effectively as possible in the interests of public order and security. This approach is an essential element of the security constitution of the civilian era from 1867 to 1918.

The next milestone in the differentiation of the armed defence system, and with it the development of the security constitution, was the development of border protection. On the one hand, the political heat of this issue was the demilitarisation of the military border guard.[21] On the other hand, however, the abolition of military border guards and border regions, which were of particular importance in the history of domestic law, clearly made it necessary to link the issue of border protection to the changing system of national and state-controlled policing, since the current security situation in the region no longer justified the military border guards that had been maintained for centuries because of the Turkish threat. This was the purpose of a decree issued by the Minister of the Interior of the Kingdom of Hungary in 1891 under No. 50.431, on the subject of the border guard instructions issued on the basis of the Hungarian-Romanian border agreement promulgated by Act XIV of 1888.[22] The order issued as an annex to the Act transferred the police tasks related to the border edges to the competence of the gendarmerie and thus essentially established the border gendarmerie, not as a separate legal category, but by means of a decree, exercising the professional control of the Minister of Interior on the basis of the Act establishing the gendarmerie. Its main tasks were to protect border markings, prevent any action against border markings, and arrest illegal border crossers and bring them to justice.[23] In addition, however, an order annexed to the decree also assigned tasks to the Treasury Police, which at that time was also an evolving institution within the civil state's law enforcement organization system.

In the context of the differentiation of armed defence, the establishment of the Hungarian Royal Darabont Guard in 1904 – modeled after its Austrian counterpart – cannot be regarded as a particularly weighty element in terms of actual power and function. Nonetheless, it is worthy of mention due to its political-historical connections. Based in Budapest, this institution primarily guarded the monarch's residence during his stays in Hungary, complementing the personal protection services of the Hungarian Royal Noble Guard.[24] As a personal protection unit with a specific role, it added further nuance to the evolving structure of the armed defence system, reflecting the unique historical evolution of bodyguard services. A key characteristic of this institution was the preservation of its military nature, while its independent organizational framework allowed for the separation of certain personal protection functions from the classic military duties of the armed forces.

However, the organisation of the border gendarmerie did not appear to be a sufficient and definitive solution to the border issue, due to the great power ambitions, which determined the development of the armed defence system. Increasing security pressures and the development of the state have necessitated the adoption of several laws on the state border and the crossing of the state border.[25] These also predicted one direction for the further development of the security constitution, which was then realized through the 1903 Act VIII on Border Police. With the establishment of the border police, the border policing function has been formed independently in the armed defence system of the Hungarian state at the statutory level, as part of the security constitution. This created a new – though existing only until the nationwide unification of the police in 1919 – armed organization. The establishment of this force reflected not only the strengthening of the migration challenges directed to and from Hungary. This organization was the next stage in the nationalization of the law enforcement, i.e., the further strengthening of its withdrawal from the jurisdiction of local authorities, as in addition to the gendarmerie, which had national jurisdiction and was under government control, and the nationalized metropolitan police, another law enforcement agency was established that operated under government control and was independent of the local authorities. The primary task of the newly established border police was to carry out border policing duties.[26] Within this framework, the law assigned an extremely detailed set of tasks to the organization[27], which included, among others:

[21] On the determination of the military contribution falling to the countries of the Hungarian Crown, due to the civilian administration of part of the Military Frontier—namely the territory of the three regiments in the Banat and the Titeli battalion— and on the amendment of Act III of 1872, as provided by Act XXXV of 1872.

[22] MRT 1891.

[23] Section 2 of the Border Guarding Regulation issued by the Royal Hungarian Minister of the Interior, in agreement with the Ministers of Defence, Justice, Finance, Agriculture, and Trade, based on the Hungarian-Romanian border agreement enacted by Act XIV of 1888. MRT 1891.

[24] In this regard, it is worth highlighting the observation made by József Parádi, who stated: "In the Austro-Hungarian Monarchy, a total of six guard units operated. On the Austrian side: the Imperial and Royal First Halberdier Guard (83 members), the Imperial and Royal Darabont Guard (61 members), the Imperial and Royal Mounted Guard Company (140 members), and the Imperial and Royal Foot Guard Company (309 members). On the Hungarian side: the Hungarian Royal Noble Guard (89 members) and the Hungarian Royal Darabont Guard (53 members). In total, therefore, 735 individuals could ensure the personal security of the common monarch." PARÁDI, J., A dualizmuskori magyar rendvédelem. In: *Rendvédelem-történeti Füzetek,* No. 21, 2010, p. 67–68. On the topic, see also: PARÁDI, J., Kontinuitás és újrakezdés a XIX–XX. századi magyar rendvédelemben. In: *Rendvédelem-történeti Füzetek,* No. 23, 2011, p. 99–110; SÁGVÁRI, Gy., Testőrök Magyarországon, 18–20. század. In: *História,* No. 5, 2010, p. 6–15.

[25] In this regard, see Act IV of 1903 on Emigration; Act V of 1903 on the Residence of Foreigners in the Territories of the Lands of the Hungarian Crown; Act VI of 1903 on Passport Affairs; Act VII of 1903 on the Establishment of Three New Gendarmerie Districts; and Act VIII of 1903 on Border Policing (hereinafter: Hrtc.).

[26] Hrtc. 1. §

[27] Hrtc. 2. §

- monitoring border crossings;
- gathering information about important incidents and events from a state security perspective along the border and communicating the findings with the relevant authorities;
- implementing regulations regarding the registration and residence of foreigners,
- preventing espionage, and possibly arresting spies;
- deporting of individuals arrested at the border and subject to deportation orders, reception and further forwarding of deportees arriving from abroad;
- preventing human/female trafficking;
- examining passports at borderlines where passport requirements applied, issuing border crossing permits;
- supporting the activities of the customs police by assisting in preventing smuggling and supporting the relevant agencies in this matter.

The law specifically extended the competence of the border police to all municipalities and towns located on the border, as well as to municipalities and towns located near the border and with strong connections with foreign countries,[28] and ensured that the border police could directly use the assistance of the gendarmerie and local police in their territory in matters referred to it by law.[29] The law clearly stated that the border police were under the control of the Minister of the Interior,[30] and referred detailed regulation to the level of service instructions.

During the differentiation of armed protection functions, in 1912 the House of Representatives Guard was established within the framework of the law, also with a military character, but with special law enforcement functions, since the main purpose of its establishment was to provide the legislature, which functions as an independent branch of power, with its own armed protection body. Article LXVII of 1912 on the establishment of the House of Representatives Guard did not conceal that the purpose of the establishment of the body and, consequently, the purpose of the organization was to support the President of the House of Representatives with law enforcement forces.[31] According to the provisions of the law, the organization is required to execute the orders of the President of the House of Representatives and the House Secretary, with the stipulation that during elections, until the new President of the House of Representatives is appointed, the organization was under the authority of the House Secretary.[32] The law stipulated that "The House of Representatives Guard shall consist of a military guard of not more than sixty members, composed of military individuals who volunteer for the service. The detailed rules for the organisation of the Guard of the House of Representatives shall be laid down by the President of the House of Representatives in agreement with the Minister of Defence."[33] This rule thus went in the direction of differentiating the system of armed defence in such a way that the legislature, as a separate branch of power, created its own "law enforcement" body with a military character rather than a body of internal security, although its function was more of a law enforcement nature. This rule thus went in the direction of differentiating the system of armed defence in such a way that the legislature, as a separate branch of power, created its own "law enforcement" body with a military character rather than a body of internal security, although its function was more of a law enforcement nature. This view was reinforced by the fact that the article of the law stipulated that „If it becomes necessary to reinforce the House of Representatives guard or to supplement its service in the House of Representatives, the President of the House of Representatives may, through the government, use the force of the gendarmerie or the armed forces for this purpose."[34] In the same section, the article of the same law ordered the metropolitan police, with the assistance of the gendarmerie and the armed forces, to be involved only in the necessary measures of law enforcement in the immediate vicinity of the House of Representatives, with the so-called surveillance service, necessary to maintain the security of persons and property, still to be provided by the state police in these areas.[35]

The organizational changes based on laws from 1867 until the First World War clearly show that although military defence and national defence were of paramount importance in the development and policy of dualism, at the same time, instead of comprehensive military dominance, state organization shifted towards strengthening and making the police independent. Although a unified police force, nationally organized, centralized and under government control in the modern sense, or even a police system formed along similar organizational principles had not yet been established in the era, but it was being built up, modernized, and strengthened institution by institution.

This clearly marked the emergence of an independent law enforcement sector as a distinct branch of armed defence – signaling the beginning of the development of a complex armed defence system that began to replace traditional military protection. The civilian nature of this transformation, in line with the ideal of a civil state, is well reflected in the legal framework within which it took place. In our view, the most significant laws governing law enforcement had a quasi-fundamental law character, much like the laws regulating national defence, as they established fundamental state institutions and affected the exercise of citizens' rights and obligations.

[28] Hrtc. 3. §
[29] Hrtc. 4. §
[30] Hrtc. 8. §
[31] The Act LXVII of 1912 on the establishment of the House of Representatives guard (hereinafter: Kőtc.) 2. §
[32] Cf. Kőtc. 2. §
[33] Kőtc. 4. §
[34] Kőtc. 4. §
[35] Kőtc. 4. §

With the above institutions, the development of a complex defence constitution began on the basis of Hungary's security constitution. This security constitution was, of course, still in its infancy, and it retained its national defence predominance in the system of wars and revolutions as well as the period between the two world wars, but it nevertheless marked the beginning of a development that has been decisive to this day. The evolution of the defence constitution should not be assessed solely in terms of its size, complexity, or importance. It must also be understood as a model of systemic development. We believe that this historical model provides significant constitutional lessons for the modern development of the defence and security system – offering deeper insights that may help guide thoughtful reforms in place of ad hoc changes. Accordingly, our study approaches the development of the armed defence system in conjunction with an analysis of the dualist evolution of the defence constitution.

3. The Significance of Defence System Laws within the Austro-Hungarian Monarchy

Thus, as noted above, reaching the political Compromise required an unavoidable settlement[36] in the field of military defence – one that simultaneously reflected concessions and achievements in terms of the demand for a national armed force and Vienna's expectations for a military capable of asserting Great Power interests. The solution was found in a model that traced back to the Pragmatica Sanctio, which legitimized the institutions of the Common Defence Forces, the Royal Hungarian Army, and the national militia, paralleled on the Austrian side by the *Landwehr* and the Landsturm. These latter forces were defined as auxiliary units to the common army – thus subject to joint imperial command based in Vienna – while also possessing limited national autonomy. The legislation regulating these military structures is collectively referred to – according to the terminology of the 1867 negotiations – as the defence system laws[37] which, by the way, clearly shows the nature of the legislation. In fact, the laws falling within this scope – in the nature of fundamental law – have laid down the rules at the statutory level for the main military defence organisations and thus the ultimate guarantee of the survival and security of the state, in addition, defined the statutory rules for the basic institutions of the dualist system of military defence in the laws on the Common Defence Forces[38], the Royal Hungarian Army[39], and the national militia.[40]

The defence system laws essentially embodied the true imprint of the legal tensions and debates that arose around the Compromise, as well as the compromise itself, which was negotiated in order to retain influence within the power structure. This is excellently reflected in the thoughts of Ferenc Eckhart, who wrote: "In the half-century following the Compromise, the Hungarian Parliament was preoccupied predominantly with constitutional matters. Particularly with regard to the Common Defence Forces, which – due to their traditions, German language, and the political mindset of their officer corps – were rightly considered by public opinion to be the embodiment of centralized Austria's ideals. In contrast, the Royal Hungarian Army (in Austria, the Landwehr), which was under the administration of the Hungarian or Austrian Minister of Defence, played a secondary role. As early as 1889, in connection with the Defence Act, the slogans of national demands were raised, and from that point until the end of dualism, the struggle almost constantly revolved around these issues…"[41]

This struggle, as Eckhart records, stalled several other reforms, and even figured prominently in the 1902 obstruction, yet it was able to build, step by step, debate by debate, with its own strangeness, the gradual development of the defence constitution. It is a fact that the solution negotiated in 1867 provided the basis for the Monarchy's armed defence in the form of a Common Defence Forces as defined by Act XL of 1868 on Common Defence Forces. Alongside it, as supplementary forces but under national command, the Royal Hungarian Army, established by Act XLI of 1868, and the national militia, which could be summoned pursuant to Act XLII of 1868 on the national militia. As such, they stood as a solid pillar in the regulation of the state system throughout the period of dualism, even though contemporary public law thinking - in a way that is difficult to understand - did not classify them as "self-evident" fundamental laws, but on the other hand, their political significance was not disputed either.

In view of the requirements developed for fundamental laws by contemporary Hungarian public law within the framework of historical constitutionalism, we consider the defence system laws to be fundamental laws, since they:

- regulated the fundamental institutions of the state, namely the organizations of its armed forces;
- regulated the fundamental rights and obligations of citizens by stating the general obligation to defend, and

[36] SCHMETTERER, C., Der Kaiser von Österreich als Oberster Kriegsherr 1867–1918. In: *Journal on European History of Law,* Vol. 4, No. 1, 2013, p. 10–18.

[37] Proposal regarding the defence system and the subsequent supplementing of the army, concerning the petition to be addressed to His Majesty regarding the issued higher directive (Document no. 51). In: Documents of the House of Representatives of the Hungarian Parliament for the session announced on December 10, 1865, Vol. II. 1867, Pest, p. 36-39. Report on the submission of the petition concerning the defence system to His Majesty (Document no. 57). In: ibid., p. 46-47. Imperial decree concerning the defence system (Document no. 60). In: ibid., p. 49-50. The Ministry's proposal for a resolution regarding the recruits (Document no. 66). In: ibid., p. 61-62. The resolution of the House of Representatives of the Hungarian Parliament on the matter of recruits (Document no. 74). In: ibid., p. 107-108. On the proposal for recruits needed for the reinforcement of the Hungarian regiments, the 1867. year IX. Law article 2.

[38] Act XL of 1868 on the Common Defence Forces, Act VI of 1889 on the Common Defence Forces, and Act XXX of 1912 on the Common Defence Forces.

[39] Act XLI of 1868 on the Royal Hungarian Army, Act V of 1890 on the Royal Hungarian Army, and Act XXXI of 1912 on the Royal Hungarian Army.

[40] Act XLII of 1868 on the Insurrection, and Act XX of 1886 on the Insurrection.

[41] ECKHART, F., *Magyar alkotmány- és jogtörténet*. Budapest, 1946, p. 436.

- regulated the relations between the two parts of the state – the parts beyond the Leitha River and the parts within the Leitha River – they included the military defence system of the entire dualist state in (fundamental) legal rules.

With the creation of the defence system laws, the first regulation of the classical military force among the armed security functions appeared in the fabric of the restored constitutionality. However, the regulation was primarily of an organizational nature, in which the framework of the contemporary function of military defence was outlined, as well as the range of legal institutions that ensured the basic conditions for the operation of the armed forces. From the predominance of organizational regulations and the content of these laws, it follows that the defence system laws cannot yet be understood as a legal system that comprehensively regulates the system of the defence sector, since many legal institutions that are significant from the point of view of defence - i.e. a broader system of tasks than military defence - were only regulated later by military laws (called "special subject" during our research).

The purpose of the defence system laws during the period of the Compromise was therefore to constitutionally establish the structures of military forces, define their fundamental tasks, and create rules, competences, and procedural regulations regarding the essential requirements of a functional armed force. Naturally, this regulatory framework was expanded and refined during the two subsequent periods of legislative revision following the Compromise; however, organizational regulation remained the defining feature of these laws throughout, just as the regulation of the core tasks of the armed forces essentially remained unchanged – being elaborated in detail by the era's exceptionally extensive body of decrees.

In this respect, it should be pointed out that, apart from certain special subject, such as the law on recruitment or the law on military criminal procedure, military defence issues were exclusively dealt within the defence system laws, while, for example, the law on service and the rules expanding the defence system laws were placed at the level of decrees. Accordingly, from the perspective of defence (or security) constitutional law, the implementing decrees of the defence system laws[42], as well as the various organizational and service instructions and service regulations, must also be regarded as highly significant. This regulatory approach reflects the legal philosophy of an emerging rule of law–particularly when one closely examines the subject matter regulated by the defence system laws, and the general, framework-like nature of the rules contained therein.

This kind of approach – namely, regulation that provides a framework and structure at the level of fundamental law – is also reflected in the fact that the defence system laws cannot be considered equivalent or identical in purpose. Among the three laws – each periodically renewed amid serious political debates – it was the law on the Common Defence Forces that laid down the systematic foundations. This law was deliberately not merely about the Common Defence Forces, but rather a broader set of provisions defining the organizational system of military defence. The rules set forth in the law on the Common Defence Forces were elaborated upon by the other two laws – namely, those on the Royal Hungarian Army and the national militia – each specifying their respective particularities while aligning with the general principles of the law on the Common Defence Forces. Accordingly, the main institutions and subject areas of the defence system were defined by the law on the Common Defence Forces, from which the broader system of military defence regulation can be derived, going well beyond the scope of the Common Defence Forces, though not yet reaching the level of the regulation of defence in the form of a code. The main regulatory topics of military defence at the time can be identified as follows:

- the definition of general and personal defence obligations;
- the components of the armed forces and their designated functions;
- the size of the armed forces, the procedure for their approval, and the conditions for renegotiation;
- the duration of the defence obligation, and the regulations regarding conscription, enlistment, and availability;
- the rules of military recruitment;
- conditions for entering and continuing service;
- the main rules on service exemptions;
- the principal regulations concerning cadets of military educational institutions;
- the regulation of conscription;
- the rules of discharge;
- the rules concerning marriage, and
- certain rules on the division of military authority.

In terms of the evolution of the state's armed defence and, in particular, the defence constitution, an important issue can be highlighted regarding not only the division of military authority but also the purpose and task system of the armed forces, as well as the regulatory framework of defence obligations, which profoundly impacted contemporary society.

Regarding the purpose of the armed forces – namely, the Common Defence Forces, the Royal Hungarian Army, and the national militia – the law on defence states: "The army and naval forces' mission is to defend the territories of both states of

[42] The circular decree of the Royal Hungarian Minister of Defence, issued under No. 155 on January 8, 1869, to all municipal authorities concerning the implementation and enforcement of Act XL of 1868 on the Common Defence Forces. (MRT 1869. item 1.), The circular decree of the Royal Hungarian Minister of Defence, issued under No. 16,300 to all municipal authorities, regarding the implementation of Act VI of 1889 on the Common Defence Forces. (MRT 1889. item 59.), The instruction issued by the Royal Hungarian Minister of Defence for the implementation of Act XL of 1889 on the Common Defence Forces. (MRT 1889. item 32.), The decree of the Royal Hungarian Minister of Defence, issued under No. 1795 ein., addressed to all municipal authorities concerning the implementation of Act V of 1890 on the Royal Hungarian Army. (MRT 1890. item 55.), Circular decree No. 65,000 of the Royal Hungarian Minister of Defence, issued in 1912, to all municipal and district authorities in Hungary, as well as to all county authorities in Croatia-Slavoniaand to district officials, as well as to the municipal authorities of the cities of Zagreb, Osijek, Varaždin, and Zemun, concerning the enforcement of Act XXX of 1912 on the Common Defence Forces and the execution of the main conscription for the current year. (MRT 1912, item 99.)

His Majesty's empire from foreign enemies and to maintain internal order and security. […] In wartime, the Royal Hungarian Army is tasked with supporting the army and providing internal defence, while in peacetime, it is entrusted with maintaining internal order and security in exceptional cases. […] The national militia, during wartime, is intended to be the final effort of the defence forces, supporting the army and the Royal Hungarian Army, preventing enemy penetration, or defeating the enemy that has already infiltrated the country."[43] This purpose was also reinforced by the laws on the Royal Hungarian Army and the militia. From this – and even more so from the regulations concerning military strength in number – it is clear that the legislator – more precisely, the political axis of Vienna, and Pest-Buda – aimed to guarantee the primacy of the Common Defence Forces in every respect. At the same time, however, it is important to note from the perspective of armed defence that tasks related to internal security, or rather the protection of internal order, were present from the beginning of the era and remained significant throughout the period. This was despite the fact that during the era, the gendarmerie was established and various police forces grew stronger. It is also significant to highlight as a characteristic that the law defined the protection of internal order and "security" as a general task of the Common Defence Forces, while it initially only prescribed this as an exceptional task for the Royal Hungarian Army. The circumstances surrounding this regulation are quite interesting, as the legislator introduced it into the Hungarian constitutional system during a period when, after the "peaceful regime change", the same individual remained at the head of the executive power who had, in 1849, suppressed the Hungarian civil revolutionary efforts by force. Despite all this – certainly not without debates and reservations – Hungarian legislation granted both the monarch and the defence system organizations the trust necessary for the use of the armed forces in maintaining internal security. This was essential, as without it, neither the great power status nor the desired level of security would have been sustainable in the dualist structure.

From today's perspective, it may seem surprising that the maintenance of internal order was included among the fundamental duties of the armed forces. However, several straightforward arguments justify this decision. On the one hand, at that time Hungary did not yet have a nationally organized police force, and even the Austrian gendarmerie, which had upheld the despotism of neo-absolutism, had been disbanded[44]. On the other hand, considering the country's territory, the size and composition of its population, and the security challenges of the era, the legislator clearly took the position that, under special regulations, it was necessary to ensure the possibility of using state defence and security forces as broadly as possible – maximizing their effectiveness – to maintain constitutional order and counter emerging threats.

The way in which the armed forces were used domestically was the internal military enforcement, the regulation of which featured an important guarantee, as it was not exclusively the responsibility of the Minister of Defence, but partly also of the Minister of Justice and the Minister of the Interior. This arrangement stemmed not only from the mutual checks and balances among government actors but also from the prevailing understanding of how internal military enforcement should be employed. In principle, the use of internal military enforcement was possible at the request of the law-enforcement authorities, i.e. local authorities not directly subordinate to the government, but under the control of the Minister of the Interior, within the framework of a decree by the ministers concerned. It is significant that the issue of military police power was regulated by the government before the adoption of the new protective laws and that the regulation was maintained at the level of regulations[45], while the specific and detailed rules of the service were laid down in the service regulations[46] and not in statutory provisions.

This kind of spirit, which defined the legal framework of the defence system, persisted throughout the entire period, and even grew stronger with the subsequent re-regulations of the defence system, since later on even in the case of the Royal Hungarian Army the maintenance of internal order was no longer defined as an exceptional task, even though at the same time the law enforcement sector had already begun to develop increasingly autonomous structures. This form of regulation, which applied the unity of the state's monopoly on violence as needed, suggests a certain degree of relative trust both between Austria and Hungary, and between the central government and local authorities, since it essentially created the possibility for the domestic deployment of armed forces within the re-established Hungarian constitutional system, while the main powers of command still remained in the hands of the monarch. Of course, this trust required the rules of power-sharing established by the Compromise, as well as further detailed rules defined by the members of the responsible Hungarian government, and a more or less realistic recognition of the geopolitical processes that forced the development of defence.

[43] Sections 7-9 of the Law on Defence, 1868, XL.

[44] Royal Decree of 23 March 1867 on the disbandment of the gendarmerie. MRT 1867.

[45] The decree of the Royal Hungarian Ministry of Justice dated June 22, 1867, regarding the employment of internal military enforcement in the execution of court decisions. (MRT 1867, item 80.) The instruction issued by the Royal Hungarian Minister of the Interior on June 26, 1867, addressed to all county, district, and rural governors, as well as the mayors of the free royal cities, concerning the use of internal military enforcement and the maintenance of good relations with the military authorities. (MRT 1867, item 84.), The circular decree of the Minister of Defence under number 1962/h.m. ein., addressed to all municipal authorities within the territory of the Hungarian Crown, regarding the use of internal military enforcement. (MRT 1876, item 81.), The circular decree of the Royal Hungarian Minister of Defence, numbered 4539/ein. ex 1886, provides instructions on the procedures to be followed by public authorities when calling upon internal military enforcement of the conscript army and the Royal Hungarian Army. (MRT 1887, item 8.), The instruction of the Royal Hungarian Minister of Defence from the year 1896, under number 6707/eln., regarding the procedure to be followed by public authorities in the countries of the Hungarian Crown in the event of the deployment of military public force from the Common Defence Forces or the Royal Hungarian Army. (MRT 1896, item 255.)

[46] *Service Regulations for the Royal Hungarian Army: Chapter XI – The Maintenance of Public Order and Security*. Budapest, 1875, p. 225–234.

4. Conclusion

The developmental stages and parallels reviewed in our study reflect that the dualist constitutional construction of the Austro-Hungarian Monarchy held significant importance not only in terms of constitutional and political history, but also in the defence and security dimension of state development. The development of the military defence system established during the unification process, followed by the development of an autonomous and unifying law enforcement sector linked to it by a number of regulatory strands, and within these two, the development of the organisational framework of intelligence and counter-intelligence, laid the foundations of the modern defence and security structure.

It is also important to highlight, in relation to the period, that the institutional development outlined above was accompanied by significant legislative achievements and innovations, both in military defence and in law enforcement. The institutional development shifting from a military-defence-dominated structure toward a complex defence and security system thus constituted an integral part of the unfolding of Hungarian civil constitutionalism and the evolution of the modern state and legal system.

The development of the defence constitution and the modernization of the Hungarian state's defence system, aside from their historical value, can also serve as an important model in terms of responses to current challenges. On the one hand, the step-by-step structure and deliberation of development, institutionalization, and legislation, and on the other hand, the complementary nature of the separated functions, along with their better adaptation to contemporary security changes, make this period a historical model that current lawmakers should consider. Although our study only briefly touched on this in relation to specific sources, it is important to note that the key public law thinkers of the period considered the defence and security institutional framework and its constitutional determination as a significant issue, which further strengthened the complexity of thinking about the defence system. This approach may also be crucial in today's changing security environment, as it allows for the simultaneous realization of both adaptation to challenges and thoughtful state organization in the fields of defence and security.

Regional Imbalances and Imperial Cohesion. Austria-Hungary's Multiple Spatial Arrangements in the aftermath of the Dual Settlement

*Andrea Komlosy**

Abstract

This article discusses processes of core formation and peripheralization in the Habsburg Monarchy, focusing on political, economic and cultural factors and their interplay in various lands of the empire between the regional, the provincial and sub-state level in the aftermath of the Austro-Hungarian Dual Settlement or Compromise (1867). The formula of the Compromise offered a way to find a political balance between the Austrian and the Hungarian sub-empires in spite of an unequal economic division of labor between industrial and agrarian provinces. The common market benefited Hungarian big agriculture as well as Austrian and Bohemian big industry, offering graduated perspectives for different business and national elites to accept the dual framework. K.u.k. unity was challenged at countless occasions, but it did not collapse before the defeat in World War I.

The article also discusses Austro-Hungary's international relations, which are characterized by a semi-peripheral position vis-à-vis West European great powers on the one hand and European as well as non-European colonized or dependent regions on the other hand. Although not possessing proper colonies, Austria-Hungary participated in "colonial complicity" with European colonial powers, especially on the Balkans, Africa and Asia. Moreover, the entangled imbalances between the sub-empires, the lands and the provinces showed similarities with colonial relations and compensated for Austria-Hungary's lack of oversee colonies, hence contributing to imperial cohesion.

Keywords: *Regional imbalances; core – periphery; core formation; peripheralization; Dual Monarchy (Austria-Hungary); Dual Settlement (Compromise); empire and nation; economic division of labor.*

Introduction

This article discusses processes of core formation and peripheralization in the Habsburg Monarchy, focusing on political, economic and cultural factors and their interplay in various lands of the empire between the regional, the provincial and sub-state level in the aftermath of the Austro-Hungarian Dual Settlement or Compromise (1867). Did the entangled imbalances between the sub-empires, the lands and the provinces compensate for Austria-Hungary's lack of oversee colonies, hence contributing to imperial cohesion in spite of huge social and regional inequalities?

1. Definitions and methods of analysis

Conceiving of multiple spatial arrangements, the following three geographical levels are involved. First, on a small scale, space refers to the relationship of regions of smaller size with leading commercial and administrative areas within single lands or provinces.

Similarly, spatial relations also occur within towns, differentiating urban space along economic functions, prosperity, income level, class status and ethnicity of the inhabitants.

Secondly, on a medium level, the lands and provinces of Austria-Hungary form groups, according to their historical position and affiliation to the Habsburg conglomerate of lands, either as hereditary lands (of Austria and of Hungary) or as regions of continental acquisition, which were appropriated (or lost respectively) in the process of territorial expansion towards West, East and South-East Europe in the 17th, 18th and 19th centuries. The conglomerate of lands that either belonged to Austria or to Hungary underwent different arrangements of defining status, constitution and relations. From an Austrian perspective, Hungary itself belonged to the acquired territories, starting with a marriage contract affiliation in1506, that was realized after King Louis' II death in the Battle of Mohács in 1526. The following centuries were accompanied by legal and military disputes about borders, autonomy and status of the Kingdom of Hungary vis-à-vis the Austrian hereditary lands. These disputes entangled with the expansion of the Ottoman Empire, incorporating Hungarian territories into their area of power. From a Hungarian perspective, Hungary never ended being an imagined unity, whatsoever the state of partition or subordination. The Dual Compromise of 1867 transformed Austria and Hungary in two sub-empires with independent governments, united by common ministries (foreign affairs, military, common finance), currency, customs and a common monarch. In Cisleithania (Austria) he ruled as Emperor, in Transleithania (Hungary) as King.

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A third type of spatial arrangement refers to the position of the Habsburg lands and Austria-Hungary in the international system, both affecting political and economic relations of balance, dominance or dependency. After the dissolution of the Holy Roman Empire (1806) and the defeat of the Austrian Army and allies in Königgrätz/Hradec Králové (1866) against Prussia, the Habsburg Monarchy found itself in a state of imbalance vis-à-vis West European great powers. Different from other European great powers, the Habsburg Monarchy did not engage in colonial expansion and did not possess non-European colonies (apart from few minor attempts). With regard to colonial yields, the state relied on its internal peripheries. In East and South-East European states, Austria-Hungary claimed to assume a core-position after the retreat of Ottoman rule.[1]

Ideally, spatial relations unfold in a setting of balance or imbalance, and they contribute to the development of convergence and divergence of the regions involved. The following overview distinguishes between relations, characterized by complementarity on equal grounds on the one hand and by complementarity based on unequal conditions on the other hand. In practice, relationships do not reflect equality or dependency exclusively, but show different results with regards to specific fields, moments and intensity of interactions. This entanglement gives rise to intermediate actors and positions who combine elements of superiority and dependency in their relationship with other partners which makes them more flexible in terms of improving their position in the system.[2]

Overview 1:

Interregional division of labor and specialization

Complementarity on equal grounds for mutual benefit	Intermediate position with regard to:	Complementarity on the basis of unequal conditions: Core formation and peripheralization processes
No disadvantages due to natural space and location; Favorable mix of resources and sectors for exchange; Radiation of core functions from the central to surrounding areas	Fields of interdependence (economy, politics, culture); Graduated dependency and intermediate spatial position as semi-periphery	Differences in geographical and factor endowment, location and political power relations; Cumulative reinforcement of the gap through polarization

Mutual benefit, unequal development and intermediate positions exist on all spatial levels, depending on fields and subjects of relation. Dependency, regionalization and polarization theories as well as world-system analysis serve as theoretical and methodological framework.[3] This implies a specific terminology: Core – periphery – semi-periphery; dominance – dependency, processes of core-formation and peripheralization.

In the context of theories of unequal and uneven development, peripheries are regions whose development potential is limited by their dependent integration into an unequal division of labor. Resources are transferred to and appropriated in other regions, whose dominance is based on economic equipment and development, eventually combined with a position of political superiority. On the one hand, this inequality prevents independent regional advancement in such a peripheralized region; on the other hand, it favours the development of the dominant partner, which is referred to as core or centre. Core formation and peripheralization occur as interrelated processes in the historical process.

Most studies on the emergence of regional inequality focus the interstate sphere. In contrast, the analytical category of the internal periphery builds on processes of core formation and peripheralization within states. Internal peripheries can be identified in every complex state. The approach proves to be particularly fruitful in the case of composite states with a heterogeneous population and regional structure, in which we face foreign political rule in the wake of conquests and territorial expansions, ethnic difference and socio-economic development gaps (in varying degrees and composition).[4]

The first studies on 'internal colonialism' focused on the discrimination of non-dominant ethnic groups, such as the Celtic peoples, the Occitans or the Basques in France, Spain and the United Kingdom.[5] The approach also turned out being fruitful for studying composite empires, which themselves had no or only a small number of overseas colonies, but established quasi-colonial conditions in the newly acquired territories of their continental expansions. Since 1990, Hans-Heinrich Nolte has initiated several conferences and volumes aiming at the comparative study of internal peripheries, including non-European examples.[6] As part of the research on the Habsburg Monarchy, various studies have emerged since the 1970s that have examined regional development and regional inequality with the help of core-periphery approaches and discussed the usefulness of the concept for this area. In Hungarian and Polish historiography, reference to dependence on the imperial core as a barrier to development dates back to the 19th century; it was assessed

1 KOMLOSY, A., Das Ende vor Augen. Österreichisch-ungarische Strategien zum Machterhalt. In: *ZWG,* 24. 1. 2023, p. 15-44.

2 BOATCĂ, M. – KOMLOSY, A. – NOLTE, H. H. (eds.), *Global Inequalities in World-Systems Perspective. Theoretical Debates and Methodological Innovations.* London – New York, 2018.

3 KOMLOSY, A., Nachholende wirtschaftliche Entwicklung. Konzepte, Beispiele und Kriterien für Erfolg oder Scheitern. In: *Zeitschrift für Weltgeschichte,* 13. 2. : Nachholende Entwicklung. Frankfurt am Main, 2012; SENGHAAS, D. (ed.), *Peripherer Kapitalismus. Analysen über Abhängigkeit und Unterentwicklung*. Frankfurt am Main, 1974; Wallerstein, I., *The Capitalist World Economy*. Cambridge – Paris, 1979.

4 KOMLOSY, A, Innere Peripherien im räumlichen Mehrebenensystem. Das habsburgische Beispiel im 19. und frühen 20. Jahrhundert. In: *Österreichische Zeitschrift für Geschichtswissenschaften* 31, No. 2, 2020. The overview on internal colonies and peripheries is following this article, p. 97-98.

5 GERDES, D. (Hg.), *Aufstand der Provinz. Regionalismus in Westeuropa*. Frankfurt am Main – New York, 1980; BLASCHKE, J. (ed.), *Handbuch der westeuropäischen Regionalbewegungen*. Frankfurt am Main, 1979.

6 NOLTE, H. H. (ed.), *Internal Peripheries in European History*. Göttingen – Zürich, 1991; NOLTE, H. H. (ed.,) *European Internal Peripheries in the 20th Century*. Stuttgart, 1997.

as 'internal colonialism', which was primarily understood from a national perspective.[7]

In the 1990s, Austrian scholars took up the motive from a cultural studies perspective under the label "k. u. k. kolonial". In particular, they dealt with colonizing practices towards ethnic groups considered 'uncivilized' in the East and South-East European expansion areas of the Habsburg Monarchy, applying the concept of "orientalization" to this geographical context.[8] Other authors used and developed the concept in order to apply it to intra-regional differentiation in economically leading core areas. One ground-breaking initiative was the Constance area study that investigated the "provincialization of a region".[9] Inspired by this approach, the author of this contribution developed the concept of peripheralization with regard to a peripheral region in north-western Lower Austria, the Waldviertel, and its relationship with the imperial core, which was later expanded to include other aspects and areas of the Habsburg Monarchy.[10]

Core – semi-periphery – periphery relations exist on every spatial level. They exist on the level of world regions on a global or a continental scale (North – South, West – East, colonizers – colonized world). They exist within empires and (nation)-states. And they exist on the sub-imperial or sub-state level of provinces and districts, between towns and countryside as well as on the inner-urban level of affluent and impoverished districts. Internal peripheries cannot be separated from the processes of spatial polarization, which are effective at all spatial levels. They interact with inter-state relations in two ways. Regional disparities in the domestic context are closely linked to the position of the respective state in the international context. In addition, the spatial shape of states is subject to constant change over the course of history, in which internal peripheries may be separated from their old core, become involved in new processes of core formation and peripheralization or can free themselves from their peripheral role. If we understand core and periphery as relational positions in an unequal system of power that extends over several spatial levels from the small to the large, a single region - depending on the context and scope of the observation - can be core, semi-periphery and periphery at the same time.

2. Austria-Hungary's international position

In the 19th century, the Habsburg Empire was in a semi-peripheral position compared to West European countries in terms of the composition and orientation of trade goods and investments. Trade relations with western Europe did not play a major role; exports of semi-finished goods predominated, while imports included high-quality manufacture of higher value. Trade statistics and comparisons of per capita product clearly show the gap between Austria-Hungary and Great Britain, France and the German Empire. Capital markets were weak, prompting western capital to engage in banks, finance and investment in infrastructure construction. Financial and FDI flows reflected the gap.[11]

These findings contrast with the economic performance vis-à-vis colonized or dependent world-regions in non-European regions, especially in Africa and the Middle East.[12] Dependency from western Europe did not prevent Habsburg state and enterprise from engaging in raw material exploration and import on the one hand and expanding export markets for Austrian (less so Hungarian) manufacture and transport services, acting in an imperial as well as imperialist way without possessing its own overseas colonies. The Shipping Company Austrian Lloyd extended its connections from the Mediterranean Sea, the Near East and North Africa to eastern and southern Africa. Austria-Hungary was part of the Suez Channel consortium and maintained strong diplomatic ties with Sudan and Egypt. It took part in the debt management of Ottoman Egypt. When credit conditions caused protests in June 1882, Austria-Hungary also contributed to the military defeat of the insurrection by sending warships and soldiers.[13]

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[7] For Galicia: KAPS, K., *Ungleiche Entwicklung in Zentraleuropa. Galizien zwischen überregionaler Arbeitsteilung und imperialer Politik (1772–1914)*. Wien, 2015, p. 375f; for Hungary: HANÁK, P., *Ungarn in der Donaumonarchie. Probleme der bürgerlichen Umgestaltung eines Vielvölkerstaates*. München, 1984; JASZI, O., *The Dissolution of the Habsburg Monarchy*. Chicago, 1961; In Polish and Hungarian historiography, the motive of dependence on the imperial core as an obstacle to national development appears in recurring cycles.

[8] FEICHTINGER, J. – PRUTSCH, U. – CSÁKY, M. (eds.), *Habsburg postcolonial. Machtstrukturen und kollektives Gedächtnis*. Innsbruck 2003; HÁRS, E. – MÜLLER-FUNK, W. – REBER, U. – RUTHNER, C. (eds.), *Zentren, Peripherien und kollektive Identitäten in Österreich-Ungarn*. Tübingen-Basel 2006; FEICHTINGER, J. – UHL, H. (eds.), *Habsburg neu denken. Vielfalt und Ambivalenz in Zentraleuropa. 30 kulturwissenschaftliche Stichworte*. Wien, 2016.

[9] HEIN, W., Zur Theorie der regionalen Differenzierung kapitalistischer Gesellschaften in der industriellen Revolution. Die ökonomische Basis der politischen und gesellschaftlichen Entwicklung der Konstanzer Region. In: ZANG, G., (ed.), *Provinzialisierung einer Region. Zur Entstehung der bürgerlichen Gesellschaft in der Provinz*. Frankfurt am Main, 1978.

[10] KOMLOSY, A., *An den Rand gedrängt. Wirtschafts- und Sozialgeschichte des Oberen Waldviertels*. Wien 1988; KOMLOSY, A., *Grenze und ungleiche regionale Entwicklung. Binnenmarkt und Migration in der Habsburgermonarchie*. Wien, 2003; KOMLOSY, A., Imperial Cohesion, Nation-Building and Regional Integration in the Habsburg Monarchy. In: BERGER, S. – MILLER, A. (eds.), *Nationalizing Empires*. Budapest 2014, p. 369–427; KOMLOSY, A., Manifestationen der Grenze in Österreich-Ungarn im 19. Jahrhundert. In: FATA, M. (ed.): *Trennen, Verbinden, Überschreiten. Grenzfragen in der Habsburgermonarchie im 19. Jahrhundert.* Stuttgart, 2024, p. 17-66.

[11] BEREND, I. – RÁNKI, Gy., *The European Periphery and Industrialization 1780–1914.* Cambridge, 1982; GOOD, D. F., The economic Lag of Central and Eastern Europe: Income Estimates for the Habsburg Successor States, 1870–1910. In: *The Journal of Economic History*, Vol. 54, No. 4, 1994, p. 869-891; GROSS, N. T. Die Stellung der Habsburgermonarchie in der Weltwirtschaft. In: BRUSATTI, A., (ed.), *Die Habsburgermonarchie 1848–1918*. Vol. 1. Wien 1973, p. 1-28; SCHULZE, M. S., Regional Income Dispersion and Market Potential in the Late Nineteenth Century Hapsburg Empire. In: *London School of Economics Working Papers* No. 106 – 07. London Nov. 2007.

[12] SAUER, W. (ed.), *K.u.k. kolonial. Habsburgermonarchie und europäische Herrschaft in Afrika*. Wien – Köln – Weimar, 2002; FISCHER, R. T., *Österreich im Nahen Osten. Die Großmachtpolitik der Habsburgermonarchie im Arabischen Orient 1633–1918*. Wien, 2006.

[13] SAUER, W., Schwarz-Gelb in Afrika. Habsburgermonarchie und koloniale Frage. In: SAUER, W. (ed.), *K.u.k. kolonial. Habsburgermonarchie und europäische Herrschaft in Afrika*. Wien – Köln – Weimar, 2002, p. 17-78, here p. 65-67.

The Ottoman Empire was a main target region of Austrian foreign policy. The Ottoman Empire was already being transformed from an exporter of high-quality luxury goods traded by Greek and Armenian merchants into a supplier of raw and semi-finished goods, especially raw cotton, over the course of the 18th century.[14] These imports were the basis for the development of the cotton industry in the Austrian and Bohemian lands. The economic peripheralization of the Ottoman Empire was accompanied by a decline in political power and in territorial defeats. Austria joined the Anglo-Turkish Trade Treaty of 1840 that secured the unconditional access to the Ottoman market, while discriminating against Ottoman exports of finished goods. At this time, the Habsburgs were already operating in the shadow of the British hegemon.

Although Austria-Hungary did not control territories in other continents, it was actively participating in collective colonialism, or imperialism[15], which included economic, political-military and cultural activities. Geographic explorations of raw material deposits and transportation routes were carried out in close cooperation between private adventurers, companies and state institutions, who eventually provided staff and logistics. Explorers from all nationalities were involved in colonial and imperialist activities. Some pioneers also worked for British projects.[16] Private merchants, adventurers and diplomats were backed by Colonial Societies, who campaigned for a more active role, often complaining about lacking official impetus, in spite of close personnel ties with bureaucracy, aristocracy and court.[17] Trade agents were securing sales and supply markets, "unequal treaties" contributed to open markets and secure the conditions of "unequal exchange". Austria-Hungary signed trade treaties with more than ten African and Asian states between 1828 and 1905.[18] Further treaties with similar ambitions to secure markets, mines and infrastructure concessions were concluded with the successor states of the Ottoman Empire on the Balkan peninsula.[19]

Such treaties were a major instrument to establish and reproduce global economic inequality, regardless whether colonial relations were formal or informal. The unequal composition of trade goods guaranteed that the benefits of exports and imports were unevenly distributed between Austro-Hungarian core and European or non-European periphery.

The economic and the political-military level were closely connected. On the one hand, Austrian Army and ministerial bureaucracy were often involved in colonial exploration. On the other hand, there was an outspoken cooperation between Austria-Hungary and those great powers, that distributed Africa among each other. Austria-Hungary did not participate in the "Great Game", i.e. the partition of Africa that started in the last quarter of the 19th century. However, Austria-Hungary was a signatory power at the Africa Conference, held in Berlin in 1884, that legalized the partition. In exchange for its colonial complicity, Austria-Hungary had been guaranteed the right to occupy and govern Bosnia and Hercegovina at the Balkan Conference that was held in Berlin in 1878.[20] Bosnia and Hercegovina was considered and called "colony" by contemporaries both in an affirmative or in a critical sense.[21] The classification as colony also corresponds to the scientific definitions outlined above.

Other expressions of colonial complicity were the Austro-Hungarian participation in suppressing the insurrection against the Egyptian debt management in 1882, or the only formal military involvement in colonial activities, the armed assistance against the Boxer rebellion in China in 1901. As a reward the Dual Monarchy received the concession of Tianjin, a tiny piece of colonial territory.[22]

Last but not least, Austria-Hungarian adventurers, merchants and private collectors were active in acquiring cultural assets of non-European peoples – either directly or from international sources.[23] Colonial civil and religious missionaries delivered moral justification for European conquest, economic inequality and civilizing missions in the name of cultural superiority of white, Christian, Europeans.

3. Relations between Habsburg Lands

The composition of the Habsburg dominion was constantly changing in the course of time. After a first collecting period in medieval times that increased the original duchies of Lower and Upper Austria to a composite body from Styria, Carinthia, Carniola, Gorizia and the Trieste Littoral to Tyrol and the scattered territories of Further Austria, the 16th century saw a huge wave of enlargement, in particular to the Lands of the Bohemian and the Lands of the Hungarian Crown – the latter contested and

[14] ISLAMOGLU-INAN, H. (ed.), *The Ottoman Empire and the World Economy*. Cambridge, 1987.

[15] "Colonialism" refers to the domination of a subjected region and its inhabitants by territorial conquest, settlement, foreign rule, appropriation of resources, feelings of cultural superiority (in different combinations). Colonialism is often used synonymously with imperialism that includes all these features. The concept of "Classical Imperialism" focuses on world economic crises of capital accumulation in the late 19th and early 20th century leading to enforced competition between the leading capitalist core states, resulting in a more systematic exploitation of colonies or dependent regions by informal economic means or by formal territorial takeover. For definitions see OSTERHAMMEL, J. – JANSEN, J., *Kolonialismus. Geschichte, Formen, Folgen*. München, 2012.

[16] SAUER 2002, p. 59-63.

[17] LOIDL, S., *„Europa ist zu enge geworden": Kolonialpropaganda in Österreich-Ungarn 1885 bis 1918.* Wien, 2017.

[18] SAUER 2002 p. 68.

[19] KOLM, E., *Die Ambitionen Österreich-Ungarns im Zeitalter des Hochimperialismus*. Frankfurt am Main – Wien, 2001.

[20] KOMLOSY, A., Das Ende vor Augen. Österreichisch-ungarische Strategien zum Machterhalt. In: *ZWG* 24. 1. 2023, p. 15-44, here p. 27.

[21] KOMLOSY 2023, p. 28; DONIA, R. J., „Proximate Colony". Bosnien-Herzegowina unter österreichisch-ungarischer Herrschaft. In: Ruthner, C. - Scheer, T. (eds.): *Bosnien-Herzegowina und Österreich-Ungarn, 1878–1918*. Tübingen, 2018, p. 147-162.

[22] LEHNER, G. – LEHNER, M. (eds), *Österreich-Ungarn und der ‚Boxeraufstand' in China*. Wien, 2002.

[23] Today major European collections of colonial possessions, including the Weltmuseum Wien, face debates about acknowledgement, apology, refurbishment and restitution.

in big parts conquered by the Ottomans. While the Bohemian Lands were included into the Holy Roman Empire, continuously (except 1740-45) ruled by Habsburg Emperors since 1438, Hungary remained a separate political body. The Military Border Province (Militärgrenze, Confin, Vojna Krajna, Katonai határőrvidék) separated Ottoman and Habsburg spheres of rule in the South-East. It became a distinctive administrative unit subjected to the Imperial Military Council for strategic reasons. Established in 1535 in Croatia, the unit changed its territorial extension along with the Habsburg-Ottoman front-line and was extended along with Habsburg territorial conquests to Slavonia (1702), the Banate (1742), and Transylvania (1764).[24]

The territorial enlargements neither corresponded to the group of hereditary lands nor to the core – periphery-pattern. An important change came along with the division of the Spanish and the Austrian Habsburgs (1556). From the 17th century onwards, state building reached a new quality of integration and central governance, that allowed future acquisitions to appear in a new meaning, driven by cameralism and mercantilism on the economic side, and military-geopolitical considerations to round off the dominion on the other side.

The acquisitions – in the case of Silesia a loss – of the 18th century reflect the competition between Habsburg, Prussia, the Russian and the Ottoman Empire, leading to a new imperial geography: Habsburg gained Galicia from the Polish Partition and Bucovina from the Moldavian Partition; new territories in West and South-East Europe were added after the extinction of the Spanish Habsburgs (Southern Netherlands, Naples, Sicily, Lombardy) and the acquisition of the Venetian Adriatic provinces (Dalmatia, West Istria, Venetia). The largest territorial gain was Ottoman Hungary, which was conquered in several stages, until the conquest was carried forward into Serbian territories under Ottoman rule. A special gain resulted from the division of the Ottoman Provinces, from which Austria-Hungary was granted the right to occupation of Bosnia-Hercegovina at the Berlin Balkan Conference in 1878.

The relations between the Habsburg Lands showed all types power distribution. In the 19th century, Lower and Upper Austria, Styria, the Bohemian Lands and Vorarlberg had the highest GDP per capita and in general interacted on equal grounds for mutual benefit. They represented the economic core of the Monarchy. Moreover, urban and industrial agglomerations within peripheral lands equally were economic cores. Carinthia, Tyrol, Trieste and the Littoral were in an intermediate position. Peripheries with a strong dependency on core regions consisted of the Carpathian lands (Galicia, Bucovina) and the south-eastern lands (Carniola, Dalmatia). As these peripheries were located within the boundaries of the Monarchy, they represented internal peripheries. Bosnia and Hercegovina, put under joint Austrian-Hungarian administration in 1878 as a separate unit of occupation, cannot be included into the corpus of internal peripheries, strictly speaking. Remaining under Ottoman affiliation, Bosnia and Hercegovina represented the exceptional case of a quasi-colony.[25] When the province was annexed in 1908 in the slipstream of the Young Turk Revolution, it received a diet with limited self-government, but still remained outside the dualist system.

Similar to the existence of core areas within peripheral provinces, there also existed peripheral areas within core provinces. According to the multiple spatial arrangement, the whole state was permeated by a network of relationships characterized by mutual benefit or dependence. Depending on the object of interaction, there were also actors, or spaces, that functioned as a core in one case or underwent peripheralization in another.

The case of Hungary deserves special attention.

4. Internal peripheries

To clarify terminology, it is important to note, that the author does not apply the term "internal colony" to denote dependent regions within Austria-Hungary. Colony is reserved for peripheral regions, who do not enjoy the same constitutional rights as the core provinces, are ruled and administered by a foreign elite or have only limited autonomy. Colonial status also refers to the personal rights of the inhabitants, who, as second-class subjects or citizens, do not have the same rights as those in the mother country. In the case of Austria-Hungary, legal double standards did not exist, while other features of coloniality prevailed.

The semi-peripheral position in the world-system was based on strong regional imbalances within Austria-Hungary with regard to the socio-economic equipment of a region and the socio-economic level and potential of its inhabitants.[26] As Austria-Hungary did not possess colonies, the question arises: Can internal peripheries be considered a substitute for lacking overseas colonies? There are arguments in favor and against this hypothesis.

The colony replacement thesis is confirmed by the economic imbalances, that allowed industrial and administrative cores to appropriate surplus value from transactions with peripheral regions. This happened in the case of the territorial acquisitions in the east and southeast (Galicia, Bucowina, Dalmatia; Bosnia and Hercegovina), which were suppliers of raw materials, agricultural goods and labor in (unequal) exchange for manufactured goods. It equally happened with regard to peripheral regions within core provinces, however. Access to the resources of the inner peripheries in core provinces was a major backbone for the economic performance not only of core regions, but of the state in general. Peripheralization within core provinces has to be included into the colony replacement argument, although the strong entanglement in these cases makes it difficult to draw the lines between core and periphery.[27]

[24] Heeresgeschichtliches Museum (ed.), *Die k.k. Militärgrenze*. Wien, 1973.

[25] DONIA 2018

[26] KOMLOSY, A., Innere Peripherien als Ersatz für Kolonien? Zentrenbildung und Peripherisierung in der Habsburgermonarchie. In: HÁRS, E. – MÜLLER-FUNK, W. – REBER, U. – RUTHNER, C. (eds.), *Zentren, Peripherien und kollektive Identitäten in Österreich-Ungarn*. Tübingen-Basel, 2006, p. 55-78; KOMLOSY 2020, p. 95-124.

[27] KOMLOSY, A., Niederösterreich als Zentrum und als Peripherie. In: KÜHSCHELM, O. et.al. (eds.)., *Niederösterreich im 19. Jahrhundert. Vol.1 Herrschaft und Wirtschaft. Eine Regionalgeschichte sozialer Macht*. St. Pölten 2021, p. 579-610.

In the case of peripheral border provinces like Galicia, Bucovina, Transylvania, the Banate or Croatia, military conquest and annexation allowed to transform territorial acquisitions into buffer zones and deployment areas vis-à-vis threatening neighbors (Ottoman and Tsarist Empires). Financed by the military budget, costs and revenues cannot be evaluated in commercial terms. However, the costs of state security must be set against the benefits that resulted from the economic exploitation of these regions. Infrastructure development served both purposes.

On the cultural level, there is no doubt that there was a claim to civilizational superiority vis-ŕ-via non-German – in the case of Hungary vis-ŕ-via non-Magyar – nationalities, which is addressed by the term "orientalization".[28] The degree of civilizational standard ascribed to different ethnic groups and their capacity for development depended on a hierarchical scale determined by traditional stereotypes, religious attitudes towards people of other beliefs and modern theories of racism. Moreover, the imperial cores pursued a policy of Divide et Impera in playing off one ethnic group against another, according to its benefit, usefulness and loyalty to the imperial core, compared to other groups.

When comparing Austria-Hungary with empires that possessed overseas colonies, we must not forget: These empires also had internal peripheries that were exploited in a similar way as in land-based empires. Internal peripheries were not a special feature of a land-based empire. Conquering, securing and administrating overseas colonies far away from the imperial core eventually triggered a bigger burden than acquiring expansion areas at the border of an Empire. In this light, the replacement thesis is becoming fragile. Not having colonies outside Europe reduced the financial burden and military challenge, while the size and heterogeneity of Austria-Hungary allowed the metropoles and core areas to access resources, labor and markets in the peripheral, agrarian parts of the country - both in the interior and in border provinces.

Moreover, there were varieties of core-regions as well as varieties of peripherality. Core and periphery did not always have the same meaning. In particular, we can observe a non-synchronicity of the economic and political understanding of core and periphery, which can also be extended to the cultural sphere.[29] For example: The Bohemian Lands represented an economic and a cultural core; in political terms they remained peripheral, because they were not successful in realizing the constitutional autonomy they aspired for the entirety of the Bohemian Crown Lands. German and Czech industries located there profited from the unequal division of labor (industry – agriculture), therefore accepting the imperial framework, in spite of political clashes out of nationality or labor conflicts. Loyalty only faded away in the course of famine, mass deaths and military defeat in World War I.

The Kingdom of Hungary on the contrary, after the defeat of the Ottomans represented a political core governing the unity of its lands, except when autonomy was suppressed in the neo-absolutist period after the defeat of the revolution. In economic terms, it remained a periphery, specialized on agriculture and agricultural processing, which government support for catch-up industrialization could not fully overcome. The division of labor favored the Hungarian landed nobility, notwithstanding rural mass poverty, however. The Habsburg customs union, which Hungary only joined in 1851, provided a single market with a common tariff. In the 1880 s tariff increases created high protectionist walls, benefiting Austrian and Bohemian lands' industry as well as Hungarian agriculture.[30] On political grounds, constitutional sovereignty allowed pursuing Magyarization and forming a political Hungarian nation.

Table 1: Austria-Hungary: Levels of GDP per Capita and Growth in GDP (Percent per annum) 1870-1910

(1990-G-K International US-Dollar)

	1870	1880	1890	1900	1910	1870-1910 Growth in %
Cisleithania						
Lower Austria	2578,2	2453,9	2656,8	3071,0	3343,3	0,65
Upper Austria	1861,4	1859,7	2096,5	2270,3	2492,5	0,73
Salzburg	1862,6	1894,7	1876,7	2308,2	2562,0	0,80
Styria	1425,9	1510,1	1698,7	2085,9	2271,9	1,17
Carinthia	1298,1	1342,1	1381,4	1822,4	2114,4	1,23
Carniola	967,5	905,9	1070,0	1369,1	1613,0	1,29
Littoral with Trieste	1414,6	1420,5	1492,7	1618,3	2126,0	1,02
Tyrol und Vorarlberg	1566,0	1487,9	1503,6	1933,0	2289,2	0,95
Bohemia	1707,3	1732,2	1968,4	2213,4	2647,3	1,10
Moravia	1521,7	1461,1	1706,4	2059,3	2333,4	1,10
Silesia	1397,1	1408,4	1729,6	1939,0	2359,6	1,07

[28] The term was coined by Edward Said (Orientalism, 1978) with regard to the Middle East. From there it was transferred into similar contexts of "othering" supposedly inferior communities or regions. For the Balkans compare TODOROVA, M., *Imagining the Balkans*. New York, 1997.

[29] KOMLOSY 2014, p. 369-428, here p. 400-404.

[30] KOMLOS, J., *Die Habsburgermonarchie als Zollunion. Die wirtschaftliche Entwicklung Österreich-Ungarns im 19. Jahrhundert*. Wien, 1986.

Galicia	858,2	875,6	1016,4	1010,0	1205,1	1,32
Buvowina	865,7	843,3	940,9	1007,6	1132,6	0,85
Dalmatia	758,5	834,5	847,6	867,1	932,9	0,67
Transleithania						
Left Bank Danube	1033,6	1058,0	1304,6	1440,2	1651,2	1,18
Right Bank Danube	940,2	996,6	1254,6	1413,8	1632,3	1,39
Hungary Danube-Tisza-Basin	1279,2	1453,0	1589,0	1868,2	2190,9	1,35
Right Bank Tisza	999,6	1034,5	1279,0	1448,6	1647,6	1,26
Left Bank Tisza	895,1	951,3	1122,0	1257,9	1463,6	1,24
Tisza-Maros-Basin	913,7	991,5	1171,8	1312,8	1517,6	1,28
Transylvania	843,9	933,9	1087,7	1189,9	1419,0	1,31
Croatia-Slavonia	772,1	918,1	1028,8	1108,7	1323,8	1,36
Cisleithania (Austria)	1449,6	1450,8	1627,8	2116,7	2334,5	1,20
Transleithania (Hungary)	961,3	1051,7	1240,0	1399,7	1636,8	1,50
Habsburg Empire total	1238,6	1285,0	1464,0	1652,7	1921,7	1,28

Source: Schulze, Regional Income Dispersion and Market Potential in the Late 19th Century Hapsburg Empire.

GDP per capita levels can only serve as a very rough indicator for centrality or peripherality of a region. Distribution of economic sectors, enterprise and employment, infrastructural equipment and other social and economic indicators provide more insight in the level of development of single regions. Moreover, trade, flows of capital and labor, inform about the quality of interregional relations.[31]

5. The special case of Hungary

The historical status as a kingdom survived the different manifestations of the Hungarian state across dynastic change, conquest, partition, foreign rule and the constitutional transformation into a sub-empire. The nobility was able to retain its autonomy even under Ottoman rule. The continuity of autonomy favored the development of a Hungarian aristocratic nation. The national aspirations manifested themselves in uprisings against Ottoman domination as well as against Habsburg claims at the beginning and at the end of Ottoman rule. In 1848 national aspirations culminated in the Hungarian Revolution, declaring full independence from Habsburg rule. The years following the defeat, revolutionaries were persecuted, punished and executed, while self-administration was suspended by Vienna, it turned out that Hungary was not governable without acknowledgement of Hungarian self-administration: The "Dual Settlement" or „Compromise" (1867) did not only solve the inter-imperial relationship between royal Hungary and the imperial core; it also contributed supporting Cisleithania's distinctive statehood vis-à-vis the all-German aspirations from Austrian Germans from within as well as from Prussia and the united German Reich from outside.[32]

The idea of the Hungarian nation underwent several transformations: the dynastic principle had a strong aristocratic foothold without emphasizing the language issue. When the idea of the nation captured broader sections of the population, the ethno-linguistic principle gained ground. Last but not least, the demand for the official use of the Magyar language was driven by Joseph' II Germanization plans. The constitution of the Hungarian statehood under the Dual Settlement aimed at harmonizing the noble, the national and the political understanding of national belonging. The Hungarian nation embraced all its non-Magyar minorities as long as they were ready to achieve assimilation, i.e. Magyarization. Different from the Austrian model of dynastic unity in a multi-ethnic empire (including Hungary as a political nation) with ten officially recognized languages, the Hungarian sub-empire followed the French model of political nation-building in line with national homogenization.[33]

5.1 Hungary's multiple spatial arrangments

According to the multi-spatial method of classification, Hungary manifested on the international, the Austrian-Hungarian and the inner Hungarian level. On the level of the East-West-division of labor, the Hungarian state represented an economic periphery. The dependent role occurred both vis-à-vis West European states as vis-à-vis the Cisleithanian sub-state. Economic dependency did not correspond with the political centrality of Hungary's status as imperial sub-state with sovereign institutions, however.

[31] For more indicators see Good, D. F., *Der wirtschaftliche Aufstieg des Habsburgerreiches 1750-1914*. Wien – Graz, 1986.
[32] KOMLOSY 2014 p. 371; LUTZ, H., *Österreich-Ungarn und die Gründung des Deutschen Reiches. Europäische Entscheidungen 1867-1871*. Frankfurt am Main, 1979, p. 416-437.
[33] KOMLOSY 2014, p. 409.

Within the Kingdom of Hungary strong economic imbalances prevailed between the more developed northwestern and northern regions and the eastern and southern regions. In 1867 Hungary can be considered an agrarian country, big landowners dominating cash crop production for internal and export markets. Industry was hardly existing apart from urban craft trades and grain mills, which produced for local needs. Some mining regions stood exceptionally out from the low level of economic development, above all the Slovak Ore Mountains in Upper Hungary, where mining, metal processing and minting enjoyed a long international reputation. After the Compromise, the government started incentives to develop infrastructure and industry. Buda and Pest, united in 1873, underwent a rapid metropolitan transformation towards center and crossroad of national integration, attracting trades and industries, migrants and artists.

The partition had favored the existence of multiple religious communities in Ottoman Hungary. Different from Vienna's strong compulsion to Roman-Catholic restoration, Ottoman rule did not suppress the Lutheran, Calvinist, or Jewish practice of religion, as long as they delivered the special taxes levied upon non-Muslims. Christians also had to deliver of male children to join the Janissary forces. Hence the tolerance went hand in hand with a societal segmentation corresponding with professional occupations and barriers for the social advent of confessional groups. When Habsburg took over rule from 1687 onwards, the variety of beliefs – along with aristocratic autonomy – came under pressure to adapt to the religious and administrative standardization that had unified the Habsburg lands so far. Resistance against the reforms was partly successful; it granted a multi-cultural variety, which also reflected in regional self-confidence.[34]

The partition of Hungary had also impacted the fragmentation of the economic landscape. Upper Hungary was part of imperial Habsburg Hungary. Transylvania (Siebenbürgen, Erdély) had enjoyed a limited self-government under Ottoman suzerainty; after the Habsburg conquest (1699), Transylvania was placed under the governance of the Transylvanian Chancellery in Vienna, which opened the door for Viennese influence over the Transylvanian estates at the expense of Hungarian ambitions. Similar to the Banate of Temes, annexed in 1719, its southern border regions became part of the Military Border province against the remaining Ottoman Empire, which was extended eastwards.[35] The Military Border province was exempted from Hungarian control. In order to transform Romanian serfs into loyal peasant-soldiers, the power of Hungarian nobility was restricted and the ecclesiastic union of Orthodox Romanians with the Catholic Church enforced.

The Sava-Danube region of Syrmia became part of the Military Border already before. After the "Great Exodus" from southern Serbia (Kosovo and Metohija) in 1690, the region received a considerable influx of Orthodox Serbs, who fled the contested area. Their religious leaders were granted autonomous church administration in exchange for their loyalty with Habsburg, while the subjects joint the peasant-soldiers. They were not subject to unification with Rome.[36]

In contrast to the orthodox parts of the Military Border with their orthodox or Greek-catholic Romanian and Serb inhabitants, Croatia's population was overwhelmingly catholic. With the pushback of the Ottomans in the 18th and 19th centuries, it recovered from Ottoman domination and become part of the Hungarian Kingdom, a subordination that was contested in the Revolution of 1848, but restored afterwards. A small variety of compromise was granted in 1868 by the Hungarian-Croat Constitutional Agreement (Nagoda). Large parts of Croatia-Slavonia remained part of the Military Border province, however, until its abolition in 1881.[37]

The regional and confessional heterogeneity of Hungary also corresponds to different historical experience, complicating the classification of regions as cores and peripheries.

6. "Compromise" – Cohesion through separation

The legal and political institution of the Compromise transformed Hungary into a sub-empire and nation-state at the same time, ruled in dynastic union of Emperor and King. The three common ministries worked in the name of both sub-state units. Regulations had to be confirmed every ten years, leading to adjustments and conflicts as well, putting the agreement at risk several times.

The political autonomy and the institutional separation allowed each side to establish its own legal framework and pursue a specific government program. On these grounds the different official understanding and conception of statehood could coexist on the following principles:

Austria:[38]

- Austrian dynastic understanding of imperial rule;
- Lands as an intermediate level of government and administration with their own diets and institutions;
- Recognition of the multinational composition of the subjects with graduated rights of national self-determination.

Hungary:

- Hungarian political understanding of royal rule;
- Centralized administrative structure, while maintaining historical privileges of counties and royal towns;

[34] KONTLER, L, *Millenium in Central Europe. A History of Hungary*. Budapest, 1999, p. 137-190; KOMLOSY, A., Imperiale Herrschaft – ökonomische Ungleichheit – kulturelle Zugehörigkeit. Manifestationen der Grenze in Österreich-Ungarn im 19. Jahrhundert. In: FATA, M. (Ed.), *Trennen, Verbinden, Überschreiten. Grenzfragen in der Habsburgermonarchie im 19. Jahrhundert* (Schriftenreihe des Instituts für donauschwäbische Geschichte und Landeskunde Vol. 28, 17-66). Stuttgart, 2024, p. 40.

[35] GÖLLNER, C., *Die Siebenbürgische Militärgrenze. Ein Beitrag zur Sozial- und Wirtschaftsgeschichte 1762–1851*. München, 1974; KOMLOSY 2024, p. 40.

[36] NINKOVIĆ, N., The Rise of a New Center on the Periphery of the Empire through the Influence of the Archbishops of Karlovci 1690-1790. In: HEPPNER, H. – VASIN, G. - NINKOVIĆ, N. (eds.), *The Habsburg State-wide and the regions in the Southern Danube basin (16th-20th centuries)*. Wien, 2020, p. 25-44.

[37] KOMLOSY 2014, p. 395.

[38] KOMLOSY 2014, p. 371; KOMLOSY 2024, p. 50f.

- Aim of assimilating non-Magyar citizens, while preserving the right to traditional culture and language in everyday life.

It goes without saying that these goals did not always meet reality. They contradicted with the proclaimed aim, when for instance German remained the leading language in Cisleithania, compelling non-German citizens to adapt German for reasons of social advance. Conversely in Hungary, in spite of Magyarization programs in education, administration, personal names etc. linguistic assimilation did not come true.[39]

With regard to the transformation of Hungary into a modern national economy, economic policy showed remarkable success.[40] The transport network underwent rapid expansion. Railways, roads and shipping capacities grew. Budapest developed into a national transport hub, without neglecting the connections to important Cisleithanian and international destinations. The government supported the build-up of Hungarian industrial enterprise. Due to a lack of capital, the government relied on investment incentives for foreign capital. West European capital displaced Cisleithanian capital as main creditor and industrial investor to a certain extent. Hence Hungarian external dependency favored westernization. The reliance on foreign capital helped speeding up railway line construction, mining, and metal works. It focused big companies that concentrated in Budapest and the western regions. So national catching-up contributed re-structuring the regional landscape of (moderate) economic activities into new growth centers. As a result of the forced industrialization strategy, however, these centers were completely isolated from the craftmanship in the rural neighborhoods and small towns, which remained unchanged, if not neglected.

At the same time big agriculture, and the big aristocratic estate-owners, remained the backbone of the state. Export of raw agricultural goods was complemented by modern rural industries, first of all grain milling, in which Hungary developed a leading position; Hungarian industrial mills outcompeted small mills not only in Hungary, but also in large parts of Cisleithania. Moreover, these plants gave incentive to food processing, spinning off towards production of machinery and chemistry, linking large-scale agriculture and industrial enterprise. Demand for machines and manufactured parts also pleased industrial producers in the Austrian and Bohemian lands, whose exports grew much faster than their Hungarian counterparts due to the limited scope of industrial capacities in Hungary. Hungarian catching-up industrialization, whatsoever successful, offered them a growing sales market for their products. These were the limits of Hungary's catch-up industrialization.[41]

Agricultural as well as big industrial producers profited from the high tariffs, the common ministry set up against foreign competition both from western manufacture and overseas agriculture in the 1880s. Hence Cisleithanian – and to a lesser extent big Hungarian - industrial firms and Transleithanian large-scale agriculturalists enjoyed a quasi-monopoly on the common internal market. This may have prevented innovation and the rise of productivity and raised prices, as economic historians often criticized. Apart from this, it benefited the big players in each sector. Small farmers and small industrial companies risked being displaced, which led to a sectoral concentration process, which subsequently trigged regional imbalances. It affected Austrian peasant agriculture and the milling industry as well as small businesses.

With regard to labor relations, the Hungarian type of catching-up went hand in hand with a labor market polarization between a limited number of skilled workers, many of them imported from abroad, and a big number of unskilled workers in precarious working conditions.[42] The regional concentration of big industry in Budapest and western Hungary as well as some labor-saving technologies in modern agriculture contributed to a growing number of day laborers, ready to take whatever job available. This led to social polarization and social insecurity. We may therefore speak of dependent catching-up.

Nonetheless, Hungary underwent a process of economic catching-up, complementing the one-sided focus on agribusiness with large industrial companies, some of which gained international reputation. The success of catching-up is reflected in the regional GDP-growth 1870-1910 (table 1). Although Hungary's GDP, departing from a lower level, grew faster than that of the Austrian sub-state, the imbalance between Cisleithania and Transleithania remained. The dependency on foreign capital, the limited sectoral breadth, the neglect of traditional crafts and the regional heterogeneity were features of economic vulnerability and peripherality.[43]

The Compromise acted as a cohesive force against the regional imbalances and social tensions that permeated the entire Dual Monarchy and took on their specific characteristics in the individual lands and sub-states. It bound the major interest groups together and thus created the imperial cohesion, which put local conflicts and discontent in their place.

Rather than by economic imbalances, centrifugal tendencies in the Dual Monarchy were fuelled by nationality conflicts. Dualism served as a stabilizing force also in this respect. It separated the conflicts of both sub-empires by agreeing on the coexistence of the imperial-dynastic multi-ethnic model in Cisleithania and the royal-national-Hungarian model in Transleithania. Claims for Bohemian Constitutional Rights and trilateralist concepts were left behind; a Bohemian Compromise would have unbalanced the Austro-Hungarian relationship and the privileged role of German Austrians and Magyar Hungarians, which forged imperial unity. There were only two regions, where Slavic nationalities were granted exceptional agreements

[39] KOMLOSY 2014, p. 412f, 421f.
[40] BEREND, I. – RÁNKI, Gy., *Hungary. A Century of Economic Development.* New York, 1974, p. 55ff.
[41] BEREND – RÁNKI 1974, p. 52f; KOMLOSY 2024, p. 57.
[42] BEREND – RÁNKI 1974, p. 87.
[43] KOMLOSY 2024, p. 57.

in 1868: Galicia and Croatia-Slavonia, strengthening the leading role of the Poles in Galicia and Croats in Croatia-Slavonia vis-à-vis cohabitants of other nationalities, hence preventing centrifugal tendencies from their respective sub-empires.[44]

7. Intertwining Empire and Nation

Recent historical studies emphasized the active participation of imperial elites in nation-building processes in the core areas of empires, undergoing a transformation from imperial to national cores in the course of the 19th and early 20th centuries.[45] These observations agree with several case and comparative studies in the British, the Spanish and the French Empires.[46] In other words, these empires transformed into nation-states, while at the same time they possessed empires, made up from their overseas colonies. Did continental empires like Romanov Russia, the Ottoman and the Habsburg show similar tendencies of nation-building tendencies? Indeed, also the Russian and Ottoman Empires showed tendencies to replace the multi-ethnic and pluri-confessional character of their empires by Russian or Turkish identity in their core areas.[47] What was the relation of empire and nation-building in Austria-Hungary in comparison?

In contrast to imperial nation-states that *possessed* empires, the Habsburg Monarchy instead *was* an empire. The ruler of Austria-Hungary maintained an imperial, multi-ethnic self-understanding of the state, which was characterized by a graduated regional self-government and by constitutional rights of the various ethnic and confessional groups to the use of language and to religious practice. This finding corresponds to an understanding of the Monarchy as a political entity that upheld its unity until the dissolution in 1918.

At closer inspection, in the decades following the Compromise of 1867, the unified polity transformed into two separate empires that followed different models of state-formation and national identity: ethnic pluralism in Austria (Cisleithania) and national homogenization in Hungary (Transleithania); Bosnia and Hercegovina was not included into the dualist construction, maintaining the role of a quasi-colonial possession in spite of its annexation in 1908. The cohesion of the Dual Monarchy was not only forged by the common institutions, including its common quasi-colony, but also by the complementarity of the different conceptions of empire and nation in the respective sub-states. Dualism allowed Austria and Hungary to maintain a specific national self-understanding, handling the integration of the non-dominant nationalities in each sub-empire: the Cisleithanian model of ethnic pluralism and the Hungarian model of the political nation that relied on assimilation instead of ethnic diversity. In the context of the joint imperial-royal unity these different models mutually reinforced each other. The Dual Settlement put both sub-empires on equal political grounds, overcoming Austrian paternalism and Hungarian secessionist ambitions of the past.

In economic terms, the relationship was still unbalanced, giving the Austrian side more weight and power to shape and profit from unequal exchange and relations. But political sovereignty allowed the Hungarian government to counterbalance dependency by a strategy of imperial restructuring and economic catching-up. Bypassing the dependency from Austrian banks and industrial investors by establishing direct connections with west European capital aimed at strengthening inter-imperial parity.

Western great powers that transformed their empires into nation-states still dominate the concepts and terminology to define success or failure of empire. Hungary's centralizing and homogenizing concept of state-building and Austria's dedication to federal pluralism and ethnic heterogeneity are often seen as opposites, for this reason doomed to failure. At closer inspection the Austrian and the Hungarian models were inseparably interwoven in a way necessary to perceive the Dual Monarchy as a genuine state construction in its own rights that cannot be defined by deviations and deficits from a western normative.

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[44] KOMLOSY 2014, p. 371.

[45] BERGER, S. – MILLER, A., Introduction: Building Nations in and with Empires – A Reassessment. In: BERGER, S. – MILLER, A. (eds.), *Nationalizing Empires*. Budapest, 2014, p. 1-30.

[46] See EVANS, N., "A World Empire, Sea-Girt": The British Empire, State and Nations, 1780–1914. In: BERGER, S. – MILLER, A. (eds.), *Nationalizing Empires*. Budapest, 2014, p. 31-98; ALDRICH, R. Colonialism and Nation-Building in Modern France. In: BERGER, S. – MILLER A. (eds.), *Nationalizing Empires*. Budapest, 2014, p. 135-198; NÚNEZ, X. M., Nation-Building and Regional Integration. The Case of the Spanish Empire, 1700-1014. In: BERGER, S. – MILLER A. (eds.), *Nationalizing Empires*. Budapest, 2014, p. 195-246.

[47] MILLER, A., The Romanov Empire and the Russian Nation. In: BERGER, S. – MILLER, A. (eds.), *Nationalizing Empires*. Budapest, 2014, p. 309-368; EISSENSTAT, H., Modernization, Imperial Nationalism, and the Ethnicization of Confessional Identity in the Late Ottoman Empire. In: BERGER, S. – MILLER, A. (eds.), *Nationalizing Empires*. Budapest, 2014, p. 429-460.

The International Legal Personality of the Austro-Hungarian Empire: Hungarian Perceptions

László Knapp *

Abstract

International legal personality originally appeared as an attribute of states, however, from the 19th century onwards, other entities were also considered to have it. Regarding the international status of the Austro-Hungarian Empire, created by Austria and Hungary in the 1867 Compromise, different views emerged. Although the Monarchy appeared as a contracting party in most of the international agreements concluded by Austria and Hungary during the dualist era, the majority of Hungarian legal literature disputed whether the joint entity would be a separate member of the international community. The Hungarian position was primarily determined by the so-called public law-oriented thinking governing the relationship with Austria, which saw the recognition of the Empire's international legal personality as a questioning of the country's independence.

Keywords: *international legal personality; 19th century; Austria; Hungary; Compromise of 1867.*

Introduction

The entity created by Austria and Hungary by the Compromise of 1867 is referred to as the Austro-Hungarian Empire or Monarchy, or simply Austria-Hungary in both states concerned and worldwide, but this has not been so clear during the five decades of its existence. A perusal of the Hungarian legal literature of the period reveals that the majority of authors rejected the use of this designation, arguing that the Compromise did not result in the creation of a new legal entity. This was a critical element, because states were then seen as legal realities, which in their relations with each other were endowed with legal personality, namely international legal personality, with the rights and obligations that this implied. The aim of this study is, on the one hand, to examine whether the Austro-Hungarian Empire had international legal status on basis of the public law framework and related practice or whether Austria and Hungary were the only legal persons. On the other hand, it aims to explore what was behind the Hungarian position, which was mostly against the personality of the Monarchy. In line with this, the first part of the paper briefly studies the evolution of the concept of international legal personality up to the 19th century. The subsequent sections analyse the related provisions of the legal framework of the Compromise, with particular reference to the differences between Austrian and Hungarian legislation, and then examine the practice of the powers related to international legal personality, i.e. whether in international relations the two states acted independently or whether the Monarchy acted as a person of international law. The final section will research the Hungarian literature of the period to explore whether the Empire was seen as a personal union or a real union, and how this influenced views on legal personality. As can be seen from the foregoing, the study employs both deductive and inductive methods, on basis of which the conclusions will be drawn.

1. Evolution of the concept of international legal personality

The concept of legal personality, which has its roots in Roman law and is understood primarily in private law relationships, was not applied to states and the relationships between them until the end of the Middle Ages. A change in this respect came with the emergence of the category of sovereignty in the 16th century. Jean Bodin, who developed the concept, saw it as a permanent and absolute power of the state, with the monarch as possessor, who had the right to wage war, make peace and conclude international treaties.[1] Half a century later, Hugo Grotius' work contributed greatly to the development of the legal concept of sovereignty, which he considered to be the supreme power, not subject to the law of any other. He was the first to introduce the category of the abstract state, which he considered to be the general subject of sovereignty and the ruler to be the

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[1] RIGÓ, A., A szuverenitás klasszikus elméletei [The classic theories of sovereignty]. In: TAKÁCS, P. (ed.), *Államelmélet I.* [Theory of state I] Budapest, 2009, p. 146-147; SENN, M.,Sovereignty – Some critical Remarks on the Genealogy of Governance. In: *Journal on European History of Law*, Vol. 1, No. 2, 2010, p. 9-10.

special subject.[2] The concept of international legal personality was first associated with sovereignty by Gottfried Wilhelm Leibniz in his work of 1693. As in earlier theories, he attributed sovereignty and legal personality to monarchs. However, since his work was published after the Treaty of Westphalia, which had established the fragmentation of the Holy Roman Empire, he was trying to establish the sovereignty of the emperor and the German princes at the same time as he was trying to take account of political realities.[3] The work of Emerich de Vattel in the mid-18th century led to a new approach to international legal personality, which considered the abstract state, separate from individuals and rulers, as the subject of status. The essence of his theory was that, in order to achieve the well-being and security of its citizens, the state was endowed with sovereignty, which is the public power to govern. This power could not be alienated, but its exercise could be delegated to one or more persons or to the people themselves.[4]

As a result, an approach linking state sovereignty with international legal personality prevailed until the 20th century, according to which states were the primary possessors of rights and obligations in international relations. This was essentially the position taken by Lassa Oppenheim in his leading work *International Law: A Treatise*, published in 1905.[5] At the same time, he pointed out that the development of the law of certain states did not result in the mere qualification of sovereign states as international legal entities. He took into account the categories of confederation and federal state, as well as personal union and real union, of which he stated that federal states and real unions were so-called composite legal entities.[6] In the case of federal states, the federation itself is primarily the international legal entity, but he referred to the constitutions of Germany and Switzerland, which name their member states as sovereign.[7] From the point of view of legal personality, he considered the division of powers between the various levels to be essential, which typically results in greater international room for manoeuvre in favour of the federation. On this basis, it considered the member States to have partial sovereignty and partial international legal personality, but did not welcomed this parallelism from an international law perspective.[8] Oppenheim also drew conclusions relevant to the subject of the present study in the context of real unions, which were also considered to have international personality. In his view, they are created by international treaties between two sovereign states, linked by a common ruler. The states of a real union cannot wage war separately or against only one of them. He considered it possible for them to conclude trade or extradition treaties independently, but in his view these agreements were always concluded by the union itself, since the states that made it up were not legal persons under international law. He analysed the examples of "Austria-Hungary" and "Sweden-Norway".[9]

2. The Compromise and international legal personality

In the period following the suppression of the Hungarian Revolution and War of Independence of 1848–1849, the institutions of the feudal constitution were suspended in Hungary, and an attempt was made to incorporate the country into the Empire by introducing a legal system and administration similar to that of other provinces of the Austrian Empire. The Franco-Austrian War of 1859 and the Austro-Prussian War of 1866, which ended in Austria's defeat, created the foreign policy backdrop for a settlement of relations with Hungary, for which there was a growing demand from the Hungarian political elite as well. The main architect of the legal and institutional construction of the Compromise was Ferenc Deák, Minister of Justice in the Batthyány Government during the Revolution, who wanted to give Hungary virtually full autonomy in domestic affairs, while in foreign affairs he planned to establish cooperation with Austria to the extent necessary for the survival of the Empire. Negotiations resulted in the formation of an independent Hungarian government in February 1867, led by Count Gyula Andrássy, and the Hungarian Parliament began debating the laws on Compromise in March, approved on 29 May and Franz Joseph sanctified it on 28 July. Franz Joseph was crowned King of Hungary on 8 June, thus the National Assembly legitimised his reign.[10] In Austria, the Delegation Act, adopted as part of the so-called December Constitution, settled the relationship between the two states.[11]

The legal foundations of the Compromise in Hungary were laid down in Act XII of 1867.[12] The legal basis for this legislation was provided by the Pragmatic Sanction of 1723, the main purpose of which was to ensure the succession of the female Habsburg line to the throne of Hungary and its partner

[2] RIGÓ, A., *op. cit.*, p. 147-148.
[3] NIJMAN, J., Leibniz's Theory of Relative Sovereignty and International Legal Personality: Justice and Stability or the Last Great Defence of the Holy Roman Empire. In: *IILJ Working Paper,* 2004, No. 2, p. 34.
[4] PORTMANN, R., *Legal Personality in International Law*. Cambridge, 2010, p. 35-36.
[5] OPPENHEIM, L., *International Law: A Treatise*. London, 1905, p. 99.
[6] Ibid. p. 126.
[7] Ibid. p. 106.
[8] Ibid. p. 131-133.
[9] Ibid. p. 127-128.
[10] MÁTHÉ, G. – MEZEY, B. – RÉVÉSZ, T. M., Parlamentáris monarchia [Parliamentary monarchy]. In: MEZEY, B., *Magyar alkotmánytörténet* [Hungarian constitutional history]. Budapest, 2003, p. 264.
[11] Basic Law of 21 December 1867 concerning the affairs common to all the provinces of the Austrian Monarchy and the manner of their treatment (R.G.Bl. 146/1867).
[12] Act XII of 1867 on the relations of common interest between the lands of the Hungarian Crown and the other lands under the reign of His Majesty and the manner in which they are to be dealt with.

countries. Acts I and II of 1723[13] confirmed the order of succession in respect of the territories of the dynasty in Germany and Hungary which it held "indivisibly and inseparably".[14] The provisions were exclusively about a common ruler and did not alter the autonomy of the countries and provinces concerned, but they did provide for the joint protection of the territories under Habsburg rule.[15] In the light of the foregoing, the Compromise Act enshrined Hungary's constitutional autonomy and the independent management of its internal affairs.[16]

Concerning the position in the international community, the primary content of the law was to define the so-called common affairs, which were directly under the sovereign and under the control of the common ministries.[17] These included common foreign affairs, common defence and common finance related to them. However, since the legal basis for these common affairs was the obligation to protect, as laid down in the Pragmatic Sanction, the Hungarian position was that only these aspects of the above-mentioned areas were included, the rest remaining under the separate administration of the two states.[18] The law derived the principle of the "expedient conduct of foreign affairs" from the obligation to protect, and included among the tasks of the common foreign minister diplomatic and commercial representation, as well as measures relating to international treaties, which he could carry out with the approval of the governments of the two states.[19] On the one hand, the Compromise Act interpreted the concept of common foreign affairs in a broad sense, while, according to the Hungarian position, Austria and Hungary could act independently in non-defence-related foreign relations, since certain economic, cultural, religious and even colonial issues were not part of common foreign affairs.[20] The Austrian Delegation Act also listed diplomatic and commercial representation and measures related to international treaties as common affairs, but its wording was contrary to the logic of the Compromise Act.[21] The law listed the above subjects in general terms under the concept of common foreign affairs, without any reference to the defence aspect, which suggested that these areas were entirely under the control of the common ministries. While the Compromise Act laid down as a general rule that international treaties should be approved by both governments, the Delegation Act only required this if it was constitutionally justified.[22]

Additional types of powers were also relevant for relations with other members of the international community. Both the Austrian and the Hungarian legislation on Compromise recognised the category of matters of common interest, which, although not derivable from the Pragmatic Sanction, were more appropriately dealt jointly because of the convergence of the parties' interests.[23] The Compromise Act listed the earlier Austrian public debt, trade and customs matters, banking matters and contingent public debt as such.[24] Oddly enough, the Delegation Act included partly different subjects. In addition to trade and customs, the monetary system and the fixing of interest rates, partly within that of banking, it also included legislation on indirect taxes closely connected with industrial production, provisions on railway lines of interest to both sides of the Empire and the fixing of the system of weights and measures.[25] The specificity of matters of common interest was that Austria and Hungary, through their respective bodies, but jointly determined the principles governing them, and that they were also dealt with according to the same procedure. The two states settled these matters by international treaties of limited duration, in which the parties were not represented by the monarch, but the competent ministries drew up the agreement, which was adopted by the two parliaments and then sanctified by the monarch.[26] Among the matters of common interest, the Customs and Trade Union, specifically mentioned in the Compromise Act, was of particular importance, as the agreements establishing it covered a wide range of areas, including trade, customs, shipping, consular affairs, and treaties on post and telegraph.[27]

The term Austro-Hungarian Empire itself first appeared at the time of the Compromise, in the context of the provisions on foreign relations. In a letter of 14 November 1868 to Friedrich Ferdinand von Beust, the Common Foreign Minister, Franz Joseph laid down how the imperial titles were to be used in international treaties concluded in his name. He ordered the use of the terms "Emperor of Austria, King of Bohemia, etc." and

[13] Act I of 1723 The estates of the realm and the partner countries express their deepest gratitude to His Imperial and Royal Majesty for the paternal and most gracious confirmation of their freedoms and privileges and for His appearance in His Most Holy Person among the estates. Act II of 1723 on the continuous royal succession of the female line of His Imperial and Royal Most Holy Majesty's House of Austria, in the Holy Crown of Hungary and in the parts formerly annexed to it.
[14] See Article 7 of Act II of 1723.
[15] Articles 1 and 7 of Act II of 1723.
[16] Article 3 of Act XII of 1867.
[17] MÁTHÉ, G. – MEZEY, B. – RÉVÉSZ, T. M., *op. cit*., p. 264-265.
[18] POLNER, Ö., Közös ügyek [Common affairs]. In: MÁRKUS, D. (ed.), *Magyar Jogi Lexikon* [Hungarian legal lexicon], Vol. V, Budapest, 1904, p. 160-161.
[19] Article 8 of Act XII of 1867.
[20] POLNER, Ö., Közös külügyek [Common foreign affairs]. In: MÁRKUS, D. (ed.), *op. cit*., p. 138.
[21] Ibid. 139.
[22] Basic Law of 21 December 1867, Article 1a).
[23] Act XII of 1867, Article 52.
[24] Act XII of 1867, Articles 55 and 58-67.
[25] Basic Law of 21 December 1867, Article 2.
[26] BALOGH, J., Közös érdekű ügyek a dualizmus rendszerében [Matters of common interest in the system of dualism]. In: Jogtörténeti Szemle [Legal history review], Vol. 9, No. 2, 2007, p. 2.
[27] Article II of Act XVI of 1867.

"Apostolic King of Hungary" and their abbreviations, including "His Majesty the Emperor and King".[28] However, the use by Franz Joseph of the terms "Austro-Hungarian Monarchy" or "Austro-Hungarian Empire" to designate all the kingdoms and lands that were constitutionally united during his reign was much more resonant.[29] The use of the term was sharply criticised in Hungarian legal literature, which argued that the common issues laid down in the legislation governing the Compromise did not result in the creation of a new unified state and the designation therefore violated the autonomy of the two states.[30] Gejza Ferdinandy even described the monarch's use of the term as "incorrect", as it implied that all parts of the whole Empire were Austrian as well as Hungarian. He also rejected common statehood on the grounds that there was neither common citizenship nor a common legislature, both of which Austria and Hungary exercised independently. He concluded that the use of the term "Austria and Hungary" was appropriate in international relations, similar to the designation "Sweden and Norway". Moreover, he preferred the use of the formula "Imperial and Royal Austrian and Hungarian" instead of "Imperial and Royal Austro-Hungarian" in the case of joint organs was the most consistent with constitutional rules.[31]

3. Practice to international legal personality and the Hungarian approach

The main content of international legal personality is that the entity that possesses it is able to act independently vis-à-vis the other subjects of the international community. Already the previously cited elaborators of the theory of legal personality have identified various rights associated with the status, such as the conclusion of international treaties, the right to wage war and make peace, and the right to form alliances. With the development of international law, the subject of the sending and receiving of envoys and international responsibility have been added.[32] The most prominent of these powers is the capacity to conclude international treaties, which is essentially a prerequisite for the other powers.

In view of the specific public-law relationship created by the Compromise, it is necessary to distinguish between the international treaties which Austria and Hungary concluded with each other and with other states. The agreements concluded between the two states could only concern matters of common interest or national competence, since the common affairs were managed by common institutions. The most significant bilateral treaties of common interest of the period were the treaties establishing the Customs and Trade Union, which were concluded by the parties as "two legally independent countries" under the Compromise Act.[33] Accordingly, the contracting parties were not the monarch, but the Lands of the Hungarian Crown and the Other Kingdoms and Realms of His Majesty,[34] on whose behalf the agreements were negotiated and concluded by their governments. The first such treaty was established in 1867 and was enacted in Hungary by Act XVI of 1867.[35] It maintained the former Austrian customs rules[36] and treated the two states as a single customs and trade territory with a common customs border.[37] However, the Union was not considered a permanent customs union from a legal point of view,[38] the agreement was established for a period of ten years, before the expiry of which the parties could terminate the treaty, otherwise it remained in force for a further ten years.[39] As in the previous agreement, the establishment of a common monetary system and the introduction of the crown as currency was achieved by an international treaty concluded by the two states, enacted by Act XVIII of 1892.[40] Again, the legal basis was the article of the Compromise Act on matters of common interest[41] under which the two governments agreed that the treaty would remain in force until 1910, or for a further ten years if not terminated.[42] As these examples show, the treaties concluded by Austria and Hungary with each other complied with the provisions of the Compromise Act, the parties having participated in their creation as independent states, thus persons of international law.

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[28] On the constitutional status of the Emperor in Austria, see: SCHMETTERER, Ch., „Geheiligt, unverletzlich und unverantwortlich" Die persönliche Rechtsstellung des Kaisers von Österreich im Konstitutionalismus [Sacred, Inviolable, and Unaccountable: The personal legal status of the emperor of Austria in constitutionalism] In: *Journal on European History of Law*, Vol. 1, No. 2, 2010, p. 2-5.

[29] Ő csász. és apostoli kir. Felségének 1868. november 14-ről kelt l. f. kézirata [His Imperial and Apostolic Royal Majesty's most supreme manuscript of 14 November 1868]. In: *Magyarországi törvények és rendeletek tára* [Gazette of acts and decrees in Hungary], Vol. 3, 1868, 544-545.

[30] KŐRÖSI, S., A magyar büntetőtörvenykönyvi javaslatról [On proposal of the Hungarian criminal code]. In: *Jogtudományi Közlöny* [Jurisprudence gazette], Vol. 10, No. 3, 1845, p. 19.

[31] FERDINANDY, G., *Magyarország közjoga* [Public law of Hungary]. Budapest, 1902, p. 803-804.

[32] See OPPENHEIM, L., *op. cit*., p. 158-161.

[33] Act XII of 1867, Articles 59-61.

[34] Later, the wording of the treaty named them Lands of the Holy Hungarian Crown and The Kingdoms and Lands Represented in the Imperial Council as parties to the treaty, see Act XII of 1908.

[35] Act XVI of 1867 on the Customs and Trade Union between the Lands of the Hungarian Crown and the Other Kingdoms and Lands of His Majesty.

[36] Article IV of Act XVI of 1867.

[37] Article I of Act XVI of 1867.

[38] PARDAVI, L., *A globális gazdaság vámjogának alapkérdései: Különös tekintettel a preferenciális szerződésekre* [Fundamental questions of customs law in the global economy: with special reference to preferential treaties]. Győr, 2016, p. 47-48.

[39] Article XXII of Act XVI of 1867. The union was renewed by the parties in 1878 (Act XX of 1878) and 1887 (Article XXIV of 1887), and a new customs treaty was concluded in 1908 (Act XII of 1908), see ibid.

[40] Article XVIII of Act XVIII of 1892 on the treaty to be concluded between the government of the Lands of the Hungarian Crown and the governments of The Kingdoms and Lands Represented in the Imperial Council concerning the coinage and currency system.

[41] Article 66 of Act XII of 1867.

[42] Article XX of Act XVIII of 1892.

A more complex situation is provided by the international treaties concluded by Austria and Hungary with "foreign powers", in relation to which Franz Joseph, in his letter, prescribed the use of the terms "Austro-Hungarian Monarchy" and "Austro-Hungarian Empire". Public lawyers of the time were concerned with the question whether the use of these terms had resulted in the creation of a new international legal entity distinct from the two states, or whether it was merely a misnomer contrary to constitutional rules. As was shown in the previous point, both the Compromise Act and the Delegation Act distinguished between the categories of common affairs and matters of common interest, but the provisions did not imply the creation of a new entity. In the Compromise Act, the functions of the common foreign minister could be seen as a reference to this, as they included diplomatic and commercial representation of the "empire" in relation to the common foreign affairs, as well as arrangements relating to international treaties.[43] Similar rules apply to matters of common interest. The customs and trade treaties did not merely regulate the legal relationship between the two states, but provided that the negotiation and conclusion of new international treaties governing the large number of areas cited above was the responsibility of the common foreign minister, who could only act on the basis of an agreement between the two ministers and the approval of the two parliaments.[44] For matters not falling into the two previous categories, Austria and Hungary could conclude international treaties separately, such as legal assistance, extradition and border management, but in practice both states were also parties to these agreements.[45]

However, following a decree by Franz Joseph, it was international treaties that were the first to refer to the Austro-Hungarian Empire as a separate legal entity. International treaties concluded immediately after the Compromise did not yet use the phrase, the agreements being concluded in the name of "His Majesty the Emperor of Austria and Apostolic King of Hungary".[46] However, the vast majority of the treaties concluded from 1869 onwards used both the title of the monarch and the term "Austro-Hungarian Monarchy",[47] referring in several cases to the citizens, borders, etc. of the latter.[48] This was also true for consular matters closely related to international legal personality. Under the rules of the time, consuls were considered diplomatic representatives, which was a common affair, so they were organisationally under the common foreign minister, but the establishment and termination of consulates was possible with the agreement of the two states' ministers.[49] In addition to the two states, the "Monarchy" appeared to a lesser extent in treaties that were neither a common affair nor a matter of common interest. These were primarily extradition treaties, the provisions of which referred to the Hungarian legal system,[50] or to the Austrian or Hungarian governments.[51]

As a result of the broad scope of the legislation and the multi-directional international treaty practice, different opinions have appeared in Hungarian legal literature as to whether the Austro-Hungarian Monarchy mentioned by Franz Joseph can be interpreted as an independent entity or whether it qualifies as an international legal person alongside the two states. Most authors rejected the existence of a common entity on the basis of the provisions of the constitutional rules emphasising the independence of Austria and Hungary. It was in this spirit that Sándor Kőrösi, a few years after 1867, based on the Pragmatic Sanction and the Compromise Act, rejected the use of the term "Austro-Hungarian Monarchy", which he saw as the incorporation of Hungary into a common state.[52] In his view, anyone who accepted the existence of the Monarchy had to deny the existence of an independent Hungarian monarchy, while at the same time he recognised the permanent alliance between the two states, based on the common monarch. On the basis of public law relations, he considered that the name "Austria and Hungary" had to be applied.[53] Three decades later, Gejza Ferdinandy, analysing the international status of Hungary, took a similar view. He considered the use of the term "Austro-Hungarian Monarchy" to be incorrect, since it gave the impression that Hungary was not an international legal person, but the two states had that status only together, as misleadingly underpinned by the fact that they maintained diplomatic relations and concluded treaties with other states under that name.[54] In support of his position, he examined certain areas of foreign relations ensuing from the Compromise Act. He derived the conduct of common affairs from the Pragmatic Sanction,

[43] Article 8 of Act XII of 1867.
[44] Articles II-III of Act XVI of 1867.
[45] POLNER, Ö., Államszerződés [State treaty]. In: MÁRKUS, D. (ed.), *Magyar Jogi Lexikon* [Hungarian legal lexicon], Vol. I, Budapest, 1898, p. 492.
[46] See Act VII of 1869 on the trade and customs treaty concluded with the German Customs Union of 9 April 1868; Act VIII of 1869 on the shipping treaty concluded with England on 30 April 1868.
[47] FERDINANDY, G., Korona és monarchia [Crown and monarchy]. In: *Jogtudományi Közlöny* [Jurisprudence gazette], Vol. 38, No. 44, 1903, p. 370.
[48] See, for example, Final Protocol of Act X of 1869 on the commercial treaty concluded with the Swiss Confederation on 14 July 1868, Article 1 of Act XXVII of 1871 on the commercial and shipping treaty concluded with the Republic of Guatemala on 28 February 1870, Articles II and VIII of Act XXXI of 1882 on the shipping treaty concluded with Serbia on 10 and 22 February 1882.
[49] BALOGH, J., *op. cit*., p. 6.
[50] Article II of Act XXIV of 1871 on the state treaty concluded with the Kingdom of Sweden-Norway of 2 June 1868 on the mutual extradition of common criminals.
[51] Article 2 of Act XXXVII of 1884 on the enactment of the state treaty concluded with Brazil on 21 May 1883 in Rio de Janeiro on the mutual extradition of common criminals.
[52] Kőrösi's thought expresses well the position of the Hungarian public lawyers of the time: „Let us not go further down the slope on which we entered in 1867 to a greater extent than was necessary. - This slope leads to the bottomless abyss of the unified empire, which, with its independent existence as a state, will bury our Hungarian nationality; on the stone of this great grave, the historian will write in cold blood the word „fuit" about our nation." KŐRÖSI, S., *op. cit*., p. 20.
[53] Ibid. p. 18-19.
[54] FERDINANDY, G., *op, cit*., 1902, p. 799-800.

thus the person of the common monarch and the obligation to protect, which, in his view, led to a confederation and an institutionalised personal union between the two states. With regard to matters of common interest, he described the relationship between the two states as an "international covenant of a provisional nature", which he also sought to emphasise by stressing the need to conclude international treaties in these areas "on behalf of the two states".[55]

However, there was no unanimity of opinion on this issue, as is illustrated by the varying content of Ödön Polner's work. In his book analysing the public law relations between Austria and Hungary, he dealt in detail with their external status. His point of departure was that they were two sovereign states, and thus qualified as persons of international law in their own right. Therefore, he considered the common practice in international treaties indicating the Monarchy and another state as contracting parties to be contrary to the rules of public law, since no common state power had been established between Austria and Hungary. In his view, the contracting parties were the two states, which independently acquired rights and obligations and became parties to international legal relations.[56] A decade later, however, he took a radically different view. In the wake of the Compromise Act and on the basis of a review of related practice, he distinguished three types of international treaties with other states. In the first group, he listed agreements on common affairs. The novelty of his approach was that in these cases he recognised the legal personality of the "Austro-Hungarian Monarchy", which, in his view, did not jeopardise the status of Austria and Hungary, since, according to the principles of international law, not only states but also their "international associations" could be persons and thus contracting parties. He distinguished from the former the case of matters of common interest, where the legal entities are the two states, but treaties can only be concluded with their mutual consent. Finally, it classified in a separate group of treaties which did not fall into any of the previous categories and which were concluded by Austria and Hungary irrespective of whether the other state was a contracting party.[57]

One attribute of a state's international presence is the range of symbols it uses. Austria and Hungary did not develop a common coat of arms and flag after the Compromise and used their own symbols for internal affairs. Since common foreign affairs, common defence and related finances were under authority of the Emperor-King,[58] they used the two-headed eagle with the coat of arms of the House of Habsburg-Lorraine on its breast, which was the same as the coat of arms of the Austrian Empire before 1867. In the following decades, Hungary's opposition to the use of the symbol grew. In a speech made in June 1902, Prime Minister Kálmán Széll described the coat of arms used by the common institutions as contrary to the existing public law and indicated that he would endeavour to develop a symbol expressing Hungarian statehood, dualism and parity.[59] It was not until the First World War, in 1915, that the common coat of arms was finally adopted. The imperial manuscript and the Prime Ministerial Decree promulgating it both referred to the coat of arms for use by the common institutions of the Austro-Hungarian Monarchy.[60] The newly developed emblem consisted of the coats of arms of Austria and Hungary, linked by the coat of arms of the Imperial and Royal House above and the motto "INDIVISIBILITER AC INSEPARABILITER" ("indivisibly and inseparably") from the Pragmatic Sanction below.[61] The denomination and the new coat of arms left room for many interpretations. The dominant Hungarian view was expressed by Károly Kmety, who argued that the Monarchy was merely a shortened version of the monarch's joint possession of the lands, and that the coat of arms represented the equivalence of Austria and Hungary as a counterweight to Austrian ambitions.[62]

4. Personal union or real union?

As we have seen in Lassa Oppenheim's seminal work, he considered Austria-Hungary as a real union, an entity made up of sovereign states, but which do not have international legal personality as such, but only the union. By contrast, the states of a personal union retain their international legal personality alongside their sovereignty.[63] Since the period of the Compromise, divergent views on this issue have appeared in Hungarian legal literature. During the negotiations between Austria and Hungary, Ferenc Deák, the draftsman of the Compromise, called the construct a personal union,[64] but his use of the term was

[55] Ibid. p. 800-801. The phrase is taken from the following provision: Article 1 of Act XXX of 1899 on the regulation of customs and trade relations and certain matters connected therewith.

[56] POLNER, Ö., *Magyarország és Ausztria közjogi viszonyai történeti kifejlődésben és jelen alakjában* [Public law relations of Hungary and Austria in their historical development and present form]. Budapest, 1891, p. 159-161.

[57] POLNER, Ö., *op. cit*., 1898, p. 491-492.

[58] MÁTHÉ, G. – MEZEY, B. – RÉVÉSZ, T. M., *op. cit*., p. 264.

[59] KMETY, K., Magyar címer és lobogó a közös ügyekben [Hungarian coat of arms and flag in the common affairs]. In: *Jogtudományi Közlöny* [Jurisprudence gazette], Vol. 50, No. 43, 1915, p. 441.

[60] A m. kir. minisztérium 1915. évi 3.069. M. E. számú rendelete az osztrák-magyar monarchia közös intézményeinek használatára szolgáló cimerről [Prime Ministerial Decree No 3.069 of 1915 of the Royal Hungarian Government on the coat of arms for the use of the common institutions of the Austro-Hungarian Monarchy]. In: Magyarországi rendeletek tára [Gazette of decrees in Hungary], Vol. 49, 1915, p. 1712-1718.

[61] For the exact heraldic description see the Decree.

[62] KMETY, K., *op. cit*., p. 442.

[63] OPPENHEIM, L., *op. cit*., p. 126-128.

[64] Regarding the earlier relationship between Austria and Hungary, in his reply to Wenzel Lustkandl's „Das Ungarisch-Österreichische Staatsrecht" he also rejected the use of the concept of real union and described the relationship as a personal union. DEÁK, F., Észrevételek Lustkandl Venczel ily című munkájára: „Das Ungarisch-Österreichische Staatsrecht", a magyar közjog történelmének szempontjából [Comments on Venczel Lustkandl's work „Das Ungarisch-Osterreichische Staatsrecht", from the point of view of the history of Hungarian public law]. In: *Budapesti Szemle* [Budapest review], Vol. 1, 1865, p. 72 and 135.

not consistent. He argued that the indivisible and inseparable common possession and the obligation to protect created by the Pragmatic Sanction did not constitute a real union, but should be considered a personal union, which he sharply contrasted elsewhere with the institution of a common parliament. At the same time, in other statements he has rejected the existence of a separate Hungarian army, which would result in a personal union detrimental to the country.[65] However, as the turn of the century approached, much more elaborate positions began to emerge, taking into account the related practices of states and the work of foreign scholars. Ödön Polner argued that in the case of both unions there is a common sovereign, distinguishing between the two concepts on the basis of whether state power was united. Accordingly, he regarded the relationship between Sweden and Norway as a personal union, and that between Russia and Finland as a real union.[66] From the foregoing, he clearly regarded the relationship between Austria and Hungary as a personal union.[67] Gustáv Beksics took a similar position, rejecting the existence of a common sovereignty, and thus of a real union, on the basis of a Hungarian sovereign, parliament and territory, which were separate in public law. In his view, there was a personal union between the two states, involving joint possession and a mutual obligation of protection.[68]

At the same time as these studies were published, opinions appeared which described the relationship between Austria and Hungary as a real union. Ernő Nagy has analysed in detail the views of mostly German-speaking foreign scholars and Hungarian authors on the subject. On this basis, he considered states with a mere common ruler to be personal unions, and those which administer certain affairs jointly or operate joint bodies for this purpose to be real unions.[69] In the wake of the foregoing, he also regarded the relationship between Austria and Hungary as a real union, the denial of which called into question the sovereign will of the two states.[70] Pompeius, who published under a pseudonym, was primarily critical of the work of Gustav Beksics cited above. He also argued for a real union on the basis of the existence of common affairs and institutions, without which relations between the two states would sink back to pre-1848 conditions.[71]

The uncertainty in Hungary about the meaning of the two concepts is well illustrated by the work of Gejza Ferdinandy, who originally called the permanent personal union between states a legal personal union and the institutionalised personal union a real union.[72] However, he rejected the use of the term real union because of its different meaning in his own country, which led him to describe the relationship between Austria and Hungary as an institutionalised personal union.[73] In principle, János Horváth also regarded the relationship between the two states, which he considered as independent, as a real union, the content of which was provided by common defence and common affairs and institutions.[74] At the same time, he acknowledged that the concepts used for other state relations were only valid with reservations in the case of the construct created by the Compromise, and therefore rejected their categorical application.[75] Ödön Polner deviated from his earlier position also on the concepts of personal union and real union, and as a compromise solution, he described the relationship between Austria and Hungary as a union, but made it dependent on the content of the two concepts as to which of the two applied to the existing relationship.[76]

As we have seen, in the Hungarian legal literature a completely different approach from that of Lassa Oppenheim prevailed in relation to the relationship between real union and legal personality. On the one hand, there was conceptual uncertainty as to the content of the personal union and the real union, but the institutionalised nature of the relationship between Austria and Hungary was not a matter of debate. On the other hand, those authors who recognised the existence of a real union between the two states either did not consider it as a legal entity and insisted on the separate status of the two states in international relations, or, if the Austro-Hungarian Empire was also considered a legal entity, in their view this did not result in the status of the two states being abandoned.

Conclusions

By the 19th century, the theory of international legal personality had become sufficiently developed for the status to be conferred on the state in abstract sense rather than on the monarchs. At the same time, it was in this century that new relations between states emerged which posed a new challenge to the field of law. Such was the case with the Austro-Hungarian Empire, which was brought into being by the Compromise that relatively

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65 HORVÁTH, J., Personál unio, reál unio [Personal union, real union]. In: *A Jog* [The law], Vol. 17, No. 22, 1898, p. 169-170.
66 POLNER, Ö., *op. cit*., 1891, p. 48.
67 Ibid. p. 216.
68 BEKSICS, G., *A dualismus. Története, közjogi értelme és nemzeti törekvéseink* [The dualism. Its history, public law meaning and our national aspirations]. Budapest, 1892. p. 238.
69 NAGY, E., Államjogunk köréből. Irodalmi állapotok. – Personal- vagy realunió? [From the circle of our state law. Literary positions. – Personal or real union?]. In: *Budapesti Szemle* [Budapest review], Vol. 56, No. 144, 1888, p. 397 and 399.
70 Ibid. p. 402.
71 Pomponius: Real-unio vagy personal-unio? [Real union or personal union?] In: *Atheneum*, Vol. 2, No. 1, p. 129-133.
72 FERDINANDY, G., *Magyarország közjogi viszonya Ausztriához és annak történelmi fejlődése* [Hungary's public law relations with Austria and its historical evolution]. Budapest, 1892, p. 212 and 253.
73 FERDINANDY, G., *op. cit.*, 1902, p. 801.
74 HORVÁTH, J., Az 1867. évi kiegyezés. Történelmi, közjogi és politikai tanulmány [The Compromise of 1867. A historical, public law and political study]. Budapest, 1895, p. 181.
75 Ibid. p. 183.
76 POLNER, Ö., Unio [Union]. In: MÁRKUS, D., (ed.), *Magyar Jogi Lexikon* [Hungarian legal lexicon], Vol. VI, Budapest, 1907, p. 762-763.

consolidated the centuries-old, struggling relationship between the Habsburg dynasty, then Austria and Hungary. The evolution of international law is shown by the fact that the personality of the various associations of states was already recognised and the categories were given a developed content, on the basis of which most authors described the Monarchy as a real union with legal personality. The Hungarian approach differed in several points, with the majority describing the relationship between Austria and Hungary as a personal union, and only a few recognising that the Monarchy was also an international person, i.e. that it could act in international relations, but none of them, unlike Lassa Oppenheim, questioned the independent status of the two states. In the terminology of modern international law, the relationship between the two countries can be clearly described as a real union, and the Monarchy, along with Austria and Hungary, was also an international legal person. The widespread international action that followed the rules of the Compromise confirmed the legal personality of the former, especially from the point of view of those states that treated it as a party to international agreements. Therefore, Austria and Hungary exercised the rights deriving from their international legal personality less frequently, but their autonomous status made it possible to conclude international treaties with each other and with a limited number of agreements with other states. The Hungarian position was formulated on the basis of the so-called public law-oriented thinking of the dualist era, which was based on the problem of independence that had been present in the relations between the Habsburgs and Hungary for centuries.[77] For the majority of Hungarian legal scholars of the period, this approach was incompatible with the recognition of the existence of a common entity and the view of the Monarchy as an independent legal person of international law. This view only changed as the end of the dualist era approached, but none of them questioned the existence of Hungary's separate international legal status.

[77] See GLATZ, F., Hóman Bálint és Szekfű Gyula párhuzamos életrajzai [Parallel biographies of Bálint Hóman and Gyula Szekfű]. In: *Történelmi Szemle* [Historical Review], Vol. 52, No. 4, 2010, p. 481.

China's Century of Humiliation and the Politics of Sovereign Apologies*

*Pär Cassel***

Abstract

The government of the People's Republic of China has become known for guarding its international image jealously and often reacts to real or perceived slights against China with demands for an apology. Building on insights from the works of Robert Bickers, this article argues that the official Chinese insistence on the "politics of apology" can be traced back to late imperial China's socialization into the world community under the treaty port system, when foreign powers often demanded that the Qing government perform various acts of repentance for missteps in its foreign relations.

Keywords: *China; national sovereignty; apologies; international law.*

When then-British Prime Minister David Cameron travelled to China in November 2010, his official visit coincided with Remembrance Day. Following a long-standing British tradition in commemorating the end of the First World War, Cameron and members of his delegation wore red poppies. This artificial flower nearly triggered an international incident. Chinese diplomats argued that the red poppies reminded them of the Opium Wars, and they demanded that the British delegation remove their Remembrance Day poppies, but Cameron refused. Luckily for him, and for Sino-British relations, his Chinese hosts did not press the matter any further.[1]

Cameron's refusal was well advised, as the red poppy (*papaver rhoeas*) and the opium poppy (*papaver sominferum*) are not only two different species in the poppy family; in Chinese, they also have two completely unrelated names: *yúměirén* 虞美人 and *yīngsù*罂粟, respectively. Evidently, the chain of association only worked in English and some related Western European languages. As law professor Donald Clarke quipped at the time, "Somebody had to put a *lot* of effort into getting offended over this."[2]

"Poppygate" stands as one of many incidents in which the Chinese government has demanded an apology for an alleged slight against the feelings of the Chinese people. In the run-up to the Beijing Summer Olympics of 2008, which was lined with perceived affronts to the dignity of China, a number of writers, bloggers, and academics commented on this phenomenon. Chinese netizens even created political maps and score-charts of countries that had offended the Chinese nation the most times.[3] Apparently not understanding the satirical quality of one of these charts, the semi-official newspaper *Global Times* republished it with some editorial alterations, which had an inadvertent comic effect.[4]

Hurt feelings and resulting demands for apologies are no soft matter of national dignity and diplomatic courtesy, however sometimes the stakes are much higher. As Richard H. Solomon pointed out in a retrospective study on US-China relations in the 1980s, "You are Hurting the Feelings of a Billion Chinese" is a tried and tested pressure tactic that has been used to prevail over foreign diplomats.[5] As the Norwegian government came to realize after the Nobel Peace Prize was awarded to Liu

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1 CHAPMAN, J., *David Cameron rejects Chinese request to remove 'offensive' poppies during visit*. In: *The Daily Mail,* 10 November 2010, https://www.dailymail.co.uk/news/article-1328311/David-Cameron-rejects-China-request-remove-offensive-poppies.html, [Accessed on 29 October 2024].

2 Donald Clarke, e-mail communication, 20 November 2010.

3 MARTINSEN, J., Mapping the hurt feelings of the Chinese people. Danwei, 11 December, 2008, https://web.archive.org/web/20081212064337/http://www.danwei.org/foreign_affairs/a_map_of_hurt_feelings.php, [Accessed on 16 May 2025]. Thanks to Donald Clarke for alerting me to this reference.

4 *Mapping China's 'hurt feelings*.' *Global Times,* 4 June 2009, https://www.globaltimes.cn/content/434630.shtml, accessed on 16 May 2025. My gratitude to Donald Clarke for pointing me to this reference.

5 SOLOMON, R. H., *Chinese political negotiating behavior: A briefing analysis* (Santa Monica, CA: Rand, 1995), p. 83, p. 98-99.

Xiaobo in 2010, the Chinese government has proven very willing to employ sharp power to support its soft power. After several years of economic sanctions and diplomatic boycotts, the Norwegian government was able to normalize relations with China only after issuing a joint statement in which the Norwegian government unilaterally gave in to the demands of the Chinese government. Paragraph three of the statement read:

> The Norwegian government reiterates its commitment to the one-China policy, fully respects China's sovereignty and territorial integrity, attaches high importance to China's core interests and major concerns, will not support actions that undermine them, and will do it best to avoid any future damage to the bilateral relations.[6]

As many commentators noted at the time, this was nothing short of a total capitulation to Chinese diplomacy. But where does this culture of grievance-mongering come from? Indeed, it is tempting – and mostly correct – to regard the moralistic tone of Chinese foreign policy as an extension of China's insecurities about its place in the world as a rising power, and as a way to claim the moral high ground.[7] This article will look at the deeper historical roots of the phenomenon. Inspired by Robert Bickers's work on the treaty port mentality, I will not only argue that Chinese-style "politics of apology" owes a lot to the way China was socialized into the world order in the second half of the nineteenth century but also that as Chinese politicians and diplomats have made important innovations to diplomatic practice by focusing on symbolic grievances.

When the Qing Empire concluded a series of "unequal treaties" in the middle of the nineteenth century, the treaties did not usually make demands any greater than what was expected from defeated European powers. The indemnities and territorial losses that Germany imposed on France after the Franco-Prussian War in 1871 were, arguably, more onerous to France than the first unequal treaties were to China: after the Second Opium War of 1839-42, the Qing Empire was forced to pay an indemnity of a total of six million silver dollars to Britain and France, but under the terms of the Treaty of Frankfurt (1871), France had to pay a whopping five billion golden francs to victorious Prussia. Until the late nineteenth century, the provisions that would later pave the way for the West's informal empire in China – such as consular jurisdiction, most-favored nation treatment, and fixed tariffs on foreign trade – were not regarded as emblematic of China's subject status in the world system. Until the turn of the century, they were not challenged in any systematic fashion.[8]

The greatest humiliation for the Qing government, it turned out, was Western powers' and later Japan's insistence on the norms of diplomatic *equality* between China and Western European countries. This set of issues, often framed around the "audience question," proved to be the most intractable problem in Sino-Foreign relations. They were, arguably, never fully resolved. Still, the treaty powers abstained from treaty provisions that were openly humiliating to the Qing state: none of the first unequal treaties assigned any culpability for the outbreak of hostilities. Instead, the causes of the wars were usually swept under the carpet in typically vague language about "being desirous to put an end to existing misunderstandings."[9] When the terms for peace were settled, they usually included indemnities for paying the cost of war, compensation for lost property or "merchandise" (an often used euphemism for opium), amnesties for collaborators, the exchange of prisoners of war, and minor territorial concessions, such as the cession of the island of Hong Kong to Queen Victoria in 1842.

When the treaty powers demanded redress for alleged humiliations, the remedies were usually exacted on the ground as part of the war itself, often with great brutality. In 1856, the British consul Harry Parkes and the governor of Hong Kong used the alleged removal of the Union Jack from a British ship as an excuse to start a conflict with the Qing Empire, which would go down in history as the Second Opium War.[10] The most infamous example of this martial diplomacy was the looting and burning of the Summer Palace in Beijing in September 1860, which James Bruce (1811-63), the Eighth Lord Elgin, ordered as retaliation against the allegedly illegal arrest of British envoy, Sir Harry Parkes (1828-85), and his delegation. Far from being a random act of vengeance in the fog of war, this was a calculated act to humiliate the imperial family, and to draw a distinction between the dynasty and the Chinese people, with whom the British government claimed to have no quarrel. Precisely to underscore that point, the treaty powers ruled out an assault on the walled city of Beijing, the most plausible alternative target of punitive action.[11] Not surprisingly, this distinction between the government and its people did not survive the emergence of modern nationalism in China. As early as in 1887, Chinese statesman Zeng Jize (曾紀澤1839-90) lamented the destruction of the Summer Palace.[12] Today, the looting of the Summer Palace is regarded as an episode emblematic of China's "Century

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[6] *Statement of the Government of the People's Republic of China and the Government of the Kingdom of Norway on Normalization of Bilateral Relations*. 19 December 2016, http://www.xinhuanet.com/english/2016-12/19/c_135917147.htm, [accessed on 1 April 2025.]

[7] For a sophisticated treatment of this problem in a comparative perspective, cf. MILLER, M. Ch., *Wronged by Empire: Post-Imperial Ideology and Foreign Policy in India and China.* Stanford, 2014. Also see GRIES, P. H., *China's New Nationalism: Pride, Politics, and Diplomacy.* Berkeley, 2004; ZHENG, W., *Never Forget National Humiliation: Historical Memory in Chinese Politics and Foreign Relations.* New York, 2012.

[8] HSÜ, I. C.Y., *China's Entrance into the Family of Nations: The Diplomatic Phase, 1858-1880.* Cambridge, MA, 1960, p. 132-145; CASSEL, P., *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan.* New York, 2012, p. 160-163.

[9] The Sino-British Treaty of Tianjin 1858, Inspectorate General of Customs, ed. *Treaties, Conventions, Etc., between China and Foreign States* (Shanghai: The Statistical Department of the Inspectorate General of Customs, 1917), vol. 1, 404.

[10] WONG, J.Y., *Deadly Dreams: Opium, Imperialism, and the Arrow War (1856-1860) in China.* Cambridge, New York, 1998. p. 43-66.

[11] VON RACKNITZ, I.E., *Die Plünderung des Yuanmingyuan: Imperiale Beutennahme im britisch-französiche Chinafeldzug von 1860.* Stuttgart, 2012, p. 229-238.

[12] ZENG, J., (Marquis Tseng), China: The Sleep and the Awakening. In: *The Asiatic Quarterly Review* 3 (January-April 1887), p. 3.

of Humiliation" and in 1994, the Chinese government designated the grounds of the former palace a "national patriotic education base."[13]

After defeating China in the Second Opium War (1856-60), the Treaty Powers embarked on a more conciliatory policy towards the Qing Empire, mitigating some of the more asymmetric aspects of the treaty port system, in order to encourage the Qing Empire to observe its commitments under the unequal treaties. British diplomat sir Rutherford Alcock (1809-97) and US diplomat Anson Burlingame (1820-70) went to great lengths to negotiate more equitable treaties between the Qing Empire and the Western Powers, but their efforts foundered on the objections of internal constituencies on both sides – including the scholar gentry in China and the expatriate Western community in Shanghai. In 1867, Burlingame was appointed extraordinary ambassador of the Qing Empire and went on an extended tour in North America and Europe to represent China, and he negotiated a treaty that temporarily opened the United States for Chinese immigration.[14]

This brief lull in Sino-Western relations was not to last long. The episode that finally halted this path towards mutual moderation was the Tientsin Massacre in 1870, in which about sixty French and Chinese Christians were killed in a confrontation between the local population on one hand and French missionaries and Chinese Christians on the other. The riot derailed joint efforts by the Chinese and French governments to regulate the activities of French missionaries in China. The Manchu nobleman Chonghou (崇厚, 1826-93) was dispatched on an official mission to deliver the Tongzhi Emperor's apology to the French president Adolphe Thiers (1797-1877). The mission made him the first Qing diplomat to be dispatched to any Western country – excepting the Chinese members of Anson Burlingame's mission three years earlier. In order to bring home the point that the French government desired reciprocal and direct access to the Qing emperor, Chonghou was initially refused an audience with the French president. Only after a brief stay in Britain was Chonghou finally received by Thiers.[15]

The Tientsin Massacre inaugurated a new and destructive pattern of Sino-Western interactions, in which local riots against Western residents in China escalated into high-profile diplomatic incidents whose resolution required gunboats, monetary indemnities, and missions of apology. In 1875, the murder of British merchant Augustus Raymond Margary (1846-75) on the Burmese-Yunnan frontier necessitated another mission of apology to Britain the following year. This in turn led to the permanent appointment of an ambassador to Britain and other countries, and Guo Songtao (郭嵩燾, 1818-91) became first minister to Britain after he had finished his mission of apology.[16] The important point to remember here is that the Qing foreign service can trace its origins to missions of apology, and not to the regular exchange of diplomatic officials.[17] In a manner of speaking, it was not so much "China's entrance into the family of nations" itself that prompted the Qing government to establish a foreign service,[18] but the need to accommodate a culture of grievance-mongering that had been nurtured in the treaty ports and the imperial metropoles.

Indeed, as Robert Bickers has astutely pointed out in in relation to the British community in Shanghai:

> Their aim was never to forget their history of humiliation and insecurity, and never to allow their compatriots and representatives to forget the lessons of their Anglo-Chinese history. It was a double-faced source of legitimacy: that conferred by a once more open trade, and that conferred by sacrifice and shame. In fact they often talked, wrote and taught, as the Chinese came to talk, write and teach about the lessons of history, and the importance of remembering national humiliation.[19]

In other words, the Chinese elites that participated in late nineteenth century politics were socialized into a diplomatic environment that demanded prompt redress to any slights, material or symbolic. Worried that a permanent foreign presence in the capital would disturb the fundamental institutions of the state,[20] the Xianfeng Emperor did not agree to British demands that a permanent legation be stationed in Beijing until after his decisive defeat in the Second Opium War, which forced the emperor to flee the capital and led to a joint British-French occupation of Beijing. The Boxer Rebellion forty years later, which caused an even more brutal occupation of the imperial capital, formed the culmination in this pattern of mutual escalation, which was exacerbated by technologies of information that could amplify outrage and put pressure on politicians.[21] Unlike any other conflict that China had waged with Western imperial powers, the Boxer War was narrated in real time. News of it reached Europe and North America through the telegraph, which inflamed emotions in the imperial metropoles.

The Boxer Protocol is remarkable in setting a precedent for a punitive peace that went far beyond the immediate demands of redressing grievances. Not only did the treaty impose a new and onerous indemnity, several hundred times larger than the sums that China had been forced to pay after the Opium Wars, but the Boxer Protocol also broke new ground in diplomatic

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13 ZHENG W. (2012) p. 52-53.

14 HSÜ, I. C. Y., Late Ch'ing Foreign Relations, 1866-1905. In: *The Cambridge History of China: Late Ch'ing, 1800-1911,* Part 2, edited by FAIRBANK, J.K., and LIU, K-Ch., Cambridge and New York, 1980, p. 70-85.

15 HUMMEL, *Eminent Chinese of the Ch'ing Period,* vol. 1, p. 209-210; "Chunghow in France". In: *The North-China Herald and Supreme Court & Consular Gazette*, 9 June 1871, p. 418.

16 CASSEL, *Grounds of Judgment*, p. 109.

17 HSÜ (1960), p. 176-179.

18 Here referring to the title of Hsü (1960).

19 BICKERS, R. A., *The Scramble for China: Foreign Devils in the Qing Empire, 1832-1914.* London, 2011, p. 111-112.

20 HSÜ (1960), p. 111-114.

21 KERN, S., *The Culture of Time and Space 1880-1918.* Cambridge, MA, 1983.

practice: it spelled out that China, and only China, bore the guilt of starting the conflict. Under Article I of the peace treaty, the Qing government undertook to build a memorial arch on the spot where the German minister to China, Baron von Ketteler, had been assassinated.[22] The arch still exists, but it has been moved to a more secluded location and it has changed names twice.[23] The treaty also imposed collective punishment on the provinces that had harbored Boxer militias by suspending imperial exams for five years, and listed a number of already executed officials as culpable for the unrest – a very unusual act of retroactive political punishment.[24]

Finally, the treaty charged Zaifeng (載灃, 1883-1951), the incumbent Prince Chun 醇親王 and the future father of the last Emperor Puyi, with the task of going to Germany to deliver the apologies for the murder of the German minister to China, Baron von Ketteler. The intractable "audience question" nearly derailed Zaifeng's audience with the German Emperor, Wilhelm II, as Zaifeng resisted German demands that he perform a kowtow in front of the sovereign. But on September 1901, Prince Chun received an imperial audience in the Grotto Hall of the New Palace in Potsdam, and the two dynasts reportedly got along well after the Chinese apology had been delivered to Germany.[25] (It is noteworthy that the Grotto Hall was in itself a symbol of expansion of the Prussian state, being created by Prussian King Frederick II to celebrate his conquest of Silesia in the Seven Years' War.)

As an early instantiation of what John Maynard Keynes would call a "Carthaginian Peace," the Boxer Protocol can be seen as a dress rehearsal for the Treaty of Versailles almost two decades later. While the Treaty of Versailles was a considerably longer and more complex peace treaty than the Boxer Protocol, its notorious Article 231 was interpreted by an enraged German public opinion as nailing the guilt of the war on Wilhelmine Germany – the very polity that had led the charge to inculpate China for the Boxer Rebellion.

In contrast to the claim that China that was singled out in ways that would be inconceivable to any Western country, here China was caught up in a destructive diplomatic cycle which started on the imperial periphery but then spread to the imperial core. The conservative casuistry of Carl Schmitt does not have to be accepted to underscore the point that international norms were irreversibly changed by the extension of international law to the non-Western world and its subsequent blowback to Europe.[26]

Starting in the 1910s, the demise of China's last imperial dynasty, the emergence of mass politics, and the demoralization of Europe all changed the political dynamic of China's relation to the West. The Great War of 1914-18 and its conclusion exposed the weakness and hypocrisy of the European great powers to the rest of the world. As Chinese nationalism gained steam with the May Fourth Movement of 1919 and the Northern Expedition of the 1920s, Chinese intellectuals started to relitigate the massive removal of cultural relics from China which had taken place since the violent opening of the country in the mid-nineteenth century. The looting and plunder of the Summer Palace were now reinterpreted not as dynastic humiliations, but as national ones.

What had been completely voluntary and fully informed acquisitions of Chinese art by Western scholars were now seen in a more sinister light. As Justin Jacobs has masterfully documented, the moment emerging Chinese nationalism started to understand voluntarily sold cultural relics as priceless assets of a national patrimony, these kinds of transactions were no longer negotiable, and formerly venerated explorers and adventurers could be retroactively portrayed as mere thieves and looters.[27] By the 1920s, it was no longer possible to launch ambitious expeditions to excavate and acquire Chinese art without the explicit approval of Chinese government, and explorers such as Johan Gunnar Andersson and Sven Hedin had to iron out detailed agreements in order to be allowed into the country.[28] Despite the enduring asymmetry in power between China and the West, Western countries accepted Chinese claims of sovereignty over archaeological excavations without much protest.

Humiliated by the debacle of the First World War, the European imperial metropoles were no longer prepared to accept open-ended commitments to maintain their informal empire in China – very much to the dismay of the treaty port communities.[29] American businessman and OSS agent J. Arthur Duff made the following telling observation in relation to a riot in the foreign concession in Jiujiang in Jiangxi Province in 1923:

> In earlier years this [riot] would have been quite sufficient to cause the British gunboat to fire a shell or two over the city, but in 1923, and following the First World War and the establishment of the League of Nations, the British were less belligerent.[30]

It was the custom of those times to 'protest' all such incidents as promptly as possible so that it could be said that

[22] Article I, International Protocol (Signed at Peking, 7th September, 1901), *Treaties, Conventions*, vol. 1, 303-304.

[23] "Victory of Justice Gate (公理戰勝牌坊) (von Ketteler Memorial), Zhongshan Park, Beijing," https://hpcbristol.net/visual/Hv47-089, [Accessed 30 March 2025].

[24] Article X, International Protocol, *Treaties, Conventions*, vol. 1, 310.

[25] "Prince Chun," *The North-China Herald and Supreme Court & Consular Gazette,* 13 November 1901, p. 916. See also BUTZ, H., "Kniefall und Geschenke. Die Sühnemission des Prinzen Chun in Deutschland". In: *Tsingtau. Ein Kapitel deutscher Kolonialgeschichte in China 1897-1914*, edited by HINZ, H.-M., and LIND, Ch., Berlin, 1998. p. 173-80; FITZPATRICK, M. P., "Kowtowing before the Kaiser," in *The Kaiser and the Colonies: Monarchy in the Age of Empire,* edited by FITZPATRICK, M. P., Oxford, 2022, p. 106-137.

[26] SCHMITT, C., *The Nomos of the Earth in the International Law of Jus Publicum Europaeum*, translated by ULMEN, G. L., Candor, 2006.

[27] JACOBS, J., *The Compensations of Plunder: How China Lost Its Treasures.* Chicago, 2021.

[28] CASSEL, P., Solitary Swedish Sinologists: Three Hundred and Fifty Years of Swedish China Studies. In: *Journal of Chinese History* 7, no. 2, 2023, p. 473-475.

[29] BICKERS, R.A., *Britain in China: Community, Culture and Colonialism, 1900-1949.* Manchester, 1999.

[30] DUFF, J. A., Language of Diplomacy [Concessions, etc] (c 1923), Memoirs/book notes, circa 1982-1985, Box/Folder 4:18, p. 1, J. Arthur Duff papers, Hoover Institution Archives.

> 'action' had been taken on the matter. Actually, the foreigners always came off second best in the years following the First World War, since no one, foreign or Chinese, in Peking wished to be bothered with these problems. They were all too well satisfied with the round of receptions and cocktail parties, and none wished to have the peace disturbed. The Chinese knew they were gaining ground constantly, and the foreigners knew their days were numbered and that every new incident hastened the process of decline in foreign prestige.[31]

The roles were now reversed. The old and demoralized treaty powers had lost control of the narrative of humiliation. Now the Republican government and the nationalist movements of China that had taken ownership of what had proven to be a very useful tool in the toolbox of international politics. Of course, humiliation is by its very nature defined in subjective terms, and it is hard to make productive comparisons across cultures, yet comparisons are essential to historical reasoning. As I pointed out in my book *Grounds of Judgement,* the Japanese outrage against extraterritorial incidents rarely stood in proportion to the injuries sustained, but moral outrage was a powerful force in forging the national unity needed to revise the unequal treaties.[32] In a similar vein, Chinese nationalists learned to leverage the politics of apology to advance an ambitious agenda of state building in the twentieth century, that was later appropriated, and perfected, by the fledgling Communist Party of China.

As I have documented in this paper, the West has its share of the blame for turning China into an aggrieved country that guards its dignity jealously. Indeed, it was the West that taught China how to humiliate former adversaries by playing the blame game and demanding reparations and apologies. In what could probably be described as the first example of imperial blowback,[33] the West finally turned this logic on itself in World War One, which devastated the old empires but also cleared the path for national self-determination in what some today call the "Global South." What is new, however, is the Chinese tendency to focus on symbolic humiliations and to relitigate the imperialist past of Western Europe and North America.

Until very recently, it was the consensus of the West that the clock cannot be turned back, and that old grievances should not be revisited. That attitude, a foundation stone in the liberal world order after the Cold War, has now changed. Now reconceived as a protean and obfuscatory term, "decolonization" no longer means the transfer of sovereignty to a former colony. It continues to accumulate new, ever-changing, and politically destabilizing meanings. And given its checkered history with the West, China wants to stand in the forefront in those endeavors. But any demand to be the beneficiary of "decolonization" undertaken by Europe, its settler colonies, or Japan merely obscures the fact that China is quickly becoming a power in its own right. China is now benefiting from asymmetries not that different from those that enabled the West to expand in the first place.

Can historians provide a way out of this vicious cycle of grievances? Can we unlearn national pride? After all, being outraged over the past is a choice and China is not trapped in its history. Other countries have learned to live with their past. When the Poppy Incident happened in 2010, many British political commentators argued that Cameron should have removed the poppy, lest the Chinese government be furious.[34] But that had probably more to do with their partisan bias in domestic politics, which made them overlook many important details that I outlined in the beginning of this paper. Perhaps that's where we historians, as I would like to think, can ask important follow-up questions and insist that history is not a closed book with ready given answers.

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[31] Ibid., p. 2.

[32] CASSEL, *Grounds of Judgement,* p. 170-172.

[33] Chalmers Johnson introduced the term "blowback" to a wider audience in his eponymous book, JOHNSON, C., *Blowback: the costs and consequences of American empire.* New York, 2001.

[34] WHITE, M., David Cameron should not have worn that poppy in China. *The Guardian*, 10 November 2010, https://www.theguardian.com/politics/blog/2010/nov/10/david-cameron-poppy-china-michael-white.

Control, Responsibility, Censorship: The Institutional Structure of Hungarian Press Regulation During the First World War – Within the Framework of the 1912 Act on Exceptional Powers

Roland Kelemen[*]

Abstract

This study explores the institutional structure of press regulation in Hungary during the First World War, with particular emphasis on the reconstruction of jurisdictional and supervisory relationships. Rather than following a unified, hierarchical model, the wartime system operated through a complex, multi-actor network involving ministries, the Board of Military Supervision (HFB), the Press Subcommittee, prosecutorial authorities, military commands, and the Prime Minister's Press Office. Drawing on archival sources and official reports, the analysis outlines how actual control over the press was divided, how political, military, and judicial authorities exercised oversight, and how mechanisms such as the "three-hour censorship," confidential notices, and objective prohibitions functioned in practice. Particular attention is paid to the fragmented and contingent nature of provincial press oversight, shaped by structural inconsistencies, linguistic limitations, and proximity to the front. Rather than relying on abstract theoretical frameworks, the article reconstructs the internal dynamics of exceptional legal regulation through the lens of everyday practice and applied legal logic.

Keywords: *wartime press regulation; exceptional legal regime; Hungary 1914–1918; military censorship; institutional oversight.*

1. Introduction

Despite – or perhaps precisely because of – the so-called Belle Époque, the specter of the zero-sum conflicts of earlier centuries hung palpably in the air at the turn of the twentieth century. While there remained territories outside Europe still open to conquest or influence, no great power had any rational interest in provoking or supporting a war that carried within it the seeds of a continent-wide conflagration. Yet the memory of the Prussian–Austrian and Prussian–French wars left no European state feeling truly secure. From this point onward, the age of modern mass warfare drew steadily closer. The American Civil War had already mobilized 2.5 million men; the Franco–Prussian War, 1.7 million. A surge of technological innovation swept across the battlefield, and civilian breakthroughs – such as the railway and telegraph – were swiftly enlisted in the service of military strategy. The contours of the coming great war were already discernible: it would place unbearable pressure on the home front and would be fought until the bitter end, until total victory. In such a war, the mobilization and deployment of resources had to function with flawless precision, uninterrupted and absolute.[1]

The most rudimentary form of governmental organisation had already been surpassed in most of the later belligerent states. They had laid the foundations of the civil rule of law – an order in which the state operates within legal boundaries, and fundamental rights enjoy elevated respect and protection. Within this framework, the press had become an indispensable instrument of democratic publicity and mass communication. Yet, particularly in light of the lessons drawn from the Franco-Prussian War, this very function of the press was seen – and indeed could justifiably be seen – by the leaders of the state and the military as a potential source of danger. Most states, in search of or gradually formulating solutions within the boundaries of legality, arrived at the Great War with legal frameworks that sought to accommodate both the ideals of constitutional development and the exigencies of war. One milestone in this constitutional evolution was the introduction of extraordinary legal regimes – measures that, in effect, suspended the centuries-old maxim inter arma silent leges. At the core of these legal regimes stood the restriction of fundamental rights, and from the outset, this included limitations on the freedom of the press.[2]

The Act LXIII of 1912 on exceptional powers in times of war (hereinafter: Kivhattv.) represented the first comprehensive

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1 WETZEL, D., *A Duel of Nations: Germany, France, and the Diplomacy of the War of 1870–1871.* Madison, 2012; WAWRO, G., *The Franco-Prussian War: The German Conquest of France in 1870–1871.* Cambridge, 2003; HOBSBAWM, E., *The Age of Capital: 1848–1875*. New York, 1996; ROBERTS, M., *Machines and Liberty. A Portrait of Europe 1789–1914.* Oxford, 1980.

2 GOSZTONYI, G., Freedoms in the Hungarian April Laws of 1848. In: *Journal on European Histroy of Law,* Vol. 15, No. 1, 2024, p. 138–142.

Hungarian legislative framework for the exercise of extraordinary governmental authority. It granted far-reaching powers to restrict a range of fundamental rights in the event of war or even the threat thereof.[3] Accordingly, the scope of the Kivhattv. extended explicitly to the domain of press law and press freedom. As justified by the Prime Minister at the time, this was due to the fact that "press reports may very easily endanger the interests of warfare. There may be press publications that could even lead to the loss of entire battles…"[4]

Section 11 of the Kivhattv. stipulated[5] that the ministry was authorised to require periodical press publications to deliver mandatory copies to the nearest royal prosecutor's office or police authority for prior examination. If the reviewing authority determined that "a press publication constituted an offence affecting the interests of warfare,"[6] it could prohibit the distribution of that publication. Under the provisions of the Kivhattv., journalists, editors, or publishers could only be subjected to sanctions in cases where a criminal offence had been committed.

The obligation to submit a regulatory copy of each press issue concurrently with its distribution had already existed prior to the war; its purpose was to enable the authorities to swiftly prosecute offences committed through the press. However, once this procedure was tied to the functioning of the Press Subcommittee, it raised exceedingly delicate questions concerning legal responsibility. As Miklós Zboray vividly observed, the censors "…place shackles even on thought itself – unseen figures, invisible spirits, without accountability, beyond reproach. There is no one to summon when they strangle ideas and suffocate public debate in the press…"[7] What Zboray articulated remains strikingly relevant, despite the fact that the Kivhattv. explicitly stated that all measures were carried out under the collective responsibility of the entire cabinet.[8] For the provision in question ultimately failed to offer a clear answer to a crucial issue: who, in fact, directed the press regulatory bodies during the war, and who exercised day-to-day oversight of their operations? By the second year of the war, this very question had become the subject of sharp debate in the National Assembly. In response to an inquiry by István Rakovszky, Minister of Justice Jenő Balogh eventually gave a definitive answer, declaring that – owing to the need for continuous administrative control – he personally assumed political responsibility for the daily conduct of affairs.[9]

In reality, however, the question of jurisdictional authority was far from being so unambiguously clear-cut. The present study seeks to examine the intricate system of competencies and institutional structures that characterised Hungarian press regulation during the First World War.

2. The Governing Authorities of Press Regulation During the First World War

The supervision of the press regulatory bodies formally fell within the remit of the Minister of Justice. Under his protective oversight operated the prosecutorial authorities, the Press Subcommittee, and the relevant local administrative organs, including the heads of regional administration. Yet the structure was far from straightforward. The Board of Military Supervision (hereinafter: HFB) likewise exercised authority over the Press Subcommittee and maintained oversight over the prosecutors, while the Subcommittee itself also held supervisory powers over the prosecutorial work. Furthermore, the Prime Minister's Press Office must also be counted among the key actors, as its head was by default a member of the HFB and exerted substantial influence – indeed, practical control – over the entire press regulatory apparatus. The Prime Minister's Office was also directly involved in rural press supervision, primarily by transmitting confidential notices from the Press Office to the local authorities, who in turn communicated them to the editorial offices.[10] In addition, oversight was also exercised by the competent regional military commanders. The authority of the joint organs – meaning the supra-ministerial or military-administrative bodies – varied depending on the matter at hand, ranging from the mere request for information to the issuance of direct instructions. However, in every case, such action had to be channelled either through the Prime Minister's Office or the HFB. Let us now turn to a detailed examination of the individual institutions involved.

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[3] For more on the development of the institution and the right of defence, see: FARKAS, Á., *A [hon]védelmi alkotmány kialakulása a polgári Magyarországon 1867–1944.* Budapest, 2019; BARNA, A., Im Wendekreis von Notstand und Ausnahmsgewalt: Politische Umbruchszeiten und ausserordentliche Normsetzungsbefugnisse in Ungarn am Beginn des 20. Jahrhunderts. In: *Beiträge zur Rechtsgeschichte Österreichs*, Vol. 8, No. 2, 2018, p. 441–451; DOMANICZKY, E., Historical Development of the Hungarian Regulation on Special Legal Order. In: *Journal on European Histroy of Law,* Vol. 12, No. 1, 2021, p. 145–156.

[4] Prime Minister László Lukács's justification for the legislative proposal on exceptional measures in the event of war., In: *Képviselőházi irományok,* Vol. XXII, 1910, No. 633, p. 15–16.

[5] See more about possible restrictions: KELEMEN, R., World War I special press order in the light of the foreign and domestic rules and practices with an outlook on limiting news on Spanish flu. In: GOSZTONYI, G. – LAZAR, E. (eds.), *Media Regulation During the Covid-19 Pandemic: A Study from Central and Eastern Europe*. Cambridge, 2023, p. 284–305; RÉVÉSZ, T. M., Die Formveränderung des Presserechts in Ungarn in den Jahren des ersten Weltkrieges. In: *Jogtörténeti Szemle*, Vol. 19, Sonderheft, 2021, p. 59–70; GOSZTONYI, G., Censorship and law in Hungary in the past. In: *Romanian Journal of Legal History*, Vol. 2021, No. 1, p. 37–46.

[6] Section 11 (2) of Act LXIII of 1912 on Measures of Exceptional Power in the Event of War.

[7] Miklós Zboray's speech during the House of Representatives debate on the bill for the Indemnity Act., In: *Képviselőházi napló,* Vol. XXVI, 1910, 576th Session (22 July 1914 – 6 May 1915), p. 472–473.

[8] Section 1, Paragraph (1) of Act LXIII of 1912 on Measures of Exceptional Power in the Event of War.

[9] István Rakovszky's interpellation concerning the unconstitutionality of press censorship, and the response of Minister of Justice Jenő Balogh. In: *Képviselőházi napló*, Vol. XXVII, 1910, 597th Session (7 May 1915 – 21 December 1915), p. 548.

[10] HL. I. 28. HM. 1917. HFB. Box 539. Chair. Nos. 2632–2738. Minutes. Registers.

The Minister of Justice exercised overarching control over the press regulation system and the institutions responsible for its implementation. But what exactly did this ministerial activity entail? The strategic direction of press regulatory efforts was primarily shaped through the issuance of so-called objective prohibitions.[11] In formulating these prohibitions, the issuing minister sought to adapt them to prevailing circumstances. Vilmos Vázsonyi, in particular, made efforts to define foundational concepts – such as the notion of military interest – although the ministry was considerably late in doing so. Much like in Cisleithania,[12] Vázsonyi also intended to reject the very possibility of political censorship.[13] While in Austria prior censorship was generally enforced and accompanied by strict sanctions,[14] in Hungary such measures were not employed during the years of the war. As a result, any formal easing of restrictions had little impact in practice. On the contrary, as evidenced by the issued prohibitions and the imposition of three-hour censorship on certain newspapers, authorities responded with increasing severity – particularly toward the labour movement.[15] In Austria, by contrast, the excessive liberalisation of press policy led to the collapse of wartime press control precisely at the moment when separatist nationalist and labour movements were intensifying activities that threatened public order.

In addition to defining the strategic direction of press regulation, the Minister of Justice also oversaw the operations of the Press Subcommittee, including the supervision of the issuance of confidential notices. In matters concerning the provincial press, he directed the press regulatory activities of both the prosecutorial authorities and the territorial administrative bodies.[16] He requested reports on individual cases,[17] authorised personnel changes,[18] and issued instructions – for example, concerning the coordination with military experts.[19] Vázsonyi requested a list of newspapers making use of the option for prior approval, and – as surviving records reveal – this practice was implemented only in a highly limited and inconsistent manner in the provinces. In addition, upon the request of the HFB, the prosecutor's office,[20] or the Press Subcommittee,[21] it was the Minister of Justice who decided whether a given newspaper should be placed under the three-hour censorship regime.

A significant shift within this institutional arrangement occurred with the appointment of Gusztáv Tőry as Minister of Justice. Upon taking office, he formally reminded Sándor Wekerle in writing that "at the time I agreed to take on the justice portfolio, an understanding was reached between Your Excellency and myself that the supervision of press control would henceforth fall within Your Excellency's jurisdiction."[22] As a result of the proposal outlined in the letter, it was ultimately agreed that the Prime Minister's Office would assume responsibility for directing the activities of the Press Subcommittee. Although the authority to impose the three-hour censorship remained formally with the Minister of Justice, he was now required to consult the Prime Minister's Office regarding the necessity and expediency of such measures. In urgent cases, he even requested a liaison officer who – bypassing the usual procedures – could swiftly obtain the Prime Minister's position on a given matter. Wekerle appointed Henrik Gonda – head of the Prime Minister's Press Office and a member of the HFB – to serve in this liaison role.[23] By the final phase of the war, effective control over the system of press regulation – and the institutions operating within it – had, in essence, shifted into the hands of the Prime Minister.

It is worth briefly addressing here the role of the Press Department within the Prime Minister's Office. During the Tisza government, Lázár Drasche headed the central organ of governmental press policy, while under Wekerle's premiership the same role was entrusted to Henrik Gonda. Both thus served as members of the HFB and took positions on matters concerning the press. According to meeting minutes, Drasche played a significantly more active role, retaining his membership in the committee even after leaving his leadership post. In essence, the head of the Press Department acted as the conduit through which the Prime Minister's expectations and perspectives on press affairs were communicated. This was also the case in January 1916, when "white windows" (i.e., blank spaces resulting

[11] The scope of objective press prohibitions was defined by the Minister of Justice through official decrees and typically referred to categories of matters or types of news – such as the movement or deployment of military units. In contrast, subjective prohibitions involved the quasi-objective classification of individual cases under these broader categories. The latter were communicated to editorial offices on a case-by-case basis by the Press Subcommittee.

[12] OLECHOWSKI, T., *Die Entwicklung des Pressrechts in Österreich bis 1918 – Ein Beitrag zur österreichischen Medienrechtsgeschichte*. Wien, 2004; SCHEER, T., *Die Ringstraßenfront: Österreich-Ungarn, das Kriegsüberwachungsamt und der Ausnahmezustand während des Ersten Weltkrieges*. Wien, 2010.

[13] HL. I. 28. HM. 1918. HFB. Box 728. Thematic Collections. Press Prohibition List by Vilmos Vázsonyi, pp. 1–2.

[14] HL. I. 28. HM. 1916. HFB. Box 423. Minutes.

[15] HL I. 28. HM. 1918. HFB. Box 727. HFB. 2/d–1275/d, Press Subcommittee 60–461. Organizational and Operational Regulations of the Press Subcommittee (hereinafter: OOR).

[16] MNL GyMSMGyL VII. Records of the Chief Public Prosecutor's Office, 1913–1918.

[17] MNL GyMSMGyL VII. Records of the Chief Public Prosecutor's Office, 1913–1918. Report of the Royal Prosecutor's Office of Győr on the activities of the newspaper *Szabadság*, published in Esztergom.

[18] MNL GyMSMGyL VII. Records of the Chief Public Prosecutor's Office, 1913–1918. Appointment of Deputy Prosecutorial Commissioner Mátyás Cherny to conduct prior press inspections upon the request of the Prosecutor's Office.

[19] HL. I. 28. HM. 1916. HFB. Box 417. eln. 906–1356. Serial No. Report of the Military Expert.

[20] See in the provinces: MNL GyMSMGyL VII. Records of the Chief Prosecutor's Office, 1913–1918. Submission by the Royal Prosecutor's Office of Győr requesting the imposition of prior censorship on the newspaper *Rábavidék*. See in Budapest: HL. I. 28. HM. 1915. HFB. Box 326. Minutes. Prosecutor's Office proceedings against *Az Est*.

[21] OOR.

[22] MNL OL, K26 1166. bundle. 1918. IV. section. Bundle no. 1166. Letter from Gusztáv Tőry to Sándor Wekerle.

[23] MNL OL, K26 1166. bundle. 1918. IV. section. Bundle no. 1166. Response from Sándor Wekerle to Gusztáv Tőry.

from censorship) once again proliferated across the pages of the press, prompting the Press Subcommittee to turn to the HFB for guidance. Conveying Tisza's position, Drasche declared that the prevailing practice – namely, deleting only fragments of sentences – was inadequate, since the excised content could often still be inferred from the surrounding context. Consequently, he insisted that entire paragraphs should be removed instead. White windows were, understandably, difficult to avoid in evening papers due to time constraints, but in the case of morning editions, a more considered approach was deemed necessary. It was at this point that Drasche proposed adopting the German practice, whereby, if a censor marked a text, it had to be published without visible gaps; if that was not feasible, the entire article was to be suppressed. The HFB adopted this proposal and issued the following decision: (1) individual sentence fragments were not to be deleted – instead, entire paragraphs (or sentences) were to be removed; (2) in the case of articles for which it was particularly desirable to avoid white spaces, the censorship process should make this explicit, adding that if such gaps could not be eliminated, the publication of the article would be prohibited; and finally, (3) if an article was to be entirely suppressed, even its title was not to appear in print.[24] In May 1917, István Tisza once again turned his attention to the issue of white spaces, prompted by the increasingly conspicuous presence of blanked-out sections in *Népszava*, which had been appearing in such form for several consecutive days.[25] He called the attention of the members of the Press Subcommittee to the need to ensure that, in future, newspaper articles whose subject matter might provoke public opinion or agitate certain segments of the population should appear without white spaces. The Subcommittee was instructed to designate this as a mandatory condition for publication; and if the newspaper in question refused to comply, the article in its entirety – including its headline – was to be deemed unpublishable.[26] The determination of which articles fell within the scope of these restrictions was left to the discretionary judgment of the Press Subcommittee. In addition, the Press Department itself was also authorised to issue confidential notices, which it could relay through the Subcommittee. It also handled specific requests from the press – most notably, it prepared decisions related to the financial support (or *subvention*) of the provincial press, as well as matters concerning exemption from frontline service.[27]

The Press Subcommittee operated under the authority of the Supervisory Committee on Military Affairs (HFB) – a fact confirmed by the Prime Minister's Office itself, as recorded in one of the HFB's minutes through a statement by Lázár Drasche. The entry referred to Lieutenant Colonel Árpád Reich, a military member assigned to the Press Subcommittee, and his unauthorised visits to press regulatory institutions in Vienna and Dresden.[28] The HFB was responsible for evaluating incoming reports and news related to the military situation from both political and military perspectives, and based on this assessment, it decided which of these could be released to the public. In the course of its activities, the HFB monitored the functioning of the press and, in cases deemed questionable, called upon the Press Subcommittee to submit a report.[29] Where sufficient information was available, the HFB also made substantive decisions concerning the press, individual journalists, or specific newspapers. It instructed the Press Subcommittee to implement these decisions – for example, issuing a warning to a member of the press or disseminating confidential notices.[30] The HFB could request the Minister of Justice to examine the possibility of imposing three-hour censorship on specific newspapers. It was also entitled to call upon the prosecutor's offices to submit reports if an issue had been published that compromised military interests – or, in the case of the provincial press, if a report appeared without censorship that should not have been permitted.[31] It instructed the prosecutor's offices to issue warnings or reprimands to certain editorial boards for violating the applicable regulations. In some cases, it requested the Minister of the Interior to order the prohibition of specific newspapers.

Perhaps its most important function, however, was maintaining communication with Austrian and joint administrative bodies. As part of this role, the HFB assessed whether Austrian press prohibitions forwarded to it should also be enforced within the territory of Hungary. Several jurisdictional disputes arose between the HFB and Austrian authorities in the field of press regulation. One such case involved a German-language article concerning Hungary, which had been sent to the HFB; the Press Subcommittee affixed its own official stamp to the document. The Vienna Supervisory Office expressly requested that in such cases only a report be submitted, and that Hungarian authorities refrain from using their own stamp, as this was seen as an affront to Austrian press authority.[32] With regard to the censorship of foreign press materials sent into Hungarian territory, it was the HFB that took a stand against Austrian practice. The censorship office in Feldkirch had been carrying out substantive censorship of foreign newspapers destined for

[24] HL. I. 28. HM. 1915. HFB. Box 326. Minutes. From the minutes recorded at the HFB meeting held on 22 January 1916.

[25] The increased oversight of *Népszava* was, in fact, the primary reason for the proliferation of white spaces in the paper. The newspaper informed its readers of this development on the front page of its 4 May 1917 issue. On page two, it stated the following: "…a strict order was also issued to the effect that no 'windows' may be left where content has been removed – that is, the white paper must not reveal to the reader that something has been omitted." See: U/A, A cenzura címére. In: *Népszava,* 1917, No. 115, p. 2.

[26] HL. I. 28. HM. 1917. HFB. Box 534. Pres. Nos. 700–1139.

[27] See: MNL OL, K26, fasc. 1109, 1917, Section V, Bundle 1109 – Subsidy cases.

[28] HL. I. 28. HM. 1915. HFB. Box 324. Gen. Nos. 2460–3500. Minutes of the HFB meeting held on 24 September 1915.

[29] HL. I. 28. HM. 1916. HFB. Box 417. Pres. Nos. 906–1356. On the authorisation of the article *The Underground Hungary* in *Népszava*.

[30] HL. I. 28. HM. 1916. HFB. Box 417. Pres. Nos. 906–1356. Confidential notice prohibiting publications concerning the future of Macedonia.

[31] See, for example, the cases of the public prosecutors' offices in Szeged and Timişoara: HL. I. 28. HM. 1916. HFB. Box 417. Pres. Nos. 906–1356; HL. I. 28. HM. 1916. HFB. Box 422. Pres. 8 February – 10 April 1916, 12 April – 31 August 1916.

[32] HL. I. 28. HM. 1916. HFB. Box 417. Presidential Nos. 906–1356.

Hungary – and, in certain cases, had even confiscated them. The Hungarian position was unequivocal: such press materials fell under the jurisdiction of Hungarian and Croatian-Slavonian governmental authorities, who alone were entitled to examine and, if necessary, seize them.[33]

In February 1918, tensions escalated between the Press Headquarters (*Sajtóhadiszállás*) and the HFB. The former sought to extend its authority into the hinterland, claiming powers that would have affected internal press control as well. The HFB, however, regarded the Press Headquarters solely as a consultative body. While the Press Headquarters submitted a number of requests to Hungarian authorities, the HFB permitted their fulfilment only insofar as they did not infringe upon the sovereign competence of Hungarian institutions in press regulation. For example, access to certain documents by the Press Headquarters was interpreted strictly as observational, not as implying any decision-making authority. Furthermore, the HFB explicitly reminded the Press Headquarters that its proposed measures would have no binding effect on Hungarian press regulation, since no general system of prior censorship was in place, and the military experts they wished to influence only encountered the newspapers post-publication. Consequently, if the Press Headquarters wished to prevent the publication of specific news items, it was required – as before – to submit its request through the HFB.[34] The above clearly illustrates that, throughout the entire duration of the war, the relationships among Hungarian central authorities involved in press regulation remained ill-defined – and that the interactions between Hungarian and supranational (joint) bodies were likewise marked by numerous frictions and attempts at jurisdictional overreach.

As a general rule, the activities of individual military commands in relation to the press were limited to submitting requests to the HFB and instructing or advising the military experts assigned to the prosecutor's offices.[35] Most frequently, it was the military commands in Budapest and Cluj (Kolozsvár) that submitted observations, inquiries, or requests to the HFB.[36] Moreover, if a given region – such as the Southern Territories (*Délvidék*) – became a theatre of war or found itself in its immediate vicinity, the Army High Command was authorised to impose special press regulatory measures on its own initiative. As the case of Subotica (*Szabadka*) demonstrates, the lifting of such measures likewise fell within the competence of the military authorities.[37] Military authorities also devoted considerable effort to monitoring the press; they regularly requested information from the prosecutor's offices regarding articles with political or military relevance. To facilitate this, prosecutors were required to submit copies of all newspapers published within their jurisdiction for review. Based on these submissions, prosecutorial proceedings were frequently initiated in response to articles deemed inappropriate. Furthermore, military command units at the regional level had to be informed about any articles that had been banned from publication.[38]

3. The Press Subcommittee and the Prosecutor's Offices as the Principal Organs of Press Regulation

A Press Subcommittee was perhaps the most important body of press oversight during the First World War. A It maintained daily contact with the Budapest-based press, reviewed articles submitted in advance and issued confidential notices. Over time, its practice gave rise to a number of crystallised objective prohibitions. It functioned as an organ of the HFB. Throughout the territory of the Kingdom of Hungary, general prior censorship was not introduced during the First World War.[39] However, newspapers not subject to prior censorship were likewise prohibited from publishing content that could endanger military interests. Any material relating to military matters could be published only if obtained from official sources, or with the explicit approval of either the Prime Minister's Press Office or the government commissioner competent for the place of publication. As a result, at the outset of the war, correspondents from periodicals turned to the Prime Minister's Press Office to submit and seek authorisation for their reports. Yet, as was stated at the time, "the Press Office of the Prime Minister's Office did not consider itself competent to carry out this task, as it lacked military experts and had no personnel versed in criminal law who could promptly communicate the necessary measures to the Royal Prosecutor's Office."[40] Accordingly, the Press Subcommittee was established and housed within the building of the Ministry of Defence. Its membership consisted of military experts assigned to the body and those members of the HFB whose sole responsibility henceforth became the supervision of the press. To assist their work, they were provided with parliamentary and other stenographers. At the request of journalists, the Subcommittee's offices were relocated in December 1914 to the Upper House section of the Parliament. There, they used Committee Chamber No. I of the Upper House for their meetings, while its antechamber served for official receptions. Committee Chamber No. II functioned as the stenographers' office and document archive, and its own antechamber was designated as a waiting area for newspaper correspondents. Servants and couriers of the newspapers delivering manuscripts were not permitted to enter the Upper House; instead, all handovers took place at Gate No. XI.[41] The Press Subcommittee continued to operate there until the very end of the war. On 28 October 1918, the Presidium of the Upper House formally instructed the HFB to vacate the offices occupied by the Sub-

[33] HL. I. 28. HM. 1917. HFB. Box 534. Presidential Nos. 700–1139.
[34] HL. I. 28. HM. 1918. HFB. Box 722. Presidential Nos. 590–899.
[35] HL. I. 28. HM. 1918. HFB. Box 731. Thematic Collections. Minutes of the HFB, 15 July 1918.
[36] See: HL. I. 28. HM. 1916. HFB. Box 417. President's Files, Nos. 906–1356.
[37] HL. I. 28. HM. 1917. HFB. Box 532. President's Files, Nos. 4–292. HFB Minutes.
[38] NÁNÁSI, L., *A magyar királyi ügyészség története (1871–1945).* Szeged, 2010, p. 210.
[39] OOR 1. p.
[40] OOR 4. p.
[41] OOR 4–5., 20. p.

committee by 1 November. This effectively marked the end of its operation.[42]

The chairman of the Press Subcommittee – until his appointment as head of the HFB – was Vilmos Payr, Ministerial Councillor at the Ministry of Defence. He was succeeded in this position by Ferenc Balogh, Ministerial Department Councillor at the Prime Minister's Office. The composition of the Subcommittee's membership is known from surviving administrative records. Initially, the Ministry of Defence was represented by Chairman Vilmos Payr, in his capacity as Deputy Chair of the HFB, and by Aurél Knapp[43], an HFB member who served as Vice Chair of the Press Subcommittee. Later, however, the Ministry of Defence no longer delegated any civilian members to the Subcommittee. The Press Subcommittee consisted of eleven civilian and six military members. Of the civilian delegates, two were appointed by the Prime Minister's Office, two by the Ministry of the Interior, five by the Ministry of Justice, and one each by the Ministries of Commerce and Agriculture. In addition to Ferenc Balogh, the Prime Minister's Office was represented by Department Councillor Alfréd Németh; the Ministry of the Interior delegated Press Secretary Kálmán Bánóczy and Councillor István Soltész. From the Ministry of Justice came Councillor Dénes Ghyczy, Judge Dávid Rozsnyai, and Department Councillors Károly Császár, Andor Börcsök, and Ferenc Rötzer. The latter two were later replaced in rotation by Prosecutor Oszkár Szöllösy, Deputy Chief Prosecutor Albert Váry, and Department Councillors Ferenc Mikó and László Zilahi. The Ministry of Commerce was represented by Ferenc Darányi, and the Ministry of Agriculture by Antal Hampel. The military members were appointed by the Minister of Defence and included Lieutenant Colonels Árpád Reich and Kálmán Szepessy, Majors József Kóssa, Elemér Szemző, and Kálmán Kovács, and Captain Zoltán Péntek. The number of stenographers employed by the Subcommittee varied over the years, ranging from four to seven. Among them were Parliamentary Auditor Henrik Fabró, stenographers Dezső Gyarmati, Dezső Téglás, Sándor Róna, and Nándor Fodor; House of Representatives official János Hollenkay; and stenographer Gyula Nosz. The latter two, however, only temporarily assisted the Subcommittee's work.[44] In addition, the Minister of Defence assigned a liaison officer to Vienna to serve the Press Subcommittee – Colonel Ernő Schor.[45] The Subcommittee's work was further supported by two civilian attendants and eight militia conscripts assigned to unarmed service duties.[46]

The primary responsibility of the Press Subcommittee was to provide guidance to newspapers and to review submitted articles. Editors were required to submit two types of content: those they themselves believed to concern military interests, and those explicitly identified in the Subcommittee's confidential notices.[47] Failure to comply – or the publication of prohibited content – entailed sanctions ranging from a formal warning or prosecutorial reprimand to the confiscation of the specific issue in question; in the most severe and repeated cases, it could ultimately lead to the newspaper's prohibition.[48] The issuance of confidential notices also fell within the remit of the Press Subcommittee. In practice, this activity assumed various forms; however, what remained consistent was that the Budapest-based press received information about matters that could not be publicly disclosed via the Subcommittee. The only variations concerned the procedures for authorisation and the range of officials to be informed. According to the Press Subcommittee's service and operational regulations, confidential notices were forwarded to the Press Department of the Prime Minister's Office, the Minister of Justice, the Minister of Defence, the HFB, the prosecutor's offices, and the police headquarters.[49] In cases where additional information was required, the Press Subcommittee could submit inquiries, but it was not permitted to engage directly with joint (imperial-royal) institutions. In matters of foreign affairs, it could consult through designated intermediaries – either Rudolf Wodianer, assigned to the Prime Minister's Office by the Ministry of Foreign Affairs, or Iván Praznovszky, stationed within the Foreign Ministry. For issues relating to the royal household, information could be obtained via the Subcommittee's liaison officer, Captain Károly Werkmann. In the case of military operations, communication passed through Colonel Ernő Schor, the liaison officer assigned to Vienna, who liaised with the Press Headquarters; for matters pertaining to the armed forces, contact was maintained through Lieutenant Colonel Barkóczy, the liaison officer assigned to the Ministry of War. For internal security events – such as strikes or demonstrations – information was requested from the competent police authorities.[50] In order to ensure that members possessed the level of awareness necessary for the performance of their duties, they were required to be familiar with the following: (1) the semi-official newspaper of the Royal Hungarian Government, along with communications from the Hungarian Telegraphic Agency and the *Magyar Tudósító*; (2) the current contents of the Hungarian press; (3) the publications of the leading Viennese newspapers; (4) extracts from foreign and enemy press reports circulated daily by the Press Headquarters; (5) the provisions and underlying rationale of the confidential notices issued by the Press Committee; (6) the content of press releases recently banned by the Committee; (7) the speeches delivered in the House of Representatives and the Upper

[42] HL I. 28. HM. 1918. HFB. Box 727. HFB 2/d–1275/d, Press Subcommittee Nos. 60–461.
[43] His membership and position as Vice-Chairman are revealed in a letter addressed to Lajos Karátson, President of the HFB. See: HL. I. 28. HM. 1916. HFB. Box 417. eln. 906–1356. serial number.
[44] HL. HFB. Thematic Collections, Box 728. Register of the Members of the HFB and the Press Subcommittee.
[45] OOR 19. p.
[46] OOR 20. p.
[47] OOR 5. p.
[48] OOR 17–18. p.
[49] OOR 7. p.
[50] OOR 14–15. p.

House; and (8) the public declarations of leading statesmen.[51] In addition to the above, military members were also required to be familiar with the following: (1) the official communiqués of the domestic, allied, and enemy general staffs, with the current military situation to be marked daily on the map displayed in the Press Committee's meeting room; (2) articles written by war correspondents and those authorised by the Press Headquarters, as these served as reference points for determining which military-related reports could be permitted; (3) decrees published in the *Regulatory Gazette* pertaining to military regulations; and (4) the status of sensational military court cases, including which aspects the competent military tribunal deemed suitable for public disclosure during the investigation phase.[52] Their communication was facilitated through both secure and public telephone lines. In addition, two telephone devices were installed in the journalists' waiting room to ease contact with newspaper editorial offices.[53]

The prosecutor's offices also played an important role in wartime press oversight during the First World War. Newspapers placed under the so-called "three-hour censorship" were examined prior to publication, and could be withheld from distribution if necessary. Since general prior censorship had not been imposed, this process required less effort in the capital, and its frequency was not particularly high in the provinces either. In general, the three-hour censorship was ordered only in Fiume, in Transylvania following the Romanian incursion, and in the Southern Regions. In Transylvania, prosecutors even had to undergo special training to ensure that they could carry out their tasks to the required standard. A much heavier burden for the prosecution service was the review of newspapers after publication. Although this practice had existed earlier, during the war the lack of generalised pre-publication control, coupled with the increased pressure stemming from wartime interests, significantly strained the capacity of the prosecutor's offices. In the course of the review, the acting prosecutor assessed whether the publication in question violated military interests, or whether it constituted an offence against such interests or was otherwise related to wartime criminal provisions. If such a violation was established, the mildest response from the prosecutor's office was a verbal or written warning addressed to the responsible editorial board. This occurred, for instance, in the case of the daily *Az Est*, whose editorial on 10 January 1918 was deemed harmful to military interests and had not been submitted in advance to the Press Subcommittee for review.[54] In more serious cases, the prosecutor initiated criminal proceedings. Additionally, the office had the authority to confiscate the relevant issue of the newspaper. It could also prohibit the distribution of specific editions abroad or to the armed forces – either independently or with the consent of the Minister of Justice. This occurred on several occasions with issues of *Népszava*, where domestic circulation was permitted, but dissemination to the front lines was explicitly forbidden.[55] In one such case, the prohibition of foreign distribution was ordered by Deputy Chief Prosecutor Albert Váry, who also served as a member of the Press Subcommittee.[56] The initiation of proceedings against *Déli Hírlap* is also associated with Váry's name: in December 1917, its editorial titled *Peace and the Front* was found to have violated military interests.[57] As a consequence, the paper was banned from distribution at the front and was placed under prior censorship.[58]

Beyond the aforementioned measures, if the acting prosecutor deemed it necessary, they could request that the Minister of Justice impose temporary prior censorship on a newspaper that had committed serious – or possibly repeated – violations, or even order a complete ban on its publication and distribution.[59] In the case of the provincial press, the workload was further increased by the fact that maintaining contact with newspaper editorial offices also fell under the responsibility of the competent local prosecutor's offices. While confidential notices were forwarded to them by the chief prosecutor's offices, it was the local prosecutors who communicated these directly to the press.[60] The oversight of minority-language newspapers posed, in some cases, an insurmountable challenge for the prosecution service due to the lack of staff with adequate proficiency in the respective languages.

Press surveillance placed a tremendous burden on the designated prosecutor's offices, as clearly reflected in their official reports. One such report characteristically stated: "Each newspaper submits the articles intended for publication in writing, and the careful reading and examination of these materials requires such an immense amount of time and effort that performing this task with the necessary precision, thoroughness, and promptness – alongside one's regular duties – 'is simply not possible'…"[61] The prosecutor in Arad expressed the situation as follows: "During the course of the war, administrative duties increased significantly and came to occupy the entire span of time from morning until evening, and beyond managing other matters as far as circumstances permitted, I was compelled to

[51] OOR 16. p.
[52] OOR 17. p.
[53] OOR 21. p.
[54] HL. I. 28. HM. 1917. HFB. Box 720. Presidential Files No. 2–299.
[55] For example: HL. I. 28. HM. 1917. HFB. Box 720. Presidential Files No. 2–299; HL. I. 28. HM. 1917. HFB. Box 538. Presidential Files No. 2180–2629; HL. I. 28. HM. 1915. HFB. Box 326. Minutes.
[56] HL. I. 28. HM. 1917. HFB. Box 720. Presidential Files No. 2–299.
[57] Thinking about peace and peacetime began during the war, but comprehensive work was more likely to follow. Baranowska, M., International Organization as the Foundation of a Peaceful Order after the First World War in the Views of Szymon Rundstein. In: *Journal on European Histroy of Law,* Vol. 13, No. 1, 2022, p. 96–101.
[58] HL. I. 28. HM. 1917. HFB. Box 539. Presidential Files No. 2632–2738. Minutes. Journals.
[59] OOR 18. p.
[60] MNL GyMSMGyL VII. Records of the Chief Prosecutor's Office, 1913–1918.
[61] NÁNÁSI, 2010, p. 212.

carry out the review of all newspapers myself – three extensive dailies of 12 to 20 pages, two smaller dailies, and nine weekly publications… 'It would have been impossible for me to read through all the newspapers in full within the available time, which would have resulted in delays in their early morning railway dispatch to the provinces, financial losses to the papers, and prompt dissatisfaction on the part of the reading public'." [62] This extraordinary workload – combined with the informational deficiencies described above and the recurring conflicts with military experts – rendered the operation of press oversight in the provinces highly fragmented. In other words, the quality and consistency of enforcement were strongly influenced by factors such as the volume of newspapers published in a given region, the number and professional competence of prosecutorial staff (particularly in relation to minority-language press), the qualifications and personal disposition of the assigned military experts, and the reliability of information provided by central authorities.

In Budapest, from January 1915 onward, Albert Váry headed the press division of the prosecutor's office. In the capital, 389 significant newspapers were published daily, from early morning until late at night. "As a result, the sheer volume and the constant state of readiness imposed by tight deadlines demanded such sustained effort that Váry moved into his office in the courthouse on Markó Street, and was always *'most courteously at the service of the press'*." [63] Editorial offices typically contacted the prosecutor's office by telephone, where even during the night, Váry personally answered calls and decided on the admissibility of the news in question. In recognition of his service, the king awarded him the title and rank of Deputy Chief Prosecutor in the summer of 1917, along with the Second Class Civil War Merit Cross. Váry was appointed to the Press Subcommittee in January 1918 by Minister of Justice Károly Grecsák, and he held this position until April. During this period, he had several conflicts with the military members of the subcommittee, particularly over issues concerning freedom of the press.[64]

4. Conclusion

The institutional framework of press oversight during the First World War was exceptionally complex and, at times, verged on the chaotic. The supervisory authority over press regulatory bodies formally rested with the Minister of Justice – at least until the final phase of the war, when Wekerle assumed direct control. Accordingly, the prosecutorial services, the Press Subcommittee, and the competent regional authorities all operated under the Justice Minister's direction. The structure was further complicated by the fact that the Supervisory Committee on Military Affairs (HFB) also exercised authority over the Press Subcommittee and maintained oversight of the prosecution services. In turn, the Press Subcommittee itself possessed supervisory powers over the prosecutorial work as well.

In addition, the Prime Minister's Press Department and its acting director were members of the HFB, and they exercised significant influence – indeed, effective control – over the entire machinery of press oversight. The Prime Minister's Office itself played an active role in provincial press regulation, primarily by transmitting confidential notices from the Press Department to the regional authorities, who in turn communicated them to local editorial offices. Beyond these structures, the relevant territorial military commanders also exercised supervisory powers. The jurisdiction of joint administrative and military bodies ranged from the right to request information to the authority to issue instructions, though such actions had to be channelled through either the Prime Minister's Office or the HFB.

Beyond evaluating the submissions of Budapest-based newspapers for prior approval, the Press Subcommittee's activities extended to issuing subjective prohibitions, monitoring the press, and supervising regional press oversight. In practice, its work crystallized numerous regulatory categories beyond the objective bans issued by the Ministers of Justice. The effective performance of press-regulatory duties by the prosecution services was hindered by vague or inconsistent directives from the capital, the extremely limited time available for press reviews, the large number of minority-language publications in some areas, and the constant frictions with the assigned military experts. The cumulative effect of these factors resulted in a fragmented, regionally inconsistent system of press regulation – one that even Minister of Justice Vázsonyi's efforts at centralization failed to unify.

[62] NÁNÁSI, 2010, p. 213.
[63] NÁNÁSI, L., *A jogrend szolgálatában: Váry Albert élete és működése 1875–1953*. Budapest, 2015, p. 21.
[64] NÁNÁSI, 2015, p. 22–23.

The Role of Transylvania in the Process of Romanian Empire Building

*Szabolcs Nagy**

Abstract

After the emergence of the Romanian national consciousness, there was a continuous effort to unite the Romanians, who were scattered in several states, to create the so-called "Greater Romania". In the 14th century, two almost ethnically homogeneous Romanian principalities, the Principalities of Wallachia and Moldavia, were established in the Balkans. The first phase of the Romanian national awakening, however, did not take place here, but in neighbouring Transylvania, which belonged to the Hungarian crown. The first leaders of this movement were Transylvanian Greek Catholic church leaders, and it was only in the 19th century that intellectuals and politicians from the Transylvanian and Moldavian regions joined in. The main ambition of the movement was expressed by its slogan: "From Dniester to Tisza", which meant the acquisition of the territories between the two rivers. As these areas were also inhabited by a Romanian-speaking population – mixed with other peoples –, the leading ideologists believed that the areas should be united to create the ideal homeland of the Romanians. According to the idea, in addition to the two principalities that were united in the second half of the 19th century and later became kingdoms, Bessarabia, which belonged to the Russian Empire, Dobruja, which belonged to Bulgaria, and Transylvania, the largest and most populated territory, were considered part of the Romanian homeland, the "Tara Romanesca". In the stormy Balkan (and European) history of the turn of the 19th and 20th centuries, the former two territories were attached to Romania for longer or shorter periods, but the most serious attempt was to acquire Transylvania, which was finally annexed in 1918, establishing "Greater Romania".

Keywords: *Transylvania; Romania; nationalism; Balkan; World War I.*

At the beginning of the winter of 1918, the Romanian army took up arms for the second time in two and a half years to annex Transylvania. This strange campaign, justified as a peace-keeping operation in the eyes of the victorious powers and international public opinion, finally succeeded, and the Treaty of Trianon [1] legitimised the main Romanian territorial claim, the attachment of Transylvania to Old Romania. However, this event was not unexpected, as it was a well-known aspiration for a century and a half, first to achieve some kind of autonomy for the Romanians in Transylvania, then to achieve independence for the region, and finally to attach it to the meanwhile established Kingdom of Romania.

This also required the establishment of two Romanian principalities on the South Eastern borders of the Kingdom of Hungary by the 14th century, Moldavia in the East and Walachia in the South. As a result of the Balkan conquests of the Turks, by the 16th century, both principalities had become and remained vassals of the Ottomans so until the second half of the 19th century. In the weakened empire, the principalities had more and more autonomy, and in 1859, Alexandru Ioan Cuza was selected as prince in both. As a result, they were united, and in the Russian-Ottoman war of 1877-78, the united Romanian Principality joined Russia, thus it was able to separate from the Ottoman Empire, and the independent Romanian kingdom was established, the ruler became Karl von Hohenzollern-Sigmaringen, who had already replaced Cuza.[2]

In the meantime, by the end of the 19th century, the ethnic relations in Transylvania [3] had changed in a quite bad direction for the Hungarians. According to the estimated data of 1919,[4] the Romanian population was about 2.9 million, the Hungar-

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1 For some aspects of the Paris Peace Treaties, see GASSNER, M., From Brest-Litovsk via St. Germain to Sèvres – A Legal Perspective on the Peace Treaties and the Disintegration of Three Multi-ethnic Empires at the End of the First World War. In: *Journal on European History of Law*, Vol. 14, No. 1, 2023, p. 2-14.

2 For more on the topic, see STAMELOS, Ch., Reflections on Legal History of Romania and a Comparison to Greek Family Law. In: *Journal on European History of Law*, Vol. 16, No. 1, 2025, p. 65-71.

3 Regarding the constitutional status of Transylvania, see CSERVÁK, CS., The Constitutional Development of Transylvania. In: *Journal on European History of Law,* Vol. 14, No. 2, 2023, p. 97-103.

4 VARGA E., Á., A népesség fejlődése, az etnikai és felekezeti viszonyok alakulása a jelenkori Erdély területén 1869-1920 között [Population development, ethnic and religious relations in the territory of present-day Transylvania between 1869 and 1920]. In: *Erdélyi Múzeum*, Vol. 59, No. 1-2, 1997.

ian about 1.6 million, the German (including Yiddish-speaking Jews) about 545.000, and all other ethnic groups together accounted for about 200.000 of the population of Transylvania. This meant that – as had been the situation for a long time – the Romanian population of Transylvania was in the majority not only in relation to the Hungarian ethnic group but also in comparison to all other nationalities. This state of things, combined with the fact that since the unification of Wallachia and Moldavia in 1862, Transylvania had been surrounded by a semicircular Romanian "motherland", was a source of danger for the unity of the Hungarian state.

Without going into prehistorical, genealogical, and toponymic discussions, or into a more in-depth analysis of the history of the Transylvanian ethnic group up to the beginning of the 19th century, it is worth outlining what led to the formation of the above-mentioned ethnic structure. We will therefore provide a brief summary of events and opinions on the issue.

In the national romantic mood of the 19th century, all nations have created mirage versions of their origins, and their ancient history. The only difference is that some nations now think of the views they once held as romantic legends, while in others, a narrow section of society still considers them as stories based on objective facts. In others, in fact, these still form the basis of the official view of history to this day. The latter group includes the Daco-Roman continuity theory and the mainstream Romanian history education, which still considered it unquestionable. The refutation of the theory will not be discussed here, as the debate on the issue has now been satisfactorily closed not only by Hungarian historians,[5] but also by Western European [6] and, more recently, by some "special-interest" Romanian historians.[7] The Gesta of Anonymus, previously cited in Hungary (and even today in the neighbouring countries) as an objective source on the history of the period, can be clearly said to have projected the conditions of his time – such as the ethnic map of the country – back to the conditions of the period he describes, several centuries earlier.[8] This is also important to note because, as we will see, Romanian nationalist thinkers – and those of other neighbouring nations – considered (and, as mentioned, still consider) the work of the anonymous notary as an important basis for their falsification of history, often relying on some of its claims, sometimes distorted. Whatever we think about the settlement of the Romanians in Transylvania, the fact is that they are first mentioned in our documents as settlers within the borders of the country only at the beginning of the 13th century.[9]

Due to their traditional way of life, the contemporary Hungarians settled mainly in the large flat areas of the Carpathian Basin (the Great Plain and the Little Hungarian Plain), in the hilly areas, and in the valleys of the mountainous regions. In this perspective, Transylvania has been the region with the fewest opportunities, so the population needed to exploit its economic potential has been relatively unavailable for a long time. Therefore, our kings of the Árpád Dynasty constantly tried to encourage certain ethnic groups to settle in Transylvania, carry out special economic activities there and to perform border defence tasks. The Saxons were first invited to the Southern part of the province by Géza II, mainly for border protection, and then the first settlers were followed by their companions, populating what later became Saxony. In his charter Andreanum of 1224, András II clarified the status of the Saxons and laid down their privileges. The first major Romanian groups likely arrived in Transylvania in parallel with these processes. They were needed by the Hungarian state for the exploitation of the high mountain meadows (transhumant pastoralism), as Transylvania had a lot of areas that could be used exclusively for this purpose, and no other ethnic group of the time could successfully practice this type of agriculture. The Romanians did not carry out any military border protection tasks (except for the guarding of the high mountains associated with pastoralism),[10] which were performed by other ethnic groups in the area, including the Pechenegues. Sources from the turn of the XII-XIII centuries mention mainly the periphery of Saxony, Făgăraş Land, as Romanian territory. Over the centuries, the high hills of Inner Transylvania were partly populated from here, while some landowners and rulers – recognising their economic benefits – invited settlers from the northern part of Moldavia to the high mountain areas of northern Transylvania (e.g. Maramures). Already in the 14th century, under the leadership of their knezes, significant groups of Romanians arrived in the country, who soon populated all the mountainous areas, except for the Eastern Carpathians inhabited by the Szeklers. After the epidemic of the plague of 1348-49, which decimated the Hungarian and Saxon populations of Transylvania (and spared the Romanian population living in the mainly isolated areas), the process accelerated further, and the lack of hard-working hands led the owners of the territories to start inviting them into regions previously inhabited exclusively by these ethnic groups (such as the Transylvanian Plain).[11]

By the time of the Principality of Transylvania, the Romanians had been integrated into the local society. It had no collective rights, some descendants of former kenezes were elevated to the ranks of the ordinary Hungarian nobility, while the others became serfs. An often-expressed opinion on the Romanian

[5] For example, from one of the biggest names: KRISTÓ, GY., Rómaiak és vlachok Nyesztornál és Anonymusnál [Romans and Vlachs in Nestor and Anonymous]. In: *Századok*, Vol. 112, 1978, p. 623-661.

[6] For example, SCHRAMM, G., *Korai román történelem [Early Romanian history]*. Debrecen, 1997.

[7] For example BOIA, L., *Történelem és mítosz a román köztudatban [History and myth in Romanian public consciousness]*. Bucharest, 1999.

[8] GYÖRFFY, GY., Anonymus Gesta Hungarorumának kora és hitelessége [The age and authenticity of Anonymus' Gesta Hungarorum]. In: *Irodalomtörténeti Közlemények*, Vol. 74, 1970, p. 1-13.

[9] KÖPECZI, B. (ed.), *Erdély története 1-3. [History of Transylvania 1-3]*. Budapest, 1986, Vol. 1, p. 303.

[10] KÖPECZI, B. (ed.), *Erdély története 1-3. [History of Transylvania 1-3]*. Budapest, 1986, Vol. 1, p. 304.

[11] KÖPECZI, B. (ed.), *Erdély története 1-3. [History of Transylvania 1-3]*. Budapest, 1986, Vol. 1, p. 341–342.

side is that the Romanian ethnic group was disenfranchised in the territory of the medieval Kingdom of Hungary. Indeed, the "Unio Trium Nationum" of 1437, the "alliance of the three nations", did not include the Romanians. However, it should also be seen that the modern, ethnically based concept of nation had not yet developed, but rather denoted a specific social group, an order. Thus, although the alliance was concluded with the participation of the county's Hungarian, Szekler, and Saxon "nations", it does not mean that the Romanians were deliberately excluded for some reason. The Szeklers and Saxons enjoyed collective privileges in the period, their society (almost exclusively) consisted of free people, and to the outside world, they behaved as a united group. Even then, the "Hungarian" parts, the society of the counties, was diverse, with a significant serf class with limited rights. The agreement did not apply to them, nor to the Romanians who also lived in dependency. But for the Romanian families that were raised to the nobility, the "Unio Trium Nationum" can be seen – according to our modern concepts – more as an alliance of privileged classes against the inferior classes, than as a nationalist convention (and from that, a convention that excludes one nation).

Romanian serfs generally lived in a worse situation during this era than their Hungarian counterparts. This is mainly due to their lifestyle and late settlement. Pastoralism was a less profitable activity compared to agriculture, and where agriculture was chosen as the main source of livelihood, the land was of lower quality than those chosen by the earlier arriving Hungarians. The blending of the two ethnic groups was not helped by religious separation, in addition to their different linguistic and cultural roots. The settled Romanians – despite all the difficulties – preserved their Greek Orthodox religion. This circumstance made their integration into Transylvanian society even more difficult, as this church had no local organization, and the Transylvanian priests had to orient themselves towards the Transylvanian region of Wallachia and Serbia. The Church, which was the almost unique cultural promoter of the age, was thus built on impulses from outside the country. Transylvania was also at the forefront of Protestant movements. These new intellectual trends left the Romanians almost entirely untouched. It was indirectly due to the spread of Protestantism, however, that the 1574 Diet of Torda decreed that an Orthodox bishopric could be established in Alba Iulia. But bishops continued to be ordained beyond the borders.[12]

The wars that took place during the existence of the Transylvanian Principality further shaped the ethnic relations in Transylvania. There were almost no Romanian serfs in the Principality's army, so their military losses were negligible. Due to the nature of their habitats (they still lived mainly in the higher mountains, in less frequented areas), the number of civilian casualties related to the campaigns was also lower among them than in other ethnic groups in Transylvania. New Romanian settlers arrived in large numbers in areas deserted during the campaigns and the Tatar invasions. Both the Saxons and some Hungarian nobles helped their settlement,[13] partly because the Hungarian-speaking population could not be used for this due to demographic loss, and partly because the Romanian settlers were considered easier to deal with than, for example, the Szeklers, who were rightly proud of their collective rights and clung to them tooth and nail.

The nationality concepts of the period discussed so far can be considered somewhat virtual. Individual people were more interested in belonging to a micro-community, a nation, a village or – not least – a denomination, than the bond formed by the mother tongue. As we have seen, this was not only the case at the level of the „little people", the political leaders also did not care about the differences between the „nationalities" living in their country, the „Unio Trium Nationum" was not bound by ethnic but by social fault lines. Throughout Europe, the 18th century was the period in which the modern concept of nation began to emerge. It was no different in Transylvania.

In some strange way, a step towards imperial unity, as originally intended, accelerated for the first time the development of the autonomous national consciousness of the Romanians. Lipót I complained that his newly acquired territory, Transylvania was inhabited by a large number of dependants – Orthodox Romanians –, who were independent of him in terms of patronage rights and who looked for guidance from beyond the borders in religious matters (which were much more important part of everyday life in those days than they are today). He therefore urged that the Greek Orthodox Church of Transylvania be incorporated in some form into the Catholic hierarchy of his empire. In 1697, the Transylvanian Orthodox Mitropolia joined the Catholic Church, thereby establishing the Romanian Greek Catholic Church. Its priests (although they did not give up much of their religious beliefs) then studied more and more in Rome and other Roman Catholic ecclesiastical schools, where they studied Latin texts and became aware of the Latin affinity of their mother tongue. Although theories associating Romanism with ancient Rome already existed in the age of humanism,[14] the first theories that became known to the wider Romanist community were those of the Greek Catholic priests. The initiator of the new trend was Inocenţiu Micu-Klein.[15] His thoughts (that the Romanians are the oldest inhabitants of Transylvania and the Romanians are the largest nation in Transylvania), but especially his actions (he fought for the „equal rights" of the Romanians) soon provoked the disapproval of the Transylvanian orders and the rulers of the time (Charles III and Maria Theresa).

It was in the Roman institution founded by Micu-Klein that three of the most influential and certainly the greatest figures

[12] KÖPECZI, B. (ed.), *Erdély története 1-3. [History of Transylvania 1-3].* Budapest, 1986, Vol. 1, p. 498.

[13] This is how, among other things, the Romanian settlement of Voşlăbeni in the heart of Szeklerland was created by the establishment of the Lazars.

[14] The best known of these is perhaps linked to Matthias's courtier, Antonio Bonfini, who noticed Romanians during his travels in Hungary and created his own Daco-Roman theory.

[15] Inocenţiu Micu-Klein (Sadu, Sibiu County, 1692 – Rome, September 22, 1768) Romanian Greek Catholic bishop of Făgăraş.

of the Daco-Roman theory, the so-called „Transylvanian Triad", Samuil Micu-Klein,[16] Gheorghe Şincai,[17] and Petru Maior[18] studied, and thus partly developed the spirit he had professed. They – and the „Transylvanian school"[19] they created – dedicated almost all their work to the rise of the Romanians in Transylvania, which had both positive (the creation of Romanian dictionaries, the construction of the Latin alphabet) and negative developments. The latter includes the falsification of history in order to emphasise the primacy of the Romanian nation in Transylvania.

The members of the Triad went further than their master, and in addition to the process of demanding rights that he had initiated, they also considered it important to develop an ideological basis that would prove, based on false historical facts, that the Romanians were not fighting for new rights, but – as the nation that once was the sole ruler of Transylvania – only wanted to regain their stolen rights.

Similar to Lipót, Maria Theresa also unwittingly helped to strengthen Romanian nationalism. Within the framework of the two Romanian border guard regiments she created, a previously missing social class could be created: a class of soldier-serfs free of the peasants' ties. It is also important to note that the officers of these regiments represented the „middle class" social group, which thus appeared for the first time in the history of Transylvanian Romanians, since the Romanian-speaking middle and lower middle nobility, who had been the main occupants of this group, assimilated quickly after gaining their privileges, and declared themselves to belong to the (Hungarian) nobility rather than to the Romanians. The Romanian Greek-Catholic clergy, who were almost the only intellectuals in society (and of course the „Triad", who played the main role), soon found a hinterland, and their seeds began to find fertile ground.

By 1791, the leading stratum of Transylvanian Romanian public opinion, strengthened by the activities of the Triad, felt that it was timely to produce *„undoubtedly the most important political work of the Transylvanian Romanians during the 18th century"*.[20] The work is the Supplex Libellus Valachorum, a royal application dated 11 March 1791. The documents of two groups, submitted partly independently of each other, bear this name today, differing in that the version submitted by Bishop Ioan Bob lacks the reference to the Daco-Roman continuity which was a highly integral part of the other, probably largely elaborated by Samuil Micu-Klein. The application listed the harm suffered by the Romanians and asked that the Romanian nation be included as a fourth nation in the Transylvanian estate system, that mixed or pure Romanian names be allowed in Romanian-inhabited or Romanian-majority jurisdictions and municipalities, that the clergy of the nations be granted equal rights, and that the ethnic composition of the electorate be taken into account in the election of officials and legates. Lipót II sent the application to the Transylvanian Diet, where it was rejected. The arguments in support of the decision included – as a completely correct statement – that the rights of nobles and freedmen are the same regardless of ethnicity, just as the burdens of serfs are the same. And in response to the issues about priests, it was mentioned that Protestants also support their priests themselves.

So, the first major political initiative of the Transylvanian Romanian leaders was unsuccessful, and the total rejection of it created resentment among them. They did not engage in such an ambitious undertaking for almost half a century, but their activities did not disappear: in the process of educating an ever-increasing number of intellectuals, the school authorities were always careful to infuse the students with the main motives of the „ ideology". And there were more and more such schools all over Transylvania. They became less and less ecclesiastical, and appeared not only in cities traditionally under Romanian spiritual influence, but also in places such as the „capital of Transylvania", Cluj-Napoca, or the „Saxon center", Brasov. The Saxons, since the time of the Principality, often found that their interests did not match those of the Hungarian nobility, so they took every opportunity to weaken their power. In order to achieve this, the Romanian movement was promoted both spiritually and materially, and it is no coincidence that one of its centers was the aforementioned Brasov.

In addition to the intellectual „battles", there were also increasing signs of (partly) ethnic tensions among the lower sections of the population. In 1784, a large-scale riot was formed under the leadership of three Romanian serfs from the Metaliferi Mountains. In November 1784, the serfs of Zaránd County, gathered by Horea (original name Vasile Ursu Nicola), Cloşca (Ion Oargă), Crişan (Marcu Giurgiu), now considered a national

[16] Sadu, September 1745 – Buda, May 14, 1806. Romanian historian, linguist, theologian, philosopher, member of the Transylvanian school (see note 18).

[17] Şincai, February 28, 1754 – Seini, November 2, 1816. Romanian historian, linguist, translator, poet, representative of the Transylvanian school.

[18] Târgu Mureş, 1760 – Buda, February 14, 1821. Romanian Greek Catholic priest, writer, historian, linguist, prominent representative of the Transylvanian school.

[19] The Transylvanian School (Romanian: Şcoala Ardeleană) was a Romanian cultural movement of the Enlightenment period, which emerged after the Romanian Orthodox Church in Transylvania re-recognized the authority of the Pope and formed the Romanian Greek Catholic Church. As a result of the Roman connection, the ideas of the Enlightenment reached the Romanians in Transylvania. The most important centers of the movement were Blaj, Oradea, Lugoj and Beiuş.
The members of the movement were the first to present historical and linguistic arguments to justify the Roman origin of the Romanians. According to their theory, the Romans destroyed the Dacians, so the Romanian people are exclusively descendants of the Romans. The Transylvanian School had a significant impact on the development of Romanian culture, not only in Transylvania, but also in Wallachia and Moldavia, contributing to the formation of Romanian national consciousness. They formulated the Second Petitions known as the Supplex Libellus Valachorum were submitted to Emperor Leopold, in which they requested proportional representation for the Romanian people.
The Transylvanian school developed the current Romanian alphabet with Latin letters, which replaced the Cyrillic script used since the 10th century. They published the first four-language Romanian dictionary in Buda in 1825. Another significant role of the school in the renewal of the Romanian language was the introduction of French and Italian neologisms. Another significant figure was Ion Budai-Deleanu.

[20] PRODAN, D., *Supplex Libellus Valachorum*. Bucharest, 1967 (the Author's translation).

hero in Romania, originally wanted to join the border guards (in the hope of a better life). However, seeing the huge crowd, the local administration wanted to prevent this, on the one hand, they feared the economic problems caused by the large number of absent working serfs, and on the other hand, they considered the gathered people to be dangerous to public order. Therefore, when Horea and his company wanted to march to Alba Iulia to join the border guards together, they were blocked by hajduks who tried to disperse the crowd. The measure escalated into a violent clash, sparking off riots led by assembled Romanians. The rioters indiscriminately destroyed the villages and towns in their way, first of all, they harassed the nobles and the local administration officials, then anyone who refused to identify with them, wore Romanian costumes, or join the Eastern churches (the rebellion was actively supported by many local priests). The horde, which by then had increased to about 30,000, massacred members of the noble families (including women and children), officials, and in some cases even village magistrates and priests not belonging to the Eastern churches, with selected cruelty. The Hungarian population of Verespatak and Abrud suffered perhaps the most devastation. In the two mining settlements, not only those belonging to the aforementioned groups but practically all Hungarians were murdered. By February 1785, by the time the – belatedly responding – army was able to put down the rebellion, at least four thousand (overwhelmingly Hungarian) had been killed by the cruelty of Horea and his followers.

Although Horea's revolt was primarily motivated by social problems, and its ethnic character was mixed with religion, one cannot ignore the fact that it was the first time that Hungarians were killed by Romanians in Transylvania for (partly) national reasons. Obviously, the main reason for this was the national character of certain social groups, but there were also ethnic tensions (partly due to religious reasons). Horea and his companions did not have a sense of nationhood in the 19th-century sense, but they felt that their problems were not only caused by the subordination of the landlord–serf but also by the suppressive actions of the Hungarians against the Romanians. Of course, it should not be forgotten that by now – mainly due to the activities of the popes – a simplified form of the „Transylvanian Triad" view, according to which the Romanian people are the „indigenous" in Transylvania, whose rights are usurped by the „interloper" Hungarians, has begun to spread among the lower strata of the Transylvanian Romanians. It is also worth noting that the core of the rioters was made up of the Romanian ethnic group, the „Moți people", who were at the forefront of the brutality during the massacres of '48, which will be discussed later, and the atrocities of 1919. Besides all this, it is an important fact that the activities of Horea and his men were not looked upon favourably by all the Romanians of the time, and were clearly condemned by the intellectual class. Samuil Micu-Klein, for example, called Horea and his companions „*damned men*", „*who wanted to destroy the nobility*", and he clearly emphasised the social rather than the nationalist aspect of the revolt.[21] The Hungarians in Transylvania, however, were acutely aware of the (partly) ethnic nature of the riot, and this event was the first warning sign that drew the attention of many to the Romanian issue.

Fortunately, similar bloody conflicts did not characterise the common history of the two nations in Transylvania for a long time afterward, but the ideological war (mainly on the Romanian side) continued. The Blaj village school, founded by Bishop Micu-Klein, became the gathering place and workshop of the new generation, which adopted and partly developed the spirit of the predecessors, the „Triad". It was here that personalities of the Romanian political elite of the time studied and/or taught, such as George Barițiu[22] (the most Hungarian-allied of the following), who, through the Brasov-based Gazeta de Transilvania, which he founded in 1838, provided a completely new and more effective platform for Romanian public opinion in Transylvania. In terms of national issues, Timotei Cipariu,[23] who was mainly active on linguistic issues, and Simion Bărnuțiu,[24] who was more politically active, were much more radical. The Romanian nationalism in Transylvania no longer had only a „triad", but (mainly thanks to the „Blaj workshop") a much broader core of intellectuals, which with the help of the forums established, grew and the essence of its activities reached wider and wider layers of the population. It should not be forgotten that at the same time, changes were also taking place in the Romanian principalities. The Turkish dependence became weaker and weaker, and the orientation towards the leading intellectual trends of the time could begin. From this point onwards, the leading ideologists of the Romanian community living in and beyond the Carpathians also influenced each other. Personalities such as Mihail Kogălniceanu[25] and Nicolae Bălcescu[26] kept in touch with their Transylvanian counterparts. Their publications, such as the literary magazine „Dacia literară", reached a wide range of Romanian intellectuals in Transylvania, who looked with eager eyes at the intellectual activity in the „free Romanian states", „free from nationalist oppression". As Lucian Boia notes,[27] this period also saw the emergence of a new cult: that of Michael the Brave.[28] In Voivode Mihai they iden-

[21] KÖPECZI, B. (ed.), *Erdély története 1-3. [History of Transylvania 1-3].* Budapest, 1986, Vol. 2, p. 1097.
[22] Jucu, 4 June 1812 – Sibiu, 2 May 1893 Romanian historian, journalist.
[23] Pănade, 21 February 1805 – Blaj, 3 September 1887 Romanian linguist, philologist.
[24] Bocșa, July 21, 1808 – Sânmihaiu Almașului, May 28, 1864. Romanian historian, academic, philosopher, lawyer, and liberal politician.
[25] Iași, September 6, 1817 – Paris, June 20, 1891. Romanian historian, writer, journalist, and politician. He played an important role in the events of 1848 in Wallachia and in the unification of the principalities.
[26] Bucharest, June 29, 1819 – Palermo, November 29, 1852. Soldier, historian, politician, leader of the Wallachia Revolution of 1848.
[27] BOIA, L., *Történelem és mítosz a román köztudatban [History and myth in Romanian public consciousness]*. Bucharest, 1999, p. 25-27.
[28] Michael II, Prince of Wallachia, (?) 1558 – Câmpia Turzii, August 9, 1601. As the Prince of Wallachia appointed by the Turks, he allied with the Habsburgs, gained the support of the Szeklers and the citizens of Brasov with false promises, and then invaded Transylvania at the end of 1599. Within a short time, his power was shaken, and in 1601 his former ally, Basta, was executed. See. WHITE, G. W., *Nationalism and territory: constructing group identity in Southeastern Europe.* Lanham, 2000, p. 132.

tify the person who „first united the three Romanian states", and of course, they believe that the Transylvanian reign of the Prince of Wallachia was failed because of the Hungarians. But there is the example: the Transylvanian Romanians do not have to suffer under Hungarian oppression. It was at this time that the idea of the desired unification of the country first appeared in the minds of some Transylvanian Romanians (in parallel, of course, with the need to unite the two Transcarpathian principalities, which were still nominally under Turkish rule).

Such changes were taking place in the Romanian nationalist movements of reform-era Transylvania, while the Hungarian liberal political elite could not provide reassuring answers to the increasingly challenging problem (of course, the Habsburg power supported Romanian nationalist aspirations along the lines of „divide and rule", among others). Hungarian politicians did not think about granting collective nationality rights, they believed that liberal liberties based on individual freedom would ensure equality for all citizens, who, once they got it, would cease to be dissatisfied because of nationality problems.[29] Although the strengthening voices of dissatisfaction might have led them to this, they did not admit their mistake until the fateful events of 1848/49. The first attempt at independence of the Hungarian state was the trial that would have proved to all Hungarian politicians that the nationality policy of the country had created tensions that seriously threatened its territorial integrity. During the War of Independence, all major nationalities in Hungary – as the example of the Romanians clearly shows – turned against the Hungarians, even taking up armed combat against the Hungarian Honvéd.

In 1848, Blaj became the symbolic place of the entire Transylvanian Romanians, which, as we have seen above, had already been the stronghold of the Romanian nationalist intellectual community through its school. Here the Romanian National Assembly of Transylvania met three times to discuss its new situation, to choose between possible political directions. The biggest problem for them was that on April 7, 1848, the Lower House of the Hungarian Parliament passed the proposal for the unification of Transylvania with the Kingdom of Hungary, thus ending the public and political separation of the two parts of the country. Basically, three types of political groupings have emerged around the elaboration of possible responses to the new challenges and opportunities. The members of the first group were not against unification but expected the situation of the Romanians to improve within the framework of the new state. One of them was the aforementioned Timotei Cipariu. This party was quickly denounced. The group in the middle would have made acceptance of the union conditional: the extension of language rights for Romanians. The best known of these was George Bariţiu, but they also included, for example, the young lawyer from Târgu Mures, Avram Iancu. The third grouping was only willing to negotiate the Union if the Romanians were recognised as a state-forming nation. Their leader was Simion Bărnuţiu.

At the first (still illegal) assembly on 30 April, the gathered mass of serfs mainly wanted to put pressure on the decision-makers for their own liberation, but some speakers, such as Bărnuţiu, also addressed the nationality issue in their speeches. The second assembly (the first official one) took place on 15 May, attended by more than 30,000 Romanians (mostly peasants). The day before, in the church of Blaj, the political leaders (approximately a thousand people) held a preliminary. Bărnuţiu expressed that the demands of the Romanians should include national equality, a separate Romanian national assembly, the right to hold consultations in the mother tongue in the national and county assemblies, and the appointment of separate Romanian officials. He expressed the following views on the Union: *„The Union is life for Hungarians, death for Romanians. For Hungarians, it is unlimited freedom, for Romanians, it is eternal servitude. If the Romanian nation unites with Hungary, it will have neither national schools nor officials to look after its national interests. It will not even have a national church. […] if there is no union, the link between the Hungarians of Transylvania and Pannonia will be broken,* ***and the Hungarians of Transylvania will naturally slowly disappear.*** [highlighting by the author]"[30]

Bărnuţiu's influence was significant throughout the assembly. The next day, a crowd gathered in a meadow near the town swore an oath of allegiance to the Romanian nation and the ruler. The sixteen points adopted as a result of the meeting were announced on 16 June. These essentially showed the influence of Bărnuţiu. Among other things, they decided on the recognition of the Romanian nation and the holding of an annual national assembly, proportional representation in the legislature and in the entire administration, the suspension of negotiations on the union until their demands were satisfied, the free use of the Romanian language in official places, the establishment of a complete Romanian school network, the establishment of an independent Romanian national church, and the abolition of customs duties between Transylvania and the Romanian principalities on the Danube, the latter clearly showing the orientation of the assembly. A delegation – led by Bishop Andrei Saguna – took the demands to Vienna (at the same time they were also sent to Cluj). The negotiations continued (not least because they received no substantive response to their demands). The Romanian peasants were not satisfied with the measures of the serf liberation, and they did not want to participate in the activities of the newly established national army. The nationality law submitted to the Hungarian Parliament on 27 September (which granted unprecedented nationality rights in Europe at the time) came too late to stop events in Transylvania. By this time, Vienna had already recognised the potential of arming the nationalities, and the Romanians in Transylvania were also given weapons. When the Romanian crowd gathered in Blaj for the third time on 16 September, many of them were already armed. The participants of the new assembly (in contrast to the previous ones) did not voice purely national demands but mainly criticized the incomplete serf liberation

[29] For more on the topic, see GERGELY, A. (ed.), *Magyarország története a 19. században [History of Hungary in the 19th century].* Budapest, 2005, p. 379.

[30] For more on the topic, see HERMANN, R. (ed.), Az 1848-49. évi forradalom és szabadságharc története [History of the 1848-49 Revolution and War of Independence]. Budapest, 1996, p. 79-81. The quote is also from him.

and the recruitment. Events changed direction when nationalist politicians also appeared in Blaj. Under their influence, the crowd formulated a joint petition asking the ruler to save them from Hungarian oppression. After the decision was adopted, more moderate politicians also joined Bărnuţiu's more radical line. Romanian leaders in Transylvania became uniformly anti-Hungarian.

As a result of the events, the Hungarians in Transylvania also began to organise. The Szeklers gathered on 18 October near Lutiţa to discuss the political direction to follow. Using the assembly as a justification, the Transylvanian commander-in-chief Antal Puchner declared a state of siege and called on the Romanian peasants (Romanian national guards) he had previously armed to ensure order, while disarming the Hungarian national guards. As was to be expected (Puchner's role as instigator is not yet clear), in the situation that developed, the fired-up Romanian free troops committed more and more atrocities against the defenseless Hungarian minority, and in more than one case a regular campaign of extermination took place. This time, too, the Moţi people were at the forefront of the action, especially the teams led by the aforementioned Avram Iancu. The first massacre took place on 19 October 1848 in Sângătin, followed by Lunca Mureşului, Grindeni, Zlatna, Cricău, Benic, Ighiu, Bucerdea Vinoasă, Ocna Mureş, Unirea. The majority of the massacres were committed by deceit, gaining access to a settlement by pretending peaceful intentions and then exterminating its Hungarian population with selected cruelties. Out of all the atrocities, the genocide in Aiud, in which an estimated 6-800 Hungarians were killed, stands out.[31] In total, around eight thousand Hungarians lost their lives in the massacres, which also significantly changed the ethnic composition of the area. The guilty were never prosecuted, and some of them are now considered national heroes in Romania. For example, a town and significant public spaces bear the name of one of the leaders, Avram Iancu, and recently his portrait was even featured on a banknote.

The events were a huge slap in the face for the politicians of the War of Independence, who realised that their previous policies on nationalities could not lead to results. When the balance of power in Transylvania changed with Bem's accession, Hungarian politicians immediately began to negotiate with the leaders of the Romanian forces. On April 14, 1849, Ioan Dragoş, a Romanian-born member of Parliament, was appointed by Kossuth to negotiate with the leaders of the free forces. They – Avram Iancu and Ioan Buteanu – agreed to this, which led the commander of the local Hungarian forces, Kálmán Csutak, to declare a ceasefire. Preliminary negotiations focused on the following: the Romanian language will be freely used in Romanian schools, churches, and community life; Romanians will be able to submit petitions and defend themselves in criminal cases in Romanian; the Greek Orthodox and Greek Catholic Churches will have equal rights with other churches; and amnesty will be granted to all guilty persons except Bishop Andrei Saguna. Although the parties had almost reached an agreement, the deal failed. Bem was not informed of the trial and therefore did not understand the hesitation of Csutak, whom he replaced because of his passivity. Imre Hatvani, who was replaced, immediately went on the offensive with his troops, causing the Romanian leaders to leave the negotiating table, suspected of treason, and never return during the War of Independence (Dragoş, suspected of intrigue, was lynched by the local crowd). The Romanian resistance was not overcome until Világos.

The behaviour of our nationalities during the War of Independence has shown that the problem is much more serious than our politicians had previously taken it. It has been proven that the question can no longer be solved with the answers given so far. In the case of the Romanians, it was also clear that they were ready to resort to separatist methods to meet their demands. One more thing has become clear. The Hungarian emigrants residing in Western Europe often met their fellow politicians from Old Romania who were also in emigrant status (due to the events of 1848 in the principalities), and during their conversations, it became clear that the framework of concessions promised to the Romanians during the War of Independence was no longer sufficient after Világos. The views of Nicolae Bălcescu,[32] who was the leader of the Romanian emigration, led directly to the intention of creating Greater Romania, which was incompatible with the territorial integrity of the Kingdom of Hungary. World political circumstances played to the advantage of the Bălcescu family: in 1859 the two principalities were united. Only the „third part of the country" was left…

Meanwhile, the liberal Hungarian politicians of the dualist state continued to settle the nationality question where they had left off in 1849. In the Law on Nationalities (Act XLIV of 1868), adopted shortly after the Compromise, the full equality of rights of individuals belonging to nationalities was declared, but the demands of minorities in relation to community rights (partially independent administration in their majority areas, cultural autonomy, free use of language in relations with the state administration) were not incorporated into the text. As has often been mentioned, this was also the most permissive legislation of its kind in contemporary Europe. Let's not forget that France, for example, which is today considered a nation-state, had – and still has – many national citizens who had no „collective" rights at that time, for example, in Corsica, the use of Corsican was prohibited in 1852, precisely in the period under discussion. It is a different matter that, as time and space have passed since the adoption of the law, the administrative officials have complied less and less with these provisions. However, this did not matter much to the Romanians, who began to look beyond the possibilities of the rights they had won within the Kingdom of Hungary. The Romanian newspapers (also available in Transylvania) were increasingly publishing articles on the idea of annexing Transylvania to Romania. The successes achieved in the Romanian-Turkish War of 1877/78 strengthened the faith of the citizens of the new state: now

[31] EGYED, Á., *Erdély, 1848-1849 [Transylvania, 1848-1849]*. Miercurea Ciuc, 1998, Vol. 1, p. 221-228.

[32] Regarding its operation at the time, see DRĂGUŞANU, A., Nicolae Bălcescu în propaganda comunistă. BOIA, L., (ed.), *Miturile comunismului românesc.* Bucharest, 1998, p. 98-132.

political opponents must also reckon with their armed forces. In the meantime, part of the Hungarian Romany population resorted to the political move used by the Hungarians of the Bach era: from 1869 they tried to become passive. However, as this move had no impact on Hungarian domestic politics, the passivity movement faded away within a few years. The history of the Transylvanian Romanian National Party can also be traced back to 1869, to which virtually every Transylvanian Romanian politician joined after that time. The party's public law fate took an interesting turn, as under the laws of the time, a purely ethnic-based party was not allowed to operate in the country. Thus, although the party was not legally recognised, its activities were acknowledged and its leaders were considered by Hungarian politicians to be the leaders of Romanian political movements. The party was not united, it included all Romanian political trends, although its spokesmen increasingly came from the irredentist wing.[33]

Even while the passivity movement was still in operation, Ioan Slavici, the future editor-in-chief of the Sibiu newspaper Tribuna, launched in 1884, took action against it. This newspaper has a completely new tone in Hungarian political life. In addition to criticising the activities of Hungarians in relation to nationalities, he also attacked both the passivist and the more narrowly defined (geographically) Romanian political tendencies in Hungary (those which were most loyal to the Hungarian political leadership). As noted elsewhere: *„However, the main target [of the intellectuals grouped around the newspaper – the author] was the emphatically moderate Romanian National Party, created just a month earlier by Archbishop Miron Románul of Sibiu and Gheorghe S, Judge of the Curia, which unconditionally took the basis of reconciliation and union."*[34] Slavici's slogan („Soarele românilor de la Bucureşci răsare – The Romanians' sun rises from Bucharest") expressed the most emphatic part of his political statement: the whole Romanian nation should follow the guidance of the Romanian state. For this (because of his ideology, which was obviously against the unity of the Hungarian state) he was subject to press trial several times, and in 1888 he was sentenced to one year in prison. After that, he moved permanently to Old Romania, where he played a crucial role in founding one of the most important Romanian irredentist organisations, the Liga Culturală.[35]

In our opinion, the inefficiency and political clumsiness of the Hungarian politicians of the dualism regarding nationality issues, which was due to the activities of the League, culminated in the Memorandum lawsuit, also mentioned by Fráter. But what was this Memorandum lawsuit? In 1891, young intellectuals grouped around the Tribuna produced a leaflet for the youth of the West, published by the League. It listed the insults suffered by the Romanians after 1867, after discussing the history of the Romanians and their role in the history of European culture. To this (due to informal government-level encouragement), a response was prepared by Hungarian university students with the help of the pro-government Romanian professor from Cluj-Napoca, Gergely Moldován, to which in 1892 a counter-response (Replica) was published by the medical student Aurél C. Popovici on behalf of the Romanian young students in Hungary. Replica has attracted considerable publicity in Europe. The international impact of the documents was considered remarkable by both the Romanian and Hungarian sides. The government wanted to take action against the speakers, so Popovici was prosecuted for incitement in 1893, but he escaped abroad to avoid punishment. Encouraged by the international response and realising that the circumstances were favourable (there was a government crisis and election fever in Hungary), the Romanian leaders thought the time had come to address a detailed letter of complaint to the ruler covering all issues. The document is quite self-contradictory, as it attacks the Compromise and the Union on the one hand, and calls for the respect of the laws that were created within this framework on the other. Otherwise, it contained the usual grievances, although its tone towards the Hungarian political leadership perhaps stands out from similar documents to that time.[36]

With the Memorandum, *„in May 1892, a delegation of 237 people, supplemented by peasants, traveled to Vienna, to – in the ironic words of the secretary of the committee – accuse the Hungarian king to the Austrian emperor."*[37] The delegation was not received by Franz Joseph, however, and the sealed document left in his office was soon forwarded to Budapest, where it was returned unopened to the home of the head of the delegation, Ioan Raţiu. The plan was almost an abject failure due to a lack of interest (neither the foreign nor the overall Romanian response was positive). But then the Hungarian political public mood intervened and offered a helping hand. First, the house of Raţiu was vandalised by demonstrators in Torda, and then in May 1893 the government brought proceedings against the signatories of the Memorandum because they had already printed and distributed their document. These cases have already had a big resonance abroad, and the divided Romanian public opinion seemed to unite in defence of the accused. At the end of the trial, extremely severe sentences were handed down: fourteen people were sentenced to between two months and two years in state prison for incitement to sedition in the press, and one person received the maximum five years. The case has very much reinforced the Western European voices about ethnic oppression in Hungary. It shows the Hungarian state's lack of conceptualism that all the convicts were granted amnesty the following year, a fact which of course received no international resonance. Thus, the condemnation of the authors of the Memorandum served no other purpose than to strengthen the negative voices in the foreign press regarding the Hungarian nationality question and to create martyrs for the Romanian movement, martyrs who, with their enhanced authority, could then fight with double effect to achieve their goals.

[33] WHITE, G. W., *Nationalism and territory: constructing group identity in Southeastern Europe*. Lanham, 2000, p. 154-156.
[34] KÖPECZI, B. (ed.), *Erdély története 1-3. [History of Transylvania 1-3].* Budapest, 1986, Vol. 3, p. 1656.
[35] FRÁTER, O., *Erdély román megszállása 1918-1919 [Romanian occupation of Transylvania 1918-1919]*, p. 68.
[36] JELAVICH, B., *History of the Balkans*. Cambridge, 1983, Vol. 2, p. 72.
[37] KÖPECZI, B. (ed.), *Erdély története 1-3. [History of Transylvania 1-3].* Budapest, 1986, Vol. 3, p. 1660.

By the beginning of the 20th century, more and more decision-makers in Hungary had a gloomy view of the future of Transylvania. Among them, Count István Tisza, who was appointed Prime Minister for the first time in 1903, stood out. He, as a Transylvanian landowner, recognised the danger posed by the growing attachment of the Transylvanian Romanians to the old country. He blamed those Hungarian voices which, through their excessive emotions, discouraged more moderate Romanian politicians from negotiating, thereby justifying the position of extremist Romanian opinion formers. The situation was also worsened by the internal political crisis of the last century, although the need to reach an agreement with the Hungarian nationalities was urgent, it was not possible to concentrate on it because of the skirmishes between the Hungarian political sides.

The threatening signs were increasing. On the eve of the war, Tisza began a series of negotiations with the Romanian leaders. In the third and last negotiation, in October 1913, the Hungarian side made many concessions. The use of the mother tongue would have been allowed in the administration and in the judiciary of first instance, officials would have been obliged to learn the national language of their place of operation, Romanian would have been taught in elementary schools and high schools in the nationality areas, and a Romanian high school would have been established, too. It would have given the Romanians thirty electoral districts. In return, Tisza asked for the abandonment of the politics of grievances and the permanent acceptance of the framework of the state (the Compromise and the union). In the end, the agreement did not materialise, mainly because of the change of opinion in Regatian politics (the successes in the Second Balkan War had increased the leaders' self-confidence and they were more clearly in favour of Romanian irredentism in Transylvania) and the Romanian leaders' doubts (whether the masses behind them would support their decision). Thus, the last chance for a political settlement until the outbreak of the First World War, which broke out shortly afterwards, was thwarted.[38]

On the eve of World War I, not only did the stalled negotiations indicate that tensions between the two nations were growing. The Hungarians in Transylvania experienced warning signs that the breaking of the hegemony of the Hungarians in Transylvania had already entered the minds of the broad Romanian (Transylvanian and Rhaetian) sections of the population. An interesting testimony to this claim was a strange „act of terror" committed against a symbolic monument of the Hungarians. In connection with the millennium celebrations, the state erected grandiose monuments at seven (in most cases border) points of historical Hungary, which also have symbolic meaning. The sites selected on the suggestion of Kálmán Thaly were Ópusztaszer, Mukachevo, Pannonhalma, Zobor Hill near Nitra, Devín, Brasov and Zemun. The 20.3 metre high monument on the top of Cenk Hill in Brasov was inaugurated on 15 October 1896 in the presence of the Minister of the Interior, Dezső Perczel. The monument, created by Gyula Jankovics, consisted of a column and a 3.5 m high statue of a conquering Hungarian warrior on top of it. Due to its location (the Cenk Hill is visible from a great distance from the relatively flat Barcovian and Tricisian terrains to the North) and its size, the monument was extremely impressive, announcing from afar the thousand-year presence of the Hungarians to those coming towards Brasov. The symbol immediately became a thorn in the flesh of locals and Romanians visiting the city. In 1906, for example, a Romanian flag was pinned next to it.[39] However, far more serious than this prank was the „act of terror" committed against the monument on 27 September 1913 by two Bessarabian students, Ilie Catarau and Timotei Kirilov.[40] The two Romanians, both foreign residents, sneaked into the country only to destroy the symbol of Hungarianism, thus demonstrating the determination of the Romanian people to change the balance of power in Transylvania. The two saboteurs sneaked up to the top of the mountain at around 6 pm and tried to blow up the monument with dynamite. The execution of the operation was not perfect, the monument was „only" significantly damaged, but it remained standing. However, the damaged statue could not withstand the first heavy snowfall of the following winter, and collapsed under the weight of the snow. The identities of the two perpetrators were not officially revealed in Romania until ninety years later, and some Romanian circles now hail them as national heroes.

By 1914, the Greater Romania plan, proclaimed as a programme by the political and scientific elite, had existed in Romania for a few decades. Nicolae Bălcescu, the national liberal Romanian revolutionary leader of 1848, for example, declared that the new country of the Romanians would sooner or later be where they spoke Romance, the Romance language. By then, „from the Dniester to the Tisza" had become one of the main slogans of Romanian irredentism, and it was the opening line of the xenophobic poem Doina by Mihai Eminescu, the most famous Romanian poet of the period. This meant that beyond the Regatta, they claimed Bessarabia, which belonged to Russia at the time, the eastern territories of the Kingdom of Hungary, and the part of Dobruja belonging to Bulgaria. However, two of the three states with which it had territorial claims – the Monarchy and Bulgaria – belonged to the Central Powers and were therefore allies. In 1914, however, Romania remained neutral and did not take any action against Russia to assert its territorial claims.[41]

Due to the above circumstances – despite the alliance with the Central Powers from 1882 – the leading politicians in Hungary did not trust Romania, since its main foreign policy goal, the annexation of Transylvania could only be achieved if it broke with its former allies. The opposition to the nominal ally was, if possible, further intensified by the fact that in the Balkan War of 1913, the Monarchy supported Bulgaria, which was

[38] BERTÉNYI, I. Jr., Tisza István és az I. világháború [István Tisza and World War I]. In: *Mítoszok, legendák, tévhitek a 20. századi magyar történelemről [Myths, legends, and misconceptions about 20th-century Hungarian history].* Romsics, I. (ed.), Budapest, 2002, p. 56-61.

[39] *Brassói Lapok [Brasov Newspapers]*, 24 May 1906, p. 3.

[40] *Brassói Lapok [Brasov Newspapers]*, 28 September 1913, p. 3. *Brassói Lapok [Brasov Newspapers]*, 1 October 1913. p. 3.

[41] WHITE, G. W., *Nationalism and territory: constructing group identity in Southeastern Europe*. Lanham, 2000, p. 138.

hostile to Romania. It was precisely for these reasons that Tisza, as Prime Minister, was reluctant to give his consent to the declaration of war against the Serbs that triggered the war.[42] Finally, under strong Austrian – and not least German – pressure, the declaration of war was sent, and what is now known as the First World War began.

Tisza was not wrong about Romania's intentions. It was only a matter of time before the Romanian declaration of war was issued, the delay being caused mainly by the fears of leading Romanian politicians about the consequences of a possible failure.[43] Since the outbreak of the war, it has been important for the Entente to keep the forces of the Central Powers engaged on as many fronts as possible. Therefore, since the beginning of the war, secret negotiations have been held to try to persuade Romania to attack Hungary. However, as Romanian politicians wanted to gain as much territory as possible without taking risks, the negotiations did not lead to results for a long time. Finally, on August 17, 1916, the secret treaty of Bucharest was signed between Romania and the Entente, in which the parties stated that if Romania entered the war on the Entente's side and remained at war until its end, i.e. if it did not conclude a special treaty, then after the war it would be granted the territories of Hungary that it claimed, roughly up to the Tisza river line.[44]

The surprise attack launched ten days later initially brought quick successes, then the combined Austro-Hungarian and German forces drove the Romanians back across the Carpathians, while the combined Bulgarian-German army attacked from the South, and on 6 December Bucharest fell. But Romania, fearful of its treaty territorial claims, was only willing to engage in peace negotiations when a strong and neighbouring Russia, which had backed the remaining Romanian state, withdrew from the war, leaving it alone in the region with no other choice. The peace treaty was signed in Bucharest on 7 May 1918. The peace provisions were extremely favourable to Romania from a territorial point of view. Only a narrow strip of land, a few kilometers wide, in the Carpathian Basin was annexed to Hungary, the main purpose of the annexation being to improve the defensibility of the Hungarian border. Dobrogea, whose status was always disputed, was transferred to Bulgaria. However, as mentioned above, Romania was given Bessarabia, which had previously been part of the territory of its ally, Russia, but the Romanian army, taking advantage of Russian internal political difficulties, invaded it. Although the balance of the war was positive for Romania from a territorial perspective, the country lost a lot economically and – partly in connection with this – in terms of its military power. The Romanian economy came under the control of the Central Powers, and its raw materials were used by Vienna and Berlin. Although they were free to try to reorganise their army with French assistance in the unoccupied third of the country's former territory, it proved almost impossible, both because of the two hundred and fifty thousand prisoners of war, dead and wounded, and because of the stock of raw materials seized by foreign powers.

However, six months later, at the end of the First World War, after the occupiers had left, Romania declared itself a belligerent party again, and soon occupied a good part of Hungary in a policing capacity, even temporarily occupying the North Danube region. Thus came the peace conference, where both the geopolitical interests of the victorious powers and the powerful lobbying of Queen Mary promised success in the creation of Greater Romania.

One of Romania's national holidays is December 1st, with which the state commemorates the Great Assembly of Alba Iulia held on December 1st, 1918. At this assembly, the Transylvanian Romanians declared their accession to Romania, anticipating the decision of the peace conference. Romania, however, was not satisfied with a narrow Transylvania, but also claimed a good part of the Transdanubian region, relying on its military presence there. The Treaty of Trianon, signed on 4 June 1920, gave it less than that, but more than Transylvania, its borders extended far beyond ethnic boundaries, and it also received the pure Hungarian areas of the eastern edge of the Great Plain. At the same time, Romania invaded the Democratic Republic of Moldova, which had been proclaimed earlier that year, on 9 April 1918, in the territory of historical Bessarabia. The reference was to a popular assembly in Chisinau, similar to the one in Alba Iulia. This action was confirmed by the Treaty of Versailles on 28 October 1920. With these acts, Greater Romania was also established in the international legal sense.

[42] BERTÉNYI, I. Jr., Tisza István és az I. világháború [István Tisza and World War I]. In: *Mítoszok, legendák, tévhitek a 20. századi magyar történelemről [Myths, legends, and misconceptions about 20th-century Hungarian history].* Romsics, I. (ed.), Budapest, 2002, p. 80-85.

[43] CSÓTI, CS. Az 1916. évi erdélyrészi háború és a Székelyföld [The Transylvanian War of 1916 and Szeklerland]. In: *Limes*, Vol. 17, No. 1, 2004, p. 51.

[44] For more information on the negotiations and the circumstances of the signing of the convention, see: RAFFAY, E., *A vajdaságoktól a birodalomig [From voivodeships to empire].* Szeged, 1989, p. 131-138.

Annex 2:
XIX. Jahrestreffen der Jungen Romanisten

An der *Alma Mater Studiorum* – Universitŕ di Bologna fand am 29. und 30. Mai 2025 das XIX. Jahrestreffen der Jungen Romanisten statt. Die Tagung wurde von Elena Pezzato Heck vom Lehrstuhl für Römisches Recht an der Universität Bologna organisiert.

Die offizielle Eröffnung der Tagung fand am Donnerstag, den 29. Mai, um 9 Uhr statt, mit Begrüßungsreden von Professor Federico Casolari, Dekan der Juristischen Fakultät, und Professor Giovanni Luchetti, Ordinarius für Römisches Recht an derselben Universität.

Professor Filippo Briguglio, ebenfalls Ordinarius für Römisches Recht an der *Alma Mater Studiorum*, berichtete von seinen Forschungserfahrungen im Ausland – insbesondere in Deutschland und Österreich – und betonte, wie wichtig es sei, ein Netzwerk der Zusammenarbeit und Freundschaft zwischen jungen Wissenschaftlern dieses Fachgebiets aufzubauen, da dies ein grundlegendes Element für die wissenschaftliche und persönliche Entwicklung sei.

Im Laufe der verschiedenen Sessionen der Tagung folgten zahlreiche Beiträge junger Wissenschaftler aus verschiedenen europäischen Universitäten, die sich mit dem Römischen Recht und der Rechtsgeschichte aus einer vergleichenden und interdisziplinären Perspektive befassten. Neben den wissenschaftlichen Diskussionen nahmen die Teilnehmer auch an verschiedenen geselligen und kulturellen Veranstaltungen teil. So fanden eine Führung durch die Altstadt von Bologna, die sich auf Orte und Themen von juristischem Interesse konzentrierte, sowie am letzten Tag ein Ausflug nach Ravenna statt.

Die erste Vortragsreihe unter dem Vorsitz von Robin Repnow (Heidelberg) umfasste zwei Beiträge, die sich mit dem Vergleich zwischen römischen Rechtsinstituten und geltendem Recht befassten. Den Auftakt machte Michael Binder (Wien) mit einem Vortrag mit dem Titel *„Quia interest nostra potius non solvere quam solutum repetere. Grenzfälle der compensatio im Römischen Recht und Österreichischen Zivilrecht"*, gefolgt von Ana Aurelia Kumin (Wien) mit dem Thema *„Das Kreditmandat – Ein Vergleich des römischen mandatum qualificatum mit dem geltenden Recht"*. Die zweite Vortragsreihe unter dem Vorsitz von Marcel Liebsch (Tübingen) umfasste Beiträge von Máté Giovannini (Budapest) zum Thema *„Klagenkonkurrenz bei Afrikan. Bemerkungen zu D. 21, 1, 51 pr.-1"* und István Bajánházy (Miskolc) zum Thema *„Fischereirecht im antiken Rom"*.

Nach der Mittagspause sprach Julian Kessler (Salzburg) über *„Ciceros Verständnis der republikanischen Rechtsfindung als historisch-dialektischer Prozess"*. Anschließend referierte Marcel Liebsch über *„Freiheit ohne Freilassung – repetitam videri libertatem divus Pius rescribsit"*.

Der zweite Tag der Tagung begann unter dem Vorsitz von Ana Aurelia Kumin mit einem Vortrag von Steffen M. Jauß (Frankfurt am Main) zum Thema „Real- und Konsensualverträge im altbabylonischen Recht. Zum Einfluss der Romanistik auf die Altorientalistik". Anschließend sprach Robin Repnow über *„Landwirtschaft, Steuererhebung und Privatrechtsdogmatik bei Honorius"*.

Unter den Beiträgen der gastgebenden Universität, die von Marcel Liebsch vorgestellt wurden, referierte Elena Pezzato Heck über *„Die Ehescheidung zwischen furores und Dämonen"*, während Sofia Arrigucci über ihre Forschungsarbeit *„Zwischen Verbot und Ausnahme: Die Veräußerung des kirchlichen Vermögens und die Novellen 40 und 120 von Justinian"* sprach.

Die letzte Sitzung wurde von István Bajánházy geleitet. Radek Černoch (Bamberg) stellte einige Entwicklungen des Forschungsprojekts zur Sammlung und Analyse spätantiker Kaiserkonstitutionen vor, das von Professor Peter Riedlberger koordiniert wird, mit einem Vortrag mit dem Titel *„Spätantike*

Kaiserkonstitutionen (AntCoCo)". Abschließend sprach Charles E. Müller (Berlin) über seine Tätigkeit im Rahmen der Entwicklung einer Software für den Aufbau wissenschaftlicher Datenbanken, die durch das FUELS-Projekt „Deutschland AG" unter der Leitung von Professor Andreas Engert initiiert wurde.

Nach den abschließenden Worten von Professor Gianni Santucci, Ordinarius für Römisches Recht an der Universität Bologna, und einer kurzen Mitgliederversammlung endete die Tagung mit der Ankündigung, sich im Frühjahr des kommenden Jahres an der Universität Heidelberg wiederzusehen.

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Quia interest nostra potius non solvere quam solutum repetere. A Case Study on the Limits of *compensatio* in Roman Law and Austrian Civil Law*

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Abstract

In certain legal situations, the defendant (the debtor) has a counterclaim against the plaintiff (the creditor). However, not every counterclaim enables the defendant to successfully raise an objection (exceptio). The concept of compensatio is recognised in Roman law and Austrian civil law, and furthermore, the legal maxim dolo facit, qui petit quod redditurus est, is applicable in both Roman law and Austrian civil law. In this article, cases involving a compensatio or the legal maxim dolo facit, qui petit quod redditurus est are analysed. Following the analysis of these cases, a distinction between the concept of compensatio and the legal maxim dolo facit, qui petit quod redditurus est is made.

Keywords: *Roman law; compensatio; set-off; lis; exceptio doli; guarantee; ususfructus; legal maxim; confusio; Austrian civil law; dolo facit, qui petit quod redditurus est.*

1. Introduction

In a legal relationship between two parties, it can occur that both parties have claims (receivables) against each other, meaning that both parties have the function of being a creditor and a debtor (*debitor*) at the same time. These claims and obligations between the parties can arise from the same *causa* (e.g., a contract) or from different *causae*. If each party were to fulfil his obligation, two payments would be necessary, as demonstrated by the following example.

X could claim 60 sesterces from Y due to a *mutuum*, and Y could claim 60 sesterces from X due to a *stipulatio*. After the two payments, the financial situation of the parties (X and Y) would not change.[1] If Y were sued by X, Y would have an interest in not making a payment to X, because after the payment to X, Y would have to bear the insolvency risk of X.[2] Furthermore, two lawsuits between X and Y would be an unnecessary burden for both parties.[3]

The concept of *compensatio* (set-off) between the claims of two parties was originally established by Roman jurists.[4] Specifically, if the requirements for a *compensatio* were met, the claims and obligations would both expire. Therefore, in the abovementioned example, X's claim for 60 sesterces against Y, Y's claim for 60 sesterces against X, X's obligation for 60 sesterces towards Y, and Y's obligation for 60 sesterces towards X would all expire. In Roman law, a *compensatio* was possible if both claims[5] were mutual, equal, valid, due,[6] and (likely) liquid.[7]

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1 See ZIMMERMANN, R., *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford, 1996, p. 760.

2 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, 1970, p. 57-59.

3 ZIMMERMANN, *Obligations*, p. 760.

4 ZIMMERMANN, *Obligations*, p. 760.

5 These requirements (mutual, equal, valid, due, and liquid) are listed by KASER, M. – KNÜTEL, R. – LOHSSE, S., *Römisches Privatrecht*, 22nd edn. München, 2021, p. 379; see further PICHONNAZ, P., § 111 Aufrechnung (compensatio). In: BABUSIAUX, U. – BALDUS, C. – ERNST, W. – MEISSEL, F.-S. – PLATSCHEK, J. – RÜFNER, T. (ed.), *Handbuch des Römischen Privatrechts II*, Tübingen, 2023, p. 3024.

6 A distinction between claims being valid and due can be made but is not necessary. Both terms (valid and due) can be summarised with the term "enforceable"; see DERNBURG, H., *Die Compensation nach römischem Rechte*, Heidelberg, 1854, p. 429-430 ("*Exigibilität*").

7 This criterion was not clearly defined by Roman jurists; see PICHONNAZ, § 111 Aufrechnung, p. 3001. A counterclaim that was not easy to determine and prove could be qualified as illiquid; see PICHONNAZ, § 111 Aufrechnung, p. 3001; see further PICHONNAZ, P., *La compensation. Analyse historique et comparative des modes de compenser non conventionnels*, Fribourg, 2001, p. 220.
Different: DERNBURG, *Compensation*, p. 466.

Similar to the legal situation in Roman law, the concept of *compensatio* exists in Austrian civil law. The requirements for a party to perform a *compensatio* are listed in sections 1438 and 1439 of the Austrian Civil Code.[8] According to these sections of the Austrian Civil Code, the claim and the counterclaim need to be mutual, equal, valid, and due for a *compensatio* to occur.

In the next sections, I analyse the circumstances under which a party could perform a *compensatio* in Roman law and Austrian civil law. Furthermore, it is necessary to explore whether two payments between the parties have to be made if one of the requirements (i.e., the claim and the counterclaim being mutual, equal, valid, or due) is not met.

2. Roman law

2.1 Introduction

In Roman law, a distinction was made between *bonae fidei iudicia* and *iudicia stricti iuris*.[9] Gaius explained how a *compensatio* could occur in the context of *bonae fidei iudicia*.

Gai. 4.63

Liberum est tamen iudici nullam omnino invicem conpensationis rationem habere, nec enim aperte formulae verbis praecipitur, sed quia id bonae fidei iudicio conveniens videtur, ideo officio eius contineri creditur.

Now the judge is free to take no account whatever of reciprocal liability for set-off; for it is not something explicitly triggered by the wording of the formula. But because it is seen as appropriate to proceedings involving good faith, it is therefore believed to be within the scope of his duties.[10]

As Gaius demonstrated, it was generally up to the discretion of the *iudex* to perform[11] a *compensatio*, and thus, the *iudex* had the possibility to omit a *compensatio* (*liberum est tamen iudici nullam omnino invicem conpensationis rationem habere*). In the *formula* of an action, there was no reference to the *compensatio*.

However, in certain cases, the *iudex* was obliged to perform a *compensatio* due to his *officium*. In the literature, it is argued that the *iudex* had to ensure procedural efficiency, which could require him to perform a *compensatio* if both claims were evident.[12] If the *iudex* did not perform the *compensatio* and, thus, condemned the defendant to make a payment to the plaintiff, the defendant had to enforce his own claim against the plaintiff (i.e., the counterclaim) in another lawsuit.[13]

A party could also perform the *compensatio* in the context of *iudicia stricti iuris*. Generally, the plaintiff had to take the claim of the defendant (the counterclaim) into consideration, which means that he would have to subtract[14] the sum that the defendant could claim from him.[15] This situation can be demonstrated with the following example.

X promised Y the payment of 30 sesterces in the form of a *stipulatio*. Subsequently, Y promised X the payment of 15 sesterces in the form of a *stipulatio*. After the due date of both claims, Y wanted to sue X.

In such a case, Y would have to take X's claim against Y (the counterclaim) into account[16] and, thus, could only claim 15 sesterces from X with the *condictio* due to the *compensatio*. If Y claimed 30 sesterces from X, the *praetor* could deny Y's action (*denegatio actionis*),[17] but the *praetor* did not have to deny such an action. If the *praetor* did not deny the action of the plaintiff, the defendant could raise an objection, and such an objection is mentioned in the following source.

Inst. 4.6.30

[…] Sed et in strictis iudiciis ex rescripto divi Marci opposita doli mali exceptione compensatio inducebatur. […].

[…] Even in actions stricti juris, a rescript of the Emperor Marcus permitted set-off to be claimed, by opposing the exception of fraud; […].[18]

According to a *rescriptum* of the emperor Marcus Aurelius, the defendant had the opportunity to defend himself with an *exceptio doli* against the action of the plaintiff, meaning that the defendant could enforce the *compensatio* (*sed et in strictis iudiciis ex rescripto divi Marci opposita doli mali exceptione compensatio inducebatur*).[19] Therefore, the defendant was not forced to make a payment and then enforce his counterclaim, which would have meant him sharing the insolvency risk of the plaintiff.

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[8] See section "3.1 Introduction".

[9] See ZIMMERMANN, *Obligations*, p. 761-764.

[10] Translation: GORDON, W. M. – ROBINSON, O. F., *The Institutes of Gaius*, London, 2001, p. 453.

[11] In the context of *bonae fidei iudicia*, a *compensatio* was only possible if both claims resulted from the same *causa*; see ZIMMERMANN, *Obligations*, p. 762; KASER – KNÜTEL – LOHSSE, *Privatrecht*, p. 379; 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. 32.

[12] PICHONNAZ, § 111 Aufrechnung, p. 2998; see further KASER, M., *Das Römische Privatrecht I*, 2nd edn. München, 1971, p. 645.

[13] See PICHONNAZ, § 111 Aufrechnung, p. 2998-3000.
D. 13.6.18.4 (Gaius *libro* 9 *ad edictum provinciale*): *Quod autem contrario iudicio consequi quisque potest, id etiam recto iudicio, quo cum eo agitur, potest salvum habere iure pensationis. Sed fieri potest, ut amplius esset, quod invicem aliquem consequi oporteat, aut iudex pensationis rationem non habeat, aut ideo de restituenda re cum eo non agatur, quia ea res casu intercidit aut sine iudice restituta est: dicemus necessariam esse contrariam actionem.*
Translation: BIRKS, P. In: WATSON, A. (ed.), *The Digest of Justinian I*, 2nd edn. Philadelphia, 1998, p. 405-406: *Whatever someone can win in the counteraction he can also obtain by set-off in a direct action brought against him. But it can happen that there is more to be obtained on the borrower's claim, or the judge may fail to take account of the set-off, or else no action may be brought against him for recovery of the thing either because it has been destroyed accidentally or returned without recourse to litigation. We will say then that the counteraction is necessary.*

[14] In Roman law, a unilateral declaration (by a party) was not necessary for a *compensatio* to take place; see ZIMMERMANN, *Obligations*, p. 761-762; KASER – KNÜTEL – LOHSSE, *Privatrecht*, p. 379. See further DERNBURG, *Compensation*, p. 455-459.

[15] KASER, *Privatrecht*, p. 646; PICHONNAZ, § 111 Aufrechnung, p. 3024.

[16] See ZIMMERMANN, *Obligations*, p. 760-764.

[17] See KASER, *Privatrecht*, p. 646; see further PICHONNAZ, § 111 Aufrechnung, p. 2996-2997.

[18] Translation: SANDARS, T. C., *The Institutes of Justinian*, Westport, 1970 (reprint), p. 449-450.

[19] See KASER, *Privatrecht*, p. 646.

In the next section, the reason why Roman jurists allowed the *compensatio* is analysed. Furthermore, it is necessary to compare the *compensatio*, which could lead to an *exceptio doli*, to the legal maxim *dolo facit, qui petit quod redditurus est*.

2.2 *Dolo facit, qui petit quod redditurus est*

A *compensatio* would lead to simplification of the legal situation, because both parties were not required to take further measures against each other after the *compensatio* took place. As indicated in the title of this paper, the Roman jurist Pomponius explained that this simplification was the main reason why the concept of *compensatio* was considered necessary.

D. 16.2.3 (Pomponius *libro* 25 *ad Sabinum*)
Ideo compensatio necessaria est, quia interest nostra potius non solvere quam solutum repetere.
Therefore, set-off is necessary because it is important for us rather not to pay than to reclaim what has been paid.[20]

Pomponius highlighted that a *compensatio* could prevent unnecessary litigation, because without it, two lawsuits would occur,[21] and the defendant would be forced to make a payment to the plaintiff and subsequently reclaim this payment (*quia interest nostra potius non solvere quam solutum repetere*).[22] If all the requirements for the *compensatio* were met,[23] the defendant could receive an *exceptio doli* against the plaintiff. However, such an *exceptio doli* always seemed to be possible if the plaintiff claimed from the defendant a sum that he would have to return to the defendant.

D. 44.4.8 pr. (= D. 50.17.173.3)-1 (Paulus *libro* 6 *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.
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.[24]

The plaintiff (the creditor) acts fraudulently if he claims something from the defendant (the debtor) that he would be forced to return (*dolo facit, qui petit quod redditurus est*), and thus, in such situations, the defendant could raise an *exceptio doli*.[25]

In certain cases, the *exceptio doli* could be explained with a *compensatio* as well as with the legal maxim *dolo facit, qui petit quod redditurus est*. The legal maxim *dolo facit, qui petit quod redditurus est* was applicable if the *lis* of both actions were identical, whereas the *compensatio* required equal claims.[26] For example, if both parties had a claim for money against each other, an *exceptio doli* could be explained either with the *compensatio* or with the legal maxim *dolo facit, qui petit quod redditurus est*.[27]

In the following section, cases are analysed in which one requirement for the *compensatio* was not met, meaning the *compensatio* was not possible. However, it is questionable whether the defendant could still defend himself with an *exceptio doli*, because the plaintiff acted fraudulently according to the legal maxim *dolo facit, qui petit quod redditurus est*.

2.3 Mutual claims

A *compensatio* was only possible if the claims were mutual, meaning that the defendant could only benefit from a *compensatio* if he himself had a claim against the creditor (i.e., a counterclaim).[28] The legal maxim *dolo facit, qui petit quod redditurus est* could be applicable even if the claims were not mutual.

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.
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.[29]

According to the cited opinion of Iulianus, the *promissor* (*ego*; the drawee) could defend himself against the action of the *stipulator* (the obligee) with an *exceptio doli*.[30] This objection could be

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[20] Translation: JONES, R. E. In: WATSON, A. (ed.), *The Digest of Justinian II*, 2nd edn. Philadelphia, 1998, p. 9.

[21] See WACKE, A., Das Rechtssprichwort. Dolo facit, qui petit quod (statim) redditurus est. In: *Juristische Arbeitsblätter*, vol. 10, 1982, p. 477-478; LAMBRINI, P., *Dolo generale e regole di correttezza*, Padova, 2010, p. 47 n. 148.

[22] See further PICHONNAZ, *La compensation*, p. 189, 207, 235.

[23] It was possible for the parties to agree in advance that a *compensatio* would not be possible. In such cases, the plaintiff could counter the *exceptio doli* with a *replicatio pacti*; see DERNBURG, *Compensation*, p. 440-441.

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

[25] PICHONNAZ, *La compensation*, p. 176-178; MADER, P., Dolo facit qui petit quod redditurus est. In: SCHERMAIER, M. J. – RAINER, J. M. – WINKEL, L. C. (ed.), *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*, Köln et al., 2002, p. 417-418.

[26] WACKE, Rechtssprichwort, p. 478.

[27] See WACKE, Rechtssprichwort, p. 478.

[28] D. 16.2.23 (Paulus *libro* 9 *responsorum*): *Id quod pupillorum nomine debetur si tutor petat, non posse compensationem obici eius pecuniae, quam ipse tutor suo nomine adversario debet.*
Translation: JONES, *Digest*, p. 11: *If a tutor claims what is owed to the pupils in their name, there cannot be set-off of the money which that tutor owes to the opponent in his own name.*
See further DERNBURG, *Compensation*, p. 377-378.

[29] Translation: BEINART, *Digest*, p. 150.

[30] BINDER, M., Defective Cover and Underlying Debt Relationship in the Context of delegatio obligandi: A Comparison of D. 44.4.7.1 and § 1402 ABGB (Austrian Civil Code). In*: Journal on European History of Law,* vol. 15/2, 2024, p. 195.

justified with the legal maxim *dolo facit, qui petit quod redditurus est*, because after a payment from the *promissor* (*ego*) to the *stipulator*, the *promissor* (*ego*) would be entitled to claim this payment from the drawer (*tu*) with a *condictio indebiti*, and the drawer (*tu*) could demand his payment to the *stipulator* back from the *stipulator* with another *condictio indebiti*.[31] Iulianus did not allow a circuity of action[32] (i.e., a circuit of actions).[33]

In the case presented by Ulpianus, there were no mutual claims between the *promissor* (*ego*) and the *stipulator*, and thus, the *compensatio* was not possible. At the time when the *promissor* (*ego*) was sued by the *stipulator*, the *promissor* (*ego*) did not even have a valid claim against the drawer (*tu*) because no payment had occurred.

Nevertheless, the *stipulator* claimed something from the *promissor* (*ego*) that the *promissor* (*ego*) would eventually receive back, and thus, the *stipulator*'s action (the *actio ex stipulatu* or *condictio*) could qualify as fraudulent. Therefore, the *promissor* (*ego*) received an *exceptio doli* against the *stipulator*, which was justified with the legal maxim *dolo facit, qui petit quod redditurus est*.[34]

2.4 Equal claims

A *compensatio* could only take place if the plaintiff's claim against the defendant and the defendant's claim against the plaintiff (i.e., the counterclaim) were equal.[35] However, claims resulting from property rights and contractual claims were not equal. In the next source, the plaintiff, who had a *rei vindicatio* against the defendant, was obliged to transfer the *res* to the defendant due to a contract.

D. 39.6.42 pr. (Papinianus *libro* 13 *responsorum*)

Seia cum bonis suis traditionibus factis Titio cognato donationis causa cessisset, usum fructum sibi recepit et convenit, ut, si Titius ante ipsam vita decessisset, proprietas ad eam rediret, si postea superstitibus liberis Titii mortua fuisset, tunc ad eos bona pertinerent. Igitur si res singulas heredes Lucii Titii vindicent, doli non inutiliter opponetur exceptio. […].

Seia made a series of deliveries and ceded her goods by way of gift to Titius, a cognatic relative of hers, but reserved the usufruct for herself, arranging that if Titius predeceased her, ownership of the goods would revert to her and that if she later died while Titius's children were still alive, the goods would then belong to them. Hence, if the heirs of Lucius Titius should make a vindicatio of the individual pieces of property, a defense of fraud will be effective against them. […].[36]

The aforementioned case, which focuses on a *donatio mortis causa*, was originally mentioned in the *responsa* of Papinianus. Seia wanted to make a *donatio* (donation) to Titius and, thus, transferred[37] some of her goods to Titius (*Seia cum bonis suis traditionibus factis Titio cognato donationis causa cessisset*). However, both parties agreed that Seia should receive an *ususfructus* over the transferred goods (*usum fructum sibi recepit*).

Furthermore, Seia and Titius consented that if Titius were to die before Seia, the heirs of Titius would be obliged to transfer the goods back to Seia (*et convenit, ut, si Titius ante ipsam vita decessisset, proprietas ad eam redirect*). After the death of Seia, the goods that Seia received back from the heirs of Titius would be transferred to the children[38] of Titius (*si postea superstitibus liberis Titii mortua fuisset, tunc ad eos bona pertinerent*).

In the case mentioned in D. 39.6.42 pr., Titius indeed died before Seia. The heirs of Titius sued Seia[39] with the *rei vindicatio*. Seia also had a claim against the heirs of Titius because they were obliged to transfer the ownership of the *res* back to Seia due to the agreement between Seia and Titius.

It was questionable whether Seia could defend herself against the heirs of Titius. A *compensatio* was not possible because the claim of the heirs of Titius against Seia, which resulted from a property right, and the claim of Seia against the heirs of Titius, which resulted from a contract, were not equal.

Nevertheless, Seia could still successfully defend herself with an *exceptio* (*doli*) against the heirs of Titius (*igitur si res singulas heredes Lucii Titii vindicent, doli non inutiliter opponetur exceptio*), as the heirs of Titius demanded something from Seia that they would be required to return to Seia due to the contract between Titius and Seia. Therefore, the *exceptio* (*doli*) of Seia against the heirs of Titius could be justified with the legal maxim *dolo facit, qui petit quod redditurus est*.[40]

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31 SACCONI, G., *Ricerche sulla delegazione in diritto romano*, Milano, 1971, p. 94; BINDER, Underlying Debt Relationship, p. 195.

32 See further WILLIAMS, G. L., *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-law Dominions*, London, 1951, p. 121, 217; WACKE, Erlaß, p. 57-58.

33 BINDER, Underlying Debt Relationship, p. 195.

34 WACKE, Erlaß, p. 57; BINDER, Underlying Debt Relationship, p. 195.

35 Gai. 4.66: *Inter conpensationem autem, quae argentario opponitur, et deductionem, quae obicitur bonorum emptori, illa differentia est, quod in conpensationem hoc solum vocatur, quod eiusdem generis et naturae est: veluti pecunia cum pecunia conpensatur, triticum cum tritico, vinum cum vino, adeo ut quibusdam placeat non omni modo vinum cum vino aut triticum cum tritico conpensandum, sed ita si eiusdem naturae qualitatisque sit. […].*
Translation: GORDON – ROBINSON, *Gaius*, p. 455: *There is this difference between the set-off which is imposed on the banker and the deduction applied to the buyer of a bankrupt estate; in set-off only things of the same class and type are invoked, for instance, money is set-off against money, wheat against wheat, wine against wine, to such an extend that it is accepted by some authorities that set-off must be made not against any kind of wine or of wheat, but only to that of the same type and quality. […].*
See further DERNBURG, *Compensation*, p. 411.

36 Translation: TUPLIN, C. J. In: WATSON, A. (ed.), *The Digest of Justinian III*, 2nd edn. Philadelphia, 1998, p. 420.

37 For more information, see AMELOTTI, M., *La "donatio mortis causa" in diritto romano*, Milano, 1953, p. 107-108.

38 It is important to make a distinction between the heirs of Titius and the children of Titius; see RÜGER, D., *Die donatio mortis causa im klassischen römischen Recht*, Berlin, 2011, p. 50, 54.
Different: SIMONIUS, P., *Die Donatio Mortis Causa im klassischen römischen Recht*, Basel, 1958, p. 160.

39 AMELOTTI, *Donatio mortis causa*, p. 109; RÜGER, *Donatio mortis causa,* p. 50-54.
Different: NOORDRAVEN, B., *Die Fiduzia im römischen Recht*, Amsterdam, 1999, p. 106-108 assumes that Seia sold a *res* to a third party, and thus, the third party was sued by the heirs of Titius.

40 HAYMANN, F., Zur lex 42 pr. D. de mortis causa donationibus, 39,6. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 38, 1917, p. 223; AMELOTTI, *Donatio mortis causa*, p. 109; SIMONIUS, P., *Donatio Mortis Causa*, p. 160.

2.5 Valid claims

For a *compensatio*, it was necessary that the plaintiff's claim against the defendant and the defendant's claim against the plaintiff (the counterclaim) were both enforceable. A claim was not valid if the claim had not yet been created because it depended on a *conditio* or if the other party had an *exceptio* against the claim.[41] In the next source, Paulus describes a case in which the plaintiff could not successfully sue the defendant for the whole amount, although the defendant's claim was not yet created at the time when he was sued by the plaintiff.

D. 46.1.71 pr. (Paulus *libro* 4 *quaestionum*)

Granius Antoninus pro Iulio Pollione et Iulio Rufo pecuniam mutuam accipientibus, ita ut duo rei eiusdem debiti fuerint, apud Aurelium Palmam mandator exstitit: Iulii bona ad fiscum venerunt: similiter et creditori fiscus successerat. Mandator allegabat se liberatum iure confusionis, quia fiscus tam creditori quam debitori successerat. Et quidem si unus debitor fuisset, non dubitabam sicut fideiussorem, ita et mandatorem liberatum esse: quamvis enim iudicio convento principali debitore mandator non liberetur, tamen ubi successit creditor debitori, veluti solutionis iure sublata obligatione etiam mandator liberatur, vel quia non potest pro eodem apud eundem quis mandator esse. Sed cum duo rei promittendi sint et alteri heres extitit creditor, iusta dubitatio est, utrum alter quoque liberatus est, ac si soluta fuisset pecunia, an persona tantum exempta confusa obligatione. Et puto aditione hereditatis confusione obligationis eximi personam: sed et accessiones ex eius persona liberari propter illam rationem, quia non possunt pro eodem apud eundem obligati esse, ut quemadmodum incipere alias non possunt, ita nec remaneant. Igitur alterum reum eiusdem pecuniae non liberari et per hoc nec fideiussorem vel mandatorem eius. Plane quia is mandati iudicio eligere potest vel creditorem, competituram ei exceptionem doli mali, si coeperit conveniri. Cum altero autem reo vel in solidum, si non fuerit societas, vel in partem, si socii fuerunt, posse creditorem agere. Quod si creditor fideiussori heres fuerit vel fideiussor creditori, puto convenire confusione obligationis non liberari reum.

Granius Antoninus was mandator to Aurelius Palma on behalf of Julius [Junius] Pollio and Julius Rufus in respect of money so lent to them that both were liable for the same thing. The estate of Julius passed to the imperial treasury which also became successor to the creditor. The mandator claimed that he was released by right of merger since the treasury was heir to both creditor and debtor. And if, indeed, there were only one debtor, I would not have doubted that like a surety, the mandator also would be released. For although a mandator is not released when the principal debtor is brought to court proceedings, nevertheless, when the creditor succeeds to his debtor, a mandator is also released, as though the obligation is extinguished by right of satisfaction or because he cannot be mandator both to and for the same person. But when there are two debtors and the creditor is heir to one of them, there is good ground for doubt whether the other debtor is also released, as though the money has been paid or only a person exempt by the merger of the obligation. In my view, a person becomes exempt on the acceptance of the inheritance by the merger of obligations, and backers of that person are also released because they cannot be under obligation both to and for the same individual; they could not be so from the outset, and they do not remain so. And so one of two debtors of the same sum is not released, nor, through him, is his surety or mandator. Of course, since he can proceed by the action on mandate against even the creditor, he will be given the defense of bad faith if proceedings are initiated against himself; but the creditor can take action against either debtor, in full if they were not partners or for a share if they were partners; I think that it follows that the debtor is not released by the merger of the obligation.[42]

The text mentioned in D. 46.1.71 pr. was taken from a case of the *quaestiones* of Paulus, in which a *confusio* occurred between the creditor (Aurelius Palma) and one debtor *in solidum* (Iulius Pollio or Iulius Rufus), because the imperial treasury (the *fiscus*) succeeded both Aurelius Palma and one debtor *in solidum*.[43] As explained in the literature, the imperial treasury most likely succeeded Iulius Rufus.[44] For the analysis of this case, it shall be assumed that Iulius Pollio was the debtor who was still alive.

There were two main questions that Paulus had to manage in this case. Firstly, Paulus had to decide whether the imperial treasury (the *heres* of the *mandatarius* [Aurelius Palma]) could sue the *mandator* (Granius Antoninus). Secondly, it was questionable whether the imperial treasury could successfully sue Iulius Pollio.

Only the second question is discussed in this article.[45] According to Paulus, the solution to this problem depended on whether Iulius Pollio and Iulius Rufus concluded a *societas* (a deed of partnership). The debtor *in solidum* who made a payment to the creditor would only have a right to recourse against the other debtor *in solidum* if a *societas* were concluded among the debtors *in solidum*.[46]

Paulus decided that the imperial treasury could claim the whole payment from Iulius Pollio if Iulius Pollio and Iulius Rufus did not make an agreement in the form of a *societas*, according to which the *socii* would have to share their losses equally (*cum altero autem reo vel in solidum, si non fuerit societas*). In such a case, Iulius Pollio would have no right of recourse against the imperial treasury (the *heres* of Iulius Rufus).[47]

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[41] See DERNBURG, *Compensation*, p. 432; KASER – KNÜTEL – LOHSSE, *Privatrecht*, p. 379.
D. 16.2.14 (Iavolenus *libro* 15 *ex Cassio*): *Quaecumque per exceptionem peremi possunt, in compensationem non veniunt.*
Translation: JONES, *Digest*, p. 10*: Whatever can be defeated by a defense does not come into set-off.*

[42] Translation: BEINART, *Digest*, p. 211.

[43] See FINKENAUER, T., Zur Inhärenz von Einreden im bonae fidei iudicium. In: *Iura: rivista internazionale di diritto romano e antico*, vol. 68, 2020, p. 114-116.

[44] FREZZA, P., *Le garanzie delle obbligazioni: corso di diritto romano I. Le garanzie personali*, Padova, 1962, p. 148; SACCONI, G., *Studi sulle obbligazioni solidali da contratto in diritto romano*, Milano, 1973, p. 78 n. 71; BEINART, *Digest*, p. 211.
Different: KIESS, P., *Die confusio im klassischen römischen Recht*, Berlin, 1995, p. 68, who is less sure that Iulius Rufus died.

[45] For more information about the first question, see FINKENAUER, Inhärenz, p. 115-116.

[46] See KASER, *Privatrecht*, p. 659.

[47] SCHMIDT-OTT, J., *Pauli Quaestiones. Eigenart und Textgeschichte einer spätklassischen Juristenschrift*, Berlin, 1993, p. 134-135.

However, if a *societas* were concluded between Iulius Pollio and Iulius Rufus, the imperial treasury would only be able to successfully demand part of the payment owed by Iulius Pollio (*vel in partem, si socii fuerunt*). In this variation of the case where a *societas* occurred, Iulius Pollio would have a right of recourse against the imperial treasury (the *heres* of Iulius Rufus), and thus, the imperial treasury would only be permitted to claim that amount of the payment that the imperial treasury could eventually keep.[48] If the imperial treasury claimed more than it could keep, Iulius Pollio could bring forward an *exceptio doli* against the imperial treasury due to the legal maxim *dolo facit, qui petit quod redditurus est*.[49]

An *exceptio doli* of Iulius Pollio against the imperial treasury could only be justified with the legal maxim *dolo facit, qui petit quod redditurus est*. The *compensatio* would not be possible in this case, because Iulius Pollio would have no claim of recourse against the imperial treasury at the time when the imperial treasury sued Iulius Pollio. Therefore, the *compensatio* would have to be denied due to the lack of a valid counterclaim from Iulius Pollio against the imperial treasury. Only after a payment from Iulius Pollio to the imperial treasury would Iulius Pollio receive a claim of recourse against the imperial treasury.

2.6 Due claims

As mentioned previously, for a *compensatio*, both claims needed to be due,[50] as demonstrated in the following example.

On January 1st, X promised to make a payment for 30 sesterces to Y by April 1st. One month later, Y promised X that he would pay him 30 sesterces by April 15th. On April 2nd, Y sued X with the *condictio* for 30 sesterces.

The question arises regarding whether X could defend himself against Y's *condictio*. X had a claim for the same amount (30 sesterces) against Y, and the claims between X and Y were mutual, equal, valid, and liquid. However, the requirements for a *compensatio* were not met,[51] because X's claim against Y was not due at the time of Y suing X.

If X were forced to make a payment for 30 sesterces to Y on April 2nd, X could claim 30 sesterces back on April 15th. Therefore, Y would claim from X with the *condictio* that which he would have to return back to X in the future. If a party claims from another party something that the party would have to return to the other party, the party acts fraudulently due to the legal maxim *dolo facit, qui petit quod redditurus est*.[52]

However, Y's obligation to return the payment would not be due yet. Consequently, it is questionable whether the legal maxim *dolo facit, qui petit quod redditurus est* would still be applicable. Some legal scholars modify this legal maxim to *dolo facit, qui petit quod statim*[53] *redditurus est*, which means that the plaintiff only acts fraudulently if he would be obliged to immediately (*statim*) return the payment to the defendant. Therefore, according to these scholars, X would have no *exceptio doli* against Y.

In my opinion, there is no reason to modify the legal maxim *dolo facit, qui petit quod redditurus est*, because the word *statim* cannot be found in any source that refers to the legal maxim *dolo facit, qui petit quod redditurus est*. Whether the defendant, whose claim is not yet due, should receive an *exceptio doli* due to the legal maxim *dolo facit, qui petit quod redditurus est* must be decided based on the case, and this decision should depend on how soon the claim of the defendant will be due.[54] In the abovementioned example, it seems that X would likely receive an *exceptio doli* because his claim would be due in the near future.

3. Austrian civil law

3.1 Introduction

Regarding the legal problem of a claim and a counterclaim, the Austrian civil law is based on Roman law foundations. The following sections of the Austrian Civil Code focus on the requirements for a *compensatio*.

§ 1438 ABGB (Austrian Civil Code)

Wenn Forderungen gegenseitig zusammentreffen, die richtig, gleichartig, und so beschaffen sind, daß eine Sache, die dem Einen als Gläubiger gebührt, von diesem auch als Schuldner dem Andern entrichtet werden kann; so entsteht, in so weit die Forderungen sich gegen einander ausgleichen, eine gegenseitige Aufhebung der Verbindlichkeiten (Compensation), welche schon für sich die gegenseitige Zahlung bewirket.

In the case of mutual claims which are valid, equal, and of a nature that an asset to which one is entitled as creditor can also be given by him as debtor to the other, a set-off of the mutual obligations takes place to the extent the amounts of the claims equal each other (set-off), which effects mutual payment as such.[55]

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[48] SCHMIDT-OTT, *Pauli Quaestiones*, p. 134-135.

[49] SCHMIDT-OTT, *Pauli Quaestiones*, p. 134-135; SCHMIEDER, P., *Duo rei. Gesamtobligationen im römischen Recht*, Berlin, 2007, p. 189; BINDER, M., Consolidation of the Creditor and Debtor. Confusio in Roman Law and in the Austrian Civil Code (ABGB). In: *Zbornik radova Pravnog fakulteta u Novom Sadu*, vol. 58/4, 2024, p. 1013.

[50] See section "1. Introduction". D. 16.2.7 pr. (Ulpianus *libro* 28 *ad edictum*): *Quod in diem debetur, non compensabitur, antequam dies venit, quamquam dari oporteat.*
Translation: JONES, *Digest*, p. 9: *Where what is owed is not exigible until a certain date, it will not be the subject of set-off before the arrival of the day, albeit that it must be paid.*

[51] If Y sued X on April 16th, X could raise an *exceptio doli* against Y's *condictio* due to a *compensatio*, because at this time, X's claim against Y would also be due.

[52] See section "2.2 *Dolo facit, qui petit quod redditurus est*"; LAMBRINI, *Dolo generale*, p. 47.

[53] SCHMIDT-OTT, J., *Pauli Quaestiones*, p. 135; WIMMER, M., Fälle des Concursus Causarum von Vermächtnis und Kauf im Römischen Recht. In: *Tijdschrift voor rechtsgeschiedenis*, vol. 69/4, 2001, p. 211 n. 30.

[54] BINDER, M., Premature Debt Repayment Then and Now. A Comparison of D. 12.6.10 and § 1434 ABGB. In: TAUCHEN, J. – KOLUMBER, D. (ed.), *Edge of Tomorrow II: the Next Generation of Legal Historians and Romanists*, Brno, 2024, p. 21.

[55] Translation: ESCHIG, P. A. – PIRCHER-ESCHIG, E., *Das österreichische ABGB – The Austrian Civil Code*, 2nd edn. Wien, 2021, p. 513-514.

§ 1439 ABGB (Austrian Civil Code)
Zwischen einer richtigen und nicht richtigen, so wie zwischen einer fälligen und noch nicht fälligen Forderung findet die Compensation nicht Statt. In wie fern gegen eine Insolvenzmasse die Compensation Statt finde, wird in der Insolvenzordnung bestimmt.
Set-off does not take place between a valid and an invalid or between a due and a not yet due claim. The extent to which set-off takes place against an insolvency estate is determined by the Insolvency Act (IO).[56]

Similar to the legal situation in Roman law, in Austrian civil law, the *compensatio* is also in general[57] only possible if both claims are mutual, equal, valid, and due.[58] Contrary to the wording of section 1438 of the Austrian Civil Code, the *compensatio* does not occur by itself but has to be declared by the party who wants to perform the *compensatio*.[59]

One of the reasons for the existence of the concept of *compensatio* in Austrian civil law is that a party should not be forced to make a payment and subsequently claim this payment back.[60] This idea is emphasised by several Austrian legal scholars who refer to the legal maxim *dolo facit, qui petit quod redditurus est*.[61] Furthermore, the Austrian Supreme Court of Justice (Oberster Gerichtshof) mentions the legal maxim *dolo facit, qui petit quod redditurus est* in the context of a *compensatio*.[62]

In the following sections, cases are analysed in which not all requirements for a *compensatio* are met. In such cases, it is questionable whether both parties have to make a payment or whether an objection is possible.

3.2 Mutual claims

As mentioned in section 1438 of the Austrian Civil Code, the claims must be mutual for the *compensatio* to take place, as is also explicitly addressed in the following section of the Austrian Civil Code.

§ 1441 ABGB (Austrian Civil Code)
Ein Schuldner kann seinem Gläubiger dasjenige nicht in Aufrechnung bringen, was dieser einem Dritten und der Dritte dem Schuldner zu zahlen hat. Selbst eine Summe, die jemand an eine Staats-Casse zu fordern hat, kann gegen eine Zahlung, die er an eine andere Staats-Casse leisten muß, nicht abgerechnet werden.
A debtor cannot set off against the creditor what he has to pay to a third party and the third party to the debtor. Even a sum, which someone can claim from a treasury cannot be set off against a payment which he has to make to another treasury.[63]

According to section 1438 of the Austrian Civil Code, the debtor is only entitled to perform the *compensatio* if he has a direct claim against the creditor. A claim from the debtor against a third party is irrelevant, even if the third party has a claim against the creditor (section 1441).[64]

However, it is questionable whether the debtor can prevent a circuity of action. For instance, such a circuity of action could occur in the context of a guarantee if the underlying debt relationship (i.e., between the orderer of the guarantee and the beneficiary of the guarantee) were defective.[65]

Generally, the beneficiary could sue the guarantor due to the guarantee, the guarantor could exercise his right of recourse,[66] and the orderer would have a claim against the beneficiary due to the defective underlying debt relationship.[67]

This situation means that the beneficiary would have a claim against the guarantor, the guarantor would receive a claim against the orderer, and the orderer would have a claim against the beneficiary.[68] Overall, a *compensatio* would not be possible because the claims between the parties are not mutual.

Nevertheless, the guarantor could a prevent circuity of action by raising an objection against the action of the beneficiary. Austrian legal scholars[69] and the Austrian Supreme Court of Justice[70] highlight that the beneficiary would be abusing his

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[56] Translation: ESCHIG – PIRCHER-ESCHIG, *ABGB*, p. 514.
[57] If the requirements are not met, the parties can, of course, perform the *compensatio* through a contract; see LEUPOLD, P., § 1431-1450. In NEUMAYR, M. (ed.), *ABGB Taschenkommentar mit EheG, EPG, KSchG, ASVG, EKHG und IPRG*, 6th edn. Wien, 2024, p. 1829, § 1438/3.
[58] See sections 1438 and 1439 of the Austrian Civil Code.
According to the main doctrine, the claims do not have to be liquid; see DULLINGER, S., § 1438-1444. In: RUMMEL, P. (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch II. § 1175 bis 1502 ABGB; Nebengesetze. 3. Teil: § 1342 bis 1502 ABGB*, 3rd edn. Wien, 2002, p. 500, § 1439/6.
[59] See WELSER, R. – ZÖCHLING-JUD, B., *Grundriss des bürgerlichen Rechts II. Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht*, 14th edn. Wien, 2015, p. 121; LEUPOLD, *Taschenkommentar*, p. 1829, § 1438/2.
Different: VON ZEILLER, F., *Commentar über das allgemeine bürgerliche Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie IV*, Wien – Triest, 1813, p. 167.
[60] EYPELTAUER, E., Verjährung und Aufrechnung. In: *Juristische Blätter*, vol. 113, 1991, p. 144 n. 69; WELSER – ZÖCHLING-JUD, *Grundriss*, p. 119.
[61] GSCHNITZER, F., § 1438-1443. In: KLANG, H., (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch VI, § 1293 bis 1502*, 2nd edn. Wien, 1951, p. 491; EYPELTAUER, E., Verjährung, p. 144 n. 69; MADER, P., *Rechtsmißbrauch und unzulässige Rechtsausübung*, Wien, 1994, p. 208; KODEK, G., *Die Besitzstörung. Materielle Grundlagen und prozessuale Ausgestaltung des Besitzschutzes*, Wien, 2002, p. 590.
[62] See 1 Ob 914/29. In: *Oesterreichische Anwaltszeitung*, vol. 7, 1930, p. 77.
[63] Translation: ESCHIG – PIRCHER-ESCHIG, *ABGB*, p. 514.
[64] BYDLINSKI, P., § 1438-1450. In: BYDLINSKI, P. – PERNER, S. – SPITZER, M. (ed.), *Kommentar zum ABGB. Allgemeines bürgerliches Gesetzbuch, EheG, KSchG, VGG, IPRG, Rom I-, Rom II- und Rom III-VO*, 7th edn. Wien, 2023, p. 2022, § 1441/1.
[65] BINDER, Underlying Debt Relationship, p. 199 n. 61.
[66] KLAUSBERGER, P., § 880a-882. In: FENYVES, A. – KERSCHNER, F. – VONKILCH, A. (ed.), *ABGB § 859 bis 887. Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch (Klang)*, 3rd edn. Wien, 2022, p. 1157-1158, § 880a/79.
[67] BINDER, Underlying Debt Relationship, p. 199 n. 61.
[68] BINDER, Underlying Debt Relationship, p. 199 n. 61.
[69] KOZIOL, H., 8 Ob 645/91 (review). In: *Bank-Archiv. Zeitschrift für das gesamte Bank- und Börsenwesen*, vol. 40, 1992, p. 578; BYDLINSKI, F., Skizzen zum Verbot des Rechtsmißbrauchs im österreichischen Privatrecht. In: BERNAT, E. – BÖHLER, E. – WEILINGER, A. (ed.), *Festschrift Heinz Krejci zum 60. Geburtstag II. Zum Recht der Wirtschaft*, Wien, 2001, p. 1094; MADER, Dolo facit, p. 426-430; KLAUSBERGER, *Kommentar*, p. 1149, § 880a/64.
[70] 3 Ob 97/20s. In: *Zeitschrift für Recht des Bauwesens*, vol. 1, 2021, p. 15-18.

right,[71] and thus, the objection of the guarantor against the beneficiary could be justified with the legal maxim *dolo facit, qui petit quod redditurus est*.

3.3 Equal claims

The *compensatio* can only be performed by a party if the claims between the parties are equal.[72] Notably, claims that result from a property right are not equal to those based on a contract.[73]

If an owner sues the *possessor* of a *res* with the *rei vindicatio*, the *possessor*, who is entitled to claim the *res* due to a contract, cannot successfully enact a c*ompensatio* due to the difference in nature of the claims.

However, after a successful *rei vindicatio*, the *possessor* could demand the *res* back with his own action due to the contract. Therefore, the *possessor* could, in certain situations, bring forward an objection against the owner due to the legal maxim *dolo facit, qui petit quod redditurus est*, as emphasised by Mader[74] and the Austrian Supreme Court of Justice.[75]

3.4 Valid claims

Section 1438 of the Austrian Civil Code permits a *compensatio* only if both claims are valid. In Austrian civil law, it is possible for the defendant to have no claim against the plaintiff but to have a right to exercise a recourse after a payment to the plaintiff.

For example, such a situation could occur if a *confusio* takes place between the creditor and a debtor *in solidum*. Such a situation can be demonstrated with the following example.

X (creditor) has a claim for 10 against Y and Z (debtors *in solidum*). Y dies, and X becomes his heir.

According to the main doctrine, the obligation of Z does not expire,[76] but after a payment for the amount of 10 from Z to X, Z would have a right of recourse[77] against X (the heir of Y) for 5. It is questionable whether X could demand 10 from Z if he must give 5 back to Z.

In the literature, it is argued that, in such a situation, Z could perform the *compensatio* if sued by X for 10, and thus, Z would only be forced to pay 5 to X.[78] The Austrian Supreme Court of Justice also shares this opinion.[79]

However, this solution seems to contradict the wording of section 1438 of the Austrian Civil Code. Z is not entitled to a *compensatio* because he has no valid claim against X at the time when X sues Z. It is understandable that Z must be protected and should not be forced to make a payment to X that he could claim back. Therefore, it seems correct that Z can raise an objection against X due to the legal maxim *dolo facit, qui petit quod redditurus est*.[80]

3.5 Due claims

According to section 1438 of the Austrian Civil Code, a *compensatio* is only possible if both claims are due. However, if the defendant's claim against the plaintiff would be due in a short period of time, the defendant could bring forward an objection against the plaintiff because the plaintiff would be obliged to return the payment to the defendant (*dolo facit, qui petit quod redditurus est*).[81]

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[71] See § 1295 (2) ABGB (Austrian Civil Code): *Auch wer in einer gegen die guten Sitten verstoßenden Weise absichtlich Schaden zufügt, ist dafür verantwortlich, jedoch falls dies in Ausübung eines Rechtes geschah, nur dann, wenn die Ausübung des Rechtes offenbar den Zweck hatte, den anderen zu schädigen.*
Translation: ESCHIG – PIRCHER-ESCHIG, *ABGB*, p. 465: *Whoever causes damages with malicious intent in a way which violates public policy is liable as well, however, if this happened when exercising a right, only if the exercise of the right obviously had the purpose of harming the other party.*
§ 1305 ABGB (Austrian Civil Code): *Wer von seinem Rechte innerhalb der rechtlichen Schranken (§ 1295, Absatz 2) Gebrauch macht, hat den für einen anderen daraus entspringenden Nachteil nicht zu verantworten.*
Translation: ESCHIG – PIRCHER-ESCHIG, *ABGB*, p. 468: *Whoever makes use of his right within the legal framework (section 1295 para 2) is not responsible for the negative consequence for someone else in connection therewith.*

[72] See section "3.1 Introduction".

[73] DULLINGER, *Kommentar*, p. 484, § 1438/3.

[74] MADER, Dolo facit, p. 420-424.

[75] Ob I 936/27. In: *Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen*, vol. 9, 1927, p. 802-803 (283); 8 Ob 290/63. In: *Handelsrechtliche Entscheidungen*, vol. 4, 1966, p. 80, 271-276 (4279/39).

[76] PERNER, S., § 888 bis 896. In: FENYVES, A. – KERSCHNER, F. – VONKILCH, A. (ed.), *ABGB § 888 bis 896. Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch (Klang),* 3rd edn. Wien, 2008, p. 131-132, § 893, 894/7; GAMERITH, H. – WENDEHORST, C., § 888-896. In: RUMMEL, P. – M. LUKAS (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch: mit wichtigen Nebengesetzen und EU-Verordnungen, § 859-916 ABGB (Vertragsrecht)*, 4th edn. Wien, 2014, p. 374, § 894/11; REISCHAUER, R., § 1445-1450. In: LUKAS, M. – GEROLDINGER, A. (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch: mit wichtigen Nebengesetzen und EU-Verordnungen. § 1445-1503 ABGB (Verjährung, Ersitzung)*, 4th edn. Wien, 2024, p. 18, § 1445/56.

[77] See § 896 ABGB (Austrian Civil Code): *Ein Mitschuldner zur ungetheilten Hand, welcher die ganze Schuld aus dem Seinigen abgetragen hat, ist berechtiget, auch ohne geschehene Rechtsabtretung, von den übrigen den Ersatz, und zwar, wenn kein anderes besonderes Verhältniß unter ihnen besteht, zu gleichen Theilen zu fordern. War einer aus ihnen unfähig, sich zu verpflichten, oder ist er unvermögend, seiner Verpflichtung Genüge zu leisten; so muß ein solcher ausfallender Antheil ebenfalls von allen Mitverpflichteten übernommen werden. Die erhaltene Befreyung eines Mitverpflichteten kann den übrigen bey der Forderung des Ersatzes nicht nachtheilig seyn. (§. 894).*
Translation: ESCHIG – PIRCHER-ESCHIG, *ABGB*, p. 322: *A joint and several co-debtor who satisfied the entire obligation by his own means is entitled, also without assignment, to request reimbursement from the others in equal shares provided that there is no other specific agreement between them. If one of them was not able to oblige himself or he is incapable of performing his obligation, such outstanding share also has to be taken over by all co-debtors. The release of one co-debtor cannot be detrimental to the others when requesting reimbursement (section 894).*

[78] PERNER, *Kommentar*, p. 132, § 893, 894/7; REISCHAUER, *Kommentar*, p. 15-16, § 1445/49.

[79] 7 Ob 255/07m. In: *Zivilrecht aktuell*, vol. 4, 2008, p. 119.

[80] See ROTH, G. H. – FITZ, H., *Unternehmensrecht. Handels- und Gesellschaftsrecht*, 2nd edn. Wien, 2006, p. 105.

[81] MAYER-MALY, T. – BÖHM, H., Die Behandlung des Rechtsmissbrauchs im österreichischen Privatrecht. In: ROTONDI, M. (ed.), *Inchieste di diritto comparato VII: L'abus de droit. L'abuso di diritto. The abuse of rights. El abuso de derecho. Der Rechtsmißbrauch*, Padova 1979, p. 235; BINDER, Premature Debt Repayment, p. 23-24.

4. Conclusion

In both Roman law and Austrian civil law, a *compensatio* requires the claims to be mutual, equal, valid, and due. Both the *compensatio*, which is only possible if the claims are equal, and the legal maxim *dolo facit, qui petit quod redditurus est*, which refers to an identical *lis* of the claim and the counterclaim,[82] prevent unnecessary litigation and, thus, ensure procedural efficiency.[83]

In many cases, the requirements are met for both the *compensatio* and the legal maxim *dolo facit, qui petit quod redditurus est*.[84] The legal maxim *dolo facit, qui petit quod redditurus est* is only mentioned twice in the Digest of Justinian (D. 44.4.8 pr. and D. 50.17.173.3), whereas a whole title (D. 16.2) is dedicated to the concept of *compensatio*.

Roman jurists were more familiar with the concept of *compensatio*, meaning that in cases where the requirements for the *compensatio* and the legal maxim *dolo facit, qui petit quod redditurus est* were both met, the jurists likely only referred to the concept of *compensatio*. Furthermore, a legal maxim did not have the same legal quality as the law itself.[85] However, it seems likely that a *iudex* could base his decision on a well-known legal maxim if he wished to do so.

In the Austrian Civil Code, only the concept of *compensatio* is mentioned (section 1438 of the Austrian Civil Code). A natural legal principle, such as the legal maxim *dolo facit, qui petit quod redditurus est*,[86] only becomes relevant if a case cannot be solved using the natural meaning of the law.[87]

In this article, it was demonstrated that the legal maxim *dolo facit, qui petit quod redditurus est* has a complementary function in relation to the *compensatio* in both Roman law and Austrian civil law. Therefore, in certain cases, the defendant could raise an *exceptio doli* even if the claims were not mutual,[88] equal,[89] valid,[90] or due.[91]

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[82] See section "2.2 *Dolo facit, qui petit quod redditurus est*"; WACKE, Rechtssprichwort, p. 478.

[83] See sections "2.1 Introduction" and "2.2 *Dolo facit, qui petit quod redditurus est*".

[84] See section "2.2 *Dolo facit, qui petit quod redditurus est*".

[85] D. 50.17.1 (Paulus *libro* 16 *ad Plautium*): *Regula est, quae rem quae est breviter enarrat. Non ex regula ius sumatur, sed ex iure quod est regula fiat. Per regulam igitur brevis rerum narratio traditur, et, ut ait Sabinus, quasi causae coniectio est, quae simul cum in aliquo vitiata est, perdit officium suum.*
Translation: CRAWFORD, M. In: WATSON, A. (ed.), *The Digest of Justinian IV*, 2nd edn. Philadelphia, 1998, p. 470-471: *A rule is something which briefly describes how a thing is. The law may not be derived from a rule, but a rule must arise from the law as it is. By means of a rule, therefore, a brief description of things is handed down and, as Sabinus says, is, as it were, the element of a case, which loses its force as soon as it becomes in any way defective.*

[86] KRAMER, E. A., Die "natürlichen Rechtsgrundsätze" des § 7 ABGB heute. In: FISCHER-CZERMAK, C. (ed.), *Festschrift 200 Jahre ABGB II*, Wien, 2011, p. 1181; KODEK, G., § 1-14. In: RUMMEL, P. – LUKAS, M. (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch: mit wichtigen Nebengesetzen und EU-Verordnungen. § 1-43 ABGB (Einleitung, Personenrechte)*, 4th edn. Wien, 2015, p. 138, § 7/85.

[87] § 7 ABGB (Austrian Civil Code): *Läßt sich ein Rechtsfall weder aus den Worten, noch aus dem natürlichen Sinne eines Gesetzes entscheiden, so muß auf ähnliche, in den Gesetzen bestimmt entschiedene Fälle, und auf die Gründe anderer damit verwandten Gesetze Rücksicht genommen werden. Bleibt der Rechtsfall noch zweifelhaft; so muß solcher mit Hinsicht auf die sorgfältig gesammelten und reiflich erwogenen Umstände nach den natürlichen Rechtsgrundsätzen entschieden werden.*
Translation: ESCHIG – PIRCHER-ESCHIG, *ABGB*, p. 2: *If a matter can neither be determined by the wording nor by the natural meaning of a law, similar matters which have been regulated by law and the purpose of other related laws must be considered. If the matter still remains ambiguous, it must be decided based on the diligently gathered and thoroughly considered facts in line with the natural legal principles.*

[88] See sections "2.3 Mutual claims" [Roman law] and "3.2 Mutual claims" [Austrian civil law].

[89] See sections "2.4 Equal claims" [Roman law] and "3.3 Equal claims" [Austrian civil law].

[90] See sections "2.5 Valid claims" [Roman law] and "3.4 Valid claims" [Austrian civil law].

[91] See sections "2.6 Due claims" [Roman law] and "3.5 Due claims" [Austrian civil law].

Recht und Verfassung bei Cicero als Resultat von dialektischer Auseinandersetzung

(Law and Constitution in Cicero's res publica as a Result of Dialectical Discovery)

*Julian Kessler**

Abstract

The paper examines Cicero's legal doctrine in the context of his political and philosophical theory, interpreting his concept of natural law as an abstract summum bonum that can only be recognized approximately, and at the same time as a precursor of modern constitutional thought. The approach is dialectical: intrapersonally through self-cultivation toward wisdom, and politically through institutions that ensure the balance of interests, thereby producing the best possible positive law. Cicero sees himself both as a philosopher and as a nomothete who, drawing on historical experience and philosophical reflection, assumes the legitimacy to propose a constitutional order. This marks him as an early forerunner of a normative, reason-based constitution, grounded in the insight that the common good must always rest on philosophical principles and be sought through procedure, and that without this pursuit no res publica can exist.

Keywords: *law, republic, natural law, Cicero, dialectics, constitution, Roman law, mixed constitution.*

Einleitung

Die Fragen nach dem Inhalt, dem Ursprung und der Geltung des Rechts sowie nach seiner Erkennbarkeit gehören zu den zentralen Themen der Rechtsphilosophie. Schon in den Schriften Ciceros treten sie auf, und machen sie damit zu einem Untersuchungsgegenstand der Rechtsphilosophie im Kontext des römischen Rechts. Im vorliegenden Beitrag möchte ich darlegen, dass das Recht bei Cicero weder als bloße Setzung im Sinne eines reinen Rechtspositivismus noch als unmittelbare Offenbarung im Sinne einer ausschließlich naturrechtlichen Doktrin erscheint, sondern dass das Recht idealerweise Resultat eines doppelten Prozesses ist. Einerseits verweist Cicero auf ein universales Naturrecht, das durch die perfektionierte Vernunft des Menschen approximativ erkennbar ist. Andererseits betont er, dass die konkrete Gestalt des Rechts aus einer historischen Dynamik und aus dem Zusammenspiel von verschiedenen Institutionen und Interessen hervorgeht. Auf beiden Ebenen resultiert das Recht aus einer bestimmten Art der dialektischen Auseinandersetzung.

Gerade die skeptische Haltung, die Cicero der akademischen Tradition verdankt, wird dabei nicht zum Hindernis, sondern zur Triebkraft. Durch das dialektische Verfahren der *disputatio in utramque partem* erlangt der Einzelne eine Haltung, die *sapientia* und *prudentia* anstrebt. In der *res publica* entspricht dieser Rechtsphilosophie die Idee einer Mischverfassung, die einerseits in einer historischen Dialektik gewachsen ist, und in der andererseits die Balance der Kräfte durch institutionelle Gegengewichte gesichert wird. Ausgehend von einer Darstellung von Ciceros Bestreben, die *res publica* zu retten, dem Sinn und Zweck, den er in der *res publica* sieht, und seinem philosophischen Skeptizismus, der *sapientia* und *prudentia* anstrebt, zeige ich, welche Bedeutung diese Ideen für den Einzelnen und für den Staat entwickeln, und wie dadurch das Recht in der Rechtsphilosophie Ciceros erklärt werden kann.

1. Cicero und die späte römische Republik

Um den Kontext zu verstehen, lohnt es sich, kurz zu rekapitulieren, wer Marcus Tullius Cicero war und warum er bis heute eine so einflussreiche Figur in der Philosophie- und Rechtsgeschichte ist.[1] Marcus Tullius Cicero (106-43 v. Chr.) trat in eine politische Welt ein, in der die römische Republik bereits von tiefen Spannungen bedroht war. In diesem Umfeld versuchte Cicero, sich aktiv am öffentlichen Leben zu beteiligen, was seiner Meinung nach für einen guten *civis* eine absolute Pflicht war. Als *homo novus*, also als erster politischer Amtsträger in seiner Familie, musste er sich allein durch seine rhetorische und juristische Begabung behaupten. Seine juristische Ausbildung

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1 FUHRMANN, M., *Cicero und die römische Republik*, 4. Aufl. München, 1997; BRINGMANN, K., *Cicero, Gestalten der Antike*. Darmstadt, 2010.

erhielt er beim damals wohl größten Lehrmeister des Rechts Quintus Mucius Scaevola. Seine philosophische Bildung verdankt er nicht zuletzt einem Bildungsaufenthalt in Griechenland. Aufgrund verschiedener Einflüsse lernte er die vorherrschenden philosophischen Schulen kennen, was den Grundstein für seine persönliche eklektische Haltung legte, mit der er schließlich Elemente des Platonismus, des Aristotelischen Peripatos, des Stoizismus und des akademischen Skeptizismus verbinden würde.

Den klassischen Juristenberuf erledigten die *iuris consulti*. Von diesen grenzten sich die *oratores* (Gerichtsredner) ab, die vor Gericht rhetorisch geschickt die Interessen ihrer Mandanten verteidigten. Später gesteht Cicero seinem Freund Servius Sulpicius Rufus im Recht die Vorrangstellung zu, doch ordnet die *ars* des Rechtes der *ars* der Redekunst unter, in der er selbstverständlich sich selbst als Erstgereihten sieht.[2] Seine Begabung in der Rhetorik geht bereits auf seine Jugend zurück. Früh verzeichnete er große Erfolge als *orator*. Der gerade einmal 25-jährige Cicero hielt im Jahr 81 bereits seine ersten Gerichtsreden, in denen er mit rednerischer Brillanz und Furchtlosigkeit auftrat. Er verteidigte zunächst Publius Quinctius, dann Sextus Roscius, zwei politisch heikle Prozesse, da Cicero seine Mandanten gegen politische Machthaber, insbesondere Sulla, verteidigen musste, ohne sich jedoch selbst in Gefahr zu bringen.[3] Auch in seinen Reden *in Verrem* konnte er brillieren.[4] Gerade in seiner Tätigkeit als Redner, basierend auf einer soliden Rechtsausbildung, entwickelte Cicero ein besonderes Gespür für die Bedeutung des Rechts: Recht war für ihn nie nur technisches Regelwerk, sondern stets eng verknüpft mit Fragen der Gerechtigkeit (*iustita/aequitas*) und des Gemeinwohls (*utilitas publica*). Mit der Kraft des Wortes versuchte er, das Recht zu ordnen und die Republik zu erhalten.[5]

Im Jahr 63 v. Chr. erreichte er das Konsulat im Mindestalter und zudem als *homo novus*. Im selben Jahr wurde er zum Protagonisten der Krise um die Verschwörung des Catilina, die er dank einer Reihe von Reden im Senat, den *Orationes in Catilinam*, einem bis heute bewunderten rhetorischen Werk, aufdeckte. Die Verteidigung der *res publica* gegen diejenigen, die sie mit Gewalt (*vis*) zu stürzen versuchten, war der Kern seiner Reden, den er beispielsweise in *Pro Sestio*, einer Rede kurz bevor er auch *de re publica* verfassen würde, wieder aufgreifen würde.[6]

Die 50er Jahre v. Chr. stellen einen entscheidenden Moment in Ciceros intellektuellem Schaffen dar. In diesen Jahren verfasste er seine wichtigsten Werke zur politischen Theorie und Rechtsphilosophie: *de oratore* (zwischen 55 und 54 v. Chr.), *de re publica* (zwischen 54 und 51 v. Chr.) und *de legibus*. Letzteres wurde wahrscheinlich zeitgleich um 54-51 v. Chr. begonnen, aber es gibt mehrere Gründe für die Annahme, dass es ein Jahrzehnt später erweitert, umstrukturiert und möglicherweise auch verändert wurde.[7] Diese Werke entstanden in einem Kontext wachsender Spannungen, mit dem Aufstieg Caesars in Gallien, der militärischen Macht des Pompeius und der latenten Rivalität zwischen den Hauptakteuren der Republik.

Ciceros breite historische und juristische Bildung, die politischen Krisen seiner Zeit - von Bürgerkriegen über die Verschwörung Catilinas, die Aufstiegskämpfe Caesars, die Diktatur und schließlich bis zu Machtkämpfen zwischen Antonius und Octavian - sowie sein philosophisch geschulter Blick zeigten Cicero eindringlich, wie Staaten durch faktisch geschaffene und als Recht getarnte Regelungen gefährdet sein können. Diese Erfahrung erklärt seine klare Ablehnung eines reinen Rechtspositivismus (um moderne Terminologie zu gebrauchen). Das Recht musste für Cicero in einem übergeordneten Maßstab verankert sein, der auch dann Orientierung geben konnte, wenn Gesetze missbraucht oder Institutionen unterlaufen wurden.

Sein philosophisches Interesse, das er auf Fragen des Rechts anwandte, fand seinen Ausdruck in Schriften über sein gesamtes Leben hinweg. Es diente kaum bloß intellektuellem und theoretischem Zeitvertreib, sondern war eng mit praktischen Fragen verknüpft. Seinen Aufruf zum staatsrechtlichen Engagement stellte er jenen Philosophen entgegen, die fernab vom politischen Geschehen theoretisieren. Die Anwendung der Philosophie auf die Praxis wird für ihn so zur höchsten staatsbürgerlichen Pflicht.[8]

Ciceros rechtsphilosophische Bestrebungen werden insbesondere in *de re publica* und *de legibus* deutlich: Wie lässt sich Recht erkennen, welches nicht von der Willkür von Machthabern ausgeht? Wie kann angesichts einer gebotenen skeptischen Grundhaltung Recht entstehen, das klaren Geltungsanspruch stellen kann? Aus der Rezeption griechischer Philosophie gewann er dafür verschiedene Bausteine: aus dem Stoizismus die Idee eines universalen Naturrechts (*logos*), aus dem Platonismus die Orientierung an abstrakten Ideen, aus der neueren Akademie den Skeptizismus, aus dem Aristotelismus die Verknüpfung von Theorie und Praxis. Nur eine Betrachtung des Zusammenspiels all dieser kann Ciceros Rechtsphilosophie erklären.

Aus diesen kontextualisierenden Bemerkungen über Ciceros Leben wird deutlich, dass er sich in einem Spannungsfeld zwischen Recht als universaler Ordnung und Recht als politischem Faktum bewegt. Einerseits suchte er als Anwalt, Politiker und Philosoph sein Leben lang nach Gerechtigkeit, die nur mit dem Recht erreicht und verwirklicht werden konnte. Andererseits

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2 *Brutus* 151: *videtur mihi in secunda arte primus esse maluisse quam in prima secundus*.

3 BRINGMANN, K., *Cicero, Gestalten der Antike*. Darmstadt, 2010, S. 35 ff; FUHRMANN, M., *Cicero und die römische Republik*, 4. Aufl. München, 1997, S. 50 ff.

4 Siehe etwa BAJÁNHÁZY, I., Urkundenfälschung im römischen Recht, Cicero als Schriftsachverständiger. In: *Journal on European History of Law* Jg. 13, Nr. 1, 2022, S. 219-226 über eine durch Cicero in diesem Zusammenhang aufgedeckte Urkundenfälschung.

5 NEUMANN, A., Cicero's Oration pro Tullio Revisited: Considerations on the Tulliana from a Legal-Historical Perspective. In: *Journal on European History of Law* Jg. 15, Nr. 2, 2024, S. 2.

6 Siehe NEUMANN, A., Cicero's Oration pro Tullio Revisited: Considerations on the Tulliana from a Legal-Historical Perspective. In: *Journal on European History of Law* Jg. 15, Nr. 2, 2024, S. 2-11.

7 KESSLER, J., *Über die Gesetze. Neuübersetzung und Kommentar zu Cicero's de legibus,* Baden-Baden, erscheint 2026 bei Nomos.

8 Siehe *de re publica* insb. Buch I und der berühmte Somnium Scipionis..

musste er als teils machtloser Staatsbürger das Entstehen konkreter ungerechter *leges* und andere politische Entwicklungen wie das Streben nach tyrannischer Macht erleben und kannte zahlreiche weitere solche Beispiele aus der römischen und griechischen Geschichte. Aus dieser Erfahrung speist sich sein Denken über die Erkennbarkeit des Rechts und über die Entstehung von Gesetzen in einer *res publica*.

2. Ciceros Vision der *res publica*

2.1 *De re publica* und *de legibus*

In seinen staatsphilosophischen Schriften - insbesondere in *de re publica* und *de legibus* - entwirft Cicero ein Bild der *res publica*, das weit über die alltägliche faktische Politik hinausgeht. Für ihn erfüllt die *res publica* verschiedene Zwecke. Zunächst die beiden Werke einzuführen, schließlich die Begründung und die Bestimmung der *res publica* nachzuvollziehen, sind notwendige Grundlage für ein Verständnis seiner Rechtstheorie.

Das Werk *de re publica*, entstanden in den 50er Jahren v. Chr., ist Ciceros umfassendste Auseinandersetzung mit der Idee des Staates und enthält seine Spezifizierung, was eine *res publica* ausmacht. In bewusster Anlehnung an Platons *Politeia* verfasst, aber nicht utopisch gehalten, sondern im römischen Kontext verankert, entfaltet Cicero den Dialog als Gespräch über Wesen, Zweck und Gestalt der *res publica*.

Der Zustand des verfügbaren Textes von *de re publica* ist bruchstückhaft nur in Fragmenten erhalten.[9] Selbst nach der Entdeckung des Palimpsests zu Beginn des 19. Jahrhunderts durch Angelo Mai verfügen wir nach fundierten Schätzungen nur über ein Drittel bis ein Viertel des ursprünglichen Werkes.[10] Der fragmentarische Zustand hat die Beurteilung seines genauen Zwecks und Inhalts erschwert. Neben einer Theorie über die institutionellen und normativen Regelungen der *res publica* scheint es sehr wahrscheinlich, dass sich ein großer Teil des Werkes auf den Staatsmann und seinen Beitrag zu einer gerechten und stabilen *res publica* konzentrierte. Die Verfassungstheorie (I 39-69) macht heute etwa 17 % des Gesamtwerkes aus, wobei der geschätzte Anteil dieses Teils am Gesamtwerk nur 8 % beträgt, was Zetzel dazu veranlasst, das Hauptziel des Werkes der Debatte über den Staatsmann zuzuschreiben.[11] Wie ein Individuum zur Gemeinschaft beitragen kann, welche Qualitäten des Staatsmannes sind und wie er die *res publica* führen kann ist für ihn das ultimative Anliegen des gesamten Dialogs.[12] Die Relevanz der Weisheit des Staatsmannes wird unten noch hervorgehoben werden.

Ein zentrales Motiv ist die Definition der *res publica* als *res populi*, wobei gilt: *populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus* (I 39). Darauf folgt eine Diskussion verschiedener Regierungsformen, die im Rahmen dieses Aufsatzes nur in Ansätzen aufgegriffen werden kann. Buch II analysiert die römische Geschichte und Buch III behandelt die Gerechtigkeit. Während vom vierten und fünften Buch kaum Text überliefert ist, handelt das sechste Buch vom berühmten „*Somnium Scipionis*“, der Ciceros Vision eine kosmische Dimension verleiht.

Das Werk *de legibus* ist unzweifelhaft als Fortsetzung und Ergänzung zu *de re publica* konzipiert, doch über den genauen Zusammenhang können nur Vermutungen angestellt werden. Denkbar ist Ciceros Plan, alle später aufgeteilten Inhalte ursprünglich in nur einem Werk unterzubringen.[13] Erst im Laufe der Zeit könnte sich die Aufteilung ergeben haben, was in weiterer Folge erklären könnte, warum *de legibus* wohl erst etwa zehn Jahre später fertiggestellt wurde.[14]

Insbesondere das erste Buch von *de legibus* ist womöglich Ergebnis dieser späteren Ergänzung bzw. Bearbeitung, nicht zuletzt weil es wie andere Werke aus derselben Zeit einen stark philosophischen Tenor hat. In ihm zeigt Cicero eine noch deutlichere Hinwendung zu Fragen der Ordnung und Normativität. In dialogischer Form entwickelt er eine Theorie der Gesetze, die nicht allein aus positiven Regelungen besteht, sondern auf einer tieferliegenden Grundlage beruht. Die übrigen Bücher beinhalten sehr konkrete Gesetzesvorschläge, das zweite über Sakralrecht, das dritte über die Magistrate. Die Annahmen über die Inhalte der nicht erhaltenen Bücher variieren. Mögliche Hinweise finden sich in III 30 „*repetam…de educatione et de disciplina locum*“ und III 48 „*ut…de potetstatum iure disputes. - faciam*“ sowie im kaum beachteten I 18 „*vias litigandi…sed hoc posterius*“ und im ebenso wenig beachteten I 23 „wie sich in Staaten durch ein gewisses Prinzip, über das noch an geeigneter Stelle zu sprechen sein wird, die verschiedenen gesellschaftlichen Verhältnisse durch Abstammung unterscheiden“. Auf dieser Grundlage scheint es plausibel, IV *de iudiciis* (über die Rechtsprechung), V *de educatione et disciplina* (Erziehung und Disziplin), VI *de proprietate et possessione* (Eigentum und Sachenrecht) anzunehmen, ferner womöglich VII *de familia* (Familienrecht samt Abstammung und Erbrecht).

2.2 Begründung der *res publica*

Mit Begründung der *res publica* möchte ich kurz auf die Gründe für den Zusammenschluss der Menschen überhaupt eingehen, um danach überzuleiten auf die Bestimmung der *res publica*, womit ich Ausrichtung und Zielsetzung der *res publica* bezeichnen will. Hinsichtlich der Gründe für den Zusammenschluss von Menschen lassen sich drei prominente Theorien im Denken von Cicero unterscheiden, die entweder Schwäche, Eigentum oder Geselligkeit betonen. Diese seien kurz vorgestellt.

[9] ZETZEL, J. E. G., *The lost republic: Cicero's De oratore and De re publica*. New York, 2022, S. 179.
[10] NICGORSKI, W., Cicero's Republicanism. In: ATKINS, J. W. - BÉNATOUĎL, T. (Hrsg.), *The Cambridge Companion to Cicero's Philosophy*. Cambridge, 2021, S. 222.
[11] ZETZEL, J. E. G., *The lost republic: Cicero's De oratore and De re publica*. New York, 2022, S. 194.
[12] ZETZEL, J. E. G., *The lost republic: Cicero's De oratore and De re publica*. New York, 2022, S. 202-203.
[13] SCHMIDT, P. L., *Die Abfassungszeit von Ciceros Schrift über die Gesetze*. Rom, 1970; SCHMIDT, P. L., The Original Version of the De Re Publica and the De Legibus. In: *Bulletin of the Institute of Classical Studies* Jg. 45, Nr. S76, 2001, S. 7-16.
[14] KESSLER, J., *Über die Gesetze. Neuübersetzung und Kommentar zu Cicero's de legibus,* Baden-Baden, erscheint 2026 bei Nomos.

Anschließend werde ich darlegen, dass Cicero Argumente aller drei Theorien eklektisch übernimmt und sie unter dem Oberbegriff des *summum bonum* zusammenfasst, das das höchste Ziel des Menschen und der Natur überhaupt ist, zu dem alle drei Theorien einen wichtigen Aspekt beitragen und das daher in seiner Ausprägung als Gemeinwohl auch als Bestimmung und Zielsetzung der *res publica* verstanden werden kann.

Die erste Alternative - *inbecillitas* (Schwäche) - legt nahe, dass Menschen von sich aus zu schwach sind und daher Gruppen bilden, um ihre individuelle Schwäche zu bekämpfen und auszugleichen. Diese Theorie wird gemeinhin als epikureisch angesehen.[15]

Die zweite Deutung legt den Schwerpunkt auf das Eigentum. Danach treten Menschen in Gemeinschaft, um das ihre zu bewahren.[16] Aus dieser Perspektive ist das Zusammenleben primär ein Instrument zur Sicherung und Verteidigung materieller Interessen. Menschen würden sich ursprünglich zusammenschließen, um ihr Eigentum zu schützen. Diese Theorie betont den Schutz des Eigentums häufig auch als Hauptzweck des Staates.

Die dritte Alternative liegt in der geselligen Natur des Menschen selbst. Nach dieser Theorie haben Menschen von Natur aus die Tendenz, sich zusammenzuschließen und zusammenzuleben, einfach als Ausdruck ihrer Geselligkeit als Teil ihrer menschlichen Natur. Im Zentrum steht dabei eine anthropologische Grundannahme: Der Mensch ist von Natur aus ein soziales und vernunftbegabtes Wesen. Die Menschen wurden zum Wohle der Menschen geschaffen.[17] Es gibt etwas in der menschlichen Spezies, das ganz natürlich dazu führt, andere Menschen zu fördern, zu schützen und zu bewahren: *ad homines iuvandos tutandos conservandos*.[18] Daher ist es der menschlichen Natur eigen und entspricht ihr, dass Menschen sich versammeln, sich zusammenschließen und ein Volk bilden und dass sie soziale Strukturen und Staaten schaffen.[19] Die *civitas* spiegelt den *civis*, den einzelnen Bürger, wider; und unter Verwendung dieser Terminologie argumentiert Cicero, dass Menschen für die Zivilgesellschaft geboren sind.[20] Die Natur hat ihnen etwas *quasi civile atque populare* eingeprägt, eine Eigenschaft, die die Griechen gewöhnlich *πολιτικόν* nannten.[21] Dies erinnert uns sofort an das aristotelische *ζῷον πολιτικόν*, das sich auf die natürliche Neigung des Menschen bezieht, sich zusammenzuschließen.[22] Da niemand gerne in Einsamkeit lebt, *facile intellegitur nos ad coniunctionem congregationemque hominum et ad naturalem communitatem esse natos*.[23] Der „Naturzustand" nach Cicero ist kein *bellum omnium contra omnes* nach Hobbes, sondern umfasst vor allem die menschliche Geselligkeit und ist somit die anthropologische Grundlage der Gesellschaft.[24]

Unmittelbar nach der schon zitierten Definition der *res publica* in I 39 beschreibt Cicero die *prima causa coeundi* des Volkes, die weniger in der *inbecillitas* als vielmehr in der *naturalis quaedam homunim quasi congretatio*, der natürlichen Neigung zur Vereinigung, liegt. In ähnlicher Weise zieht Cicero in *de officiis* das Beispiel der Bienen heran, die sich weniger zur Bildung von Bienenstöcken als vielmehr aufgrund ihrer natürlichen Geselligkeit zusammenschließen.[25] Aufgrund der zahlreichen Belege für Ciceros Glauben an die menschliche Geselligkeit, überzeugt am ehesten die Annahme, dass es diese menschliche Geselligkeit ist, die den ursprünglichen Anstoß zum Zusammenleben gibt.

Bei einer Bewertung dieser Ansätze ist zu beachten, dass Cicero möglicherweise zwischen den ursprünglichen Ursachen des Zusammenschlusses (*causae coeundi*) und dem späteren Zweck der staatlichen Ordnung (*res publica*) unterscheidet.[26] Der Grund für das anfängliche Zusammenleben ist nicht notwendigerweise identisch mit der Aufgabe des Staates in seiner ausgebildeten Form. Erst aus dem Leben in Gemeinschaft ergeben sich Fragen nach Eigentum, Gerechtigkeit und schließlich nach dem Recht als beständige Lösung für diese Fragen. Es wird sich zeigen, dass die Grundlage dieser Ordnung für Cicero im Naturrecht liegt: Es bestimmt, was recht und gerecht ist, und es sichert zugleich das Recht auf Eigentum.

2.3 Bestimmung der *res publica*

Nach der Analyse der Begründung der Gemeinschaft und *res publica* wird in diesem Abschnitt ein Überblick über seine Axiologie gegeben, welche im Kontext der *res publica* ihre normative Ausrichtung vorgibt. Dazu stellt sich im Rahmen Ciceros ethischer Philosophie die Frage: Was ist das *τέλος* (das Ziel, der Sinn, der Zweck)? Was ist das *finis bonorum*? Finis wird hier als Wortspiel ausgedrückt, das sich sowohl auf die identifizierenden Merkmale des allgemein Guten als auch auf

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15 STRAUMANN, B., *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution*. New York, 2016, S. 162 ff.

16 *De officiis* II 73: *nam etsi duce natura congregabantur homines tamen spe custodiae rerum suarum urbium praesidia quaerebant.*

17 *De officiis* I 22: *homines autem hominum causa esse generatos.*

18 *Tusculanae Disputationes* I 32: *quae est melior igitur in hominum genere natura quam eorum, qui se natos ad homines iuvandos tutandos conservandos arbitrantur?*

19 *De finibus bonorum et malorum* III 63: *itaque natura sumus apti ad coetus, concilia, civitates*.

20 *De legibus* I 62: *se ad civilem societatem natum senserit*.

21 *De finibus bonorum et malorum* V 66: *nam cum sic hominis natura generata sit, ut habeat quiddam ingenitum quasi civile atque populare, quod Graeci πολιτικόν vocant*.

22 Aristoteles *Politika* 1253a 3: *ἐκ τούτων οὖν φανερὸν ὅτι τῶν φύσει ἡ πόλις ἐστί, καὶ ὅτι ὁ ἄνθρωπος φύσει. πολιτικὸν ζῷον*; 1278b 19: *ὅτι φύσει μέν ἐστιν ἄνθρωπος ζῷον πολιτικόν*. Aristoteles *Nikomachische Ethik* 1169b: *πολιτικὸν γὰρ ὁ ἄνθρωπος καὶ συζῆν πεφυκός.*

23 *De finibus bonorum et malorum* III 65: *quodque nemo in summa solitudine vitam agere velit ne cum infinita quidem voluptatum abundantia, facile intellegitur nos ad coniunctionem congregationemque hominum et ad naturalem communitatem esse natos.*

24 MOATTI, C. Cicerón. In: RAYNAUD, P. - RIALS, S. (Hrsg.), SARAZIN, M.-P. - PEÑALVER, M. (Übers.), *Diccionario Akal de Filosofía Política (Edición Española)*. Madrid, 2001, S. 86.

25 *De officiis* I 157: *Atque ut apium examina non fingendorum favorum causa congregantur, sed cum congregabilia natura sint, fingunt favos, sic homines, ac multo etiam magis, natura congregati adhibent agendi cogitandique sollertiam.*

26 ATKINS, J. W., Roman Republicanism. In LOVETT, F. - SELLERS, M. N. S. (Hrsg.), *The Oxford Handbook of Republicanism (in progress)*. Oxford, 2024.

die „Obergrenze“ des Guten, d. h. das höchste Gut, bezieht. Cicero merkt an, dass dieses Thema oft und kontrovers diskutiert worden ist,[27] und widmet ihm schließlich eine ganze Abhandlung, *de finibus bonorum et malorum*. Darin diskutiert Cicero, was das höchste Gut, das *summum bonum*, ist, dessen Erlangung zu einem wirklich glücklichen und erfolgreichen Leben (*vita beata*) führt.

Zunächst lässt Cicero den Epikureismus aufgrund seines mangelnden Interesses und seiner Relevanz für Staatsangelegenheiten beiseite und orientiert sich stattdessen an den Argumenten des Stoizismus und der Alten Akademie. Er reflektiert über die Argumente beider philosophischer Schulen und entwickelt dann seinen eigenen ethischen Standpunkt im fünften Buch von *de finibus*. Hier konzentriert sich Cicero auf die Position der Alten Akademie, vertreten durch Piso, die eine moderate und pluralistische ethische Sichtweise vertritt, während die Stoa eine monistische Haltung hat. Die von Aristoteles beeinflusste akademische Tradition behauptet, dass zwar die Tugend die wichtigste Komponente des Guten (*summum bonum*) ist, aber auch andere äußere Güter wie Freundschaft, körperliches Wohlbefinden und materielle Stabilität wesentlich zum menschlichen Gedeihen (*εὐδαιμονία*) beitragen. Für die Alte Akademie und Aristoteles ist die Tugend daher das *summum bonum*, aber nicht das *solum bonum*. Cicero schreibt, dass die Alte Akademie alles, was unserem Leben zuträglich ist, als *bonum* bestimmt hat, und setzt sie in Kontrast zur Stoa, die nur das *honestum* als *bonum* akzeptierte.[28] Für den Stoiker Zeno etwa sollte nur die *honestas* als *summum bonum* angestrebt werden.

Für die Alte Akademie jedoch - welche wohl den bedeutenderen Anteil im Denken Ciceros einnimmt - sollte, während auch andere Güter angestrebt werden, der *honestas* „bloß“ ein größeres Gewicht beigemessen werden als allen anderen Gütern.[29] Was auch immer für ein anderes Gut auf die eine Seite einer Waage gelegt wird, wenn sich auf der anderen Seite die *virtus* als *summum bonum* befindet, wird diese mehr wiegen und die äußeren Güter würden kaum einen Unterschied machen. Laut Cicero hatte ferner Aristoteles in seiner Theorie den Wert der Tugend und den Wohlstand eines tadellosen und lasterfreien Lebens miteinander verbunden.[30] Im Gegensatz zum Stoizismus ermöglicht diese akademisch-peripatetische Alternative ethisches Wachstum und erkennt den Wert der Dinge an, die sich unserer vollständigen Kontrolle entziehen. Sie versteht das gute Leben als eine Kombination aus rationalem moralischem Verhalten und geordneten äußeren Umständen und fordert daher Tugendhaftigkeit, während sie gleichzeitig die Integration guter Umstände anerkennt. Er bezeichnet die Stoiker als *nerviosius* (beharrlich standhaft) und die Akademiker als *remissius* (nachsichtiger, verständnisvoller).[31]

In Konsequenz dessen kann die Existenz eines *summum bonum* im ethischen Denken Ciceros konstatiert werden. Dieses ist in seiner Abstraktheit perfekt, einheitlich und widerspruchsfrei, kann gleichzeitig aber vielfach ausgedrückt werden, was in einem terminologischen Pluralismus resultiert. Es gibt viele Wörter, um das Gute zu beschreiben, und ob sie tatsächlich dasselbe bedeuten (*solum bonum*) oder ob sie im Wesentlichen dasselbe bedeuten und bloß in den Wörtern variieren, spielt keine Rolle.[32] Entsprechend dem inhärenten Platonismus befinden sich diese Werte in einer abstrakten Sphäre, die Menschen nur anstreben aber nicht perfekt realisieren können. Es handelt sich um einen Themenkomplex, der durch die klassische Idee des *τέλος* und das Leitprinzip der Natur strukturiert ist. So ist das höchste Gut in der Perfektion der *virtus* realisiert, aber ebenso in der Perfektion der *honestas*, und an diese knüpfen viele weitere ethische Begriffe an. Etwa in *de officiis* untersucht Cicero die Natur des *honestum*, indem er dem stoischen Philosophen Panaitios folgt und aufzeigt, dass *honesta* und *utilia* sich niemals wirklich widersprechen können, wodurch *utilia* ebenfalls Teil dieses komplexen Netzwerks von Gütern wird.[33]

Um schließlich die Relevanz der Ethik für die *res publica* aufzuzeigen ist die Einsicht wichtig, dass Gerechtigkeit, das Gemeinwohl und das Recht ebenfalls am *summum bonum* teilhaben und somit in die Bestimmung der *res publica* Eingang finden. Die Menschen pflegen *iustitia* und respektieren das *cuique suum tribuere*, eine viel gepriesene Charakterisierung der klassischen Gerechtigkeit.[34] Während wilde Tiere nur ihren Instinkten folgen, um ihren Besitz zu bewahren oder ihre Wünsche mit roher Gewalt zu befriedigen, schreiben die Menschen jedem das zu, was ihm zusteht. In ähnlicher Weise ist die *aequitas* eng mit der *utilitas* verbunden.[35] Ebenso entspricht für Cicero das Gemeinwohl dem höchsten Gut, das für alle Menschen notwendigerweise dasselbe ist. Es umfasst unter anderem die Erkenntnis und Anerkenntnis der Gleichheit der Menschen sowie das platonische Ideal der Gerechtigkeit. Das Gemeinwohl - wie auch die anderen Ausprägungen des *summum bonum* - stellen die Leitungsmaxime für die Rechtsfindung dar. In einer *res publica* müssen die Regierenden dieses Gemeinwohl anstreben. Wenn die Regierenden statt des Gemeinwohls Partikularinteressen verfolgen, gibt es keine *res publica*.[36]

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[27] *De legibus* I 52: *Ad finem bonorum, quo referuntur et quoius apiscendi causa sunt facienda omnia, controversam rem et plenam dissensionis inter doctissimos.*

[28] *De legibus* I 54: *quippe quom antiqui omne quod secundum naturam esset, quo iuvaremur in vita, bonum esse decreverint, hic nisi quod honestum esset non putarit bonum.*

[29] *De officiis* III 35: *aut sola expetenda est ut Zenoni visum est aut certe omni pondere gravior habenda quam reliqua omnia quod Aristoteli placet.*

[30] *De finibus bonorum et malorum* II 19: *ut Aristoteles virtutis usum cum vitae perfectae prosperitate coniunxit.*

[31] *De officiis* III 106: *Itaque nervosius qui ista disserunt, solum audent malum dicere id, quod turpe sit, qui autem remissius, ii tamen non dubitant summum malum dicere.*

[32] *De legibus* I 54, ähnlich I 30.

[33] *De officiis* III 19-20, 35.

[34] *Tusculanae Disputationes* V 38 über wilde Tiere, die das Gegenteil des *„suum cuique tribuere“* verkörpern, dies z.B. in *Brutus* 85, *de finibus bonorum et malorum* V 65, *de legibus* I 19, *de officiis* I 15. Und natürlich in den Digesten: Ulp. D.1.1.10.

[35] *De finibus bonorum et malorum* III 71: *gravissimeque et verissime defenditur numquam aequitatem ab utilitate posse seiungi.*

[36] *De re publica* I 49: *ex utilitatis varietatibus, cum aliis aliud expediat, nasci discordias.*

Wenn in *de legibus* die Natur als Leitprinzip zwischen *bonum* und *malum*, zwischen *honesta* und *turpia* dargestellt wird, wird auch sie zum Maßstab für die Beurteilung dessen, was zu tun und was zu unterlassen ist. Die Aufgabe, diese Fälle zu identifizieren, obliegt allein der *ratio*. Wie bereits erwähnt, betrachtet Cicero die *ratio humana als* eine göttliche Gabe, weshalb die *perfecta ratio* auch gerecht ist. Diese *ratio* - die in der Natur und in der Göttlichkeit abstrakt, perfekt und unendlich *per se* ist, in weltlichen Angelegenheiten jedoch nur im Geist der Weisen perfekt ist - ist gleichzeitig die *lex*, das Gesetz, das zwischen dem, was getan werden sollte, und dem, was unterlassen werden sollte, unterscheidet.[37]

In diesem Zusammenhang ist wiederum Ciceros Überzeugung von Bedeutung, dass es eine universelle moralische Ordnung gibt, die durch die Vernunft zugänglich ist, alle Menschen verbindet, das ethische Leben stützt und die Grundlage der Rechtssysteme bilden sollte. In einem sokratischen Dialog in *de legibus* II 12 wendet sich Marcus an seinen Bruder Quintus und fragt ihn, ob eine bestimmte Sache als Gut zu betrachten sei, wenn deren *Abwesenheit* jeden Staat zum Untergang verurteilen müsste. Quintus antwortet, dass sie als eines der höchsten Güter zu betrachten sei. Die Brüder kommen zu dem Schluss, dass ohne die *lex* kein Staat existieren kann und dass die *lex* somit als *optima res* zu betrachten ist. In der hier dargelegten Interpretation Ciceros Axiologie mit dem *summum bonum* quasi als Platzhalter des abstrakten und multipel realisierbaren höchsten Guts muss auch die *summa lex*, die sich direkt aus der Natur ableitet, als Ausprägung des *summum bonum* betrachtet werden. Aus der *summa lex*, die das Richtige gebietet und das Unrichtige verbietet, leitet sich in weiterer Folge auch das „richtige" *ius* ab.

Aus alledem folgt, dass all diese Konzepte, *honestum*, *utilia*, *aequm*, *summa lex*, *ius* und schließlich auch *iustitia* und alle Tugenden im Allgemeinen, *per se* wertvoll sind, gepflegt werden müssen und Teil der von Cicero vertretenen ethischen Werte sind.[38] Inwiefern sie erkennbar sind, ist die Frage, der sich die folgenden Abschnitte kurz widmen.

3. *Sapientia, prudentia* und *dialectica*

In Betrachtung Ciceros epistemologischer Grundhaltung stellt sich heraus, dass Cicero, anstatt auf absolute Wahrheiten zu vertrauen, der skeptischen Schule folgt, die ursprünglich von Platon stammte und Cicero von Philo von Larisa vermittelt wurde. Nach dieser gemäßigten Skepsis müssen Argumente *in utramque partem* und die Kunst der Dialektik genutzt werden, um zu verstehen, was *probabilis* ist, und um das zu erreichen, was der Wahrheit am nächsten kommt (*veri simili*). Es ist wichtig zu verstehen, dass Cicero nicht leugnet, dass die absolute Wahrheit existiert - sie ist mit der *sapientia* und der *virtus* im abstrakten Netz der Güter verflochten -, sondern dass er nur behauptet, dass sich die absolute Wahrheit (zumindest über ethische Aussagen) außerhalb der Reichweite des endlichen menschlichen Verstandes befindet. Menschen können ihr nur mit Bezug auf das Wahrscheinlichste nahekommen, während nur die Götter und der hypothetische perfekte *Sapiens* Zugang zu absolutem Wissen haben. Die Rolle des *sapiens* ist selbstverständlich eine, die sich der manchmal recht unbescheidene Cicero gelegentlich auch selbst zuschreibt, wie wir unten sehen werden.

Ohne näher auf diese erkenntnistheoretischen Erörterungen eingehen zu können, müssen für unseren Zweck hier nur kurz die Qualitäten diskutiert werden, die das bestmögliche Streben nach Wissen und nach dem höchsten Gut ermöglichen, und die in weiterer Folge in der bestmöglichen Realisierung des Gemeinwohls und in den bestmöglichen Gesetzen resultieren.

In etwa entspricht die *sapientia* der *perfecta ratio*, die u.a. das *summum bonum* theoretisch erfasst und perfekt durchschaut. *Prudentia* ist nicht bloß Klugheit im alltäglichen Sinn, sondern reflektiert als kluge Voraussicht (*pro-videre*[39]) jene Art der Urteilskraft, die das Angemessene im jeweiligen Fall erspürt und ausführt. Während *sapientia* auf universale Prinzipien verweist, bindet *prudentia* diese an konkrete Konstellationen. Das eine ohne das andere verfehlt sein Ziel. Weisheit ohne praktische Einsicht verharrt im Abstrakten, und Klugheit ohne Weisheit verkommt zur bloßen Zweckmäßigkeit. Erst im Zusammenspiel beider entsteht eine Haltung, die den Herausforderungen des öffentlichen wie des privaten Lebens gewachsen ist.

Die Betonung von *sapientia* und *prudentia* darf nicht als abstrakter Idealismus verstanden werden, sondern reflektiert vielmehr den methodischen Zugang zu einer Lebens- und Staatsauffassung, die sich im Spannungsfeld von Theorie und Praxis entfaltet. Beide Begriffe tragen eine doppelte Funktion: einerseits als Orientierung im Denken, andererseits als Leitfaden im Handeln. Ohne diese Verknüpfung von Einsicht und Maßhaltung bliebe jede Reflexion über menschliches Verhalten, über Pflicht, Nutzen und Gerechtigkeit unvollständig.

Die relevante Methode, um *sapientia* und *prudentia* zu entwickeln, ist die Dialektik. Durch sie kann zwischen Wahrem und Falschem unterschieden werden.[40] Dass Cicero diese Verbindung betont, zeigt sich nicht zuletzt in seiner Darstellung philosophischer Traditionen. Er stellt sich nicht ausschließlich auf die Seite des Stoizismus oder des Platonismus, sondern sucht Elemente, die im römischen Kontext anwendbar sind. In dieser Auswahl spiegelt sich sein Bewusstsein, dass Weisheit stets geprüft und an den Maßstab des Praktischen rückgebunden werden muss. Zugleich offenbart sich hier die Überzeugung,

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[37] Z.B. *de legibus* I 18: *lex est ratio summa, insita in natura, quae iubet ea quae facienda sunt, prohibetque contraria. Eadem ratio, cum est in hominis mente confirmata et perfecta, lex est*; *de legibus* (Fragment nach Ziegler in III 33): *est quidem vera lex recta ratio, naturae congruens, diffusa in omnis, constans, sempiterna, quae vocet ad officium iubendo, vetando a fraude deterreat, quae tamen neque probos frustra iubet aut vetat, nec improbos iubendo aut vetando movet*.

[38] *De legibus* I 48: *et ius et omne honestum sua sponte esse expetendum. Etenim omnes viri boni ipsam aequitatem et ius ipsum amant, nec est viri boni errare et diligere quod per se non sit diligendum: per se igitur ius est expetendum et colendum. Quod si ius, etiam iustitia; sin ea, reliquae quoque virtutes per se colendae sunt.*

[39] *De legibus* I 60.

[40] *Lucullus* 91: *dialecticam inventam esse dicitis veri et falsi quasi disceptatricem et iudicem… quae coniunctio quae diiunctio vera sit, quid ambigue dictum sit, quid sequatur quamque rem quid repugnet*. Siehe auch *de finibus bonorum et malorum* II 17. *Lucullus* 7: *neque nostrae disputationes quicquam aliud agunt nisi ut in utramque partem dicendo et audiendo eliciant et tamquam exprimant aliquid quod aut verum sit aut ad id quam proxime accedat.*

dass kein System allein hinreicht, um der Vielschichtigkeit des menschlichen Zusammenlebens gerecht zu werden. Ferner ist die dialogische Form vieler seiner Schriften nicht zufällig. Indem Cicero Gegner und Befürworter verschiedener Schulen miteinander und *in utramque partem* ins Gespräch treten lässt, demonstriert er, dass *sapientia* nicht als fertige Wahrheit vorliegt, sondern im Widerstreit der Argumente sichtbar wird. Zugleich übt sich der Leser darin, *prudentia* walten zu lassen: aus der Auswahl der Argumente das Angemessene zu wählen, ohne sich dem bloßen Skeptizismus oder der dogmatischen Einseitigkeit zu verschreiben.

So wird deutlich, dass die Verbindung von Weisheit und Klugheit weniger ein theoretisches Postulat als ein methodisches Instrument darstellt. Sie bietet Orientierung in einem Feld, das durch Widerspruch, Unsicherheit und Vielfalt geprägt ist, und eröffnet zugleich die Möglichkeit, Maß und Ordnung in die wechselnden Umstände des Lebens einzutragen. Damit sind *sapientia* und *prudentia* nicht nur Tugenden des Einzelnen, sondern Prinzipien, die das gemeinsame Leben zu strukturieren und zu stabilisieren vermögen.

Die Verknüpfung der vorher beleuchteten Axiologie - das Wertenetz rund um das abstrakte *summum bonum* - mit der hier betonten Dialektik erfolgt auf zweierlei Art und Weise. Zunächst gibt es eine Art „Dialektik des Individuums". Die Perfektionierung der individuellen *ratio* erfolgt durch eine antidogmatische, skeptische Grundhaltung, durch Gegenüberstellung von Positionen und Erkennen derjenigen Synthese, die am ehesten der Wahrheit entspricht. Die Dialektik des Individuums besteht somit darin, dass Wissen und Weisheit nicht isoliert, sondern im Prozess des Fragens, Zweifelns und Widerlegens entstehen. Der Einzelne gelangt zu Einsichten, indem er unterschiedliche Perspektiven prüft, Widersprüche erkennt und versucht, sie in einer neuen, höheren Einsicht zu überwinden. Dieses ständige Wechselspiel zwischen These und Antithese führt nicht zu endgültigen Wahrheiten, wohl aber zu einer Annäherung und Vertiefung des Verständnisses. Die individuelle Suche nach Wahrheit ist somit ein dialogischer Prozess, in dem das Denken selbst auf Konfrontation, Austausch und Reflexion angewiesen bleibt. Auch im staatlichen Kontext ist es zunächst Sache eines Weisen, die *res publica* anzuführen und angesichts möglicher Entwicklungen in einem moderaten und ausgeglichenen Zustand zu erhalten: *Quos cum cognosse sapientis est, tum vero prospicere inpendentis, in gubernanda re publica moderantem cursum atque in sua potestate retinentem, magni cuiusdam civis et divini paene est viri*.[41]

In ähnlicher Weise gibt es eine „Dialektik der Geschichte", wobei sich die Geschichte als ein sich über die Zeit ausdehnender fortgesetzter Austausch von Standpunkten, Erfahrungen und Theorien entfaltet. Unterschiedliche Kulturen, Epochen und Denktraditionen treten miteinander in Spannung, wobei Konflikte und Krisen oft den Anstoß zu neuen Synthesen geben. Doch zur Erkenntnis dieser Synthesen bedarf es im Denken Ciceros der weisen und klugen Beachtung der Geschichte durch fähige Staatsmänner. So wie das Individuum aus innerer Dialektik wächst, so schreitet auch die Gesellschaft insgesamt durch Auseinandersetzung und Vermittlung voran, insofern sie durch *sapientia* und *prudentia* angeleitet wird. Das geschichtliche Wissen, was Cicero vielfach als *sapientia veterum* und *mos maiorum* wiedergibt, ist das Ergebnis eines langen, dialektischen Prozesses, in dem aus Differenzen neue Gemeinsamkeiten und aus Gegensätzen höheres Verständnis hervorgeht. Das Vergessen der Geschichte hingegen wäre fatal und würde die Annäherung an das *summum bonum* zum Scheitern verurteilen.

Die Dialektik einerseits als Methode des Weisen und andererseits als Prozess historischer Auseinandersetzungen - wobei sich erstere auch in einer klugen, auf *sapientia* und *prudentia* beruhenden Analyse und Einsicht über letztere darstellt -, muss sowohl auf den Staat und seine Verfassung, als auch auf das Recht an sich angewandt werden.[42] Diesen finalen Schritt des Arguments werde ich im Folgenden näher ausführen.

4. Recht in der *res publica*

Wie oben ausgeführt, nehmen Gerechtigkeit, Recht und Gemeinwohl gemeinsam mit ähnlichen Konzepten in Ciceros politischem Denken die Rolle eines obersten Maßstabs ein, den er als abstraktes *summum bonum* fasst. Das Recht beruht nicht auf bloßer Konvention, sondern es gibt einen abstrakten, normativen Standard, nach dem das Recht beurteilt wird. So gedachtes Recht ist für Cicero Naturrecht. Bei Cicero ist es ewig gültig ist und beruht auf der Vernunft, die allen Menschen gemeinsam ist. Dieses höchste Gut, das zugleich höchstes Recht ist, kann jedoch nie in reiner Form von Menschen verwirklicht werden. Zu groß sind die individuellen Begrenzungen, zu unvollkommen die politischen Realitäten. Darum bleibt die Erkenntnis des Naturrechts grundsätzlich nur annähernd möglich, eine Approximation, die Orientierung gibt, ohne perfekt erreicht werden zu können.

Die Annäherung an dieses *summum bonum* geschieht im Staat wie oben bereits angekündigt, dialektisch, und zwar in mehrfacher Hinsicht. Einerseits bedarf das Individuum der dialektischen Selbstprüfung: nur wer Argumente abwägt, Gegensätze prüft und in der Synthese höhere Einsichten gewinnt, nähert sich der Wahrheit. Andererseits entfaltet sich auch die Geschichte selbst in einem dialektischen Prozess: Völker und Staaten entwickeln sich im Widerstreit von Ideen, Krisen und Institutionen weiter, wobei sich allmählich das, was dem Naturrecht am nächsten kommt, herauskristallisiert. Dies geschieht vor allem im Bereich dessen, was modern Verfassungsrecht genannt wird. Im Rahmen der Gesetzgebung durch die so verfassungsmäßig etablierten Institutionen zeigt sich eine weitere Dialektik, die durch die mäßigende Interaktion der verschiedenen Machtpole gerechte Gesetze hervorbringt. Cicero, der sowohl philosophisch geschult als auch historisch belesen ist,

[41] *De re publcia* II 45.

[42] *Brutus* 152 f.: *quod numquam effecisset ipsius iuris scientia, nisi eam praeterea didicisset artem, quae doceret rem universam tribuere in partes, latentem explicare definiendo, obscuram explanare interpretando, ambigua primum videre, deinde distinguere, postremo habere regulam, qua vera et falsa iudicarentur et quae quibus propositis essent quaeque non essent consequentia.* [153] *Hic enim adtulit hanc artem omnium artium maxumam quasi lucem ad ea, quae confuse ab aliis aut respondebantur aut agebantur. Dialecticam mihi videris dicere, inquit.*

erkennt diese dritte, und insgesamt also mehrfache Dialektik. Sein Rückgriff auf die römische Geschichte, auf Mythen wie die Gründung Roms oder auf die Entwicklung der republikanischen Institutionen, dient gerade dem Zweck, die geschichtliche Annäherung an das Naturrecht aufzuzeigen. Ciceros historisch-dialektische Sicht auf die Staatsverfassung und auf das institutionelle Gleichgewicht und die Mäßigung werden besonders aufschlussreich für sein Verständnis vom Recht.

Vor diesem Hintergrund tritt Cicero selbst in die Rolle des Weisen, ja fast des *Nomotheten*.[43] Er präsentiert sich als jemand, der aus individueller Weisheit und historischer Erfahrung heraus befähigt ist, die Strukturen einer gerechten politischen Ordnung zu entwerfen. In seinem *de legibus* erklärt er nicht bloß abstrakte Prinzipien, sondern schlägt konkrete staatliche Strukturen vor, die das Gemeinwohl sichern sollen. Die Selbstlegitimation beruht auf seiner angemaßten doppelten Kompetenz: der philosophischen Fähigkeit, das Naturrecht in Ansätzen zu erkennen, und der historischen Bildung, die ihn befähigt, dessen Annäherung im realen Verlauf der Geschichte zu deuten.

Aus der römischen Geschichte, wie sie Cicero in *de re publica* II darlegt, wird klar: Der Staat ist instabil, wenn eine einzelne Person vorgibt, das Gute zu erkennen und immer gerecht zu regieren. Ein *rex* kann zwar eine *res publica* regieren, aber nur insofern, als er gerecht regiert. Bei einem einzigen Herrscher ist es wahrscheinlich, dass er entweder das Gute nicht erkennt, nicht anerkennt, oder sich korrumpieren lässt, nur noch seine eigenen Interessen verfolgt und ungerecht regiert.[44] Cicero warnt jedoch nicht nur vor tyrannischen Monarchen, sondern vor jeder Form von Tyrannei. Diese tritt auch auf, wenn eine Gruppe von Aristokraten - die zuvor die *civitas optimatium* gerecht regiert haben - zu einer *factio iniusta*, einer ungerechten und tyrannischen Bande, wird.[45] Auch die Menge, die Cicero durch unaufhörliche Abstimmungsaktivität charakterisiert, garantiert nicht die Befolgung des Guten. Es ist wahrscheinlicher, dass sie ihre Freiheiten missbrauchen, dass die Gesellschaft gespalten wird, dass die *libertas* zur *licentia* wird und dass der koordinierte *populus* als solcher aufhört zu existieren und zu einer bloßen tyrannischen Menge wird.[46] Aus den genannten Gründen lehnt Cicero sowohl die Herrschaft des *rex* als auch die der *optimates* und die der *multitudo* ab. Auch hier ist das Problem zweifach: Nicht nur existiert dieses *iter ad finitimum quoddam malum* in jeder reinen Regierungsform, sondern es fehlt auch in jeder die Beteiligung der beiden anderen Alternativen.[47]

Um die verwerflichen Staatsformen zu vermeiden, befürwortet Cicero einen *moderatus permixtusque status rei publicae*[48], der die verschiedenen Gruppen zusammenführt und zu einer *optima res publica* verschmilzt. Bemerkenswert ist, dass Cicero eine Mischung der Gewalten verteidigt, einen Konsens befürwortet, der das *ius* quasi als Verfassung im modernen Sinne festlegt,[49] und darüber hinaus zur Mäßigung aufruft. Unter vielen möglichen Interpretationen bietet der *iuris consensus* die Idee, eine Synthese über das Recht zu finden, die auch die institutionelle Struktur und eine Synthese zwischen verschiedenen Positionen behandelt. Um beständig zu sein, muss eine Verfassung die geschichtlichen Extreme mäßigen und rechtlich bindend festlegen, wobei diese Festlegung auf einer Metaebene geschieht und infolgedessen eine höhere Geltungssicherheit beansprucht. So wie der individuelle *animus* gelenkt, und die *voluptas* durch die *ratio* kontrolliert, werden muss, muss auch im Staat jede Form der Übertreibung vermieden und Extreme gemildert werden. Die sozusagen verfassungsmäßig eingerichtete römische Republik würde durch dialektische Interaktion der Institutionen die jeweiligen Extreme gegenseitig mäßigen und gerechte Gesetze hervorbringen Das Konzept der Mäßigung wird viele Jahrhunderte später von Montesquieu auf illustre Weise wieder aufgegriffen werden.[50] Ciceros moralische Anforderungen an Gesetze zirkulieren seit jeher in verschiedenen Rechtsordnungen und beeinflussen auch moderne Rechtsordnungen.[51]

Cicero ist nicht der Erste, der eine gemischte Verfassung empfiehlt. Die Idee hat ihren Ursprung im Denken des griechischen Historikers Polybios, der im Gegensatz zu Platon und Aristoteles seinen Fokus nicht auf Griechenland, sondern auf Rom legte. In seinen Historien analysierte er die römische Geschichte als eine Abfolge von monarchischen, aristokratischen und demokratischen Elementen mit seiner Theorie der *ἀνακύκλωσις* (Anacyclosis). Seiner Meinung nach verdiente die römische Republik besondere Aufmerksamkeit, da ihre Stabilität eher auf ausgewogenen Institutionen als auf einer tugendhaften Bürgerschaft beruhte.[52] Im Gegensatz dazu glaubte Cicero, weniger empirisch und eher normativ, dass die verschiedenen Gewalten innerhalb der Verfassung miteinander vermischt werden sollten, anstatt sich, wie in Polybios Darstellung, voneinander zu trennen und in gegensätzlichen Positionen zu verbleiben.[53] Es

[43] Siehe insb. GIRARDET, K. M., Die Ordnung der Welt. Ein Beitrag zur philosophischen und politischen Interpretation von Ciceros Schrift De legibus. In: *Historia. Zeitschrift für alte Geschichte. Einzelschriften*, Band 42, 1983, der diese Thematik dezidiert aufgreift.

[44] *De re publica* I 65, 68; II 47-49; III 43, 45.

[45] *De re publica* I 44, 45, 68.

[46] *De re publica* I 44, und besonders I 67.

[47] *De re publica* I 44.

[48] *De re publica* I 45: *Itaque quartum quoddam genus rei publicae maxime proban- dum esse sentio, quod est ex his quae prima dixi moderatum et permixtum tribus*. I 69 *iuncta moderateque permixta constitutione rei publicae*.

[49] STRAUMANN, B., *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution*. New York, 2016, S. 147-238.

[50] MONTESQUIEU, *Discourse on Cicero*; RAINER, J. M., Polybios und Montesquieu: Die Idee der Balance. In: *Index* Nr. 45, 2017, S. 671-676.

[51] CALLEWAERT, M. – KOVAČ, M. Cicero's Responsibilizing Narrative and Moral Decision Making in Roman Law. In: *Journal on European History of Law* Jg. 16, Nr. 1, 2025, S. 10-24.

[52] STRAUMANN, B., *The Just State. Greek and Roman Theories of Justice and Their Legacy in Western Thought*. Hoboken, 2025, S. 137. Polybius *Historien* 6.43.5 ff.

[53] ATKINS, J. W., Roman Republicanism. In: LOVETT, F. - SELLERS, M. N. S. (Hrsg.), *The Oxford Handbook of Republicanism (in progress)*. Oxford, 2024, Kapitel 2.

ist anzumerken, dass die gemischte Verfassung nicht Teil einer utopischen Vorstellung des Philosophen Cicero ist, sondern aus den Beobachtungen der *res publica maiorum* resultiert, zu denen der *civis Romanus* Cicero, der in Geschichte und Philosophie gut ausgebildet war, in der Lage ist. Es sind die großen Staatsmänner der römischen Geschichte - in Ciceros Selbstverständnis ihn selbst einschließend -, die es verstanden haben, das, was zuvor eine reine Monarchie war, weiterzuentwickeln, die dank ihrer Weisheit die Notwendigkeit erkannten, weitere Institutionen einzuführen, um die *res publica* zu stabilisieren.

Cicero beschreibt mehrfach, wie die Staatsgewalt in der *optima res publica* gemischt und gemildert sein muss. Das *imperium* verbleibt bei den *consules*, deren Macht der Macht des Königs in einem *regnum* ähnelt.[54] Aber bereits hier wird Mäßigung durch die Idee der Kollegialität eingeführt, indem ein zweiter Konsul hinzugefügt wird. Die Macht des *ius intercedendi* jedes einzelnen ermöglicht es ihnen, jeden Befehl des anderen zu blockieren. Es ist besser, „etwas Gutes zu verhindern, als etwas Böses zuzulassen", schreibt Cicero.[55] Der Senat verfügt über das *consilium*, die Erfahrung und Weisheit, um politische Maßnahmen zu erwägen. Sein oberstes Prinzip ist das Wohl des Volkes: *Senatu salus populi suprema lex esto*.[56] Schließlich kommt es zur Beteiligung des *populus* in Form von Wahlen sowohl der Konsuln als auch indirekt der Senatsmitglieder, bei denen es sich in der Regel um zuvor gewählte Beamte handelt. Cicero befürwortet jedoch nur eine sehr moderate Beteiligung des *populus*. Bereits Polybios warnte vor (übertriebener) Demokratie.[57] Und Cicero schränkt die Macht des *populus* auf verschiedene Weise ein. Er kann wählen, aber nicht geheim.[58] Er kann Gesetze verabschieden, aber nicht initiieren. Außerdem verbleibt die wahre Macht bei den Wohlhabenden, da bei den Wahlen die Stimmen der Zenturien, die die reichen Bürger vertreten, ein größeres Gewicht hatten.[59]

Neben der Kombination der drei klassischen Regierungsformen umfasst die von Cicero entwickelte Mäßigung auch andere Institutionen wie die Auguren unter Berücksichtigung des Wertes der Religion oder die Volkstribunen zur Besänftigung des Volkes. Er erkennt an, dass bestimmte soziale Dynamiken - wie in seinem Fall das unvermeidliche Streben der Plebejer nach Macht - nicht ignoriert, sondern klug in das Staatsgefüge integriert werden müssen. Dieses kann als sehr nützliches Beispiel dienen, um das Konzept der Mäßigung bei Cicero zu verstehen. Die Debatte über die Einführung der Institution des Volkstribuns findet zwischen den Protagonisten des *de legibus* III 19-26 statt. Hier erkennt Cicero an, dass bestimmte soziale Dynamiken - wie in diesem Fall das unvermeidliche Streben der Plebejer nach Macht - nicht ignoriert, sondern intelligent in die Struktur des Staates integriert werden sollten. Was zuvor eine unkontrollierbare, brutale Menge war, wird mit der Institution des Volkstribuns, der sie vertritt, zu einer gemäßigten Macht, die in der Politik des Staates berücksichtigt werden kann.

So wird die Schaffung des Tribunats nicht als Bedrohung angesehen, sondern als paradigmatisches Beispiel dafür, wie sich das republikanische System durch umsichtige Reformen unter der Führung weiser Staatsmänner weiterentwickeln kann. Das Unvermeidliche - in diesem Fall das Streben des Volkes nach Geltung - darf nicht ignoriert werden, sondern muss klug in die Struktur des Staates integriert werden (III 26). Diese Perspektive unterstreicht den Wert des dialektischen Gleichgewichts zwischen verschiedenen sozialen und politischen Kräften, zwischen verschiedenen, vielleicht gegensätzlichen Ideen, und zeigt sogar, was später wie erwähnt etwa durch Montesquieu in seinen Überlegungen zur Mäßigung und Gewaltenteilung wieder aufgegriffen wird.

So kommt Cicero zu einem Staatsentwurf, der in seiner Funktion dem entspricht, was die Moderne unter einer Verfassung versteht.[60] Seine Ordnung ist eine bewusste, reflektierte Gestaltung des politischen Gemeinwesens, die „geschichtliche Thesen und Antithesen" verknüpft und in einer gemischten Verfassung resultieren lässt, die das Ziel hat, die Annäherung an das Naturrecht institutionell abzusichern, um Beständigkeit zu garantieren und die fortschreitende prozedurale Suche nach dem *summum bonum* auf „einfachgesetzlicher" Ebene bestmöglich abzusichern.

Cicero lobt in *de re publica* die Weisheit seiner Vorfahren (*sapientia maiorum*), die im Laufe der Zeit ein Gleichgewicht der Kräfte (*temperatio*, *moderatio*) gefunden hatten, das zur Stabilisierung der politischen Ordnung beitrug. Es sind die fortschreitende Entwicklung des Staates im Laufe der Geschichte unter der Führung weiser Staatsmänner, die *sapientia maiorum* (die Weisheit der Vorfahren; III 24) und das dialektische Gleichgewicht (*moderatio*) der verschiedenen Machtpole im Staat, die Cicero zu einem Bewahrer der Tradition machen, der kontinuierliche Reformen akzeptiert, anstatt ein Befürworter einer disruptiven Revolution zu sein. Seine Perspektive unterstreicht den Wert des dialektischen Gleichgewichts zwischen den verschiedenen sozialen und politischen Kräften und zwischen unterschiedlichen, vielleicht gegensätzlichen Ideen.

Auch in der staatsverfassungsrechtlichen Synthese zeigt sich wieder Ciceros Eklektizismus, indem er einerseits den platonischen Idealismus und andererseits die stoische Überzeugung von globaler Gerechtigkeit übernimmt und sie mit den Schlussfolgerungen aus dem dialektischen Prozess verbindet. Er bleibt nicht wie Platon bei einer Utopie stehen, sondern leitet seine Theorie aus der tatsächlichen römischen

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[54] *De legibus* III 4: *Quod genus imperii primum ad homines iustissimos et sapientissimos deferebatur - idque et in re publica nostra maxime valuit, quoad ei regalis potestas praefuit -, deinde etiam deinceps posteris prodebatur, quo <et> in iis qui etiam nunc regnant<ur> manet.*

[55] *De legibus* III 42: *Parere iubet intercessori, quo nihil praest<abil>ius: impediri enim bonam rem melius quam concedi malae.*

[56] *De legibus* III 8.

[57] POLYBIOS *Historien*, z.B. VI 44; EDELSTEIN, D., - STRAUMANN, B., On the liberties of the ancients: licentiousness, equal rights, and the rule of law. In: *History of European Ideas* Jg. 49, Nr. 6, 2023, S. 1042.

[58] *De legibus* III 34-39.

[59] *De re publica* II 39.

[60] STRAUMANN, B., *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution*. New York, 2016, S. 147 ff.

res publica zu ihrem Höhepunkt ab, bereichert sie mit seiner philosophischen Perspektive und wendet sie auf die römische *res publica* seiner Zeit in einem Versuch der Reformierung an. Mit dieser Kombination, der platonisch abstrakten Affirmation eines stoischen allgemeingültigen *logos*, der das Naturrecht umfasst, und einer skeptischen Methodik zum Erreichen desselben, können die Kontroversen darüber, welcher Philosophie sich Cicero anschließt, einfacher verständlich gemacht und erklärt werden.

Die Anwendung dieser epistemologischen Prämissen auf die Staatstheorie bedeutet anzuerkennen, dass staatliche Stabilität nicht ohne epistemologische Stabilität garantiert werden kann. So wie in einer Debatte das *veri simili* als Ergebnis des Abwägens von Meinungen *in utramque partem* angenommen werden muss, muss im Staat jede Politik („policy") als Ergebnis des Abwägens der verschiedenen Kräfte und Interessen angenommen werden. Einerseits garantiert die Mischverfassung Stabilität aufgrund eines Ausgleichs historisch aufgetretener Antithesen, andererseits garantiert die Mischverfassung die dialektische Prüfung einzelner Gesetzesvorhaben.

Konklusion

Im Ergebnis erschöpft sich Ciceros republikanisches Denken nicht in der Formulierung eines einmaligen Zieles oder in der bloßen Beschreibung eines Idealzustands. Vielmehr versteht er Rechtserkenntnis und Staatsgestaltung als einen unaufhörlichen Prozess, in dem das Gemeinwohl durch geeignete Verfahren immer wieder neu gesucht und approximativ verwirklicht werden muss. Die *res publica* ist weniger eine fertige Ordnung als vielmehr eine Bewegung: ein Streben, das niemals endgültig abgeschlossen werden kann. Dennoch beruht sie auf bestimmten Grundannahmen wie der Gleichheit der Menschen und dem Wert von Bildung und Austausch für das Erreichen von *sapientia*, *prudentia* und schließlich Gerechtigkeit.

Mehrere Ebenen der Dialektik prägen diesen Prozess. Auf der intrapersonalen Ebene geht es um die Selbstbildung des Einzelnen: Durch dialektische Reflexion entwickelt der Mensch Weisheit und Tugenden, die ihn befähigen, das Naturrecht zumindest in Ansätzen zu erfassen. Auf der politischen Ebene ist die Dialektik in den Institutionen verkörpert, die weise durch die Vorfahren eingerichtet wurden. Sie wirken einerseits als Ergebnis der durch weise Staatsmänner erkannten historischen Dialektik und andererseits als dialektischer Rahmen, in dem unterschiedliche Interessen und Positionen in einzelnen Gesetzes- und policy-Verfahren austariert und im Verfahren auf das Gemeinwohl hin ausgerichtet werden. Diese mehrfache Dialektik - individuell und institutionell - ist der Schlüssel zur republikanischen Ordnung.

In Ciceros Denken verbinden sich dabei die platonische Postulation eines abstrakten, höchsten Prinzips - das wiederum die stoische, allgemeingültige Anerkennung des *logos* zulässt - mit einer skeptischen Methodik, die anerkennt, dass der Zugang zu diesem Prinzip nur schrittweise, durch Prüfung und Verfahren, möglich ist. Gerade aus dieser Spannung lässt sich erklären, weshalb Cicero nicht eindeutig einer philosophischen Schule zugeordnet werden kann: Seine Philosophie ist integrativ, schöpft aus unterschiedlichen Traditionen und versucht, die Suche nach dem Richtigen und Gerechten sowohl abstrakt als auch praktisch zu fundieren.

Die konkrete Gestalt dieser Verbindung ist sein Konzept der Verfassung. In dieser Hinsicht erscheint Cicero als einer der ersten Denker, der das Prinzip einer normativen, schriftlich fixierten und einer zwar nicht durch eine Zweidrittelmehrheit, aber einer durch Vernunft legitimierten Verfassung entwirft. Diese versteht er als die stabilste Ordnung, die eine Annäherung an das *summum bonum* durch kluge Gesetzgebung und ausgewogene Strukturen ermöglicht. Damit ergibt sich eine klare Verantwortung: Die Regierenden haben das Gemeinwohl zu verfolgen und dabei ihre eigene Weisheit zu vervollkommnen. Institutionen und Prozesse wiederum müssen so gestaltet sein, dass sie dieses Streben ermöglichen und fördern. Verfehlen die Regierenden jedoch dieses Ziel und verfolgen statt des Gemeinwohls lediglich Partikularinteressen, so ist die *res publica* im eigentlichen Sinne aufgehoben. Denn nur dort, wo das Gemeinwohl den Maßstab bildet, verdient die politische Ordnung den Namen *res publica*. Und es könnte fruchtbar sein, die Relevanz dieses Maßstabs für Republiken auch im modernen Diskurs wieder verstärkt aufzugreifen.

Purchase of a Slave by Means of an Agent, in D. 21,1,51 pr.-1*

*Máté Giovannini***

Abstract

Even today, the issue persists whereby a purchased item is subsequently discovered to have a defect, thereby impairing its intended use. Warranty is a central institution of the law of sales, protecting the buyer's interest in performance free from defects. In ancient Rome, warranty was originally closely linked to the contract of sale, and through centuries of development it evolved into the form that continues to serve as the basis of regulation to this day. Liability for latent physical defects first emerged in relation to the purchase of slaves and cattle. Slave traders did not have a particularly good reputation; and it was well known that they often took advantage of the buyer's inexperience; therefore, one had to be careful when conducting business with them. The buyer could find themselves in an even more vulnerable position if they were unable to be present in person at the transaction. The texts analysed below report cases in which the slave was purchased not by the dominus himself, but by his agent. In the first case, a slave acts on behalf of the absent party, while in the second, a procurator does so. The decisions of Africanus and Julian merit consideration not only with regard to liability for latent defects, but also from the perspective of agency.

Keywords: *actio empti; actio redhibitoria; actio mandati; actio negotiorum gestorum; aedilician edict; agency; latent defects; mandatum; negotiorum gestio; procurator; Roman law.*

1. Liability for latent defects

Qui enim scire debuit de sanitate, de fuga, de furtis, praestat edicto aedilium[1] ("For by the aediles' ruling the vendor is answerable for any deficiency in the slave he sells, for he is supposed to know if his slave is sound, or if he is a runaway, or a thief."[2]). Through the Cicero quote, we gain insight into the regulation of latent defects in ancient Rome. The first provisions on latent defects were promulgated by the *aediles curules*,[3] who, as part of their general administrative duties, also controlled markets.[4] The aedilician edicts established rules concerning the sale of slaves and cattle, highlighted the typical defects characteristic of the particular goods, and obliged sellers to inform buyers of these defects in every case.[5] The rules prescribing the obligation

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1 Cic. *off*. 3,71. See the analysis of the passage: FIORI, R., *Bonus vir. Politica, filosofia, retorica e diritto nel de officiis di Cicerone*. Napoli, 2011, p. 337-339.

2 WALTER, M., *Cicero: De officiis*. Cambridge, MA, 1928, p. 343.

3 JAKAB, É., *Praedicere und cavere beim Marktkauf. Sachmängel im griechischen und römischen Recht*. München, 1997, p. 1.

4 The office was probably established in the 5th century BC; at that time there were two aediles, and their task was to control the buildings where the *plebiscita* were kept: GEDEON, M., Die Ädilen und die Unterhaltungsindustrie im antiken Rom. In: MACH, P. – PEKARIK, M. – VLADÁR, V. (eds.), *Constans et perpetua voluntas. Pocta Petrovi Blahovi k 75. narodeninám.* Trnava, 2014, p. 177-185, p. 177. The magistrates carried out market supervision duties up until the end of the Principate: PÓKECZ KOVÁCS, A., *A principátus közjoga (Kr. e. 27 – Kr. u. 284)*. Budapest – Pécs, 2016, p. 78. The aediles further oversaw the maintenance of public order in the city, could serve as prosecutors in trials concerning state property, and at times conducted investigations as well: BAJÁNHÁZY, I., *Az állami vagyonnal kapcsolatos szerződések Livius munkájában. Általános rész: az államszervezet és az igényérvényesítés*. Vol. 1, Miskolc, 2017, p. 46-47.

5 Liability was confined for certain physical defects: ZULUETA, F., d., *The Roman law of sale. Introduction and select texts*. Oxford, 1945, p. 50. Therefore, sellers had to ensure that buyers were informed of these defects, if they existed, because in that case buyers could not complain, and no liability would arise: PUGSLEY, D., The Aedilician Edict. In: WATSON, A. (ed.), *Daube Noster. Essays in Legal History for David Daube*. Edinburgh – London, 1974, p. 253-264, p. 256.

of slave traders to provide information have been preserved in Ulpian's commentary on the edict.[6]

The seller was required to inform the buyer publicly and correctly *(palam recte)*[7] if the slave had any disease or defect,[8] or the habit of running away or loitering, or still subject to noxal liability.[9] If a slave was sold without compliance with these provisions, or it turned out that the ware was not actually in the condition the seller had stated or promised at the time of sale,[10] the aediles granted actions to the buyer.[11] Owing to the defect, the buyer was entitled to bring an action either for rescission or for reduction.[12] The aediles considered it irrelevant whether the seller knew about the defect or not; the seller was held liable regardless of fault.[13] The reason for the promulgation of this edict was, in fact, to prevent the frauds of sellers and to provide relief for buyers who had been deceived by sellers.[14] The sellers were professional merchants, possessing experience and expertise regarding their goods; in contrast, individual buyers were often inexperienced and thus vulnerable to the merchants.[15] According to Ulpian's explanation, reflecting a 'consumer protection' spirit, the regulation was not inequitable *(iniquum)*, because the seller could easily obtain knowledge of these matters, while for the buyer it made no difference whether he was deceived by the seller's ignorance or cunning.[16] In addition, the buyer was

[6] The aediles continuously shaped their edict, occasionally removing old regulations and adding new ones: JAKAB, É., Aediles curules. Róma rendészeti igazgatása és ennek hatása a magánjog fejlődésére. In: TÓTH, K. (ed.), In memoriam Dr. Kovács István akadémikus, egyetemi tanár. *Acta Juridica et Politica*, Tom. XL. Fasc. 1-26, Szeged, 1991, p. 131-155, p. 145ff. The Ulpian text (D. 21,1,1,1) likely represents later additions to the edict, but it summarizes the rules collectively, cf. Gell. *NA*. 4,2,1; Ulp. D. 21,1,31,21.37. For the wording of the edict, see: NICHOLAS, B., Dicta promissave. In: DAUBE, D. (ed.), *Studies in the Roman Law of Sale. Dedicated to the memory of Francis de Zulueta*. Oxford, 1977, p. 91-101.

[7] Information was often provided on a *titulus*, a small tablet hung around the neck of the slave, on which, e.g., his origin, age, and nationality were recorded: ERNST, W., Neues zur Sachmängelgewährleistung aufgrund des Ädilenedikts. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 116, No. 1, 1999, p. 208-221, p. 217. In addition to the above, documents often also indicated the sex of the slave: CIL IV. 3340; FIRA III, 133; PÓLAY, E., *A dáciai viaszostáblák szerződései*. Budapest, 1972, p. 145; JAKAB, É., Apropó jogharmonizáció. Gondolatok az ókori kellékszavatossági modell kapcsán. In: TÓTH, K. (ed.), In memoriam Nagy Károly egyetemi tanár (1932-2001). *Acta Juridica et Politica*, Tom. LXI. Fasc. 1-26, Szeged, 2002, p. 225-237, p. 226ff.

[8] The concepts of *morbus* and *vitium* could be extended to any hidden physical defect that negatively affected the usability of the slave: JAKAB, É., Kellékszavatosság és jótállás. In: HAMZA, G. – KAJTÁR, I. – ZLINSZKY, J. (eds.), *Tanulmányok Benedek Ferenc tiszteletére*. Pécs, 1996, p. 113-123, p. 115.

[9] Ulp. D. 21,1,1,1. Regarding the defects, see: BECHMANN, A., *Der Kauf nach Gemeinem Recht*. Vol. 3, Leipzig, 1965, p. 112-117. The provisions of the edict can be divided into two groups. On the one hand, it lists certain disabilities of the slave that the seller must inform the buyer about; on the other hand, it establishes the seller's obligation to be liable for what he has stated or promised: PÓLAY, E., Az eladói kellékszavatosság a preklasszikus római jogban. In: *Acta Juridica et Politica*, Tom. XI. Fasc. 9, Szeged, 1964, p. 12.

[10] According to Ulpian, a statement *(dictum)* is understood as that which is expressed in speech and terminated by the words themselves, while a promise *(promissum)* could be either a mere assurance that something will be done, or one that can be exacted, or one based on an agreement: Ulp. D. 21,1,19,2. It should be noted that classical jurists used various verbs and expressions to indicate the seller's binding guarantee regarding the quality of the ware (e.g., *praedicere*, *dicere*, *promittere*, *adfirmare*, *pronuntiare*, *cavere*, etc.); for details, see: JAKAB, É., Cavere und Haftung für Sachmängel. Zehn Argumente gegen Berthold Kupisch. In: JAKAB, É. – ERNST, W. (eds.), *Kaufen nach Römischem Recht. Antikes Erbe in den europäischen Kaufrechtsordnungen*. Berlin – Heidelberg, 2008, p. 123-137, p. 132-134. Sellers could indicate various features, which jurists assessed as *dicta*, e.g., if the slave was skilled in a science or craft, educated, or a musician. However, even in such cases, the disclosure of defects prescribed in the edict could not be omitted: Flor. D. 18,1,43 pr.; Ulp. D. 21,1,37; Ven. eod. 65,2; Hor. *ep.* 2,2,4; JAKAB, É., Rabszolgavételek Rómában. In: TÓTH, K. (ed.), Emlékkönyv Dr. Cséka Ervin egyetemi tanár születésének 70. és oktatói munkásságának 25. évfordulójára. *Acta Juridica et Politica*, Tom. XLI. Fasc. 1-40, Szeged, 1992, p. 247-259, p. 256-258; LÜBTOW, U. v., Zur Frage der Sachmängelhaftung im römischen Recht. In: *Studi in onore di Ugo Enrico Paoli*. Firenze, 1956, p. 489-496, p. 491. The seller was not liable for a statement, which was considered mere praise *(nuda laudatio)*: Ulp. D. 21,1,19 pr. 3.

[11] The limitation period for bringing a lawsuit began either on the day of the sale or from the moment something was stated or promised about the goods: PRINGSHEIM, F., The Decisive Moment for Aedilician Liability. In: *Revue internationale des droits de l'Antiquité*, Tom. 1, 1952, p. 545-556, p. 548. A slave could also be purchased under a *pactum displicentiae*, with a 60-day trial period: Ulp. D. 21,1,31,22-23; PÓKECZ KOVÁCS, A., *A szerződéstől való elállás az adásvétel mellékegyezményeinél a római jogban és továbbélése során*. Pécs, 2012, p. 216-217. Here too, the clause granted the buyer a right to withdraw: CSOKNYA, T. É., Az adásvétel mellékegyezményeihez kapcsolódó ingyenes dologhasználat egyes esetei a klasszikus római jog forrásaiban. In: *Glossa Iuridica*, Vol. 7, No. 3-4, p. 239-261, p. 239-240.

[12] Ulp. D. 21,1,38 pr. Although, only the *actio redhibitoria* is mentioned in the slave edict: LENEL, O., *Das Edictum Perpetuum. Ein Versuch zu seiner Wiederherstellung*. Leipzig, 1927, 554; however, it is highly probable that by this time the *actio quanti minoris* had also been developed and applied: PRINGSHEIM, F., Das Alter der aedilizischen actio quanti minoris. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 69, No. 1, 1952, p. 234-301, p. 250. Cf. Gell. *NA*. 4,2,5.

[13] IMPALLOMENI, G., *L'editto degli edili curuli*. Padova, 1955, p. 18ff; HONSELL, H., Von den aedilizischen Rechtsbehelfen zum modernen Sachmängelrecht. In: NÖRR, D. – SIMON, D. (eds.), *Gedächtnisschrift für Wolfgang Kunkel*. Frankfurt am Main, 1984, p. 53-67, p. 54; DU PLESSIS, P. J., *Borkowski's Textbook on Roman Law*. Oxford, 2010, p. 270-271. The aedilician rules later laid the foundation for the modern institution of 'implied warranty': ROGERSON, A., Implied Warranty against Latent Defects in Roman and English Law. In: DAUBE, D. (ed.), *Studies in the Roman Law of Sale. Dedicated to the memory of Francis de Zulueta*. Oxford, 1977, p. 112-131, p. 127; JÖRS, P. – KUNKEL, W. – WENGER, L., *Römisches Privatrecht*. Berlin, 1935, p. 235-236; MURRAY, D. E., Implied Warranty Against Latent Defects. A Historical Comparative Law Study. In: *Louisiana Law Review*, Vol. 21, No. 3, 1961, p. 586-605; P. SZABÓ, B., A kellékszavatossági szabályok fejlődése a korai újkori (16-18. századi) jogtudomány és joggyakorlat tükrében. In: *Debreceni Jogi Műhely*, Vol. 15, No. 1-2, 2018, p. 27-38, p. 30ff; VÉKÁS, L., Eltérő ideológiai-jogpolitikai koncepciók a kellékszavatossági jogok változó szabályozása mögött. In: *Magyar Jog*, Vol. 71, No. 7-8, 2024, p. 385-391, p. 385-387.

[14] Ulp. D. 21,1,1,2.

[15] JAKAB, É., Diebische Sklaven, marode Balken. Von den römischen Wurzeln der Gewährleistung für Sachmängel. In: SCHERMAIER, M. J. (ed.), *Verbraucherkauf in Europa. Altes Gewährleistungsrecht und die Umsetzung der Richtlinie 1999/44/EG.* München, 2003, p. 27-53, p. 33.

[16] Jakab highlights that strict liability had strict limits: it extended only to those cases expressly (exhaustively) listed in the edict; moreover, condemnation never exceeded the purchase price (restitution or reduction): JAKAB, É., Sale and Community from the Roman World. In: JAKAB, É. (ed.), *Sale and Community. Documents from the Ancient World. Individuals' Autonomy and State Interference in the Ancient World. Proceedings of a Colloquium supported by the University of Szeged, Budapest 5-8. 10. 2012*. Trieste, 2015, p. 213-229, p. 228.

granted an action if the seller knowingly acted in bad faith *(sciens dolo malo)*.[17]

It sometimes happened that the future owner of the slave was not personally present when the transaction was concluded. The texts under analysis report cases in which the purchase was conducted by the agent of the buyer instead of the *dominus*. In the case of the fragments from Africanus' work *Quaestionum libri*, the *responsa* are based on legal disputes arising from the purchase of defective goods.[18]

2. Transaction conducted by a dependant person

Afr. 8 *quaest*. D. 21,1,51 pr.: *Cum mancipium morbosum vel vitiosum servus emat et redhibitoria vel ex empto dominus experiatur, omnimodo scientiam servi, non domini spectandam esse ait, ut nihil intersit, peculiari an domini nomine emerit et certum incertumve mandante eo emerit, quia tunc et illud ex bona fide est servum, cum quo negotium sit gestum, deceptum non esse, et rursus delictum eiusdem, quod in contrahendo admiserit, domino nocere debet. Sed si servus mandatu domini hominem emerit, quem dominus vitiosum esse sciret, non tenetur venditor.*

"When a slave himself buys another slave who is defective or diseased and his master brings the action for rescission or that on purchase, it is, says [Julian], in every way the state of knowledge of the slave, not of the master to which we look, so that it does not matter whether the slave makes the purchase with his peculium or in the name of his master or whether it be certain or not that he buys on his master's instructions; for in such a case, it will accord with good faith that the slave engaged in the purchase was not deceived and, looking at it from the other point of view, his wrong in knowingly making such a purchase should redound to his master's disadvantage. Again, if a slave buy at his master's behest a slave whom the master knows to be defective, the vendor will incur no liability."[19]

According to the fact pattern, a slave acts as buyer and purchases a slave. The purchased *mancipium* had some kind of disease or defect.[20] The legal scholar had to decide on the issue of the seller's liability. In the text, two different cases are distinguished, corresponding to the two main clauses.

2.1 Case 1: Transaction without the knowledge of the master

Africanus first notes that the *dominus*, on whose behalf the slave purchased the goods, could bring an action under the aedilician edict. By means of the *actio redhibitoria*, an action for rescission could be brought within six months.[21] This action entitled the buyer to recover the entire price on returning the slave to the seller.[22] In this case, the seller's liability is objective, that is, independent of fault.[23] As a second option, the application of the action on purchase arises.[24] *Actio empti* depended on *dolus*, the seller could be held liable only if his fault was

[17] Ulp. D. 21,1,1,1. HONORÉ, A. M., The History of the Aedilitian Actions from Roman to Roman-Dutch Law. In: DAUBE, D. (ed.), *Studies in the Roman Law of Sale. Dedicated to the memory of Francis de Zulueta*. Oxford, 1977, p. 132-159, p. 136ff; HUBRECHT, G., Giambattista Impallomeni, L'editto degli edili curuli (Padoue, Cedam, 1955). In: *Latomus*, Tom. 16. Fasc. 2, 1957, p. 395-397, p. 396; ZIMMERMANN, R., Liability for Non-conformity. The New System of Remedies in German Sales Law and its Historical Context. In: *Irish Jurist*, Vol. 39, 2004, p. 1-50, p. 5. It is remarkable that the division of liability known in the field of contractual relations did not appear with respect to warranty; the sources do not mention of negligent conduct by the seller: HAMZA, G., Az eladói kellékszavatosság fejlődése a római jogban. In: *Acta Facultatis Politico-iuridicae Universitatis Scienctiarum Budapestinensis de Rolando Eötvös nominatae*, Vol. 32, 1990, p. 41-60, p. 52-53. Cf. TALAMANCA, M., *Istituzioni di diritto romano*. Milano, 1990, p. 591.

[18] The Sabinian jurist of the 2nd century, Sextus Caecilius Africanus, was a pupil of Salvius Julianus: KUNKEL, W., *Herkunft und soziale Stellung der römischen Juristen*. Weimar, 1952, p. 172. The originality of the texts attributed to him is debatable, and for this reason posterity tends to underestimate his work: HARKE, J. D. (ed.), *Africani quaestiones. Studien zur Geschichte und Dogmatik des Privatrechts*. Berlin – Heidelberg, 2011, p. v; SCHULZ, F., *History of Roman Legal Science*. Oxford, 1946, p. 230-231. There is no doubt that the theses of his teacher had a significant influence on his way of thinking, and it is likely that he also learned the application of formal logic from Julian: FREZZA, P., *Corso di storia del diritto romano*. Roma, 1954, p. 395. However, in his works he does not merely report Julian's opinion; his own reasoning, conclusions, and techniques of argumentation can also be discerned in them: CERAMI, P., Considerazioni sulla cultura e sulla logica di Cecilio Africano. A proposito di D. 35,2,88 pr. In: *IURA. Rivista internazionale di diritto romano e antico*, Vol. 22, 1971, p. 127-137, p. 136-137; LIEBS, D., Sex. Caecilius Africanus. In: SALLMANN, K. (ed.), *Handbuch der lateinischen Literatur der Antike. Die Literatur des Umbruchs, von der römischen zur christlichen Literatur, 117 bis 284 n. Chr.* Vol. 4, München, 1997, p. 106-108, p. 107; WIEACKER, F., *Römische Rechtsgeschichte. Quellenkunde, Rechtsbildung, Jurisprudenz und Rechtsliteratur*. München, 1988, p. 102.

[19] WATSON, A. (ed.), *The Digest of Justinian*. Vol. 2, Philadelphia, 1998, p. 159-160.

[20] In the text, a terminological distinction is made between the purchasing slave *(servus)* and the slave put up for sale *(mancipium)*.

[21] Ulp. D. 21,1,19,6; Paul. *Sent*. 2,17,5. The purpose of the action was to restore the parties to the economic position they would have been in had the contract never been concluded or performed. GAROFALO, L., L'impossibilità della redibizione nella riflessione dei giuristi classici. In: *Studia et Documenta Historiae et Iuris*, Vol. 65, 1999, p. 43-65, p. 44-45. In special cases — for the buyer's protection — it could occur that the aedile set a two-month limitation period: Gai. D. 21,1,28, for the analysis of the text, see: JAKAB, *Praedicere und cavere beim Marktkauf*, p. 301-303; for the history of interpretation, see: SIKLÓSI, I., *Forráselemzések római dologi és kötelmi jogból*. Budapest, 2020, p. 136-144. For the relationship between the limitation period in Roman law and modern private law, see: DELI, G., Időtényező a kellékszavatosság szabályozásában. In: *Miskolci Jogi Szemle*, Vol. 3, No. 2, 2008, p. 30-57.

[22] ARANGIO-RUIZ, V., *La compravendita in diritto romano*. Vol. 2, Napoli, 1990, p. 369.

[23] Ulp. D. 21,1,1,2; eod. 14,9; eod. 21,1. HONSELL, H., *Quod interest im bonae-fidei-iudicium. Studien zum römischen Schadensersatzrecht*. München, 1969, p. 68.

[24] In the classical period, in cases regulated by the aedilician edict, the *actio empti* essentially served a supplementary function: PEZZANA, A., Sull'actio empti come azione di garanzia per i vizi della cosa in alcuni testi di Cicerone. In: *Bullettino dell'Istituto di Diritto Romano "Vittorio Scialoja"*, Vol. 1, 1959, p. 185-197, p. 197. In the case of a hidden defect, the aedilician rules automatically became applicable: JAKAB, *Praedicere und cavere beim Marktkauf*, p. 217. When it was not possible to bring an action under the aedilician remedies, the buyer was granted the *actio empti*: VECCHI, P. M., La garanzia nella vendita in diritto commune. In: SCHERMAIER, M. J. (ed.), *Verbraucherkauf in Europa. Altes Gewährleistungsrecht und die Umsetzung der Richtlinie 1999/44/EG.* München, 2003, p. 67-109, p. 93.

proven.[25] In the first clause, therefore, we find the general rules regarding the assertion of claims.[26] The specific case is introduced in the text by the impersonal *ait* passage. Here, Africanus most likely referred to the opinion of his teacher, meaning that the fragment conveys Julian's thought.[27]

According to Julian, the knowledge of the slave conducting the purchase must be considered in any case, from which it follows that the awareness of the *dominus* is irrelevant.[28] The issue centres on the knowledge of the slave (i.e., the information available to him). The legal scholar eliminates all other factors from the examination of the fact pattern: it does not matter whether the slave purchased the defective goods from his fund given by the master[29] or directly on the master's account or whether it be certain or not that he purchased on his master's instructions.[30] The details excluded from consideration indicate that the determination of liability is not affected by the possible economic independence of the purchasing slave.[31]

The purchase of defective goods could have occurred in two ways: if the seller had cunningly taken advantage of the opportunity to conduct business not with the *dominus* himself but with his slave, and therefore did not inform the *servus* about the disease or defect of the *mancipium*, he would have acted contrary to *bona fides* on the one hand and infringed the provisions of the aedilician edict on the other; thus, he would be liable towards the *dominus*.[32] However, if the slave was aware of the disease or

[25] VACCA, L., Ancora sull'estensione dell'ambito di applicazione dell'actio empti in età classica. In: *IURA. Rivista internazionale di diritto romano e antico*, Vol. 45, 1994, p. 35-73, p. 60ff.

[26] Cf. SCHERMAIER, M. J., Rechtsangleichung und Rechtswissenschaft im kaufrechtlichen Sachmängelrecht. In: SCHERMAIER, M. J. (ed.), *Verbraucherkauf in Europa. Altes Gewährleistungsrecht und die Umsetzung der Richtlinie 1999/44/EG.* München, 2003, p. 3-25, p. 14-15.

[27] SOLAZZI, S., Errore e rappresentanza. In: *Scritti di diritto romano*. Vol. 1, Napoli, 1955, p. 277-294, p. 278.

[28] The slave carries out the acquisition in its entirety, thus all of its elements — both objective and subjective — must be assessed solely with regard to his person: NICOSIA, G., *L'acquisto del possesso mediante i «potestati subiecti»*. Milano, 1960, p. 149.

[29] A slave could also purchase a (sub-)slave for himself from his fund *(peculium)*: D'ORS, A., *Las Quaestiones de Africano*. Mursia, 1997, p. 376; cf. Ulp. D. 15,1,7,4. Slavery did not necessarily imply poverty; a wealthier slave *(servus ordinarius)* could even have several sub-slaves of his own: WATSON, A., *Roman Slave Law*. Baltimore – London, 1987, p. 95; who could also have *peculium*: Cels. D. 15,1,6; Ulp. eod. 17. The sub-slave could assist or substitute the slave in work, but could also act solely for the benefit of the slave: LABRUNA, L., «Servus vicarius»: l'arricchimento dello schiavo. In: *Index. Quaderni camerti di studi romanistici*, Vol. 13, 1985, p. 467-475, p. 470-471. See in detail: BUCKLAND, W. W., *The Roman Law of Slavery*. *The Condition of the Slave in Private Law from Augustus to Justinian*. Cambridge, 1908, p. 239ff.

[30] Benöhr draws attention to the fact that, regarding the judgment of the knowledge of the slave, other legal scholars held different views, and the source of this difference of opinion is provided by the passage: *peculiari an domini nomine emerit et certum incertumve mandante eo emerit*: BENÖHR, H.-P., Arglist und Kenntnis der Hilfspersonen beim Abschluß schuldrechtlicher Geschäfte. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 87, No. 1, p. 123-196, p. 144. See also: REDUZZI MEROLA, F., *«Servo parere». Studi sulla condizione giuridica degli schiavi vicari e dei sottoposti a schiavi nelle esperienze greca e romana*. Napoli, 1990, p. 245. In the sources, there is a contradiction as to whether an acquisition carried out by the dependant — either from his *peculium* or outside of it — required the master's will *(voluntas)*, or at least his knowledge *(scientia)*. For the requirement of the master's knowledge, see e.g., Pap. D. 41,2,44,1; Paul. D. 41,3,4,7; Pap. eod. 44,7; Paul. D. 41,4,2,11. For acquisition of possession in the case of the master's ignorance, see: Gai. D. 41,1,32; Paul. D. 41,2,1,5; Ulp. eod. 34,2; Pomp. D. 41,3,28. The question is also a subject of debate in the literature. According to the prevailing view, the master acquires possession through his slave only if he either has knowledge of the acquisition, or if the slave assumes an obligation at the expense of the *peculium* — provided to him by the master. In other words, the dependant could in fact acquire for the *dominus ignorans* solely under the title of *peculium (causa peculiaris)*: SAVIGNY, F. C. v., *Das Recht des Besitzes. Eine civilistische Abhandlung*. Wien, 1865, p. 310-311; SCHLOSSMANN, S., *Der Besitzerwerb durch Dritte nach römischem und heutigem Rechte. Ein Beitrag zur Lehre von der Stellvertretung*. Leipzig, 1881, p. 141; RICCOBONO, S., Zur Terminologie der Besitzverhältnisse. Naturalis possessio, civilis possessio, possessio ad interdicta. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 31, No. 1, 1910, p. 321-371, p. 357-358; BONFANTE, P., *Istituzioni di diritto romano*. Torino, 1946, p. 364-365; BURDESE, A., Considerazioni in tema di peculio c.d. profettizio. In: *Studi in onore di Cesare Sanfilippo*. Vol. 1, Milano, 1982, p. 71-111, p. 83; ALBANESE, B., *Le persone nel diritto privato romano*. Palermo, 1979, p. 142-143; KLINCK, F., *Erwerb durch Übergabe an Dritte nach klassischem römischen Recht*. Berlin, 2004, p. 63ff. Cf. VOCI, P., *Modi di acquisto della proprietà. Corso di diritto romano*. Milano, 1952, p. 69ff; NICOSIA, *L'acquisto del possesso*, p. 339ff; CLAUS, A., *Gewillkürte Stellvertretung im Römischen Privatrecht*. Berlin, 1973, p. 115ff. The following seems to me the most convincing concept: in the case of acquisition without authorization (and without *causa peculiaris*), possessory rights arise on the master's side if he subsequently assents the acquisition *(ratihabitio)* — for which it is sufficient that he acknowledges the acquisition: KASER, M., *Das römische Privatrecht*. München, 1971, p. 267; MÁRTON, G., *A római magánjog elemeinek tankönyve. Institúciók*. Budapest, 1960, p. 142; BENEDEK, F. – PÓKECZ KOVÁCS, A., *Római magánjog*. Budapest, 2023, p. 185; MOLNÁR, I. – JAKAB, É., *Római jog*. Szeged, 2023, p. 189. See regarding this: DE FILIPPI, M., *Ratihabitio*. Bari, 2002, p. 33; DIECKMANN, S., *Die ratihabitio im klassischen römischen Recht*. Berlin, 2023, p. 165.

[31] BUTI, I., *Studi sulla capacità patrimoniale dei «servi»*. Napoli, 1976, p. 94-95. Wealthy Romans could accumulate such vast fortunes that they were unable or unwilling to manage them themselves. Therefore, they gave a certain amount of fund to their dependants so that they could manage their finances: BRÓSZ, R., Peculium servi (vel filii?). In: *Acta Antiqua Academiae Scientiarum Hungaricae*, Vol. 18, No. 3-4, 1970, p. 307-335, p. 334. The *peculium* remained the master's property, but it provided the slave with a certain degree of financial and social autonomy: POZSONYI, N., A családgyermek különvagyona a nem jogászi irodalomban (Suet. Tib. 15 és 50). In: *Acta Facultatis Politico-iuridicae Universitatis Scienctiarum Budapestinensis de Rolando Eötvös nominatae*, Vol. 52, 2015, p. 73-85, p. 74-75. Cf. the historical concept of *familia pecuniaque*: ERDŐDY, J., Zur Frage der Problematik von Familia Pecuniaque. In: *Pázmány Law Review*, Vol. 3, No. 1, 2015, p. 99-103. A slave endowed with *peculium* and authorized to administer property could engage in almost any industrial or commercial enterprise without being under strict supervision — except for the possibility that his privileges could be revoked at any time: WESTERMANN, W. L., *The Slave Systems of Greek and Roman Antiquity*. Philadelphia, 1955, p. 83. From as early as the 2nd century BC, the employment of slaves became widespread: DI PORTO, A., *Impresa collettiva e schiavo 'manager' in Roma antica (II sec. a.C. - II sec. d.C.)*. Milano, 1984, p. 31ff. Thus, it became common practice for dependants to manage industrial, commercial, or maritime enterprises: DE MARTINO, F., *Diritto, economia e società nel mondo romano*. Vol. 3, Napoli, 1997, p. 263. In this way, a slave could amass considerable wealth and even purchase his own freedom from his earnings: SÁRY, P., A rabszolgaság intézménye Iustinianus jogalkotásában. In: VARGA, Z. (ed.), *Jogi kihívások és válaszok a XXI. században*. Vol. 2, Miskolc, 2023, p. 237-247, p. 243.

[32] Flor. D. 18,1,43,2; Ulp. D. 19,1,11,3; D. 21,1,14,9.

defect of the *mancipium* and purchased it with this knowledge, his deed would cause harm to the master. *Delictum* here certainly does not mean a crime;[33] the word is used in a non-technical sense in the text.[34] In my opinion, it is a matter of a fault committed by the slave in the management of business.

In the foregoing situation, which may be regarded as theoretical, the seller would burdened with objective liability, since he did not inform the buyer of the defect of the goods.[35] In this way, the *dominus* could bring the *actio redhibitoria* against the seller. Based on the context of the text, it is certain that this procedure did not take place.[36]

In the second scenario, the seller's liability would be established on the basis of fraud.[37] At this point, however, it is important to take into account the not insignificant factor that the slave was not deceived *(servum, cum quo negotium sit gestum, deceptum non esse)*, that is, the slave knowingly purchased a diseased or defective *mancipium*.[38] Under such circumstances, the seller is given the opportunity to prove that the slave was aware of the defect of the *mancipium (exculpatio)*.[39]

2.2 Case 2: Transaction in accordance with the intention of the master

In the second sentence of the text, the legal scholar clearly exonerates the seller from liability, that is, he dismisses both the *actio redhibitoria* and the *actio empti* if the *dominus* himself ordered the slave to purchase a diseased or defective *mancipium*.[40]

The sharp difference between the two cases is determined by the different states of knowledge of the *dominus* and the slave. While in the first case the slave possesses information about the condition of the goods, in the second case it is the *dominus* who is aware of the defect.[41]

If the slave knowingly purchases defective goods, the master's ability to assert his rights is impaired regardless of his own ignorance.[42] He could at most bring the *actio empti* against the seller, which allows for liability to be determined on the basis of *dolus*.[43] In such a case, the seller could claim that he fulfilled the requirements of *bona fides*[44] and properly informed the slave about the condition of the goods prior to the purchase.[45]

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[33] In the titulus concerning the aedilician edict, the term *delictum* appears only three other places: Ulp. D. 21,1,1,8; eod. 17,5. 18. In each case, the slave is not the one referenced; rather, the mention concerns the conduct of another.

[34] The literature is not unanimous regarding the judgment of the conduct of the slave. D'Ors defines it as *dolus* ('fraude'): D'ORS, *Las Quaestiones de Africano*, p. 376. Bechmann considers it *culpa*: BECHMANN, *Der Kauf nach Gemeinem Recht*, p. 111. Schulz — who, like Lenel (LENEL, O., Afrikans Quästionen. Versuch einer kritischen Palingenesie. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 51, No. 1, 1931, p. 1-53, p. 42), Nicosia (NICOSIA, *L'acquisto del possesso*, p. 148[12]) and Reduzzi Merola (REDUZZI MEROLA, *«Servo parere»*, p. 244) regards certain parts of the text interpolated — holds that the expression can only be understood in light of the compilers' commentary, according to which *delictum* here means *culpa vel stultitia*: SCHULZ, F., Scientia, Dolus und Error bei der Stellvertretung nach klassischem römischen Recht. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 33, No. 1, 1912, p. 37-80, p. 49ff. Benöhr — who connects *delictum* to the concepts of negligence ('Nachlässigkeit') or dishonesty ('Unredlichkeit') — also considers the specific expression to mean *culpa vel stultitia*: BENÖHR, Arglist und Kenntnis der Hilfspersonen, p. 143. Impallomeni also questions the originality of the text; according to his grammatical interpretation, similar to Schulz, here *delictum* means folly ('stoltezza'), but he believes that in the original version of the text its meaning may have been extra-contractual negligence ('colpa extracontrattuale'): IMPALLOMENI, *L'editto degli edili curuli*, p. 238[27]. According to Manna, the correct meaning of the term is *culpa in contrahendo*: MANNA, L., *Actio redhibitoria e responsabilità per i vizi della cosa nell'editto de mancipiis vendundis*. Milano, 1994, p. 236. Biondi — who holds that the perpetrator of the *delictum* is the seller — argues that the expression should be understood in a broader sense, as it may signify the violation of an obligation imposed by law or morality: BIONDI, B., *Studi sulle actiones arbitrariae e l'arbitrium iudicis*. Roma, 1970, p. 139. This opinion is shared by Thielmann: THIELMANN, G., 'Actio redhibitoria' und zufälliger Untergang der Kaufsache. In: *Studi in onore di Edoardo Volterra*. Vol. 2, Milano, 1971, p. 487-520, p. 515.

[35] The duty to inform did not extend to defects that were patent, visible to everyone: DONADIO, N., *La tutela del compratore tra actiones aediliciae e actio empti*. Milano, 2004, p. 264-265. Such visible defects included, e.g., the blindness or any noticeable scar on the body of the slave: Ulp. D. 21,1,14,10.

[36] CLAUS, *Gewillkürte Stellvertretung*, p. 216.

[37] If the seller's fault was proven, the buyer was entitled to claim his full damages *(interesse)*: FÖLDI, A. – HAMZA, G., *A római jog története és institúciói*. Budapest, 2025, p. 521.

[38] In this case, although the slave does not represent his master in the intent, he still determines exactly over which thing the master acquires possession cf. KLINCK, *Erwerb durch Übergabe an Dritte*, p. 356-357.

[39] JAKAB, É., Stipulationes aediliciae. A kellékhibákért való helytállás kialakulása és szabályai a római jogban. In: *Acta Juridica et Politica*, Tom. 44. Fasc. 7, Szeged, 1993, p. 155.

[40] REDUZZI MEROLA, *«Servo parere»*, p. 244.

[41] An instruction to purchase defective ware can be considered bad faith conduct, and the consequences should therefore be borne by the party acting in this manner, namely the *dominus*: WIELING, H., Drittwirkungen des Mandats und ähnlicher Rechtsverhältnisse. In: NÖRR, D. – NISHIMURA, S. (eds.), *Mandatum und Verwandtes. Beiträge zum römischen und modernen Recht*. Berlin – Heidelberg, 1993, p. 235-267, p. 264.

[42] The buyer did not gain a more favourable position by resorting to the *actio empti*; in the lawsuit, the buyer had to convincingly prove the seller's fraud, prior knowledge of the defect, and its intentional concealment: JAKAB, É., Prozess um eine entlaufene Sklavin (P.Cair.Preis. 1). Vertrag in der provinzialen Rechtskultur. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 135, No. 1, 2018, p. 474-526, p. 490.

[43] Cf. DONADIO, N., Garanzia per i vizi della cosa e responsabilità contrattuale. In: JAKAB, É. – ERNST, W. (eds.), *Kaufen nach Römischem Recht. Antikes Erbe in den europäischen Kaufrechtsordnungen*. Berlin – Heidelberg, 2008, p. 61-82, p. 63-64. For the scope of *actio empti*, see: RABEL, E., *Die Haftung des Verkäufers wegen Mangels im Rechte*. Leipzig, 1902, p. 75ff.

[44] By means of *quidquid* clause integrated into *bonae fidei actio*, the judge could consider all the circumstances of the case and take into account all factors favouring or prejudicing the debtor, which could not necessarily be invoked under civil law: FÖLDI, A., A jóhiszeműség és tisztesség elve. Intézménytörténeti vázlat a római jogtól napjainkig. In: *Publicationes Instituti Iuris Romani Budapestiensis*, Fasc. 9, Budapest, 2001, p. 15-16; LOMBARDI, L., *Dalla «fides» alla «bona fides»*. Milano, 1961, p. 179ff.

[45] VACCA, Ancora sull'estensione dell'ambito di applicazione dell'actio empti, p. 60. For *dolus* arising in connection with the delivery of goods, see: Ulp. D. 4,3,7,3; CURSI, M. F. – FIORI, R., Le azioni generali di buona fede e di dolo nel pensiero di Labeone. In: *Bullettino dell'Istituto di Diritto Romano «Vittorio Scialoja»*, Vol. 1, 2011, p. 145-184, p. 177-180.

If the *dominus* knew about the defect of the goods, this fact *eo ipso* precludes the application of the rules of the edict.[46] Thus, when he ordered his slave to purchase a *mancipium* with a defect known to him, his own *scientia* excludes the possibility of holding the seller liable.[47]

The concept of the legal scholar is founded on the principle *omnimodo scientiam servi domino nocere debet*, i.e., the knowledge of the slave always harms the *dominus*.[48] It follows that the *dominus* suffers disadvantage not only from his own *scientia*, but also from the knowledge of the slave. It seems that Julian regarded the *scientia* of the slave as equivalent to that of the *dominus*.[49]

The interpretation of the verb *mandare* appearing in the fragment also deserves mention. The phrase *mandante eo* in the fifth clause of the first sentence, an *ablativus absolutus*, expresses that the slave purchased on the instruction of the *dominus*. The term *mandatu*[50] in the second sentence, an *ablativus causae*, conveys the same meaning. These passages, however, certainly do not refer to a contract of mandate. The verb *mandare*[51] in the sources carries both a narrower and a broader legal meaning[52] and in literary texts it often appears in a colloquial sense.[53] From my viewpoint, in our text it refers to the master's unilateral declaration, which could be a *iussum*[54] in a proper sense.[55]

The following fragment is closely related to this case.

3. Transaction conducted by an independent person

Afr. 8 *quaest*. D. 21,1,51,1: *Circa procuratoris personam, cum quidem ipse scierit morbosum vitiosum esse, non dubitandum, quin, quamvis ipse domino mandati vel negotiorum gestorum actione sit obstrictus, nihilo magis eo nomine agere possit: at cum ipse ignorans esse vitiosum mandatu domini qui id sciret emerit et redhibitoria agat, ex persona domini utilem exceptionem ei non putabat opponendam.*

"Where a procurator makes the purchase and knows that the slave is defective or diseased, there can be no doubt that although he is liable to his principal in the action on mandate or for unsolicited administration, proceedings cannot be taken on the purchase; but if, at the principal's behest, the procurator unwittingly buys a slave whom the principal knows to be defective and then brings the action for rescission, a valid defense against his suit cannot, according to [Julian], be raised on the ground of the principal's knowledge."[56]

The fact pattern of the two texts is the same, again, it is about the purchase of a diseased or defective *mancipium*. The phrase *non putabat* in the second sentence here also refers to Julian's perspective. The essential difference between the sources lies in the differing legal status of the agents.[57] When comparing the two texts, we can observe a distinction between

[46] Cf. Ulp. D. 21,1,1,6; eod. 14,10; Pomp. eod. 48,4; MAC CORMACK, G., «Sciens dolo malo». In: *Sodalitas. Scritti in onore di Antonio Guarino*. Vol. 3, Napoli, 1984, p. 1445-1453, p. 1449. Africanus' decision aligns with the opinion set out in D. 18,1,13: according to Pomponius, a principal who is aware of the defect of the slave put up for sale cannot sue the seller *(ex empto)*, regardless of whether the dependant, acting in the name of the master — even when following his instructions — was *ignorans,* and the seller was *sciens*; see in this regard: NICOSIA, *L'acquisto del possesso*, p. 149ff; SOLAZZI, Errore e rappresentanza, p. 279ff. Cf. HOFSTETTER, J., Direkte Wirkungen indirekter Stellvertretung. In: ANKUM, J. A. – CANNATA, C. A. et al. (eds.), *Mélanges Felix Wubbe. Offerts par ses collègues et ses amis à l'occasion de son soixante-dixième anniversaire*. Fribourg, 1993, p. 161-177, p. 175ff; SCHULZ, Scientia, Dolus und Error, p. 52ff.

[47] MEISSEL, F.-S. – NOVITSKAYA, A., Bonae fidei iudicia. Grundlagen. In: BABUSIAUX, U. – BALDUS, Ch. et al. (eds.), *Handbuch des Römischen Privatrechts*. Vol. 2, Tübingen, 2023, p. 2017-2038, p. 2020[23]. The legal effect arising from the fact pattern is "paralyzed" as an external obstacle by the master's awareness: NICOSIA, *L'acquisto del possesso*, p. 149.

[48] BECHMANN, *Der Kauf nach Gemeinem Recht*, p. 212.

[49] BENÖHR, Arglist und Kenntnis der Hilfspersonen, p. 143; CLAUS, *Gewillkürte Stellvertretung*, p. 216.

[50] The *mandatu domini* passage, apart from those examined in this paper, occurs in the following fragments: Ulp. D. 3,3,1 pr.; Mod. eod. 63; Afr. D. 10,3,9; Paul. D. 41,4,2,9; Ulp. D. 44,6,2. Of these, only the latter concerns the agency by a dependant — specifically, a slave. Similarities can be observed between D. 44,6,2 and the case presented above by Africanus. Ulpian also addresses the question of whether the knowledge of the master or of the slave should be taken into account in the case of a purchase made by a slave, and he refers in his decision to Julian's opinion. The contradiction between the *responsa* lies in the object of the purchase. While Africanus mentions a *mancipium*, Ulpian speaks about a *res litigiosa*: See in this regard: BENÖHR, Arglist und Kenntnis der Hilfspersonen, p. 182ff; D'ORS, *Las Quaestiones de Africano*, p. 377-378; NICOSIA, *L'acquisto del possesso*, p. 151ff; SCHULZ, Scientia, Dolus und Error, p. 42ff; SOLAZZI, Errore e rappresentanza, p. 285ff.

[51] The Oxford Latin Dictionary lists the following as the primary meanings of *mandare*: to hand over, deliver, consign, commit, give, entrust, assign, delegate, order, command etc.

[52] CLAUS, *Gewillkürte Stellvertretung*, p. 216. ARANGIO-RUIZ, V., *Il mandato in diritto romano*. Napoli, 1949, p. 59; DONATUTI, G., *Contributi alla teoria del mandato in diritto romano. La volontà del Mandante*. Vol. 2, Perugia, 1929, p. 21; JAKAB, É., *Humanizmus és jogtudomány. Brissonius szerződési formulái I*. Szeged, 2013, p. 235; JAKAB, É. – MANTHE, U., Recht in der römischen Antike. In: MANTHE, U. (ed.), *Die Rechtskulturen der Antike. Vom Alten Orient bis zum Römischen Reich*. München, 2003, p. 239-317, p. 306. See in detail: RANDAZZO, S., *Mandare. Radici della doverosità e percorsi consensualistici nell'evoluzione del mandato romano*. Milano, 2005, p. 102ff; WATSON, A., *Contract of Mandate in Roman Law*. Oxford, 1961, p. 1ff. Cf. Paul. D. 3,5,41; D. 4,4,23; Pomp. D. 18,1,13; Ulp. D. 21,1,32,5; Pap. D. 26,7,40; Ulp. D. 26,10,1,4; D. 27,3,1,13-14. 18.

[53] E.g., Plaut. *Am*. 80-81; *Stich*. 652-654; Cat. *agr*. 143; Caes. *bell. civ.* 1,8; *bell. gall.* 2,24; Cic. *Q. fr*. 3,1,5; *fin*. 1,4,11; *Planc*. 12,31; Verg. *Aen*. 3,444; Hor. *ep*. 1,19,9; Liv. 7,18; Ovid. *fast.* 5,654; Sen. *ep.* 2,13,16; Plin. *ep*. 8,16; Tac. *Ann*. 2,30; Suet. *Iul.* 7; *Tib.* 65; Gell. *NA.* 4,13,1.

[54] The term *iussum* primarily meant order ('Befehl') or authorization ('Ermächtigung'): HEUMANN, H. G. – SECKEL, E., *Heumanns Handlexikon zu den Quellen des römischen Rechts*. Jena, 1914, p. 290. *Iussum* in a general sense was "any act covered by the expression (iubere), such as an order or authorization given by a father (or master) to a son under his power (or his slave) to conclude a transaction, to commit a licit or illicit act": BERGER, A., *Encyclopedic Dictionary of Roman Law*. Philadelphia, 1980, p. 534. Following the introduction of *actio quod iussu*, the technical meaning of the term could have developed, referring to a declaration made toward a third party: FÖLDI, A., *Kereskedelmi jogintézmények a római jogban*. Budapest, 1997, p. 128. The primary addressee of this declaration, however, was already the third party: MICELI, M., *Sulla struttura formulare delle 'actiones adiecticiae qualitatis'*. Torino, 2001, p. 317. It is possible that the distinction between the two institutions was established in the late classical period, following Paul's and Ulpian's works: VALIÑO, E., Las «actiones adiecticiae qualitatis » y sus relaciones básicas en derecho romano. In: *Anuario de Historia del Derecho Español*, Vol. 37, 1967, p. 339-436, p. 418.

[55] Ulp. D. 15,4,1,3. This opinion is held by CLAUS, *Gewillkürte Stellvertretung*, p. 216; and also by COPPOLA BISAZZA, G., *Dallo iussum domini alla contemplatio domini. Contributo allo studio della storia della Rappresentanza*. Milano, 2008, p. 143.

[56] WATSON, *Contract of Mandate*, p. 160.

[57] For a detailed comparison of the agency by dependant and independent persons, see: AUBERT, J.-J., *Business Managers in Ancient Rome. A Social and Economic Study of Institores, 200 B.C. - A.D. 250*. Leiden – New York – Köln, 1994, p. 46ff.

transactions carried out by the dependant and independent agents. In this case, a free person — potentially of social rank equivalent to that of the principal — makes the purchase.[58] However, Africanus was probably not guided by dogmatic considerations in formulating the distinction, but rather by a similar solution strategy to the legal problems. As a consequence, two cases are again distinguished from each other in the main clauses.

3.1 Case 1: Transaction without the knowledge of the principal

When a *procurator* knowingly purchases a defective or diseased slave for the *dominus*, he cannot bring an action on behalf of the latter.[59] The future owner of the goods, however, has no right of action against the seller, since he is not a party to the sale.[60] Thus, the *dominus* can claim compensation for his loss exclusively from the *procurator*.[61]

Although, the subject of agency is the same in both texts — each dealing with sale, with emphasis placed on the buyer's knowledge — a further factor must be examined in the case of the management by the *procurator*, namely the internal legal relationship between the principal and the agent.[62]

Two actions are mentioned in connection with the liability of the *procurator*: The *dominus* can bring *actio mandati* or *actio negotiorum gestorum* against the agent.[63] From this passage we

[58] Originally, a freedman of the head of the household acted as a *procurator*: BONFANTE, P., Facoltà e decadenza del procuratore romano. In: *Scritti giuridici varii. Obbligazioni, comunione e possesso*. Vol. 3, Torino, 1926, p. 250-261, p. 260-261; HAMZA, G., *Az ügyleti képviselet. Dogmatikai és elméleti vizsgálatok az antik jogoktól napjainkig*. Budapest, 1982, p. 158ff; QUADRATO, R., Rappresentanza (diritto romano). In: *Enciclopedia del diritto*. Vol. 38, Milano, 1987, p. 417-435, p. 422ff. The freedman owed various services *(officium)* to his patron, including tasks related to property administration; see in this regard: BRÓSZ, R., *Nem teljes jogú polgárok a római jogforrásokban. A római polgárság rétegződése*. Budapest, 1964, p. 95ff; WATSON, A., *The Law of Persons in the Later Roman Republic*. Oxford, 1967, p. 227ff. Agency by a person of higher social status, a legally independent person, likely spread at a later stage: DÜLL, R., Über Ansätze direkter Stellvertretung im frührepublikanischen römischen Recht. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 67, No. 1, 1950, p. 162-184, p. 108ff; WATSON, A., *The Law of Obligations in the Later Roman Republic*. Oxford, 1965, p. 193-194; ZIMMERMANN, R., *The Law of Obligations. Roman Foundations of the Civilian Tradition*. Oxford, 1996, p. 53. See in connection with this: Cic. *Caec*. 20,57; *Verr*. 2,24,59; *Phil*. 12,7,18; *ad fam*. 12,24; 13,43.

[59] As a legally capable person, the *procurator* would otherwise be entitled to assert a claim based on the defect; however, his *scientia* excludes resorting to the aedilician remedy. Africanus only states that he cannot sue on behalf of the principal; the specific action — unlike in D. 21,1,51 pr. — is not mentioned in the first sentence of the text. Impallomeni merely remarks that the *actio redhibitoria* does not apply: IMPALLOMENI, *L'editto degli edili curuli*, p. 24. This aligns with the view of D'Ors, who holds that the seller's *exceptio* mentioned in the second sentence refers solely to the *actio redhibitoria*: D'ORS, *Las Quaestiones de Africano*, p. 377[938]. According to Solazzi, the legal scholar deals with the *actio redhibitoria* in both fragments and considers the *actio empti* mentioned in D. 21,1,51 pr. to be interpolated: SOLAZZI, Errore e rappresentanza, p. 282[8].

[60] CLAUS, *Gewillkürte Stellvertretung*, p. 217.

[61] BENÖHR, Arglist und Kenntnis der Hilfspersonen, p. 146.

[62] A very complex picture of the *procurator* emerges in legal and literary sources — including his status, authority, and the scope of his activities — and this issue has long been debated among Romanists: MICELI, M., *Studi sulla «rappresentanza» nel diritto romano*. Milano, 2008, p. 105-106. A detailed presentation of the various concepts would exceed the scope of this case-study paper; in the following, only the text before us will be examined.

[63] According to the *communis opinio*, the *procurator* could originally only be sued by *actio negotiorum gestorum*: MICELI, *Studi sulla «rappresentanza»*, p. 210-211. The view that this was the only action that could be brought against the *procurator* in the era of classical law was particularly popular in earlier literature: FRESE, B., Prokuratur und negotiorum gestio im römischen Recht. In: *Mélanges de droit romain dédiés à Georges Cornil*. Vol. 1, Paris, 1926, p. 326-384, p. 333; BOSSOWSKI, F. v., Die Abgrenzung des mandatum und der negotiorum gestio im klassischen und justinianischen Recht. Ein Beitrag zur Lehre von der Konkurrenz der Klagen. In: *Archiwum Towarzystwa Naukowego we Lwowie*, Vol. 20, No. 2, Lwów, 1937, p. 67; LEVY, E., *Weströmisches Vulgarrecht. Das Obligationenrecht*. Weimar, 1956, p. 67; ALBERTARIO, E., Procurator unius rei. In: *Studi di diritto romano*. Vol. 3, Milano, 1936, p. 496-521, p. 497ff; SERRAO, F., *Il procurator*. Milano, 1947, p. 107ff. Arangio-Ruiz considers it conceivable that in classical law the liability of the *procurator* could no longer be established solely under this action: ARANGIO-RUIZ, *Il mandato*, p. 19. They likewise call into question the exclusive nature of the *actio negotiorum gestorum*, as noted by SOLAZZI, S., La definizione del procuratore. In: *Scritti di diritto romano*. Vol. 2, Napoli, 1957, p. 557-567, p. 564; MORELLI, M., *Die Geschäftsführung im klassischen römischen Recht*. Berlin – Leipzig, 1935, 39ff; MECKE, B., Die Entwicklung des 'procurator ad litem'. In: *Studia et Documenta Historiae et Iuris*, Vol. 28, 1962, p. 100-161, p. 108ff; MICHEL, J.-H., Quelques observations sur l'évolution du procurator en droit romain. In: *Études offertes à Jean Macqueron*. Aix-en-Provence, 1970, p. 515-527, p. 516ff. A similar view is held by ANGELINI, P., *Il «procurator»*. Milano, 1971, 50ff; BEHRENDS, O., Die Prokuratur des klassischen römischen Zivilrechts. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 88, No. 1, 1971, p. 215-299, p. 225ff; KASER, M., Stellvertretung und „notwendige Entgeltlichkeit". In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 91, No. 1, 1974, p. 146-204, p. 190-191; KLAMI, H. T., Teneor mandati. In: *Annales Universitatis Turkuensis*, Tom. 140, Turku, 1976, p. 101. More recent research assumes that from the 2nd century A.D. onwards, the *procurator* could already be sued by means of the *actio mandati*: BRIGUGLIO, F., *Studi sul procurator. L'acquisto del possesso e della proprietà*. Milano, 2007, p. 19; NICOSIA, G., Gestione di affari altrui (Premessa storica). In: *Enciclopedia del diritto*. Vol. 18, Milano, 1969, p. 628-643, p. 632; SEILER, H. H., *Der Tatbestand der negotiorum gestio im römischen Recht*. Köln – Graz, 1968, p. 104ff; BURDESE, A., Sul 'procurator' (a proposito del volume di Piero Angelini). In: *Studia et Documenta Historiae et Iuris*, Vol. 37, 1971, p. 307-328, p. 323; TALAMANCA, M., Le fattispecie dell'«actio negotiorum gestorum». In: *Labeo. Rassegna di diritto romano*, Vol. 17, 1971, p. 217-244, p. 221; PAPERI, O., Considerazioni sull'origine del «procurator ad litem». In: *Labeo. Rassegna di diritto romano*, Vol. 48, 2002, p. 37-71, p. 53; MARTINI, R., Il mandato. In: *Derecho romano de obligaciones. Homenaje al profesor José Luis Murga Gener*. Madrid, 1994, p. 637-648, p. 638-640; NEGRI, G., La gestione d'affari nel diritto romano. In: *Derecho romano de obligaciones. Homenaje al profesor José Luis Murga Gener*. Madrid, 1994, p. 661-686, p. 666-669; HAMZA, G., *Az ügyleti képviselet*. Budapest, 1997, p. 126; CENDERELLI, A., *La negotiorum gestio. Corso esegetico di diritto romano. Struttura, origini, azioni*. Torino, 1997, p. 115ff; FINAZZI, G., *Ricerche in tema di negotiorum gestio. Azione pretoria ed azione civile*. Vol. 1, Napoli, 1999, p. 215ff; COPPOLA BISAZZA, G., In tema di sostituzione volontaria e procurator. In: *Studi per Giovanni Nicosia*. Vol. 2, Milano, 2007, p. 491-557, p. 497ff; KLINCK, F., Zur Bedeutung des Wortes procurator in den Quellen des klassischen Rechts. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 124, No. 1, 2007, p. 25-52, p. 32ff; DEPPENKEMPER, G., *Negotiorum gestio – Geschäftsführung ohne Auftrag. Zu Entstehung, Kontinuität und Wandel eines Gemeineuropäischen Rechtsinstituts*. Vol. 1, Osnabrück, 2014, p. 187-191; MEISSEL, F.-S., Altruismus und Rationalität. Zur „Ökonomie" der negotiorum gestio. In: BABUSIAUX, U. – NOBEL, P. – PLATSCHEK, J. (eds.), *Der Bürge einst und jetzt. Festschrift für Alfons Bürge*. Zürich – Basel – Genf, 2017, p. 255-288, p. 280.

may infer that the *procurator* either had an appropriate legal title regarding the purchase, or he did not.[64] The scope of agency may of course be narrower (limited to a specific affair[65]) or broader (covering various affairs – general management[66]); however, it is clear that in our case its legal basis is the contract of mandate.[67] Any act carried out by the agent without a mandate is considered unsolicited intervention.[68] For claims that cannot be enforced by the *actio mandati*, the application of the *actio negotiorum gestorum* may offer a solution.[69] If the *dominus* has previously entrusted the *procurator*, he can bring the *actio mandati directa* against him. If the *procurator* acted on behalf of the *dominus* without authorisation, the principal can enforce his claim by means of the *actio negotiorum gestorum directa* under the rules of unauthorized management of affairs.[70] Thus, the *dominus* may hold the agent liable on the basis of *mandatum* or *negotiorum gestio* for having caused him damages by purchasing a defective or diseased goods.[71]

However, Africanus examines the seller's liability independently of the internal legal relationship between the principal and the agent; similar to the previous text, he focuses on the parties to the sale, on the relationship between the seller and the buyer. Again, the decisive factor is the knowledge of the person conducting the purchase.[72]

3.2 Case 2: Transaction in accordance with the intention of the principal

If the *procurator* is unaware of the defect but purchases the slave by the direction of the *dominus*, who, however, knows this feature of the goods, the principal — being outside the contract of sale — cannot sue the seller.[73] On this occasion, there is no possibility of asserting a claim even on the basis of the internal legal relationship (*mandatum* or *negotiorum gestio*). I believe that, similar to the previous fragment, the word

[64] The use of the conjunction *vel* suggests that the *actio mandati* and the *actio negotiorum gestorum* are presented as alternatives: CENDERELLI, *La negotiorum gestio*, p. 131-132; BURDESE, Sul 'procurator', p. 323. However, one remedy necessarily excludes the other: KLINCK, Zur Bedeutung des Wortes procurator, p. 38. In classical law, the actions therefore could not compete with each other: HEINEMEYER, S., Klage aus Auftrag (actio mandati). In: BABUSIAUX, U. – BALDUS, Ch. et al. (eds.), *Handbuch des Römischen Privatrechts*. Vol. 2, Tübingen, 2023, p. 2357-2378, p. 2372; MAYER-MALY, Th., Probleme der negotiorum gestio. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 86, No. 1, 1969, p. 416-435, p. 431; SEILER, *Der Tatbestand der negotiorum gestio*, p. 114-115; WITTMANN, R., Die Prozeßformeln der actio mandati. Ein Beitrag zur Geschichte des prätorischen Edikts. In: NÖRR, D. – NISHIMURA, S. (eds.), *Mandatum und Verwandtes. Beiträge zum römischen und modernen Recht*. Berlin – Heidelberg, 1993, p. 39-51, p. 44. Cf. Ulp. D. 3,3,31 pr.; Pap. D. 3,5,31 pr.-1; D. 16,1,7; Ulp. D. 17,1,6,1; Scaev. eod. 60,1; Gai. D. 44,7,5 pr. The text is regarded as an interpolation by SCHULZ, Scientia, Dolus und Error, p. 45; SERRAO, *Il procurator*, p. 118-119. A contrary opinion is presented by CENDERELLI, *La negotiorum gestio*, p. 129; FINAZZI, *Ricerche in tema di negotiorum gestio*, p. 241; LENEL, Afrikans Quästionen, p. 42[8]; WATSON, *Contract of Mandate*, p. 40. The two actions are mentioned together in further fragments as well: Ulp. D. 3,5,16; Iav. eod. 27; Ulp. D. 14,3,1; Afr. D. 15,3,17 pr.; Ulp. D. 46,1,4 pr.

[65] Paul. D. 2,14,13; Ulp. D. 3,3,1,1; Gai. eod. 48; Mod. eod. 63; Gai. D. 4,4,25,1; Paul. eod. 26 pr.; Gai. D. 20,6,7,1; Ulp. D. 44,4,4,18; D. 46,3,12 pr.

[66] Ulp. D. 2,14,12; D. 3,3,1,1; Iul. eod. 47; Paul. eod. 60; Mod. eod. 63; Paul. D. 3,6,7 pr.; Gai. D. 4,4,25,1; Paul. D. 12,2,17,3; Ulp. D. 17,1,6,6; Scaev. eod. 60,4; Gai. D. 20,6,7,1; Ulp. D. 21,1,25,3; Pap. D. 23,2,34 pr.; Ulp. D. 44,4,4,18; D. 46,3,12 pr.; Cels. eod. 87; Ulp. D. 46,7,3,2; D. 47,10,17,16.

[67] Some authors believe that the text refers to a *procurator omnium bonorum*: ALBERTARIO, Procurator unius rei, p. 519; SEILER, *Der Tatbestand der negotiorum gestio*, p. 107-108; FINAZZI, *Ricerche in tema di negotiorum gestio*, p. 238; MICELI, *Studi sulla «rappresentanza»*, p. 329; MEISSEL, F-S., Klage aus Geschäftsführung ohne Auftrag (actio negotiorum gestorum). In: BABUSIAUX, U. – BALDUS, Ch. et al. (eds.), *Handbuch des Römischen Privatrechts*. Vol. 2, Tübingen, 2023, p. 2379-2399, p. 2384.

[68] If the *dominus* and the *procurator* were bound by a mandate, and the mandatary exceeded the authority granted by the contract *(excessus mandati)*, the mandator would be entitled to bring the *actio mandati directa* against him. The mandator could sue for the amount which he loses by the of the contract: Gai. 3, 161; Gai. D. 17,1,41,1. A prerequisite for this is that the mandate would otherwise have been capable of being executed: NÖRR, D., Mandatum, fides, amicitia. In: NÖRR, D. – NISHIMURA, S. (eds.), *Mandatum und Verwandtes. Beiträge zum römischen und modernen Recht*. Berlin – Heidelberg, 1993, p. 13-37, p. 15; NÖRR, D., Paulus (32 ad ed.) D. 17. 1. 3, 5: ein Traktat zum Mandatsexzeß. In: CHIUSI, T. J. – KAISER, W. – SPENGLER, H.-D. (eds.), *Dieter Nörr. Historiae iuris antiqui. Gesammelte Schriften*. Vol. 3, Goldbach, 2003, p. 1899-1932,·p. 1902. The duty of the mandatary is to diligently observe the limits of the mandate: Paul. D. 17,1,5 pr. The contract of mandate, once concluded, excludes the application of the *actio negotiorum gestorum*, regardless of whether the agent has undertaken acts beyond the scope of the contract: Ulp. D. 17,1,6,1; SCHULZ, F., *Classical Roman Law*. Oxford, 1951, p. 623; PRINGSHEIM, F., Noch einmal Gai. 3. 161. und Inst. Just. 3. 26. 8. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 72, No. 1, 1955, p. 54-89, p. 64; DEPPENKEMPER, *Negotiorum gestio*, p. 569.

[69] The *actio negotiorum gestorum* functioned as a subsidiary remedy: PARTSCH, J., Studien zur Negotiorum Gestio. Vol. 1. In: *Sitzungsberichte der Heidelberger Akademie der Wissenschaften, Philosophisch-historische Klasse*. Heidelberg, 1913, p. 4; MAYER-MALY, Probleme der negotiorum gestio, p. 417-418; SAYIN, B. Y., Negotiorum Gestio As a Source of Obligation. From Roman Law to Modern Codes. In: *Annales de la Faculté de Droit d'Istanbul*, Vol. 73, 2023, p. 261-325, p. 269. *Negotiorum gestio* was suitable for any form of managing another's affairs not covered by *mandatum* or *tutela*: DELI, G., *Salus rei publicae. A helyes döntés kritériuma a római magánjogban*. Budapest, 2014, p. 132. Its application extended to matters concerning *cura* as well: ÚJVÁRI, E., Összetett eszköztár a gyámolt érdekeinek védelmében a klasszikus korban: a C.5.75.1 tanúsága. In: P. SZABÓ, B. – ÚJVÁRI, E. (eds.), *Risus cum lacrimis. Könyv Babják Ildikó emlékére (tanulmányok, baráti írások)*. Debrecen, 2017, p. 267-280.

[70] MORELLI, *Die Geschäftsführung im klassischen römischen Recht*, p. 36[46].

[71] The *procurator* could cause damage to the principal through either fraudulent or negligent conduct: BENÖHR, Arglist und Kenntnis der Hilfspersonen, p. 146. Cf. Afr. D. 15,3,17 pr.; Ulp. D. 17,1,8,10. 10 pr.-1; Cic. *Rosc. Am*. 111; *Quint*. 61. See further details in ARANGIO-RUIZ, V., *Responsabilità contrattuale in diritto romano*. Napoli, 1958, p. 206ff; DE ROBERTIS, F. M., *La disciplina della responsabilità contrattuale nel sistema della compilazione giustinianea*. Vol. 2, Bari, 1964, p. 414ff; MAC CORMACK, G., The Liability of the Mandatary. In: *Labeo. Rassegna di diritto romano*, Vol. 18, 1972, p.156-172, p. 163ff; SCHUBERT, D., *Die Mandatarhaftung im Römischen Recht*. Baden-Baden, 2014, p. 198ff.

[72] NICOSIA, G., Exceptio utilis. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 75, No. 1, 1958, p. 251-301, p. 285.

[73] NICOSIA, *L'acquisto del possesso*, p. 151.

mandatu[74] here also expresses the declaration of the *dominus* regarding the purchase of a certain slave.

Ignorantia, on the other hand, creates a right of action for the party acting as an independent legal entity.[75] The *procurator* can therefore avail himself of the *actio redhibitoria*, by means of which he can hold the seller liable,[76] while Julian denies the latter the possibility of defending himself with an *utilis exceptio*.[77]

4. Conclusion

Summarizing the results of the analyses, it can be concluded that the provisions of the aedilician edict also apply to purchases conducted by an agent. The legal scholar examined, case by case, the information concerning the goods possessed by the *dominus* and the agent, and, depending on these variables, allowed or denied claims. It can be observed that the knowledge of the person physically present at the sale determines the possibility of asserting claims and the seller's liability. The aedilician rules imposed objective liability on the seller, but they were applicable only in the case of certain defects, and the remedies were available within short limitation periods. The *actio redhibitoria* can only be brought if the person conducting the purchase is unaware of the defect of the goods. If the agent is aware of the defect, the principal is entitled at most to the *actio empti*, while the seller can prove that he acted in good faith and fulfilled his obligation to provide information. In the argumentation system discernible from the texts, the cases of agency by *persona alieni iuris* and *persona sui iuris* are distinguished.[78] From the perspective of the seller's liability, both the legal status of the agent and the knowledge of the *dominus* are of significance.

In the case of a sale concluded by a dependant, the master is considered the contracting party. Thus, his knowledge overrides the ignorance of the dependant and results in the seller's exemption from liability. The master must also bear the consequences of the conduct of his slave. Any damage arising in connection with the contract falls within his sphere of risk. Just as he enjoys the benefits resulting from the activities of his slave, he is also obliged to share in the associated disadvantages, and therefore cannot sue the seller.[79]

In contrast, a legally capable *procurator* participates independently in the sale, either as a *mandatarius* or as a *negotiorum gestor*.[80] The seller's liability is not affected by the legal fate of the purchased goods; it does not matter who acquires its ownership. Therefore, the *procurator* can bring an action against the seller regardless of the principal's awareness, except when he himself knowingly purchases defective goods.

As to whether the concepts recorded in the texts truly reflect Africanus' opinion or are rather an interpretation of Julian's thoughts, posterity could hardly give a definite answer. The decision on the issues was made in accordance with the principles derived from Julian's works and references to these are clearly recognizable in the fragments. In my view, the cases arose in Julian's practice, but later Africanus provided explanations and additions to them.[81]

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[74] Arangio-Ruiz argues that the term *mandatu domini* expresses that the *procurator* acted on the basis of a special mandate ('speciale incarico'): ARANGIO-RUIZ, *Il mandato*, p. 74[2]. According to Coppola Bisazza, the *mandatum* concerned specific affairs ('singoli affari'), while the general administration ('amministrazione generale') of the *procurator* was covered by *negotiorum gestio*: COPPOLA BISAZZA, *Dallo iussum domini alla contemplatio domini*, p. 207-208. For further reference in this context, see: QUADRATO, R., D. 3,3,1 pr. e la definizione di "procurator". In: *Labeo. Rassegna di diritto romano*, Vol. 20, 1974, p. 210-224, p. 221-223. If we base ourselves on the interpretation proposed in D. 21,1,51 pr., the term *mandatu domini* may here also refer to the unilateral declaration *(iussum)* of the *dominus*. Cf. MITTEIS, L., *Die Lehre von der Stellvertretung nach römischem Recht mit Berücksichtigung des österreichischen Rechtes*. Wien, 1885, p. 43-44. The dogmatically adequate definition of *iussum* is overshadowed by *potestas*. However, even Karlowa no longer regarded it as an order addressed to a dependant: KARLOWA, O., *Römische Rechtsgeschichte*. Vol. 2, Leipzig, 1901, p. 1165-1166. According to Bürge, *iussum* is an authority ('Vollmacht') expressing the will of the head of the household: BÜRGE, A., *Römisches Privatrecht. Rechtsdenken und gesellschaftliche Verankerung. Eine Einführung*. Darmstadt, 1999, p. 174. Kaser, on the other hand, states that over time the institution outgrew the family context and could also be used to authorize free persons: KASER, *Das römische Privatrecht*, p. 265. Briguglio likewise examines the question from a historical perspective: BRIGUGLIO, *Studi sul procurator*, p. 15. The personal scope is not clearly defined in the sources either, see e.g., Pomp. D. 13,6,13,2; Ulp. D. 15,4,1,3. 9; D. 17,1,6,6; Paul. eod. 26,8. The literature also recognizes the view that *mandatum* may encompass *iussum*: WIELING, Drittwirkungen des Mandats, p. 237; FINKENAUER, Th., Direkte Stellvertretung bei Stipulationen? In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 125, No. 1, 2008, p. 440-497, p. 494.

[75] SOLAZZI, Errore e rappresentanza, p. 279.

[76] BECHMANN, *Der Kauf nach Gemeinem Recht*, p. 140. In the case of fraud, the *procurator* would theoretically also have the possibility to sue *ex empto*: MAC CORMACK, G., Juristic Use of the Term Dolus: Contract. In: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Vol. 100, No. 1, 1983, p. 520-532, p. 523ff. Cf. ERNST, W., Die Vorgeschichte der exceptio non adimpleti contractus. In: JAKOBS, H. H. – PICKER, E. et al. (eds.), *Festgabe für Werner Flume zum 90. Geburtstag*. Berlin – Heidelberg, 1998, p. 1-57, p. 17. However, this possibility likely did not arise in this case. I consider two possible explanations for this to be conceivable. On the one hand, a comparison of the texts shows that Africanus still addresses the issue of deception in D. 21,1,51 pr., whereas in D. 21,1,51,1 he does not. This difference may indicate that in the latter case the seller's fraud was not even raised, and that he acted in good faith during the transaction. On the other hand, in the case of a hidden defect, bringing the *actio redhibitoria* appears straightforward, thereby allowing the plaintiff to achieve his aim more easily, since objective liability is imposed on the seller: ERNST, W., Klagen aus Kauf (actio empti, actio venditi). In: BABUSIAUX, U. – BALDUS, Ch. et al. (eds.), *Handbuch des Römischen Privatrechts*. Vol. 2, Tübingen, 2023, p. 2039-2288, p. 2223-2224.

[77] The adjectival phrase *utilis exceptio* may serve to express the particular meaning of the *exceptio* arising from the circumstances of the given case, e.g., Iul. D. 4,4,41; Ulp. D. 14,6,7,1. However, the use of the adjective does not necessarily imply a special meaning of the term; e.g., Paul. D. 18,5,3; Pap. D. 46,3,96,2. Sometimes it simply means that the ordinary *exceptio* can be raised effectively, usefully: NICOSIA, Exceptio utilis, p. 253. In our case, the expression likely does not refer to any special circumstance either. Taking into account Julian's decisions, Benöhr concludes that the legal scholar recognizes the application of the *exceptio* in cases where state protection must be ensured for groups of persons in need of safeguarding (e.g., minors, children, women). However, the seller does not in itself represent a group of persons requiring special protection, and therefore there is no urgent need to extend any *exceptio* in his favour: BENÖHR, Arglist und Kenntnis der Hilfspersonen, p. 148-149. Cf. BABUSIAUX, U., *Id quod actum est. Zur Ermittlung des Parteiwillens im klassischen römischen Zivilprozeß*. München, 2006, p. 151[727]. According to Impallomeni, the *exceptio* expresses the seller's tacit waiver ('tacita rinuncia') of raising the principal's *scientia* as a defence in the lawsuit: IMPALLOMENI, *L'editto degli edili curuli*, p. 24. Overall, by mentioning the *exceptio utilis*, Julian's intention may have been to demonstrate how no *exceptio ex persona domini* could be raised against the *procurator ignorans*: NICOSIA, Exceptio utilis, p. 289-290.

[78] Cf. COPPOLA BISAZZA, *Dallo iussum domini alla contemplatio domini*, p. 183.

[79] BENÖHR, Arglist und Kenntnis der Hilfspersonen, p. 143-144; CLAUS, *Gewillkürte Stellvertretung*, p. 216.

[80] WITTMANN, Die Prozeßformeln der actio mandati, p. 43.

[81] Cf. D'ORS, *Las Quaestiones de Africano*, p. 378-379.

David von Mayenburg (Gesamtherausgeber)

Handbuch zur Geschichte der Konfliktlösung in Europa

Band 1: Konfliktlösung in der Antike, hrsg. v. Nadine Grotkamp und Anna Seelentag, 2021, XXXV, 398 S., ISBN 978-3-662-56099-0
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Band 4: Konfliktlösung im 19. und 20. Jahrhundert, hrsg. v. Peter Collin, 2021, XXXVI, 738 S., ISBN 978-3-662-56075-4

„Ex omnibus unum" ein selten eingelöster Anspruch, dem sich das Handbuch zur Geschichte der Konfliktlösung in Europa verschrieben hat. Bereits durch seine vierbändige und voluminöse Konzeption tritt das Werk als μέγα σύγγραμμα seines Fachgebiets hervor und dies gleich in dreifacher Hinsicht. Es nimmt sich (a.) als Längsschnitt einer Zeitspanne von Antike bis Gegenwart an, besticht (b.) durch einen konsequenten multidisziplinären Ansatz und weitet den Fokus (c.) auf eine europäische Perspektive.

Seine Entstehung verdankt dieser Band der hessischen Exzellenz-Initiative (LOEWE-Projekt) „Außergerichtliche und gerichtliche Konfliktlösung" der Jahre 2012 bis 2015 an der Goethe-Universität Frankfurt am Main mit einer Vielzahl von Teilprojekten von Historikern, Rechtshistorikern, Juristen und Rechtspraktikern.[1] Eine weitere Förderung durch die DFG sicherte die nachfolgenden Arbeiten bis zum Erscheinen der vier Bände.

Das Handbuch widmet sich den rechtlichen und außerrechtlichen Wegen der Entscheidung von Konflikten zwischen einzelnen Menschen sowie zwischen Personen und ihren Obrigkeiten; beschränkt sich also auf „private Konflikte", was interterritoriale bzw. überstaatliche Konflikte wie Kriege ausschließt (Band 1, S. XXIX f.). Die moderne Konfliktforschung entwickelte sich im beginnenden 20. Jahrhundert zunächst aus der Psychologie, Soziologie und Politikwissenschaft heraus mit einem in der zweite Hälfte dieses Säkulums auch stark zunehmenden Interesse der Geschichtswissenschaften, während die Rechtsgeschichte und Rechtswissenschaft dieses – ihr ureigenstes Metier – noch lange eher unter der engeren Perspektive der gerichtlichen Streitbeilegungen betrachtete (Band 1, S. XXIII-XXV).

(a.) Die Gliederung der Bände orientiert sich an den vier Epochen Antike, Mittelalter, Frühe Neuzeit und 19./20. Jahrhundert. Eine stimmige fünfteilige Gliederung aller Bände in eine (1.) Einführung in die jeweilige Epoche, gefolgt von den für den Zeitabschnitt relevanten (2.) Akteuren, (3.) Verfahren und Institutionen und anschließend die Kernfragen und Zentralprobleme der Streitentscheidung in zeittypischen Konfliktfeldern (4.) sowie Spezifika der Konfliktlösung in verschiedenen europäischen Rechtsräumen (5.) soll die epochenübergreifende Arbeit zu spezifischen Streitbeilegungen mit allen vier Bänden ebenso erleichtern wie die Erschließung der breiten Vielfalt der Konfliktlösungen in einer Epoche allein (Band 1, S. XXX f.).

(b.) Soweit es die Multidisziplinarität betrifft, mögen die Herausgeberschaften prima facie eine gewisse Dominanz der „juristischen Rechtsgeschichte" indizieren, sind doch die Herausgeberinnen und Herausgeber allesamt an rechtswissenschaftlichen Fakultäten wissenschaftlich sozialisiert. Nachdem indes die überwiegende Mehrheit auch noch zumindest Geschichtswissenschaften studierte und/oder im Ausland tätig war, ist bereits dadurch der historische sowie europäische Blickwinkel auch biographisch abgesichert. Noch deutlicher wird die Multidisziplinarität, wenn man auf die breite Autorenschaft von 169 Autoren aus verschiedensten Disziplinen schaut.

(c.) Ebenfalls ganz am Puls der Zeit und Forschungstrend orientiert sich die gewählte europäische Perspektive.[2] Sie schlägt sich in den jeweiligen Überblicken zu einzelnen Ländern, Regionen und Rechtskulturen nieder und den vielen hochkarätigen Autoren verschiedenster europäischer Länder. Dabei soll nicht unterschlagen werden, dass in den jeweiligen Bänden auch Räume oder Kulturen jenseits des geographischen Europas Berücksichtigung finden, etwa das antike Ägypten, das Kalifat des Mittelalters, das Osmanische Reich der Frühen Neuzeit oder die Kolonialgebiete.

Ein weiteres Ziel des Handbuchs ist es, den aktuellen Debatten um Konfliktlösungen Reflexionsmöglichkeiten durch einen Zugang zu den historischen Tiefendimensionen gegenwärtiger Entwicklungen zu bieten (Band 1, S. XXVIII). Diese Charakteristika lassen das Handbuch nicht nur für die juristische, rechtshistorische und historische Leserschaft reizvoll erscheinen. Folgend werden die einzelnen Bände kurz vorgestellt, wobei mit Blick auf die schiere Anzahl der Beiträge nur grobe Linien gezeichnet werden oder exemplarisch einzelne Aspekte genauer beleuchtet werden können.

I. Band 1: Konfliktlösung in der Antike

In diesem von Nadine Grotkamp und Anna Seelentag herausgegebenen ersten Band „Konfliktlösung in der Antike" nehmen die Verfahrensweisen vor den Gerichten Roms und Athens den größten Raum ein, was geradezu paradigmatisch für den seinerzeitigen

[1] Vgl. dazu bereits Peter Collin/Wim Decock/Nadine Grotkamp/David von Mayenburg/Anna Seelentag, History of Conflict Resolution in Europe – A Project Report. In: *Rechtsgeschichte – Legal History* Rg 30, 2022, S. 65-80.

[2] Vgl. dazu etwa: HIRTE, M., Forschungsbericht: juristische Strafrechtsgeschichte. In: *ZNR*, 2024, S. 97-137, hier v.a. S. 101-105.

Fokus auf die Stadt als zentraler Bezugspunkt des Lebens einerseits und die Überlieferungsdominanz der römischen und attischen Quellen und der Fokussierung der Forschung auf diese andererseits steht (S. 1). Die Grundlagen-Beiträge widmen sich den Gerichtsorten als markantem Charakteristikum sowie den Aspekten, die für die Zugänglichkeit von Justiz eine besondere Rolle gespielt haben, etwa Status oder Eigeninitiative (S. 2). Sie arbeiten zentrale Unterschiede zwischen antiken und gegenwärtigen Konfliktlösungsmodi auf, beispielsweise der Grad der staatlichen Interventionen, die Bewertung von Rache und Selbsthilfe, das Zusammenspiel von Gesetzgebung, Rechtsprechung und Herrschaft oder die Rhetorik als Konfliktlösungstheorie, wohingegen bei den materiellen Medien der Unterschied weniger augenfällig ist, als man prima facie meinen mag (S. 3 ff.). Beim Vergleich mit anderen Epochen zeigen sich die geringere Bedeutung der Religion in der Antike und Besonderheiten der an der Konfliktlösung beteiligten Akteure (u.a. Richterschaft, attische Massegerichte oder römische Prätoren) sowie die schwierige Quellenlage zu lebensweltlichen Zusammenhängen und Konfliktfeldern jenseits der Stadt (S. 4 ff.). Da sich das Handbuch als Abkehr vom tradierten Forschungsansatz der Fokussierung auf antike, v.a. römische und attische Institutionen und Verfahren versteht, nehmen die entsprechenden Beiträge in der Gesamtbetrachtung einen geringeren Raum ein. Zudem weitet der erste Band den Fokus auf weitere Quellen, bislang weniger beachtete Konfliktfelder wie Konfliktlösung in Wettkämpfen oder andere Rechtsordnungen wie das antike Israel oder Ägypten.

II. Band 2: Konfliktlösung im Mittelalter

Der zweite Band des Handbuchs zur Geschichte der Konfliktlösung in Europa, herausgegeben von David von Mayenburg, übersteigt den Seitenumfang des ersten Bands um ein gutes Fünftel. Erfreulicherweise entscheidet sich der Band dazu, etablierte Fachtermini wie „das Mittelalter" beizubehalten, also nicht auf dem Altar von Neologismen oder Anglizismen zu opfern, sondern durch einführende wissenschaftsgeschichtliche Klarstellungen Problembewusstsein zu schärfen (S. 1 f.). Auch dieser Band verlässt die tradierten Pfade, Forschungsansätze und Narrative der nach wie vor wirkmächtigen älteren Rechtsgeschichte. Dabei lässt dieser Perspektivwechsel unser Wissen über die Epoche von 500 bis 1500 deutlich weniger sicher erscheinen, als noch um 1900 (S. 2). So zeigt der Band dann auch die Vieldeutigkeit, Widersprüchlichkeit und teils auch Fremdheit der mittelalterlichen Welt (S. 3). Er setzt in der Alltagswelt und deren spezifischen Konflikten an und nimmt die Strategien, Instrumente, Traditionen, Personen und Normensysteme der Konfliktlösung in den Blick, womit dann auch Gemeinsamkeiten und Traditionslinien zu heutigen Konfliktlösungsstrategien deutlich werden (S. 3 ff.).

So wird deutlich, dass der *access to justice* weder selbstverständlich noch immer präsent war, gerade auf dem Lande und für Minderheiten, wohingegen andernorts, etwa in den Städten, teils bereits hochspezialisierte Gerichte mit überschneidenden und konkurrierenden Zuständigkeiten judizierten (S. 3). Große Bedeutung kam hier ständischen oder familiären Netzwerken zu sowie dem persönlichen und finanziellen Einsatz bei der Rechtssuche (S. 3). Mangels Staatlichkeit im heutigen Sinne nahm auch die „Privatgewalt", häufig in Form der Fehde, eine deutlich größere Rolle ein, was eine „moderne" Differenzierung zwischen spontanen Gewaltakten und „rechtlich legitimierten" Gewaltakten schwierig macht (S. 4 f.). Ein weiteres Kennzeichen des Mittelalters sind die parallelen Konfliktlösungsstrategien einer oralen Rechtskultur und einer komplexen schriftlichen Rechtskultur, wobei der Band eine allzu optimistische Sicht auf die Schriftlichkeit ein Stück weit relativiert (S. 5 f.). Der Religion kam eine starke Rolle bei der Konfliktlösung zu, sei es als eigene Jurisdiktion, als Rechtswissenschaft (Kanonistik) und auf Beweismittelseite (Gottesurteile und Reinigungseide), und auch das fundamentale Konzept der Gnade als Gegensatz und Spiegelbild differieren deutlich von aktuellen Vorstellungen (S. 6 ff.).

Auch der zweite Band nimmt im zweiten Teil die Akteure der Konfliktlösung genauer unter die Lupe und spiegelt dabei die gesamte Bandbreite aller Stände und beiderlei Geschlechts. Soziale Herkunft, Würde und Prestige der Streitentscheider, später auch zunehmend eine (juristische) Ausbildung, waren entscheidend für eine effektive Konfliktlösung (S. 8 ff.). Der dritte Teil „Verfahren und Institutionen" mit Beiträgen zu Ordalien, Eid, Schiedsgerichten, gemeinem Prozess, Strafrecht, Appellation und Dispensation steht gleichberechtigt neben sowohl markanten mittelalterlichen, und als Laboratorien zu bezeichnenden also auch eher prima facie „exotisch" wirkenden Konfliktfeldern (Teil IV), wie dem Wettkampf in Sport und Spiel (S. 9 f.). Noch deutlich größer wird die Bandbreite mittelalterlicher Konflikte und deren Ansätze, wenn man mit dem fünften Teil den Blick vom Reich löst und Richtung Byzanz (und die Kreuzfahrerstaaten), Russland, Frankreich, England und nach Skandinavien schweifen lässt (S. 10).

Gerade in der breiten Anlage des Bandes wird an vielen Stellen deutlich, dass sowohl bei der gerichtlichen als auch der außergerichtlichen Konfliktlösung eine Vielzahl offener Forschungsfragen einer vertieften und auch interdisziplinären Behandlung harren. So räumt die Einführung dann auch zutreffend ein (S.10 f.), dass bei weitem kein auch nur annähernd vollständiges Wissen zur Konfliktlösung geboten werden kann. Die noch zu missenden Beiträge, vor allem im Bereich der Territorien (S. 11), sollten einer Zweitauflage angetragen werden.

III. Band 3: Konfliktlösung in der Frühen Neuzeit

Der verglichen mit dem zweiten Band fast 50 % umfangreichere dritte Band „Konfliktlösung in der Frühen Neuzeit" entstand unter der Herausgeberschaft von Wim Decock und deckt gut drei Jahrhunderte ab (1500 bis 1800). Er bildet das Scharnier zwischen der mittelalterlich-religiösen Ständegesellschaft und dem modernen, von den liberal-säkularen Prinzipien der französischen Revolution beeinflussten Rechtsstaat, in dem sich die „Doppelgesichtigkeit" der Frühen Neuzeit in allen Facetten und durchgehend zeigt (S. 1 ff.). Dem aus der historischen Kriminalitätsforschung rührenden Konzept der Infrajustiz wird, trotz schwieriger Quellenlage, eine große Bedeutung beigemessen (S. 5).

So liegt dann auch die Pluralität der Konfliktlösung in einer poly-diversifizierten Gesellschaft im Fokus dieses Bandes, was – vom Herausgeber zutreffend konzediert (S. 16) – nicht nur Verallgemeinerungen schwierig macht, sondern auch das nach wie vor bestehende Desiderat einer Integration von rechtshistorischen und (tiefgreifenden) rechtsvergleichenden Forschungsmethoden aufzeigt sowie die Nachteile einer leider immer noch weitgehend zersplitterten Forschungslandschaft auf mehrere Teildisziplinen (S. 18) mit einem aus Sicht des Herausgebers Chancen und Risiken bergenden signifikanten Rückzug der Juristen und Rechtshistoriker (S. 19), wobei sich dem Rezensenten nicht ganz erschließt, warum nicht auch Juristen und Rechtshistoriker den Interdependenzen formeller und informeller Konfliktaustragungsmechanismen größere Beachtung schenken könnten (S. 19).

Der erste Teil „Grundlagen und Grundprobleme" weitet den Blick vom tradierten Narrativ der europäischen Kriminalitäts- und Strafrechtsgeschichte einer graduellen Beseitigung rivalisierender Herrschaftsverbände hin zum modernen staatlichen Gewaltmonopol (S. 16) bzw. der allmählichen Entstehung des jeweiligen modernen Nationalstaats- und Justizsystems (S. 3) auf Infrajustiz und außergerichtliche Formen der Konfliktregulierung (Nr. 3). Es zeigt sich, dass auch im Zuge des intensivierten Staatsbildungsprozesses (Nr. 4) bei Professionalisierung der Akteure (Nr. 5) und zunehmender Verschriftlichung (Nr. 6) die Streitkultur im Kern informell und mündlich blieb, selbst vor Gericht (S. 15). Auch wird deutlich, dass die Poly-Diversifizierung der Gesellschaft und eine zersplitterte Gerichtslandschaft die Justiznutzung fördern oder bremsen konnte und teils auch von ärmeren Konfliktparteien geschickt genutzt wurde (S. 8 und Nr. 2). Als weiterer Erkenntnisgewinn zeigen viele Beiträge dieses Bandes eine kontinuierliche Pluralität des Strafens (S. 16).

Der zweite Teil, abweichend von den übrigen Bänden nicht mit „Akteuren" tituliert, sondern mit „Diversität und Konfliktlösung", ist vom Umfang recht knapp gehalten mit einem Fokus auf Diversität (Nr. 12), Gender (Nr. 13), Indianer (Nr. 14) sowie moslemische Prozessparteien (Nr. 15). Dass der dritte Teil „Konfliktlösung in Verfahren und Institutionen" mehrheitlich von Nichtjuristen bearbeitet wurde, dürfte der Ausrichtung und Zielsetzung des Gesamtwerks geschuldet gewesen sein, ist indes angesichts der adäquat berücksichtigten juristischen bzw. rechtshistorischen Fachliteratur in den Einzelbeiträgen kein Nachteil. Während sich die Konfliktfelder, (von Adel über Bergbau, Universität und Kirchen bis Jüdische Gemeinden) verglichen mit dem zweiten Band noch weitgehend die Waage halten, fächert sich die Anzahl der Länderforschungsberichte signifikant auf (insgesamt 16). Dies führt dazu, dass beispielsweise grenz- und disziplinübergreifende Phänomene dieser Epoche, etwa Hexerei- und Hexenverfolgungen, in einem knappen Dutzend Beiträgen angerissen werden. Dies erschwert zwar einerseits initiale Annäherungen sowie Gesamtbetrachtungen, ist andererseits ein Paradebeispiel der Pluralität, der sich der dritte Band verschrieben hat.

IV. Band 4: Konfliktlösung im 19. und 20. Jahrhundert

Der vom Umfang dem dritten Band in nichts nachstehende vierte Band der Reihe, herausgegeben von Peter Collin, widmet sich dem 19. und 20. Jahrhundert. Ausweislich seines Vorwortes zeigt er auf, wie eng miteinander verflochten die nationalen Wege waren; will aber neben den großen Linien auch als Impulsgeber und Hilfsmittel für die Detailforschung dienen (S. VII). Der Herausgeber macht als wesentlichen Charakterzug des europäischen 19. und 20. Jahrhunderts die Herausbildung und Etablierung neuer Konfliktlösungsmechanismen aus, die sich in vielerlei Hinsicht von gleichgerichteten Prinzipien leiten ließen (S. 1) und zeichnet eine nationale Vielgestaltigkeit mit gesamteuropäischen Verflechtungen auf (S. 2).

Auch dieser Band folgt der Untergliederung der Vorgängerbände. Als Haupttendenzen und -stationen sind etwa eine Neukonfigurierung von „gerichtlich" und „außergerichtlich" (S. 7 ff.), eine Verrechtlichung und Professionalisierung der Gerichtsbarkeit (S. 9 ff.), eine Vereinheitlichung von Organisation, Verfahren und Entscheidungsgrundlagen (S. 12 ff.), eine Erweiterung des Zugangs zur Justiz (S. 15) und eine (geänderte) Visualisierung und Inszenierung von Justiz (S. 19 f.) auszumachen. Die Differenzierungsprozesse im Bereich institutionalisierter Konfliktlösung im 19./20. Jahrhundert sind von einer Gleichzeitigkeit von Entdifferenzierungsprozessen (etwa Adel, Handwerk, Religionsgemeinschaften und Militär) und Ausdifferenzierungsprozessen (etwa Wirtschaft, Arbeit, Soziales, Verwaltung und Sport) gekennzeichnet (S. 20 ff.). Eine Erosion der staatlichen Justiz wird indes nicht erkannt (S. 31 ff.).

Nach den Grundlagen und Grundproblemen des ersten Teils, liegt der Fokus im zweiten Teil (Akteure) auf Frauen, Berufs- und Laienrichtern. Der dritte Teil zur Konfliktlösung in Verfahren und Institutionen ist stark international ausgerichtet, wohingegen die Teile Konfliktfelder und Länderforschungsberichte wieder stärker dem Band 3 ähneln. Bedauerlich ist das Fehlen eines Beitrags zur Konfliktlösung im Sozialismus, einem seit einigen Jahren stark prosperierenden Forschungsfeld, was angesichts des späten Rückzugs des Autors weder durch einen neuen Autor noch durch einen insoweit erweiterten Länderforschungsbericht zu Deutschland kompensiert werden konnte (vgl. S. 17 Fn. 23). Dessen ungeachtet spiegelt der breit angelegte, umfangreiche vierte Band die Dominanz der Zeitgeschichte in der universitären Rechtsgeschichte wider, wobei es ihm gut gelingt, die schiere Masse der Publikationen zum 19. und 20. Jahrhundert so zusammenzuführen und zu komprimieren, dass der Handbuchcharakter erhalten bleibt.

V. Schlussbetrachtung

Das vierbändige Handbuch zur Geschichte der Konfliktlösung in Europa löst seinen Anspruch als zentrales Referenzmedium für die historische Dimension aller Aspekte der Streitentscheidung ein.

Verdienstvoll ist bereits und vor allem der Längsschnitt durch alle Epochen und deren paritätische Gewichtung in jeweils einem einzelnen Band, auch für Antike und Mittelalter. Die in Lehre und Forschung zunehmend an die Peripherie exiliert scheinende Ältere Strafrechtsgeschichte erhält so ein dringend benötigtes Forum zur Wiederherstellung des Anschlusses an die Neuere Straf-

rechtsgeschichte und Zeitgeschichte, ohne dass die derzeitige Dominanz der Forschung zu letzteren kaschiert wird. Ein weiterer wertvoller Beitrag des Handbuchs ist die durchweg gelungene Herausarbeitung und Sichtbarmachung diachroner Zusammenhänge, indem die Themen auch im Längsschnitt aufeinander abgestimmt wurden. Dass, wie von den Herausgebern konzediert, in der Erstauflage keine Vollständigkeit erreicht werden konnte (Band 1, S. XXXII), dürfte in gewisser Weise in der Natur der Sache – der Längsschnittdarstellung in einem seitenzahlbegrenzten Handbuch – liegen. Soweit es die kurzfristigen Artikelabsagen betrifft, können hier jedoch folgende Auflagen sicher Abhilfe schaffen. Dies gilt auch mit Blick auf eine, an der einen oder anderen Stelle noch etwas vertieftere Berücksichtigung nach wie vor maßgeblicher rechtshistorischer Sekundärliteratur früherer Jahre zu einzelnen Feldern (etwa Band 2, Nr. 13 Ordalien, Arbeiten von Winfried Trusen, Karin Nehlsen-von Stryk und Günter Jerouschek sowie eine Interpretation der Gottesurteile als Einbruch der freien richterlichen Beweiswürdigung ins Formalbeweisverfahren durch die Interpretationsfähigkeit bzw. -bedürftigkeit so manchen Ordalausgangs) oder neuerer Forschungsergebnisse (etwa Band 2, Nr. 17, S. 205 zur Programmatisierung von *ne crimina remaneant impunita* nicht erst unter Innozenz III., sondern bereits früher[3]).

Auch das zweite Charakteristikum des Handbuchs, die Heterogenität des Zugriffs mit Blick auf den multidisziplinären Charakter des Werkes, verschreckt weniger, als es den Horizont für die Schwesterdisziplinen weitet. Durch die Abwendung von der tradierten Herangehensweise über Recht und Gericht eröffnet das Handbuch insbesondere den stärker in der traditionellen Sichtweise verankerten klassischen Strafrechtshistorikerinnen und Strafrechtshistorikern die Chance, in komprimierter und kondensierter Weise einen erkenntnisfördernden Perspektivwechsel zu vollziehen. So imponiert das Handbuch in seiner ganzen Breite als gelungenes Beispiel für Multi- und Interdisziplinarität.

Die „Europäisierung" der Konfliktlösung gelingt dem Handbuch schließlich gleichermaßen und dies nicht nur durch die ausführlichen Forschungsberichte zu Ländern, Regionen und Territorien im letzten Teil der jeweiligen Bände, sondern auch deren Zusammenführungen in den Grundlagen, bei den Akteuren, Institutionen, Verfahren und Konfliktfeldern.

Dieses durchgehend positive Gesamtverdikt des Bandes schmälern auch in keinster Weise kleinere Lapsus in (ohnehin nur) homöopathischer Größenordnung, etwa Kurzbelege ohne Aufnahme in die Bibliographie (Band 3, S. 336, Haldemann 2016, S. 340), Falschdatierungen (Band 4, S. 170, Abschaffung der Todesstrafe im Großherzogtum Toskana nicht 1793/94, sondern 1786) oder bei fast 2.500 Seiten fast unvermeidliche kleinere orthographische Fehlerteufel (etwa Band 1, S. XXVIII „Konflikt-lösung", S. 8 „dar"), zumal diese in einer Zweitauflage problemlos ausgebessert werden können.

Mit stetiger Sorgfalt gewachsen, zeigt das Handbuch, *labor omnia vincit improbus* (Vergil, Georgica I, 145) und sei der mit der Materie nicht oder nur fragmentarisch vertrauten breiten Öffentlichkeit ebenso warm ans Herz gelegt wie dem ausgewiesenen Konfliktforscher der jeweiligen Disziplin.

Markus Hirte*

[3] Vgl. bereits HIRTE, M., *Innozenz III., das IV. Lateranum und die Strafverfahren gegen Kleriker*. Tübingen 2005, S. 193-198 sowie ganz aktuell ders., „Ne crimina remaneant impunita". In: HIRTE, M., KOCH, A., KÖLBEL, R. (Hrsg.), *Recht und Geschichte – Psyche und Gewalt*. Gießen, 2023, S. 133-157, hier S. 155 f.

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Piotr Eckhardt

Socialism under Construction. Law and Ideology in Housing, Construction and Spatial Planning in Poland 1944–1989

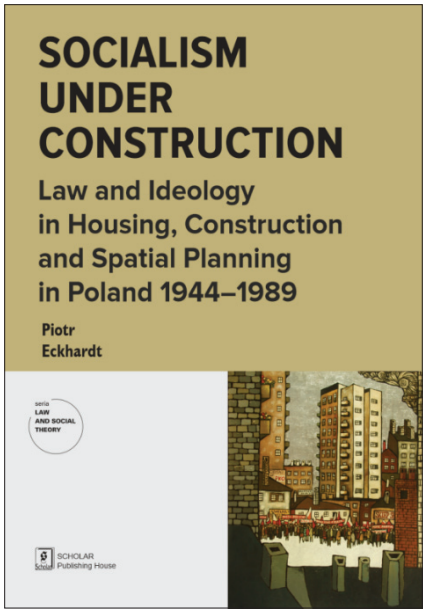
Warsaw: Scholar Publishing House, 2024, 409 pp., ISBN 978-83-67450-58-4

Dr. Piotr Eckhardt's recently published monograph[1] touches upon a very important and yet flagrantly underresearched question regarding the mutual relations between law and ideology during the period of state socialism. There is certainly a need for more research on the ideological entanglements of law in a historical perspective, which entails enriching historical research methods with the perspective of critical jurisprudence.[2] The Author has decided to investigate this nexus on the example of four closely interrelated fields of (mainly public) law: construction law, spatial planning law, housing law, and gardening allotment law – on the example of Poland. The choice of the areas of law for the purpose of analysing the relations between law and ideology during the period of state socialism is in itself noteworthy. When one thinks of heavily ideologised areas of law in that period, one would think especially of constitutional law and, to an extent, criminal law (with particular focus on political crimes), possibly also the

[1] The monograph is available in open access on the website of the publisher: https://scholar.com.pl/pl/bezplatne-ebooki/8854-socialism-under-construction-law-and-ideology-in-housing-construction-and-spatial-planning-in-poland-1944-1989.html

[2] See MAŃKO, R., Towards an Ideological History of Private Law, or What Legal History Can Gain from Critical Legal Theory. In: MACHNIKOWSKA, A., GAŁEDEK, M. K., MAŃKO, R., *Ideology and Private Law: Polish Experiences in the Long 20th Century*. Leiden, 2025, p. 16-79.

area of law linked to national security, and so forth. By contrast, the areas of housing, construction, spatial planning and gardening allotments would seem *prima facie* to be purely technical. One would expect that they regulate certain issues which are common to all political systems, capitalist and socialist alike. However, Dr. Eckhardt's investigation has shown that this was not the case, and that those apparently technical areas, mainly of administrative law and partly of civil law, have been heavily ideologised during the period in question.



The book is composed of eight chapters. Chapter 1, titled "Purpose, object and methods of the study" serves as an introduction. It starts in a very suggestive way from a description of the reshaping of central Warsaw during its post-War reconstruction at the turn of the 1940 s and 1950s. Dr. Eckhardt describes the new MDM quarter of Soviet-style socialist housing, which replaced pre-War "bourgeois" houses in the prestigious Marszałkowska street. The Author rightly remarks that: "This is an ideal example of shaping the material – architectural and urban – environment of human life in accordance with political ideology" (p. 10), and introduces the main hypothesis of his monograph in the following words:

> (…) the content of the legislation on construction, housing, and urban planning depended on the political ideology as it was specific to the particular period of the history of People's Poland, and these norms served to shape the aforementioned areas of socio-economic life in accordance with the vision embodied in that ideology. (p. 10)

He then goes on to set out three dimensions of the law – ideology nexus:

> (…) (1) when ideology is the *reason* for the existence of some regulation; (2) when some regulation was necessary for other reasons, but *ideological considerations contributed to the choice of one of several possible solutions*, and (3) when the use of a particular legal solution was motivated by pragmatic reasons but, at the same time, was *in line with the prevailing ideology and contributed to strengthening it*. (p. 10, emphasis added)

This typology is interesting not only for the purposes of the reviewed monograph, but also has a theoretical value in itself because it emphasises that the impact of ideology upon law is broader than just those situations when ideology is the *causa causans* (first situation); also when a given legal solution is adopted primarily for non-ideological reasons, ideology may still have played a part in the choice (second situation) or the chosen regulation may uphold the official ideology (third situation). This analytical framework can certainly be useful for studying relations between law and ideology in other historical settings, or even with regard to contemporary law.

As regards the concept of ideology, Dr. Eckhardt recalls the genealogy of this notion, relying *inter alia* on Polish sociologist Jerzy Szacki, and then draws attention to a sociological monograph from 1983 by Raymond Taras which studied the official ideology in People's Poland.[3] Following Taras, he explains that his goal is to analyse the "operative ideology" of the period, that is – so to say – "ideology in action," rather than ideology conceived of as a purely theoretical construct. Whereas Taras based his research on political sources (such as official communist party declarations and ideological publications), Eckhardt explains that his methodology implies analysing legal sources, i.e. legislative acts (p. 15). The subsequent part of Chapter 1 (pp. 16-36) is devoted to a synthetic account of the history of People's Poland – the facts are known to anyone familiar with Polish legal history, but certainly their concise presentation will be useful to foreign readers. The subsequent section is more theoretical in outlook and addresses the question of ideological instrumentalisation of the law (pp. 36-50). Here, the Author relies mainly on authors from the Wrocław school of legal theory[4] (Andrzej Bator, Włodzimierz Gromski, Jacek Kaczor, and the late Artur Kozak), as well as other Polish legal theorists (Wiesław Lang, Lech Morawski) to elucidate the concepts of instrumentalisation of law and instrumentalism of law. Following Professor Gromski, Dr. Eckhardt assumes that any law is by its very nature instrumental (p. 48), but it is nonetheless possible to identify specific "acts of instrumentalisation of the law," i.e. those instances when the political power uses the law to achieve its goals (p. 47). This allows to define the scope of research undertaken in the monograph to acts of *ideological instrumentalisation* of the law (p. 48).

The last part of Chapter 1 is devoted to methodology. It relies on the concept of multilevel interpretation of legal texts, proposed by Polish legal theorist Ryszard Sarkowicz.[5] Among the levels proposed by Sarkowicz, Dr. Eckhardt chose to focus on the ideological one, noting that Sarkowicz was actually inspired by the Critical Legal Studies movement when he proposed this specific level of interpretation (pp. 51-52). Concerning the sources, Dr. Eckhardt decided to base his research on the legal acts in force during the

[3] See TARAS, R., *Ideology in a Socialist State: Poland 1956–1983*. Cambridge, 1985.

[4] Although most works emanating from this school have been written in Polish, there are two representative edited volumes in English: BATOR, A., PULKA, Z. (eds), *Legal Theory and Philosophy of Law: Towards Contemporary Challenges*. Warsaw, 2013; BATOR, A., PULKA, Z. (eds), *A Post-analytical Approach to Philosophy and Theory of Law*. Berlin 2019.

[5] See SARKOWICZ, R. *Poziomowa interpretacja tekstu prawnego [Multilevel interpretation of a legal text]*. Kraków, 1995; IDEM, Levels of interpretation of a legal text. In: *Ratio Juris*, vol. 8, issue 1, 1995, p. 104-112.

socialist period, and more specifically on a total of 91 legislative decrees and statutes (p. 55). Moreover, the Author also studied 27 ordinances (executive decrees), 32 government resolutions (also a form of executive decrees) as well as eight internal regulations of state authorities (p. 402-408). The book is, of course, also based on legal and general literature, both from the studied period and contemporary. By contrast, it does not rely on archival sources or oral history, and practically does not analyse case-law (only two cases are referred to).

Chapter 2 focuses on "Regulations on the reconstruction of the damage done during World War II." It discusses a number of legal acts introduced directly after World War II, especially four decrees from 1945: the Decree on the Right to Build (which created the Polish variant of the *Baurecht*), the Decree on Demolition and Repair of Buildings Destroyed and Damaged by War, the Decree on the General Duty of Personal Services for the Reconstruction of the City of Warsaw, and the Decree on the Ownership and Use of Property in Warsaw ("Bierut Decree") (which nationalised land in the capital), followed by the 1947 Act on the Reconstruction of the City of Warsaw. The discussion is not just a dry reconstruction of the content of these legislative acts, but also includes the broader political and urban planning context, including contemporary debates on nationalisation of urban land in order to facilitate planning (e.g. views of Hans Bernoulli), as well as comparisons with Western Europe (legal frameworks for reconstruction of entirely destroyed cities in Netherlands, France, England). Concerning the key Bierut Decree, Dr. Eckhardt comments that it

> (…) was based on solutions proposed before 1939 in Western Europe. In its wording, it was also no more radical than some of the solutions introduced after the war. Its declared goals were not unique to socialism. However, the partial practice of its application (covering communalisation but not the establishment of temporary ownership or the payment of compensation) made the act an instrument for implementing the goals of People's Poland's political ideology related to a radical change in property relations. (…) The Bierut Decree declared compensation payments and other instruments that made it not drastically different from the solutions used in some countries on the western side of the Iron Curtain. Tax breaks and exemptions from state housing management were other instruments targeted at private owners and investors. It is evident in all these laws that they did not ultimately implement the ideology of state socialism to the same extent as later legal solutions. (pp. 102-103, 115)

He notes, however, that despite the similarities of the Bierut Decree to Western European solutions, in practice: "No implementing acts were issued for the Bierut Decree, which would have made it possible to obtain compensation for seized properties. (…) There was also no ordinance through which the promised financial assistance to investors renovating their properties could be launched" (p. 116).

The following five chapters – which constitute the core of the monograph – are devoted thematically to five selected legal areas: construction law (Chapter 3), spatial planning law (Chapter 4), housing law (Chapter 5), housing cooperatives law (Chapter 6), and gardening allotments law (Chapter 7). In this way, following a general theoretical introduction in Chapter 1, and an examination of the legal acts adopted during the reconstruction period in Chapter 2, Dr. Eckhardt examines, one by one, specific areas of the law related to spatial planning, housing and construction. Within each chapter, the subject-matter is then discussed chronologically, followed by an analysis from the point of view of law and ideology.

Chapter 3, titled "Construction law," examines the legal regulations concerning construction "at the micro-scale, i.e. at the level of individual buildings" (p. 119). The Author begins by presenting the pre-War regulations in this area, i.e. the 1928 Ordinance of the President of the Republic on the Construction Law and Development of Settlements. Against this background he then discusses the rules enacted after World War II – in particular the amendments to the 1928 Ordinance, the Construction Law of 1961, followed by the Construction Law of 1974. The discussion of these legislative acts is accompanied by an analysis of the relevant academic literature of the period, not only legal but also concerned with town and country planning. Concluding the chapter, Dr. Eckhardt notes that the pre-War 1928 Ordinance survived for a very long time – until 1961. Explaining the reason for this remarkable legal survival,[6] Dr. Eckhardt explains:

> The state construction industry, which dominated after 1945, was given little attention there [i.e. in the 1928 Ordinance]. That is why these provisions did not contradict the policy of the People's Poland authorities. They left a kind of legal vacuum, which could be filled by various decrees and, above all, by acts of a lower rank: resolutions, ordinances, executive orders. Occasionally, it also turned out that this gap did not need to be filled with anything. (p. 182)

This finding is very interesting for it explains the survival of the 1928 Ordinance by the fact that most of its rules did not *de facto* apply, making it an example of a so-called "quiet survival" or "relic."[7] As far as the ideological imprint of the Acts of

[6] The concept of a "legal survival" was coined by American jurist Oliver Wendell Holmes. See HOLMES, O.W., *The Common Law.* Cambridge, MA, 2009 [1881]. For a contemporary discussion of the notion, see e.g. MALAGOLI, L., 'Bettabilitarian' jurisprudence: Pragmatic evolutionism in the jurisprudence of Oliver Wendell Holmes Jr. In: ZAŁUSKI, W., BOURGEOIS-GIRONDE, S., DYRDA, A. (eds.), *Research Handbook on Legal Evolution*. Cheltenham, 2024, p. 439-440; MAŃKO, R., Legal Transplants, Legal Survivals, and Legal Revivals: Towards a Reconceptualisation of the Circulation of Legal Forms in Time and Space. In: *Acta Universitatis Lodziensis. Folia Iuridica*, vol. 109, 2024, p. 93-117; IDEM, Legal Survivals and the Resilience of Juridical Form. *Law and Critique*, vol. 36, 2025, p. 67-89.

[7] See MAŃKO, R., Legal Survivals and the Resilience of Juridical Form. In: *Law and Critique*, vol. 36, 2025, p. 80.

1961 and 1974 are concerned, Dr. Eckhardt draws a distinction between the much more ideologised Act of 1961, and the more technocratic Act of 1974, where the ideological content was essentially limited to the preamble of the Act (p. 185-186). This is line with the political transformation within state socialist Poland, where the Gierek era (1971-1980) is commonly considered a decade of technocracy, with a more façade approach to Marxist-Leninist ideology.[8] It has even been referred to as a period of "hybrid socialism."[9]

Chapter 4, titled "Spatial planning law," moves on from the level of regulation of individual buildings to the level of town and country planning. Here, once again, Dr. Eckhardt begins from the aforementioned Ordinance of 1928, which, however, was quickly replaced as regards spatial planning by the 1946 Decree on the Planned Spatial Development of the State. Comparing the situation under state socialism to the pre-War period, the Author concludes

> Compared to the prewar solutions, the structure of the bodies with competence in spatial planning was changed completely. The system, in which – with some exceptions – the most important powers were held by democratic local self-government, was replaced by a concept based on a strongly hierarchical structure of state institutions. They were empowered to draft planning acts at all envisaged levels, and public participation was limited to the approval of ready-made spatial plans by the façade bodies of people's democracy – Sejm (parliament) and the national councils. In addition, the professional consultative bodies established by the 1946 Decree did not even begin to function, indicating that, most likely, they were also of a phoney nature already in their conception. Therefore, in practice, the system created was prepared primarily for the effective implementation of the supreme political authorities of the People's Republic of Poland's decisions in the area of spatial planning. (p. 198)

Dr. Eckhardt also underlines the links between spatial planning, as a specific form of planning, on one hand, and general economic planning, on the other. He notes, in particular, that "the relationship between spatial planning and economic planning was asymmetrical" (p. 199), in the sense that general planning was dominant vis-à-vis the spatial planning.

What is particularly interesting is the survival of certain rules and even entire legal institutions from the Ordinance of 1928 within the post-War Decree of 1946. This kind of "borrow[ing] abundantly from prewar legislation, which can also be seen in the case of the provisions analysed in other chapters" was, nonetheless, selective – "Legal institutions that were most obviously incompatible with the new political ideology were removed and modified in the first place" (p. 201). The analysed phenomenon is also an example of a legal survival – described in the literature as "transfiguration,"[10] i.e. the replication of an old legal form (here: the Ordinance of 1928) within a new one (here: the Decree of 1946).

Following the Decree of 1946, the Author discusses the centralisation of spatial planning which occurred, following Soviet models, as from 1949 (p. 202-213), before moving to the Spatial Planning Law of 1961 (p. 213-231), and then to the Spatial Planning Law of 1985 (p. 231-242). Concerning the ideological entanglements of spatial planning law, Dr. Eckhardt highlights the parallels between the political and economic development of the country, on the one hand, and changes in spatial planning laws (p. 242-246). His principal finding is that "in the history of spatial planning law in People's Poland it is possible to distinguish several periods corresponding quite closely to particular eras in the political history of the country" (p. 246).

Chapter 5, titled "Housing Law," covers the "area of law responsible for determining the rules for disposing of dwellings" (p. 247). Once again, the order of treatment is chronological, and starts from pre-WW2 regulations (p. 248-253) which sets the scene for legal acts introduced by the communist powers: the 1944 Decree on Housing Committees, three decrees from 1945 (Decree on Public Management of Dwellings and Rent Control, Decree on Extraordinary Housing Committees Decree on Decree on Tenancy of Dwellings), followed by later legislation: the Housing Law of 1959, and the Housing Law of 1974 (p. 253-281). In his analysis of the ideological entanglements of the legislation (p. 281-282), Dr. Eckhardt draws attention to the relative stability of housing law, "despite the enactment of completely new bills [acts] in 1959 and 1974" (p. 282).

Chapter 6, titled "Legal framework for the operation of housing cooperatives in People's Poland" moves towards the cooperative sector which – in legal terms – belonged not to administrative law, as the areas analysed in chapters 3-5, but primarily to civil law. The importance of housing cooperatives as regards the provision of houses in Poland cannot be underestimated – as Dr. Eckhardt underlines, its relative share in this sector grew from 16.59% in 1960, to 69,95% in 1984 (p. 283). Thus, in contrast to some other state-socialist countries, in Poland almost most apartments (dwellings) for citizens were provided by the housing cooperatives, rather than directly by the state. This – alongside the private ownership of land, including most of the agricultural land – is one of the important differences of the "Polish path to socialism" which should be taken into account by comparative legal historians when making generalisations about the Eastern bloc.

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[8] See e.g. SULIKOWSKI, A., Government of Judges and Neoliberal Ideology: The Polish Case. In: MAŃKO, R., CERCEL, C.S., SULIKOWSKI, A. (eds), *Law and Critique in Central Europe: Questioning the Past, Resistin the Present.* Oxford, 2016, p. 18-19; IDEM, *Postliberal Constitutionalism: The Challenge of Right Wing Populism in Central and Eastern Europe*. Abingdon-New York, 2023, p. 21-22.

[9] See SULIKOWSKI, A., The Return of Forgotten Critique: Some Remarks on the Intellectual Sources of the Polish Populist Revolution. In: *Review of Central and East European Law*, vol. 45, 2020, p. 390.

[10] See See MAŃKO, R., Legal Survivals and the Resilience of Juridical Form. In: *Law and Critique*, vol. 36, 2025, p. 77-78.

The discussion in Chapter 6, as in the previous ones, follows a chronological order. Dr. Eckhardt begins with pre-WW2 regulations and practice of the housing cooperative sector (p. 283-292), before moving to the position of the sector during the directly post-War period of reconstruction and the ensuing domination of the state in housing construction (p. 292-308). Following that, he moves on to the rise of the cooperative sector, starting from the late 1950s, and discusses the subsequent legal acts on cooperatives – Resolution No. 81 of the Council of Ministers of 15 March 1957 on state aid for housing construction from the population's own funds, the Act of 28 May 1957 on the exclusion of single-family houses and premises in housing cooperative buildings from public management, Resolution No. 59 of the Council of Ministers of 15 March 1958 on additional state aid for cooperative housing construction, the eight "May Resolutions" of 1965, as well as two comprehensive pieces of legislation: the Act of 17 February 1961 on cooperatives and their associations, succeeded in 1982 by the Cooperative Law. Dr. Eckhardt's meticulous analyses of these various legal acts focuses not only on the letter of the law, but also on its practical application, especially in the context of the centralised system of "mammoth corporations" (p. 328), as he describes the housing cooperatives of the state-socialist period. In the final analysis of the ideological entanglements of the legal acts on housing cooperatives, Dr. Eckhardt once again draws attention to the strong parallels between the political and economic changes in the country as reflected in shifts of housing policy, on one hand, and the changes of the legal acts in question.

Chapter 7, titled "The history of the law of People's Poland and allotment gardens – a case study (towards a conclusion)" is focused on another legal institution typical of the socialist period, namely the legal form of an allotment garden. Dr. Eckhardt justifies their inclusion in his monograph by their social significance, pointing out that gardening allotments occupied up to 5% of spaces in large cities, and that in the early 1980s there were as many as 6,798 gardens comprising a total of 811,229 allotments (p. 337). Considering that each allotment served, usually, a family of – say – four people on average, we can safely approximate that the legal form of a gardening allotment was relevant to as many as 3,2 million Polish citizens.

Following the path of previous chapter, Dr. Eckhardt's treatment of the gardening allotment as a legal form is also structured chronologically, beginning with pre-WW2 regulations, following which he discusses the relevant legal acts of the socialist period: the Decree of 25 June 1946 on allotment gardens, the Act of 9 March 1949 on allotment gardens for employees, later replaced by the Act of 6 May 1981 bearing the same title. Dr. Eckhardt's analyses of these pieces of legislation is embedded in their political and social context. In his analysis of the ideological entanglements of these regulations, the Author draws attention to the fact that gardening allotments for workers was, in fact, a survival from the pre-War period:

> The subject of allotment gardens was already mentioned in the [1944] Decree of the Polish Committee of National Liberation on Carrying out Land Reform, which contained a kind of declaration of support of the People's Poland authorities for the development of this idea. It was created before the war, in completely different political and political system conditions. Thus, the inclusion in this decree, in a way, certified its compatibility with the new ideology, and therefore, gave an opportunity for continuation of activities and development in its area. (p. 358)

However, during Poland's transition towards Stalinism in 1949, the line of continuity was broken and radically new solutions were introduced. A grassroot movement was modified into a centralised one, only to become once again more autonomous during Gomułka's period of "thaw":

> The creation of the National Council of Workers' Allotment Gardens [in 1957] within the structure of fully state-controlled trade unions became a substitute for self-government. Moderate liberalisation, reducing the omnipotence of the state and slightly increasing the scope of civil liberties, was not unique to allotment gardening or even to the entire area of construction, housing, spatial planning, and real estate. (p. 360)

However, a true breakthrough and genuine liberalisation of the legislation on gardening allotments too place in 1981 – shortly before the introduction of martial law[11] at the end of that year:

> Fundamental changes in the way allotment gardening was legally regulated in People's Poland were made by the Law of [6 May] 1981. By virtue of its provisions, an independent and self-governing organisation was created – the Polish Allotment Association, which was granted exclusive management of all existing and new allotment gardens (and allotment gardeners became its members by law). The reform, which without exaggeration can be considered revolutionary, basically reversed the changes made by the regulations of 1949. The enactment of the 1981 Law was the implementation of the demands formulated by the [National Council of Workers' Allotment Gardens] in October 1980. It was possible because both of these events coincided with a period of liberalisation and relative civil freedoms that lasted from the signing of the August Agreements in Gdańsk in 1980 to the imposition of martial law on 13 December 1981, often referred to as the Carnival of Solidarity. So, in this case, as well, the legal changes concerning allotment gardening were a reflection of the significant political processes taking place in People's Poland. (p. 360)

[11] Cf. MAŃKO, R. "Our Fatherland has found itself on the verge of an abyss…": Poland's 1981 martial law, or the unexpected appearance of the state of exception under actually existing socialism. In: CERCEL, C., FUSCO, G.G., LAVIS, S. (eds.), *States of Exception: Law, History, Theory*. Abingdon, 2020, p. 140-166.

The last, eighth chapter, titled "Summary," contains the conclusions of the monograph, which focus on identifying the rhythm of development of construction, spatial planning, housing and gardening allotment law during the entire period of state socialism in Poland. Not unsurprisingly, Dr. Eckhardt identifies here four distinct periods: 1) the immediately post-War period (up to 1949); 2) the period of Stalinisation (1949-1955); 3) the period of post-Stalinist "thaw" (1956-1957); 4) the period of "mature" state socialism under 1st Secretary Władysław Gomułka (1957-1970); 5) the period of technocratic management under 1st Secretary Edward Gierek (1971-1980); 6) the 1980s, which began with the August Accords between the communist party and the opposition in August 1980, opening a brief spell of liberalisation, followed by the martial law introduced in December 1981.

The periodisation, used by Dr. Eckhardt, is not controversial, and it accords with the general political and economic history of state socialism in Poland. What is important, is how he has shown the close links between those political developments, on one hand, and the legal form, on the other. That direct connection is – in a theoretical perspective – an important indicator of the limited autonomy of law, at least in the socialist period. Concluding, he finds that:

> (…) the content of the legal regulations on construction, housing, and spatial planning actually depended on the political ideology as it was shaped in the particular period of the history of the People's Poland, and these norms actually served to form the aforementioned areas of social and economic life in accordance with the vision set forth in this ideology. The case study presented in this book reveals the role of law as a link between political ideology and construction, housing and spatial planning in People's Poland. (p. 375)

Dr. Eckhardt's monograph can certainly be recommended to anyone working on construction, spatial planning and housing law during the state socialist period in any of the countries of the former communist bloc, and seeking to compare the solutions in their country with those found in Poland. The reviewed book is certainly a reliable source of information about the principal legal regulations in that period in Poland. Moreover, the theoretical and sociological angle of Dr. Eckhardt's research, focusing on the acts of ideological instrumentalisation of the law can be a source of inspiration for legal historians working on the state socialist period in any area of the law. In my view, the methodological tools developed by Dr. Eckhardt can easily be transplanted onto research about other areas of the law in different countries.

From a legal historian's perspective, a certain limitation of the book is the source base: it is based only on acts of positive law, as well as legal literature, but not on archival research (e.g. the preparatory documents for the legal acts, administrative practice, internal documents of housing cooperatives, etc.) or oral history. However, given the fact that Dr. Eckhardt's monograph is the first book-length study covering those areas of the law during the epoch of People's Poland, and especially its broad subject-matter justify, in my view, the limitation to typically legal sources (although it would have been advisable to have included more analyses of case-law, for instance to verify whether the courts' reasoning was ideologically inspired). All in all, despite this source base limitation, Dr. Eckhardt has nonetheless succeeded in presenting a broader political, sociological and economic picture thanks to the ample use of non-legal literature, especially contemporary works by historians and sociologists. It is also clearly visible from the text that the Author is not only a legal scientist, but also has a genuine passion for urban planning and history of urban development (this is visible, inter alia, in the Author's broad erudition on these topics, evidenced by the referenced non-legal literature).

An additional value of the book regarding its theoretical outlook is the reliance on Polish sociologists and legal theorists, such as Jerzy Szacki or Ryszard Sarkowicz, or legal theorists from the Wrocław school, whose theories are not yet sufficiently well known in the West but certainly can offer a fresh perspective on questions of law and ideology, both in a historical and contemporary perspective. Dr. Eckhardt's monograph can contribute to bridging this gap and making Polish legal theory better known among English-speaking legal scientists.

Definitely, more research is necessary in the areas covered by Dr. Eckhardt's monograph. It would be particularly important to study the archival materials of administrative bodies granting construction permits or the internal documentation of housing cooperatives. A broader analysis of case-law could reveal whether ideological motives had any influence upon judicial reasoning and decision-making in the areas covered by the study.[12] Moreover, given that individuals who were professionally active during the 1970s and 1980s as cooperative presidents or administrators in bodies granting construction permits are still alive, it would be crucial to conduct interviews using the research method of oral history. Moreover, comparative legal historians wishing to analyse the Polish material – who will certainly benefit greatly from Dr. Eckhardt's valuable monograph – would greatly appreciate the publication of the Polish legislation and regulatory acts in the field, translated into English.

Rafał Mańko*

[12] For instance, when analysing socialist-era case-law concerning the cooperative member's *in rem* right to an apartment, I found a number of decisions in which the Polish Supreme Court: expressed the view that one apartment is sufficient to satisfy a family's housing needs; considered a citizen's delay in moving in to his apartment as an abuse of subjective right justifying its forfeiture; found that a citizen who concealed that he lived in his wife's apartment could be legally expelled from the cooperative; upheld the decision of a cooperative to expel a member who moved abroad. See MAŃKO, R., *The Cooperative Member's Proprietary Right to an Apartment: A Legal Survival ofthe Period of Actually Existing Socialism in Polish Private Law*. In: *Zeszyty Prawnicze UKSW*, vol. 15, issue 4, 2015, p. 157-159.

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Michaela Sohn-Kronthaler, Markus Zimmermann (Hg.)

Ignaz Seipel (1876–1932). Im Spannungsfeld von Kirche, Partei und Politik

Böhlau: Wien, 2024, S. 486 S., ISBN Print 9783205221203, ISBN E-Book 9783205221210

1. Verortung und Aufbau des Bandes

Am 20. November 1918, also nur wenige Tage nach der Ausrufung der Republik am 12. November,[1] veröffentlichte Ignaz Seipel in der Reichspost einen Artikel mit dem Titel „Das Wesen des demokratischen Staates".[2] Darin bekannte sich der nunmehr ehemalige Minister der letzten kaiserlichen Regierung unmissverständlich zum demokratischen Staat, der seiner Auffassung nach nur auf föderaler Basis entstehen könne – nämlich durch den Zusammenschluss jener Landesteile, die nun dem neuen Staat angehörten. Zugleich wandte sich Seipel entschieden gegen ein ständisches Denken nach dem Vorbild Frankreichs vor der Revolution und forderte einen umfassenden Schutz von Minderheiten innerhalb eines demokratisch verfassten Gemeinwesens. Das Gegenbild zu einem auf föderativer Grundlage errichteten Staatswesen bezeichnet Seipel als „oktroyierte Demokratie".[3] Dieses eindeutige Bekenntnis zur demokratischen Staatsform unmittelbar nach dem Zusammenbruch der Österreichisch-Ungarischen Monarchie ist bemerkenswert und wirft die Frage auf, wie jemand, der sich so deutlich zur Demokratie bekannte, innerhalb nur eines Jahrzehnts – zumindest nach verbreiteter Auffassung – zum Wegbereiter eines autoritären Staates werden konnte. Für die Beantwortung dieser Frage ist entscheidend, dass Seipel in einer Zeit wirkte, die von tiefgreifenden gesellschaftlichen, politischen und wirtschaftlichen Krisen geprägt war – sowohl auf nationaler als auch auf internationaler Ebene.

Der von Michaela Sohn-Kronthalter und Markus Zimmermann herausgegebene Sammelband „Ignaz Seipel (1876-1932). Im Spannungsfeld von Kirche, Partei und Politik" gibt einen ausgeglichenen Einblick in Leben und Werk dieses herausragenden und kontrovers beurteilten Staatsmannes. Die Publikation beruht auf einem interdisziplinären Symposium und enthält 19 Beiträge, die Seipels kirchliche, parteipolitische und staatliche Rollen kritisch reflektieren. Besonders hervorzuheben ist die erstmalige systematische Auswertung der von Seipel zwischen 1916 und 1932 geführten Tagebücher, die neue Einblicke in seine Selbstdeutung und Entscheidungsprozesse erlauben. Insgesamt liegt die Stärke des Bandes in der Aufarbeitung von nicht – oder nur wenig – bekanntem Quellenmaterial. Alle Autoren sind führende Forscher ihrer Disziplin. Bemerkenswert ist, dass trotz der verschiedenen Zugangsweisen auf inhaltlicher Ebene kaum Widersprüche zu finden sind. Eine der wenigen Divergenzen findet sich darin, dass Florian Wenninger Seipel eine grundsätzliche Scheu vor unwiderruflichen Entscheidungen zuschreibt (S. 290), während Johannes Schönner die Einsamkeit politischer Entscheidungen zu seinen Stärken zählt (S. 329). Der Band macht insbesondere auch das innere Spannungsverhältnis Seipels zwischen reformorientierter Offenheit und seiner Bindung an tradierte Ordnungen deutlich. Das Buch ist in sechs thematisch klar gegliederte Abschnitte unterteilt: „Politische Katholizismen", „Von der Monarchie zur Republik", „Österreich und Europa", „Parteipolitische Kontroversen", „Öffentliche Diskurse und Demokratiekritik" sowie „Politiker und Priester". Die Kapitelstruktur erlaubt es, Seipels Wirken in übergreifenden Kontexten zu verorten, ohne biographische Chronologie zu erzwingen.

2. Die einzelnen Beiträge

Im ersten Abschnitt arbeitet Siegfried Weichlein die Strukturmerkmale des politischen Katholizismus in Österreich heraus: das enge Verhältnis zur kirchlichen Hierarchie, der Christlichsozialen Partei und den katholischen Verbänden (S. 31). Im Unterschied zu Deutschland war der österreichische politische Katholizismus nicht defensiv, sondern beanspruchte Mehrheit und Tradition. Einen vergleichenden Blick bietet Jaroslav Šebek mit seiner Analyse des politischen Katholizismus in der Ersten Tschechoslowakischen Republik. Er zeigt, wie Antiklerikalismus und Säkularisierung die katholische Kirche dort zu einer defensiven Haltung zwangen (S. 42–43).

Die unter den Rubriken „Von der Monarchie zur Republik" und „Österreich und Europa" zusammengefassten Beiträge zeichnen das Bild eines traditionsverbundenen, zugleich aber anpassungsfähigen Politikers. Seine Fähigkeit, sich auf die poli-

[1] Die symbolische Bedeutung dieses Tages hat Christian Neschwara behandelt. Vgl. NESCHWARA, CH. „Zum immerwährenden Gedenken an die Ausrufung des Freistaates": Das Selbstbild der (deutsch-)österreichischen Republik 1918/19 und seine Verdrängung. In: *Journal on European History of Law*, Jg. 10, Nr. 1, 2019, S. 2-14.

[2] SEIPEL, I., Das Wesen des demokratischen Staates. In: *Reichspost*, Jg. 25, Nr. 535, S. 1.

[3] Ibid.

tischen Realitäten der Republik einzustellen, tritt neben seiner Verwurzelung im Weltbild der Habsburgermonarchie deutlich hervor. Rupert Klieber betont in seiner Darstellung der Salzburger Jahre Seipels frühes Engagement für eine Verbindung von Moraltheologie und Zeitdiagnose, etwa in *Nation und Staat* (1916) und *Gedanken zur Reform der österreichischen Verfassung* (1917).

Helmut Wohnout behandelt Seipels Haltung zur Revolution anhand der Schrift *Das Problem der Revolution* (1917). Seipel anerkennt dort die grundsätzliche Legitimität revolutionärer Umwälzungen, sofern ein System zur Lösung gesellschaftlicher Probleme untauglich geworden ist. Vorrang habe aber ein Wandel auf dem Verhandlungsweg unter Einbindung des Herrschers; nur wenn dieser Weg versperrt sei, sei Gewalt als *ultima ratio* moralisch vertretbar. Diese Position sieht Wohnout (S. 106) auch in der Linie Kardinal Piffls gegenüber dem neuen Staat. Außerdem verweist er auf eine bisher wenig beachtete Äußerung Seipels im Christlichsozialen Klub aus dem Jahr 1923, die belegt, dass die Formulierung der sogenannten Verzichtserklärung Kaiser Karls auf Seipel zurückgeht.

Thomas Olechowski widmet sich dem Staatsdenker Seipel. Er analysiert dessen Begriffe von „Nation" und „Staat", die dieser als „Schicksalsgemeinschaften" deutet – die Nation als kulturelle und sprachliche, den Staat als politische Einheit. Im Zentrum steht Seipels Konzept des Ständestaates, entwickelt im Anschluss an die Sozialenzyklika *Quadragesimo anno*. Zudem beleuchtet Olechowski Seipels Mitwirkung an der Ausarbeitung der Bundesverfassung. Einem Nachruf Adolf Merkels, der Seipel als demokratischen Denker darstellt, begegnet Olechowski selbst jedoch mit Zurückhaltung (S. 126).

Michael Gehler analysiert Seipels Außen- und Europapolitik, die auf finanzielle Stabilisierung durch Internationalisierung und Europäisierung zielte. Ergebnis waren die Genfer Protokolle und die Völkerbundanleihe. Innenpolitische Voraussetzung dafür war die Einigung zwischen Christlichsozialen und Deutschnationalen (S. 138). Seipel erscheint hier als Vordenker europäischer Zusammenarbeit (S. 149), dessen Öffnung nach außen jedoch innenpolitisch nicht nur Zustimmung fand.

Walter M. Iber beleuchtet die ökonomischen Herausforderungen der Ersten Republik und Seipels Reaktion darauf. Trotz beachtlicher Sanierungserfolge blieben diese vor dem Hintergrund der internationalen Lage fragil und standen – so Iber – auf „tönernen Füßen". (S. 193).

Anita Ziegerhofer untersucht Seipels Europaverständnis anhand seiner Beziehungen zu Richard Coudenhove-Kalergi und Karl Anton Rohan. Persönlich stand er Rohan näher, dessen kulturellem Ansatz er sich verbunden fühlte (S. 216). Gleichwohl unterstützte er auch Coudenhove-Kalergis Paneuropa-Bewegung, übernahm deren Präsidentschaft und stellte ihr Räumlichkeiten in der Hofburg zur Verfügung – ein Beispiel seiner realpolitischen Flexibilität.

Leopold Neuhold zeigt in seiner Analyse mehrerer Schriften Seipels Friedensverständnis auf: Die Kirche sei für die Formung der Friedensgesinnung zuständig, der Völkerbund für die Organisation des Friedens. Nachhaltiger Friede sei erst möglich, wenn er in alle Bereiche des Lebens eindringe. In diesem Sinne unterscheidet Seipel zwischen Friedensgesinnung und Friedensorganisation (S. 228, 232–233).

Der Abschnitt zu parteipolitischen Kontroversen beginnt mit dem Beitrag von Robert Kriechbaumer über Seipel als Obmann der Christlichsozialen Partei. Seipels Machtübernahme fällt in eine Zeit tiefer innenpolitischer Krisen, etwa im Zusammenhang mit den Volksabstimmungen zu einem etwaigen Anschluss an das Deutsche Reich. Kriechbaumer betont Seipels Bereitschaft, das Staatswohl über Einzelinteressen zu stellen – sichtbar etwa in seiner Haltung nach dem Brand des Justizpalastes (S. 257), in seinem Begriff der „wahren Demokratie" (S. 258) und im Zurückstellen eigener Anliegen (S. 259).

Helmut Wagner vergleicht Ignaz Seipel mit Johann Nepomuk Hauser. Hauser war von 1908 bis 1927 Landeshauptmann von Oberösterreich und bekleidete außerdem zahlreiche gesamtösterreichische Funktionen. Wie Seipel war auch Hauser katholischer Priester. Wagner arbeitet heraus, dass es Hauser aus Seipels Sicht an Entschlusskraft fehlte. Im Jahr 1920 zog Hauser sich endgültig aus der Bundespolitik zurück. Die Spannungen zwischen beiden kulminierten in der Frage nach der Budgethoheit des Bundes gegenüber den Ländern. Hauser, als oberösterreichischer Landesobmann, widersetzte sich Seipels zentralistischen Sparvorgaben – eine Konfrontation, die 1924 schließlich Seipels Rücktritt als Bundeskanzler zur Folge hatte (S. 273–274).

Die in der Einleitung zur vorliegenden Besprechung erwähnte Diskrepanz zwischen absoluter Bejahung des demokratischen Systems und einer Hinwendung zum autoritären Staatswesen kommt vor allem im Beitrag von Wenninger zur Wahrnehmung Seipels durch die österreichische Sozialdemokratie zum Ausdruck. Der Autor skizziert Seipels Bemühungen um eine präsidiale Verfassungsreform (297-299). Seine Vorschläge zielten auf die Schwächung des Nationalrats und eine ständische Umgestaltung des Bundesrats – Schritte, die von der Sozialdemokratie als Angriff auf die parlamentarische Demokratie gewertet wurden. Dieter A. Binder beschreibt unter dem Titel „Die entsorgte Geschichte" das Verhältnis der Österreichischen Volkspartei nach 1945 zu Ignaz Seipel. Entscheidend ist dabei wohl die zusammenfassende Feststellung, dass „die austrofaschistische Nachnutzung [Seipels] eine öffentliche Kanonisierung seiner Person in der Volkspartei verhinderte (S. 317). Auch distanzierte sich die Partei von der engen Beziehung zwischen Kirche und Staat, die von der Charakterisierung der Person und des Wirkens Seipels nicht wegzudenken ist, deutlich. Die Partei bekannte sich zwar grundsätzlich zu den Prinzipien der christlichen Soziallehre (S. 316), verstand sich aber vor allem als antimarxistische Sammelbewegung (S. 311).

Das Kapitel zu Karikatur und Plakat (S. 321–356) zeigt Seipel als zentrale Symbolfigur der Christlichsozialen. Zugleich wird deutlich, wie visuelle Medien zur politischen Radikalisierung beitragen können und auch beigetragen haben. Karikaturen stellten

Seipel teils dämonisierend als Inbegriff von Klerikalismus und Repression dar. Die Polarisierung erschwerte sachliche Auseinandersetzung und befeuerte den Lagerkampf.

Das Kapitel über die Heimwehr (S. 357–375) zeigt Seipel als taktischen Bündnispartner einer zunehmend eigenständigen, autoritär ausgerichteten Bewegung. Er nutzte sie als Gegengewicht zur Sozialdemokratie, befeuerte aber damit die politische Polarisierung. Seipel versuchte, ihre Energie politisch zu kanalisieren, ohne ihre Radikalisierung zu stoppen. Damit trug er indirekt zur Erosion demokratischer Strukturen bei.

Im Kapitel zum Ständegedanken bei Ignaz Seipel zeigt Erika Kustatscher, dass dessen Konzept wesentlich auf der ontologischen Ordnung bei Thomas von Aquin beruht. Besonders hervorzuheben ist ihre Analyse, wonach Seipel seinen Standesbegriff in einem personalistischen Menschenbild verankert. Eine personalistische Zugangsweise dient als Korrektiv gegen ein totalitäres Verständnis des Begriffes (S. 375). Dieses Prinzip kommt einerseits in der Forderung Seipels nach einer paritätischen Zusammensetzung des Bundesrates zum Ausdruck – wodurch die Gleichheit der (Länder)Individuen unterstrichen wird. Andererseits auch in seiner Fassung des Begriffes Nation als geistig-kulturelle Einheit (380).

Der letzte Abschnitt ist der Einheit von Politiker und Priester in der Person Seipels gewidmet. Michaela Sohn-Kronthaler behandelt Seipels Beziehung zu Hildegard Burjan, der ersten weiblichen Abgeordneten der Christlichsozialen Partei und Gründerin der Caritas Socialis. In Burjan fand Seipel nicht nur eine verständige Gesprächspartnerin und Mitstreiterin auf politischer Ebene, sondern auch er fand bei ihr und ihrer Familie auch „als Mensch, Priester und Staatsmann eine familiäre Beheimatung“ (S. 427). Seipels Beziehung zum Heiligen Stuhl wird von Jürgen Steinmair dargestellt. Der Autor tut dies in sieben Thesen, die einerseits die institutionellen Beziehungen des Bundeskanzler-Priesters zum Vatikan darstellten, aber auch die Opferbereitschaft des Priesters, die auch von seinen vorgesetzten kirchlichen Stellen als solche erkannt wurde (sechste These S. 447-449). Die Stärke dieses auf einer Dissertation des Autors aus dem Jahre 2012 beruhenden Beitrages liegt auf dem aufgearbeiteten Quellenmaterial, das auch Nuntiaturberichte und Material aus den vatikanischen Archiven beinhaltet. Im abschließenden Beitrag richtet Markus Zimmermann den Blick auf den Priester hinter dem Politiker. Er entwirft das Bild eines frommen und sich selbst gegenüber anspruchsvollen Geistlichen, der selbst in Zeiten höchster politischer Belastung seine priesterliche Berufung nie aus dem Blick verlor. Ausdruck fand dies unter anderem darin, dass Seipel auch als Bundeskanzler die Feier und den Empfang der Sakramente nicht vernachlässigte und als unermüdlicher Prediger galt. Unter dem Titel „Ein kurzer Befund“ (S. 474) arbeitet der Autor – nicht ohne leisen kritischen Unterton – heraus, dass Seipels Frömmigkeit durch systematisches Denken, selbstanalytische Reflexion und ein tief empfundenes Gefühl der Unzulänglichkeit vor Gott geprägt war. Zugleich betont er, dass sich in Seipels Person priesterliche Existenz und politisches Handeln zu einer inneren Einheit verbanden.

3. Zusammenfassende Einordnung und Ausblick

Der Band analysiert auf breiter Quellengrundlage Ignaz Seipels Wirken im Spannungsfeld zwischen demokratischem Anspruch und autoritären Tendenzen. Die Beiträge sind zuweilen kritisch, bemühen sich aber immer um Objektivität und sind nie einseitig voreingenommen. Sie entwerfen das facettenreiche Bild eines Politikers, dessen priesterliche Identität eng mit seinem Staatsverständnis verwoben ist. Das Buch bildet eine unverzichtbare und äußerst wertvolle Grundlage für jede weitere Forschung. Nur am Rande wurden die spezifisch theologischen Arbeiten Seipels berücksichtigt, insbesondere seine Dissertation zur Dreifaltigkeitslehre[4] und seine Habilitationsschrift zu den wirtschaftsethischen Lehren der Kirchenväter,[5] deren Relevanz für sein staatsphilosophisches Denken ein lohnendes Forschungsvorhaben für die Zukunft darstellt. Besonders vielversprechend erscheint die Frage, inwieweit Seipels Auseinandersetzung mit der Trinitätslehre seinem sozialethischen Denken – und in weiterer Folge auch seinen politischen Überzeugungen – einen ausgeprägt relationalen Charakter verliehen hat. Bereits der Ausgangspunkt seiner Habilitationsschrift legt eine solche Deutung nahe. Auch ein kurzer Blick auf seine Behandlung der Eigentumsfrage bestätigt dies: Seipel leitet – in Anknüpfung an Clemens von Alexandria – das Privateigentum aus der Freundschaft mit Gott ab.[6] Die anschließenden Erörterungen über den Missbrauch des Eigentums, der zu Armut führt, oder über die Schädigung des Mitmenschen weisen ebenfalls eine deutlich relationale Ausrichtung auf. Seipel argumentiert folglich nicht primär aus naturrechtlicher Perspektive, wie es die frühen Sozialenzykliken intendieren sollten, sondern aus der Sicht des Menschen, der als Ebenbild des dreifaltigen Gottes von vornherein als Beziehungswesen geschaffen ist. In diesem Sinne stünden die sozialethischen Überlegungen des späteren Bundeskanzlers in enger Übereinstimmung mit einer Antwort, die die Theologie gerade auch in einer postmodernen Gesellschaft zu formulieren sucht.[7]

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[4] Die Arbeit trägt den Titel: *Novissimae quae circumferuntur sententiae de divinis processionibus inquiruntur et discutiuntur* und ist in lateinische Sprache und handschriftlicher Ausfertigung als Manuskript vorhanden. Die Dissertation ist als Auseinandersetzung mit den Lehren von Herman Schell konzipiert.

[5] SEIPEL, I., *Die wirtschaftsethischen Lehren der Kirchenväter*.Wien, 1907.

[6] Ibid. S. 54.

[7] Vgl. zu diesem Ansatz: MASPERO, G., VIGORELLI, I., Social Doctine of the Church and Relational Ontology: The Trinitarian Roots of Subsidiarity. In: SCHLAG, M., KOLLER, B. (Hrsg.), *Rethinking Subsidiarity: Multidisciplinary Reflections ont he Catholic Social Teaching*. Cham, 2024, S. 9-27.

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Joanna Kulawiak-Cyrankowska

Utilitas in Roman Jurists' Legal Interpretation

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This book is an English translation of Kulawiak-Cyrankowska's Polish PhD thesis from the University of Łódź.[1] The book is divided in five parts: Introduction, three chapters: 1. *Utilitas*: Terminological and Axiological Aspects, 2. *Utilitas* as a Guideline for Legal Interpretation, 3. *Utilitatis causa* Interpretation, Conclusions, and Appendix and Tables, Charts and Graphs.

In the *Introduction* (pp. 11-27), the author presents the subject of the research: the concept of *utilitas*, which manifested itself in the way Roman jurists thought about the law as well as in the law. She rightly notes that non-legal sources, especially rhetorical ones, are often overlooked in studies of the role of *utilitas* in legal interpretation. The author situates *utilitas* within the existing Roman law literature, to which she refers in footnotes throughout the book. However, Polish sources may be inaccessible to non-Polish readers and English translations would have been of use. While the author's focus on the classical period of Roman law is understandable, a research of the role of *utilitas* in legal interpretation in the *longe durée* would also have been of interest. After the introduction to the research topic and a presentation of the state of the research, the author explains the various parts of her study, as described above. She also aims to supplement the corpus of the the *utilitatis causa* decisions. She does so partly in the main text and partly in the separate Appendix which also includes explanations and commentaries – important ones are analysed in the main text, of less importance in the appendix. But do not be deceived: also the appendix contains a lot of value. The introduction concludes with the methodology used, showing the author's awareness of sources, challenges and methodologies in Roman studies and exegesis, including the palingenetic analysis of sources, as well as the broader cultural and intellectual context.

Before delving into the study, it is important to note, as the author does in her State of the research, that Roman law studies primarily focusses on a specific manifestation of *utilitas* in juristic interpretation and of decisions taken *utilitatis causa*. The late Hans Ankum regarded these decisions as a reflection of a pragmatic legal method, in which decisions referring to *utilitatis causa* could either indicate the reason for the decision or serve as an argument for its acceptance.[2] Leptien referred to them as being taken for teleological reasons, where *utilitas* was used as an auxiliary instrument for legal interpretation.[3] Kaser considered them subordinate rules, shaped by case-specific circumstances,[4] while Navarra, in contrast, considered *utilitas* a fundamental legal value.[5] However, I would agree with the author that references to *utilitas* extend beyond these decisions. The author explains that her study addresses the gap in our understanding of *utilitas*, by examining *utilitas* in a broader context, such as ethical, rhetorical and philosophical context. Indeed, in Roman times the boundaries were not as rigid as they seem to be today. A close connection existed between rhetorics on one hand and law and politics on the other.[6]

In *Utilitas: Terminological and Axiological Aspects* (pp. 28-67), the author explores the role of *utilitas* in legal, economic, and ethical thought. While central to Roman legal thinking, its meaning varied according to context, encompassing both economic and ethical dimensions. The author examines *utilitas* in the works of Cicero, Horace and Epicurus, showing that the justice of a legal norm was judged by its usefulness, highlighting the law's role in serving the community. The ethical dimension of *utilitas* is evident, not only in philosophical and legal thought as reconstructed from literary sources, but also in Roman jurists' reflections. Linked to *bonum* and *aequum*, *utilitas* is seen in Ulpian's passage from D. 1.1.1pr., which refers to Celsus' *ius est ars boni et aequi*. The author explores

[1] On p. 27, the author explains that the translations of Latin and Greek texts in Polish are hers. However, the English translation of the PhD dissertation, including the sources, was performed by an English translator.

[2] ANKUM, J.A., Utilitatis causa receptum. On the practical methods of the Roman lawyers. In: ANKUM, J.A., FEENSTRA, R., LEEMANS, W. F. (eds.), *Symbolae iuridicae et historicae Martino David dedicatae*, vol. 1, Leiden, 1968, p. 28; Utilitatis causa receptum: sur la méthode pragmatique des jurists romains classiques. In: *RIDA* 1968, vol. 15, p. 132; The functions of expressions with utilitatis causa in the works of the Classical Roman lawyers. In: *Fundamina: A Journal of Legal History,* 2010, vol. 16, no. 1, p. 6; Utilitatis causa en los trabajos de los juristas clásicos romanos. In: *Revista chilena de derecho,* 2016, vol. 43, no. 3, p. 1122.

[3] LIPTIEN, U., *Utilitatis causa. Zweckmässigkeitsentscheidungen im römischen Recht*. Freiburg, 1967, p. 235, 241; 'Utilitatis causa'. Zweckmäßigkeitsentscheidungen im römischen Recht. In: *SDHI,* 1969, vol. 35, p. 72.

[4] KASER, M., 'Ius publicum' und 'Ius privatum'. In: *ZSS RA,* 1986, vol. 103, no. 1, p. 28, 33.

[5] NAVARRA, M., *Ricerche sulla 'utilitas' nel pensiero dei giuristi romani*. Turin, 2002, p. 206.

[6] See TELLEGEN-COUPERUS, O. E., 'Introduction'. In: TELLEGEN-COUPERUS, O., *Quintilian and the Law. The Art of Persuasion in Law and Politics*. Leuven, 2003, p. 12ff.

the concept *ars* in Latin and Greek sources, noting that *artes* were practised for a practical life purposes and thus to the people's benefit, demonstrating the interplay between the concepts of *utilitas* and *ars*. According to both Celsus and Ulpian, *utile*, *bonum* and *aequum* are inherently linked. The ethical foundation of *utilitas* in Ulpian's definition is further emphasized by his reference to the concept of *iustitia*. In praetorian law, the concepts of *aequum* and *utile* were closely interwoven: the pursuit of public utility was the goal of *ius praetorium* (pp. 64-67).[7]

In *Utilitas as a Guideline for Legal Interpretation* (pp. 68-102), the author explores how *utilitatis causa* decisions are teleologically motivated, situating *utilitas* within the context of general legal interpretative principles. As this task extends beyond jurisprudence, she begins with the role of *utilitas* in rhetoric. *Utilitas* was interpreted in two ways: as benefit to those advised and as common utility, an ethical value highly regarded by orators and jurists alike. The author's interpretation of D. 1.1.1pr.-2 is very interesting in the sense that it does not refer to the systematisation of the legal order, but rather to the interpretation of the law. The two concepts (*publicum et privatum*) were rather two foundations (*positiones*) of deliberation and argumentation.[8] She challenges the traditional separation of law and rhetoric by examining how the terms *publicum* and *privatum* were metaphorically linked. Arguments were derived from these two categories. The author argues that it was Cicero's *Pro Murena*, in which *utilitas* was directly related to the possibility of using what was public (*res publica*), and what was private (*res nostrae*) that inspired Ulpian. According to Ulpian, the *publicum* and the *privatum* were the two pillars of jurists' interpretations. The utility of the common members, understood both in a collective and in an individual sense, formed a coherent whole. Ulpian indicated that the teleological interpretation as fundamental method of interpreting the law, tied the purpose of legal norms to *utilitas*, whether an individual or the whole community was involved.

In *Utilitas causa Interpretation* (pp. 103-191), the author examines the role of *utilitas* in *utilitatis causa* decisions, beginning with its function in rhetorical theory of legal interpretation. *Utilitas* played a major role in Cicero's doctrine, in the so-called *status* (Gr. στάσεις), which refer to types of issues that determine the matter of the dispute. In this case, this concerns a category of situations in which the letter of the law seems contrary to its intention, creating a gap between literal and teleological interpretation. The latter assumes the categories of *aequitas* and *utilitas* as determinants in the interpretation of legal norms. *Utilitas* pointed to the utility of the community, consistent with the utility of all citizens. The discrepancy between letter and spirit of the law as particularly visible when a given case was legally regulated. In these cases, the so-called *status scripti et voluntas/sententiae* could be utilized. The party arguing *ex sententia* reasoned *contra scriptum*, i.e. contrary to the literal interpretation. The same can be discerned in the *utilitas causa* decisions in jurisprudence. When interpreting *contra scriptum*, jurists referred to *utilitas* – leading either an interpretation that departed from the application of the norm, or applied it, always contrary to what was dictated by a literal interpretation. On the other hand, when the law was silent on an issue, rhetoricians used the *status syllogismi* (or *ratiocinatio*), conducting an *ex sententia* interpretation *supra scriptum*[9], in other words, despite the fact that the law did not provide a proper regulation for a given case. According to the author, these decisions did not concern the tension between the rule and the exception, they rather detailed and refined binding rules, or created subordinate rules necessary for specific groups of cases and filled legal loopholes, namely specifically those *contra legem*. The same can be observed in the supplementary *ex utilitatem* interpretation by jurists and in the law-making activity by the praetor. The author argues that references to *utilitas* – 56 individual decisions in total – were rooted in intellectual thought and reflected jurists' efforts to correct the unambiguous results of linguistic interpretation and to prevent from applying what definitely resulted *ex litteris* (p. 191).

In the *Conclusions* (pp. 193-199), the author summarizes her findings, positioning them within broader academic debates. She concludes that *utilitas* was a multifaceted thought tool: a guideline for interpretation and a general clause. In cases in which decisions taken *utilitatis causa* became part of the *ius receptum*, it also served as a supplementary norm, shaping legal thought in order to address practical needs and to align with *iustum et aequum* (p. 199). After the Conclusions, an *Appendix* follows (pp. 201-219), presenting 28 fragments of *utilitatis causa* decisions including brief commentaries with references. Furthermore, *Tables, Charts and Graphs* (pp. 221-226) are provided including the occurrence of the root *util** in various data on the occurrence and frequency of the root *util* in Roman law sources, as well as analyses of 78 fragments and 82 decisions that exemplify the *utilitatis causa* interpretation. The depth of this data warrants its inclusion in the main text rather than the appendix. Finally, a *List of Abbreviations*, an *Index of Sources*, and *References* is given. This book is of high interest for Roman law scholars, legal historians and legal theoreticians: it is well-written, of high quality, and interdisciplinary by nature. The author has shown to be capable to interpret the original (Latin and Greek) sources in a broader intellectual context, offering a comprehensive analysis of *utilitas*, a concept that remains of interest for jurists until today and in the future.

Emanuel van Dongen*

[7] See Pap. 1.1.7.1.

[8] Comp. Priscianus, *Praex.* 11. 31.

[9] See also Quint., *Inst.* 7. 8. 1.

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Dirk Heirbaut

Redefining Codification: A Comparative History of Civil, Commercial, and Procedural Codes.

Oxford: Oxford University Press, 2025, 462 p., ISBN 9780198947363

Codification has traditionally been regarded as one of the most distinctive symbols of modern law. Since the adoption of the French Code Civil, also known as the Code Napoléon in 1804, it has become synonymous with legal rationalization and systematization, as well as a political project that was supposed to offer citizens an understandable and uniform legal framework for their daily lives. In legal scientific and legal historical circles, the concept of codification is often used as self-evident and indisputable. It is this obviousness that the Belgian legal historian and author of the reviewed book Dirk Heirbaut questions.

It is precisely the new definition of the term codification that his book Redefining Codification: A Comparative History of Civil, Commercial, and Procedural Codes seeks to achieve. A comparative analysis of four countries – France, Germany, the Netherlands and Belgium – is a tool to achieve this goal. The author does not stop at civil codes, but also focuses on commercial and procedural codifications, i.e. areas that are unjustly neglected in literature.

The book is formally divided into a total of eight parts. From the reader's point of view, however, it is divided into two main parts. The introduction of the book is followed by the first, most extensive part, presenting national studies of the four above-mentioned countries of Western Europe. The second part is thematic in nature and analyses more general issues, such as the absence of an "ideal code", the role of individual actors in codification or the motivation of legislators. The book then ends with a synthesizing conclusion with a proposal for a redefinition of the concept of codification.

Methodologically, Heirbaut moves between legal history, comparative studies and legal theory. His approach is distinctly empirical – it is based on archival sources, legislative proposals, discussions and period commentaries. At the same time, however, it conducts a dialogue with modern legal theory, which understands codification mainly in normative terms.

As mentioned above, the first part of the publication is devoted to a total of four studies of national codification paths. In the first study, Heirbaut focuses on the mother of codifications – France. He shows that the famous Code Civil is neither a purely revolutionary nor a purely Napoleonic work, but a compromise that combined Enlightenment ideas with elements of the old law. Codification here was less the result of "scientific systematics" and more a political tool for stabilizing society after the Revolution. The author also mentions an important aspect of French codification – codification as an export model, where its influence reached Belgium, the Netherlands, Italy and Latin America. In this chapter, the author does not deal only with the post-revolutionary civil law codification. As far as civil law is concerned, Heirbaut covers the entire period of France's relevant codification efforts – that is, from the Revolution to the present day. In the following two subchapters, the book is devoted to commercial law and civil procedure, which again focus on the entire period of the codification process, in the case of commercial law, rather attempts at it.

After France, Heirbaut turns his attention to France's continental rival – Germany. Right at the beginning, the reader is introduced to the situation of fragmentation of the former Holy Roman Empire and thus the absence of unitary codification in the territory of today's Germany, up to the era of the unified German Empire in 1871. The chapter is again divided into subchapters dealing with substantive civil law, commercial law and civil procedure. The process of codification of these legal branches is again assessed throughout the history of modern Germany, which Heirbaut jokingly described as a "laboratory of codification". A very interesting part is the comparison of the development of civil law in post-war divided Germany. The development of the German Bürgerliches Gesetzbuch, known by the abbreviation BGB, was extremely long and complex. Heirbaut emphasizes the tension between jurisprudence, which strived for dogmatic precision, and the practical requirements of the state administration. Codification eventually resulted in a compromise, but not towards its addressees, the citizens, where the main pitfall for them became technical difficulty. The German example illustrates that codification does not always facilitate access to the law – on the contrary, it can strengthen the role of professional lawyers.

The author devotes the third study to the codification development of the Netherlands. Heirbaut introduces the state of Dutch codification development by describing the turbulent power changes that the territory of today's Netherlands underwent and the resulting codification difficulties and successes. At the same time, the Dutch case illustrates the story of a country lying in the shadow of the codification power France. The author describes the influence of the French model and at the same time the effort to define himself against it. Heirbaut emphasizes the role of political elites who wanted to create their own legal identity through codification. Nevertheless, the Dutch Code never achieved the prestige of French or German, which calls into question the simple understanding of codification as the "pinnacle" of legal development. The Dutch codification process is actually summarized by Heirbaut in the title of the introductory subchapter 'a small nation of great achievements'.

The author devotes the conclusion of part of the national studies to his homeland – Belgium, where the French Code Civil remained in force even after its independence in 1830. Heirbaut analyses in detail the discussions on a possible new codification and shows how the Belgian legal culture oscillated between the import of foreign models and its own reform efforts, which the author vividly illustrates on examples of individual legal branches. This case illustrates how codification is not only a legal issue, but also a political and cultural one.

A great benefit of the book is the inclusion of commercial and procedural codes. These are often considered "secondary" in comparative legal history, but they have nevertheless had a major impact on the economic and institutional functioning of the above-mentioned states. For example, commercial codes were closely linked to the development of capitalism, and procedural codes shaped the daily work of the courts. Heirbaut thus reminds us that codification is not a one-dimensional phenomenon, but a complex process affecting various areas of law.

The conclusion of the book represents Heirbaut's most important contribution. According to him, the traditional definitions of codification – completeness, systematicity, exclusivity – have never corresponded to historical reality. Codes have always been imperfect, often deliberately incomplete, and their sustainability depended on subsequent amendments and interpretations.

Heirbaut therefore proposes to understand codification as a process of negotiation and negotiation between actors – legislators, lawyers, businessmen, judges – whose goals and expectations differed and often did not materialize. Codification in this conception is an empirical-historical phenomenon, not an abstract ideal.

In the final part, the author also contradicts the efforts for European codification of the above-discussed legal branches.

A major contribution of Heirbaut's work is the coverage of commercial and procedural codes, which extends research beyond the boundaries of traditional civil law. The perfect basis for the book itself is the empirical basis of the author's claims, where his work is based on a careful study of sources and secondary literature. An essential element for the originality and I would say attractiveness of the text is the application of the comparative method. It is the juxtaposition of the four states that makes it possible to reveal similarities and differences, and thus relativizes the idea of universal codification. An interesting topic that Heirbaut brings to the surface is also the development of comparative legal history as an independent scientific subdiscipline within the limits of legal history. However, it is a theoretical overlap of his work, where the redefinition of the term codification offers a framework that can be used outside of legal history, e.g. in political science or sociology of law.

With a more critical view of the book, the reader lacks the broader geographical framework of national studies. After fascinating national studies, the reader is ready to continue comparative studies beyond the borders of Western Europe to the east, to other parts of Europe, or to travel to different continents. Understanding a text requires legal-historical erudition, which is a necessary condition for its understanding. The book is thus not very accessible to a wider audience, which is completely understandable given the subject matter of the book. Attention could also be paid to reception in practice, moving on how the codes really worked in everyday legal practice and how they were perceived by judges or citizens would be another very interesting chapter of the work. However, the reader would certainly not have gotten into the hands of it on the date of her book publication.

The book Redefining Codification represents an important contribution to the history of law and to the theory of legislation. Dirk Heirbaut convincingly shows that codification is not a timeless ideal, but a historically conditioned process that always reflects specific political, social and professional interests. The book challenges simplistic notions of codes as "perfect codes" and instead offers a picture of legal developments full of compromises and imperfections.

For legal historians and comparative scholars, the book is indispensable, for students it is a challenging but extremely inspiring read. However, its theoretical overlap may also appeal to researchers from other social science disciplines. Heirbaut's redefinition of codification has the potential to become a new reference point for future research.

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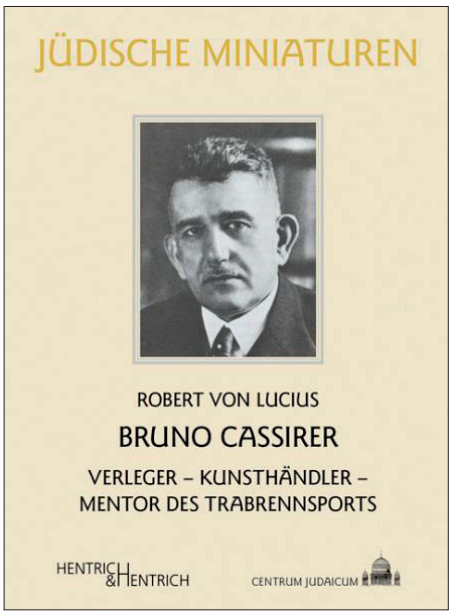
Robert von Lucius

Bruno Cassirer. Verleger – Kunsthändler – Mentor des Trabrennsports

Berlin/Leipzig: Hentrich & Hentrich Verlag, 2025, 73 S., ISBN 978-3-95565-740-6



(1) Robert von Lucius ist als Biograph bereits im Journal on European History of Law (JEHL, Heft 2/2024, S. 217-218, unsere Rezension) bekannt, zuletzt zu Hellmuth Freiherr Lucius von Stoedten. Diplomat zwischen Kaiserreich und Weimar, Zeitgeschichtliche Forschungen Band 67, bei Duncker & Humblot Berlin 2024 erschienen. Wir kennen ihn überdies als Autor im JEHL: In Heft 2 (2022) veröffentlichte er einen Nachruf zu Ehren von Michael Stolleis.

„Auf dem Schreibtisch jedes preußischen Beamten. Fernwirkungen von Robert Graf Hue de Grais bis nach Japan" lautet schließlich der Titel seines Aufsatzes im selben JEHL-Heft. Des Weiteren zeichnet er als Autor der schon in 3. Auflage erschienenen Biographie von Felix Mendelssohn Bartholdy in Frankfurt am Main (Heidelberg 2024) verantwortlich. Mit der nun vorliegenden Biographie zu Bruno Cassirer (1872-1941) begegnet den JEHL-Lesern eine jüdische Persönlichkeit aus einer nennenswerten Schriftenreihe, die „Jüdische Miniaturen" heißt und dort bereits Band 341 füllt.

Dank des diplomatischen Berufs des Vaters wuchs Robert von Lucius, der 1949 in Berlin das Licht dieses Erdballs erblickte, teils im Ausland auf, so in Norwegen, Südafrika und Namibia. In Deutschland studierte er Rechtswissenschaft und war an der Universität zu Bonn tätig am Kirchenrechtlichen und am Völkerrechtlichen Institut. 1982 wurde Robert von Lucius Redakteur der Frankfurter Allgemeinen Zeitung, FAZ, die ihn für den Zeitraum 1987 bis 2001 nach Johannesburg als Afrika-Korrespondent, im Abschluss nach Stockholm für die nordischen und baltischen Länder sowie als Korrespondent für Niedersachsen, Sachsen-Anhalt und Bremen nach Hannover entsandte. Dazu erschien im Übrigen das lesenswerte Buch „Spuren des Schreibens. Redakteur, Korrespondent, Autor" von Robert von Lucius im Wolff Verlag (Berlin 2021).

(2) Bruno Cassirer (1872-1941) verschrieb sich, so erfahren wir schon am Anfang, einer Trias der Dinge, die ihn bewegten und die vor allem er selbst bewegte: Kunst, Verlag und Trabrennsport. So war er Mentor der Trabrennen, ja sogar Retter der Berliner Trabrennbahn Mariendorf, und kann als der bedeutendste Verleger von Büchern über Kunst und Künstler im ersten Drittel des 20. Jahrhunderts qualifiziert werden. Als Galerist bahnte er mit seinem Vetter Paul Cassirer den Weg des französischen Impressionismus in Deutschland und für viele bedeutende Künstler, die wie Max Slevogt und Max Liebermann Kunstgeschichte schrieben und viele Werke von Cassirer zu illustrieren halfen. „Kunst und Künstler" ist der Name seiner Zeitschrift, die Auflagen stark über Jahrzehnte Kunst vermittelte (S. 46-51).

Zu Cassirers Lektoren zählten Christian Morgenstern und Max Tau. Das Verlagsteam entdeckte wichtige Autoren der deutschen Literatur, wozu die zentralen Buchkapitel „Kunstsalon" und „Verlag Bruno Cassirer in Berlin" (S. 31-45) vom JEHL-Leser zu entdecken sein werden.

Spannend für den Buchhistoriker und den Rechtshistoriker mit Schwerpunkt Urheber- und Verlagsrecht erweist sich das Kapitel „Cassirer und Max Tau" (S. 52-55), welches dann zu vertiefen ist mit der Biographie zu „Max Tau. Schildknappe Literatur-Erster Friedenspreisträger", die Robert von Lucius 2023 in derselben Reihe der Jüdischen Miniaturen herausgebracht hat. Tau entdeckte Marie Luise Kaschnitz und den Journalisten und späteren Nachkriegsschriftsteller Wolfgang Koeppen (S. 54), der auch in der Urheberrechtsgeschichte in Erscheinung treten sollte. Vgl. dazu *Gergen*, Erinnerung an Wolfgang Koeppen (1906-1996): Nicht „Plagiator", sondern nutzungsberechtigter Schriftsteller („Jakob Littners Aufzeichnungen aus einem Erdloch") und Kommunikator der Nachkriegsmenschen („Tauben im Gras"). In: Stephan Meder (Hg.), Geschichte und Zukunft des Urheberrechts V, Göttingen 2026 (Beiträge zu Grundfragen des Rechts).

(3) Bruno Cassirer gründete 1898 mit seinem Vetter Paul (1871-1926) im Berliner Tiergartenviertel den avantgardistischen „Kunstsalon Bruno & Paul Cassirer", eine Verlags- und Kunsthandlung. 1901 übernahm Bruno Cassirer den Verlag, welcher zum wohl wichtigsten Kunstverlag nach der Jahrhundertwende wurde. Nach 40 Jahren erfolgreichem Wirken erging es Cassirer wie vielen anderen jüdischen Persönlichkeiten: Er wurde 1938 aus Berlin vertrieben.

In London und später Oxford gründete er die „Bruno Cassirer Publishers Ltd.“, deren Archiv seit 2011 die Staatsbibliothek in Berlin verwahrt. Mit der Ausstellung *„Auf zu neuen Werken!* - Max Slevogt und sein Verleger Bruno Cassirer“ im Landesmuseum Mainz vom 27. November 2025 bis 08. März 2026 und danach in Saarbrücken und Berlin sowie der Restitution von Slevogt-Porträts Bruno Cassirers und seines Vaters an die Familie und dem Rückerwerb durch die Nationalgalerie in Berlin erhielt und erhält der Verleger und Kunstsammler Bruno Cassirer wieder die ihm zustehende öffentliche Aufmerksamkeit (S. 10-11).

Robert von Lucius und dem Verlag Hentrich & Hentrich sei dafür gedankt, dass sie mit dieser Biographie ihren Beitrag zur Bekanntheit und Wertschätzung Bruno Cassirers leisten.

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Reforminstitute im deutschen Erbrecht. Entstehung und Entwicklungsstand*

Elmar Wadle (1938–2025)

Einleitung zum Vortragstext: [1]

Elmar Wadle, geboren am 24. August 1938 in Pirmasens, ist am 8. April 2025 in St. Ingbert/Saar verstorben. Der Rechtshistoriker lehrte und forschte in familien- und erbrechtlichen Themen bis 2006 an der Universität des Saarlandes. Sein hier abgedruckter Vortrag, gehalten im Rahmen der Familienrechtsvorlesung von Professor Dr. Walter Pintens im belgischen Löwen am 5. März 1991, behandelt diejenigen Punkte aus dem deutschen Erb- und Familienrecht, die Anfang der 1990er Jahre Inhalt von Reformdiskussionen bildeten. Insofern passt er in die europäische Erbrechtsgeschichte hinein.

Zu den Reforminstituten seiner Zeit gehörte insbesondere das Erbrecht der nichtehelichen Kinder, welches erst 1998 zum Kern der Erbrechtsgesetzesänderung werden sollte *(ErbGleichG v. 16. 12. 97).* Die alten Fassungen sind in den Text zum besseren Verständnis eingefügt. Auf sie nimmt Art. 227 EGBGB Bezug:

> *Art. 227 EGBGB enthält hierzu die Übergangsvorschrift zum Gesetz zur erbrechtlichen Gleichstellung nichtehelicher Kinder vom 16. Dezember 1997:*
> *(1) Die bis zum 1. April 1998 geltenden Vorschriften über das Erbrecht des nichtehelichen Kindes sind weiter anzuwenden, wenn vor diesem Zeitpunkt*
> *1. der Erblasser gestorben ist oder*
> *2. über den Erbausgleich eine wirksame Vereinbarung getroffen oder der Erbausgleich durch rechtskräftiges Urteil zuerkannt worden ist.*
> *(2) Ist ein Erbausgleich nicht zustande gekommen, so gelten für Zahlungen, die der Vater dem Kinde im Hinblick auf den Erbausgleich geleistet und nicht zurückgefordert hat, die Vorschriften des § 2050 Abs. 1, des § 2051 Abs. 1 und des § 2315 des Bürgerlichen Gesetzbuchs entsprechend.*

Überhaupt spiegelt der in der Vortragsform belassene Text die historische Entwicklung von Ehe-, Familien- und Verwandtenerbrecht im Fahrwasser der praktischen Umsetzung des Gleichheitsgrundsatzes (in der seinerzeitigen Fassung in Art. 3 sowie Art. 5 Absatz 6 GG) seit den frühen 1950er Jahren wider; nicht zuletzt rechtfertigt dieser Punkt die nun folgende Veröffentlichung des Vortragstyposkripts.

Eine wichtige Publikation Wadles zum Erbrecht findet sich mit „Der Erbvertrag im deutschen Recht: Gegenwart und Geschichte“, veröffentlicht in der Festschrift, dem *liber amicorum*, zu Ehren von Walter Pintens, von 2012 namens „Confronting the frontiers of family and succession law“, 2, S. 1701-1709 (Cambidge: Intersentia).

Es folgt nun der leicht angepasste Vortrag von Elmar Wadle.

I.

Meine Damen und Herren, ich möchte über Reforminstitute im deutschen Erbrecht sprechen. Der eine oder andere mag sich schon gefragt haben. Was ist das für ein eigenwilliges Thema? Was ist damit gemeint? Was soll ein solches Thema in einer Vorlesung, die sich sogar dem Familienrecht widmet? Von diesen Fragen ist die letzte am leichtesten zu beantworten.

Zwischen dem Familien- und dem Erbrecht gibt es immer enge Berührungspunkte, denken sie etwa an das Erbrecht von Verwandten oder an das Erbrecht der Ehegatten. Sie beruhen allesamt auf familienrechtlichen Voraussetzungen. Insoweit ist es sicher angebracht, in einer Familienrechtsvorlesung auch über erbrechtliche Probleme zu sprechen.

Aber was meine ich mit dem Schlagwort Reforminstitute? Zunächst will ich festhalten, dass ich dieses Wort selbst erfunden habe, um deutlich zu machen, dass es ausschließlich um bestimmte Einrichtungen des deutschen Rechts geht, die im Zuge von Reformen in das Erbrecht des Bürgerlichen Gesetzbuches aufgenommen worden sind.

Diese Reforminstitute gehen im Wesentlichen auf zwei Gesetze zurück. Beide Reformgesetze sind durch das Grundgesetz der Bundesrepublik Deutschland veranlasst worden, und zwar einerseits durch Artikel 3 Absatz 2 und andererseits durch Artikel 6 Absatz. 5.

Artikel 3 Absatz 2 GG lautet: „Männer und Frauen sind gleichberechtigt.“ Es handelt sich dabei um eine besonde-

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* Der Text fand sich in den Lehrstuhlakten, Fachbereich Recht, Universität des Saarlandes. Elmar Wadle war dort von 1978 bis 2006 Professor für Deutsche Rechtsgeschichte und Bürgerliches Recht.
Zur Vita siehe: https://www.uni-saarland.de/aktuell/85-geburtstag-professor-elmar-wadle-27116.html [25. 11. 2023] bzw. in *der Festschrift zum 70. Geburtstag: Das Recht und seine historischen Grundlagen. Festschrift für Elmar Wadle zum 70. Geburtstag.* Berlin, 2008. Oder bereits: *Vielfalt und Einheit in der Rechtsgeschichte – Festgabe für Elmar Wadle zu seinem 65. Geburtstag.* Köln/Berlin, 2004. Sowie jüngst *„von Natur im Besitze des Gedankens selbst“ (Siebenpfeiffer) - Elmar Wadles Auseinandersetzung mit dem gewerblichen Rechtsschutz und dem Urheberrecht im Deutschen Bund*. Homburg/Saar, 2022.

[1] Vortrag eingeleitet von Professor Dr. Dr. Thomas Gergen, Maître en droit (Luxemburg/Saarbrücken).

re Ausprägung des Gleichheitssatzes. Es versteht sich von selbst, dass die Forderung nach Gleichberechtigung für Mann und Frau vor dem Privatrecht nicht halt machen kann. Auch und gerade nicht vor dem Familienrecht. Diese Erkenntnis ist alt, sie geht in die Anfangsjahre der Bundesrepublik zurück, und sie führte schon bald zu erheblicher Rechtsunsicherheit. Die Frage war insbesondere, ob die Regeln des Bürgerlichen Gesetzbuches zum Ehegüterstand mit dem Gleichheitssatz vereinbar waren.

Für die Anfangszeit hatte das Grundgesetz selbst in einer besonderen Vorschrift die Anpassung an Artikel 3 Absatz 2 erleichtert; Artikel 117, also eine der Übergangsbestimmungen, sah vor, dass das mit dem Gleichheitssatz nicht vereinbare Recht bis zu seiner Anpassung an diese Bestimmung des Grundgesetzes in Kraft bleiben sollte, jedoch nicht länger als bis zum 31. März 1953.

Von diesem Zeitpunkt an war Artikel 3 Absatz 2 unmittelbar geltendes Recht mit der Folge, dass alle der Gleichberechtigung widersprechende Normen des Zivilrechts außer Kraft gesetzt wurden. Dies bedeutete, dass einige dieser Normen ersatzlos entfielen; andere, die wegen des Zusammenhangs mit den übrigen Teilen der Rechtsordnung nicht fortfallen konnten, musste man umgestalten im Sinne des Gleichbehandlungsgrundsatzes. Der Praxis hat dies viele Probleme beschert, aber die obersten Gerichte, sowohl der Bundesgerichtshof als auch das Bundesverfassungsgericht, sind von einer unmittelbaren und sofortigen Geltung des Artikels 3 ausgegangen.

Der Gesetzgeber jedenfalls hatte die vom Grundgesetz gesetzte Frist versäumt. Erst am 18. Juni 1957 erging das sogenannte Gleichberechtigungsgesetz mit dem Ziel, das Familienrecht an Artikel 3 anzupassen. Allerdings wurden nur einige Teilbereiche geregelt, während die Anpassung anderer Partien auf später verschoben wurde. Zu den geregelten Teilen zählte auch das eheliche Güterrecht. Der gesetzliche Güterstand, also gleichsam der Normalfall des ehelichen Güterrechts, wurde in einer Weise geregelt, die in einem entscheidenden Punkt in das Erbrecht hinüberreicht. Und um diesen Zipfel Erbrecht im Zusammenhang mit der Neuregelung des Ehegüterstandes geht es u.a. in meinem Vortrag.

Neben dem Gleichheitsartikel steht der Artikel 6 Absatz 5 des Grundgesetzes. Er lautet: „Den unehelichen Kindern sind durch die Gesetzgebung die gleichen Bedingungen für ihre leibliche und seelische Entwicklung und die Stellung in der Gesellschaft zu schaffen wie den ehelichen Kindern." Dieser Artikel enthält also einen klaren Auftrag an den Gesetzgeber. Da anders als beim Gleichheitssatz keine Fristen für die Reform durch den Verfassungsgeber selbst gesetzt waren, ließ man sich Zeit. Die Neuregelung der Rechtsverhältnisse der nichtehelichen Kinder zögerte sich hinaus. Deshalb kam es zu einem spektakulären Urteil des Bundesverfassungsgerichts, welches erklärte, wenn der Gesetzgeber den ihm erteilten Auftrag zur Reform des Unehelichenrechts bis zum Ende der damals laufenden (= fünften) Legislaturperiode des Bundestages nicht erfülle, so sei der Wille der Verfassung so weit wie möglich von der Rechtsprechung zu verwirklichen. Dies bedeutete, dass das Bundesverfassungsgericht nachholte, was der Verfassungsgeber selbst versäumt hatte. Es setzte eine Frist für die Reform. So kam schließlich das Gesetz über die rechtliche Stellung der nichtehelichen Kinder vom 19. August 1969 zustande. Dieses Gesetz wollte nicht nur den Auftrag von Artikel 6 Absatz 5 GG erfüllen, sondern darüber hinaus das System des Verwandtschaftsrechts völlig umgestalten. Dies ist auch geschehen. Das Schwergewicht auch dieses Reformgesetzes liegt im Familienrecht und nicht im Erbrecht. Aber: Es reicht in seinen Konsequenzen selbstverständlich auch in das Erbrecht hinein.

II.

Im folgenden Abschnitt will ich nun darstellen, wie die beiden Reformgesetze, also das Gleichberechtigungsgesetz und das Nichtehelichengesetz, in das Erbrecht hineinreichen.

Ich habe vorhin schon angedeutet, dass das Gleichberechtigungsgesetz einen neuen gesetzlichen Ehegüterstand in das deutsche bürgerliche Recht eingeführt hat. Das Gesetz bezeichnet diesen Güterstand als Zugewinngemeinschaft. Ich will es mit ein paar Schlagworten umschreiben: Es geht einerseits um Gütertrennung, andererseits um einen Ausgleich des Zugewinns nach Beendigung der Ehe.

Dies bedeutet: Die Ehegatten behalten auch nach der Eheschließung ihr jeweils eigenes Vermögen, und sie haben während der Ehezeit die Chance, dieses Vermögen zu vermehren, also jeweils einen Zugewinn zu erzielen. Die beiden Gütermassen können sich demnach unterschiedlich entwickeln. Wird die Ehe aufgelöst, ändert sich an der Gütertrennung nichts. Jeder behält, was ihm gehörte. Es wird lediglich der jeweilige Zugewinn während der Dauer der Ehe ermittelt und miteinander verglichen. Hat der eine Ehegatte mehr Zugewinn erzielt als der andere, so kommt es zu einem Ausgleich.

Der Gesetzgeber musste nun die Art und Weise dieses Ausgleichs regeln. Die naheliegende Konsequenz wäre gewesen, einen familienrechtlichen Ausgleichsanspruch in allen Fällen der Auflösung der Ehe zu gewähren. Diesen Grundsatz hat der Gesetzgeber auch formuliert; den vielleicht wichtigsten Fall hat er aus praktischen Überlegungen dann doch anders behandelt, nämlich den Fall der Auflösung der Ehe (und damit des ehelichen Güterstandes) durch den Tod eines Ehegatten.

Wenn die Ehe durch Tod eines Ehegatten beendet wird, so kann man natürlich auch in einem komplizierten Verfahren die jeweiligen Zugewinne errechnen und die Ausgleichspflicht festlegen. Diese Berechnungen sind aber äußerst umständlich und belasten überdies das persönliche Verhältnis zwischen dem überlebenden Ehegatten und den sonst noch vorhandenen Erben. So kam der Gesetzgeber auf die Idee, eine pauschale Lösung des Ausgleichspro-

blems zu statuieren. Ihren Niederschlag hat diese Regelung in § 1371 BGB gefunden. Um klarzustellen, dass erbrechtliche Bestimmungen diese Lösung des Ausgleichsproblems nicht unterlaufen können, wurde in dem Paragraphen, der sich mit dem Erbrecht des Ehegatten befasst, ein neuer Absatz 3 eingefügt. § 1931 Abs. 3 BGB lautet nämlich: „Die Vorschriften des § 1371 bleiben unberührt."

Als gesetzlicher Erbe bekommt der überlebende Ehegatte ohnehin einen gewissen Anteil vom Vermögen des Verstorbenen. Man brauchte für diesen Fall den Anteil nur um ein pauschales Viertel zu erhöhen, um die Ausgleichsproblematik zu lösen. Alles in allem: Eine erbrechtliche Lösung für ein familienrechtliches Problem.

Es liegt auf der Hand, dass die Pauschalierung des Ausgleichsanspruchs, also die erbrechtliche Lösung, nicht unerhebliche Kritik hervorrufen musste. Die Einwände gegen diese Lösung ergeben sich zum Teil aus der Ausgleichsidee selbst, zum anderen aus dogmatischen Überlegungen.

Die Idee des Zugewinnausgleichs wird bei einer pauschalen Lösung letztlich verlassen, denn auf die Höhe des Erbteils bleibt es ohne Auswirkung, ob der Zugewinn des überlebenden Ehegatten wirklich geringer war als derjenige des verstorbenen. Selbst wenn der verstorbene Ehegatte überhaupt keinen Zugewinn erzielt hat, während der überlebende hohe Beträge erwirtschaften konnte, soll die erbrechtliche Lösung Platz greifen. Dass dies zulasten anderer Erben, insbesondere anderer Familienmitglieder, gehen muss, liegt auf der Hand. Eine innere Rechtfertigung der Ausgleichspflicht ist letztlich in solchen Fällen nicht gegeben.

Aus dogmatischer Sicht musste die Verknüpfung von familienrechtlichem Zugewinnausgleich und Erbrecht problematisch erscheinen, da es ja letztlich um zwei verschiedene Dinge geht. Das Hineinwirken der erbrechtlichen Lösung in andere erbrechtliche Zusammenhänge liegt auf der Hand. Eine ganze Reihe von Konsequenzen ergeben sich etwa für das sogenannte Pflichtteilsrecht, also jene Bestimmung des Bürgerlichen Rechts, die eine Mindestbeteiligung bestimmter Familienangehöriger am Nachlass eines Verstorbenen sicherstellen wollen.

Wie hängt nun das Nichtehelichenrecht mit dem Erbrecht zusammen? Zunächst ist man geneigt zu sagen: Die Dinge sind doch ganz einfach. Das Reformgesetz hat eine Bestimmung aufgehoben, die seit Jahrzehnten umstritten war, nämlich den alten Paragraphen 1589 Absatz 2 BGB, in dem es hieß: „Ein uneheliches Kind und dessen Vater gelten als nicht verwandt." Ein Musterbeispiel für eine juristische Fiktion. Diese Bestimmung entfiel, so dass das allgemeine Abstammungsrecht Platz zu greifen hatte. Soweit es um erbrechtliche Konsequenzen ging, bedeutete dies, dass nichteheliche Kinder nicht nur ihre Mutter beerben können (Dies war schon immer möglich); sondern auch ihren Vater. Und dass umgekehrt auch der Vater das nichteheliche Kind beerben kann, soweit das Erbrecht der Verwandten als gesetzliches Erbrecht in Betracht kommt.

Dadurch, dass das Nichtehelichengesetz die Fiktion der Nichtverwandtschaft aufgehoben hat, gelten zwischen dem nichtehelichen Kind und seinem Vater die Regeln des Verwandtenerbrechts, ohne dass eine positive, das nichteheliche Kind einbeziehende Vorschrift nötig wäre. Das nichteheliche Kind gehört beim Tod des Vaters zu den gesetzlichen Erben der ersten Ordnung, § 1924 Absatz 2.

Neben dem nichtehelichen Kind können aufgrund der allgemeinen Regeln über die gesetzliche Erbfolge von Verwandten dann noch andere Angehörige stehen. Kurz gesagt: Hätte man lediglich die Fiktion der Nichtverwandtschaft beseitigt, so hätte das nichteheliche Kind wie jedes andere Kind an der Erbschaft teilgenommen.

Über diese Konsequenz ist außerordentlich viel gestritten worden. Die Befürworter stützten sich auf Artikel 6 Absatz 5 GG. Die Gegner hingegen verwiesen auf die besonderen Probleme, die sich aus einem möglichen Nebeneinander von nichtehelichem Kind einerseits und ehelichen Kindern bzw. Ehegatten andererseits ergeben konnten. Man sagte, das Erbrecht der ehelichen Kinder und des Ehegatten würde geschmälert. Überdies sei der von der Verfassung garantierte Schutz von Ehe und Familie in Mitleidenschaft gezogen. Man zweifelte an der inneren Berechtigung eines Erbrechts des nichtehelichen Kindes. Dieses lebe ja regelmäßig nicht in der Familie des Erblassers. Überdies könne die Beteiligung eines nichtehelichen Kindes am Nachlass zu erheblichen Konflikten mit dem überlebenden Ehegatten und den ehelichen Kindern führen.

Solche Argumente blieben nicht ohne Wirkung. Gegen Ende des Gesetzgebungsverfahrens fand man eine Lösung, die reichlich kompliziert ist und letztlich dazu führt, dass von einer völligen Gleichstellung der nichtehelichen mit den ehelichen Abkömmlingen im Bereich des Erbrechts eben nicht gesprochen werden. Wie sieht diese Lösung aus?

Sie ist enthalten in den Paragraphen 1934a bis 1934d BGB. Schon ein erster Blick zeigt, dass es nicht um eine, sondern um zwei Lösungen geht. Dem entsprechen die beiden Stichworte „Erbersatzanspruch" und „vorzeitiger Erbausgleich".

Der Erbersatzanspruch, von dem zunächst die Rede sein soll, hat das Ziel, konfliktgeladene Miterbengemeinschaften bei Vorhandensein nichtehelicher Kinder zu verhindern:

§ 1934a a.F.

(1) Einem nichtehelichen Kinde und seinen Abkömmlingen steht beim Tode des Vaters des Kindes sowie beim Tode von väterlichen Verwandten neben ehelichen Abkömmlingen des Erblassers und neben dem überlebenden Ehegatten des Erblassers an Stelle des gesetzlichen Erbteils ein Erbersatzanspruch gegen den Erben in Höhe des Wertes des Erbteils zu.

(2) Beim Tode eines nichtehelichen Kindes steht dem Vater und seinen Abkömmlingen neben der Mutter und ihren ehelichen Abkömmlingen an Stelle des gesetzlichen Erbteils der im Absatz 1 bezeichnete Erbersatzanspruch zu.

(3) Beim Tode eines nichtehelichen Kindes sowie beim Tode eines Kindes des nichtehelichen Kindes steht dem Vater des nichtehelichen Kindes und seinen Verwandten neben dem überlebenden Ehegatten des Erblassers an Stelle des gesetzlichen Erbteils der im Absatz 1 bezeichnete Erbersatzanspruch zu.
(4) Soweit es nach den Absätzen 1 und 2 für die Entstehung eines Erbersatzanspruchs darauf ankommt, ob eheliche Abkömmlinge vorhanden sind, steht ein nichteheliches Kind im Verhältnis zu seiner Mutter einem ehelichen Kinde gleich.

§ 1934b a.F.
(1) Der Berechnung des Erbersatzanspruchs wird der Bestand und der Wert des Nachlasses zur Zeit des Erbfalls zugrunde gelegt. Der Wert ist, soweit erforderlich, durch Schätzung zu ermitteln. § 2049 gilt entsprechend.
(2) Auf den Erbersatzanspruch sind die für den Pflichtteil geltenden Vorschriften mit Ausnahme der § 2303 bis 2312, 2315, 2316, 2318, 2322 bis 2331, 2332 bis 2338 a sowie die für die Annahme und die Ausschlagung eines Vermächtnisses geltenden Vorschriften sinngemäß anzuwenden. Der Erbersatzanspruch verjährt in drei Jahren von dem Zeitpunkt an, in dem der Erbersatzberechtigte von dem Eintritt des Erbfalls und den Umständen, aus denen sich das Bestehen des Anspruchs ergibt, Kenntnis erlangt, spätestens in dreißig Jahren von dem Eintritt des Erbfalls an.
(3) Auf den Erbersatzanspruch eines Abkömmlings des Erblassers sind auch die Vorschriften über die Ausgleichungspflicht unter Abkömmlingen, die als gesetzliche Erben zur Erbfolge gelangen, entsprechend anzuwenden.

Würde beim Tod des Vaters ein nichteheliches Kind in die Erbengemeinschaft mit der Ehefrau und anderen ehelichen Kindern des Erblassers eingebunden sein, so könnten sich daraus besondere Spannungen und Schwierigkeiten bei der Auseinandersetzung ergeben. Auch schien dem Gesetzgeber die Mitberechtigung an den Nachlassgegenständen beim nichtehelichen Kind weniger gerechtfertigt als bei der Familie des Erblassers, die ein Leben lang eng mit dem Haushalt und den Vermögensgütern des Erblassers verbunden war. Denken Sie nur an Wohnhaus, Haushalt, Gewerbebetrieb, Erinnerungsgegenstände u.v.a.m.

Um derartige Schwierigkeiten zu vermeiden, hat der Gesetzgeber immer dann, wenn eine solche Erbengemeinschaft entstehen würde, das Erbrecht des nichtehelichen Kindes ersetzt durch einen Geldanspruch im Wert des gesetzlichen Erbteils. An die Stelle einer Mitberechtigung am Nachlass, also eines Anteils am Gesamtnachlass, tritt ein bloßer Ausgleichsanspruch. Dieser Anspruch ist auf Geld gerichtet und orientiert sich in seiner Höhe am Wert des gesetzlichen Erbteils.

Hinter dieser Regelung steht die Vorstellung, dass Artikel 6 Absatz 5 GG keine schematische Gleichstellung verlangt, sondern lediglich fordert, dass ein nichteheliches Kind wertmäßig als Erbe so zu stellen ist, wie ein eheliches Kind stehen würde. Um es noch einmal zu sagen: Keine schematische Gleichstellung, sondern nur wertmäßige Gleichbehandlung, Einräumung einer gleichwertigen Position.

Die Einräumung des Erbersatzanspruches führt zu einer ganzen Reihe von Problemen.

Zunächst muss feststehen, dass das nichteheliche Kind, wäre es nicht auf den Ersatzanspruch verwiesen, Erbe geworden wäre, und zwar Erbe kraft Gesetzes! Man muss also feststellen, wie umfangreich der Erbanteil des nichtehelichen Kindes gewesen wäre, wenn es den Erbersatzanspruch nicht gäbe. Es muss dann der Wert des Nachlasses ermittelt werden. Wie schwer das sein kann, brauche ich ihnen nicht zu sagen, Aktiva und Passiva müssen ermittelt und abgeglichen werden, und erst, wenn alle diese Daten ermittelt sind, kann etwas über den Umfang des Erbersatzanspruches gesagt werden. Er ist dann in Geld zu leisten.

Andere Auswirkungen hat die Regel des 1934a BGB auf die Berechnung der dann tatsächlich gegebenen Erbteile der übrigen Erben. Um sie zu ermitteln, muss die Lage so angesehen werden, als ob das nichteheliche Kind nicht vorhanden gewesen wäre. Dabei ist zu beachten, dass die Frage, wer als Erbe berufen ist, durch das Ausscheiden des nichtehelichen Kindes nicht beeinflusst werden soll. Gesetzliche Erben sind also ausschließlich jene Personen, die auch neben dem nichtehelichen Kind als gesetzliche Erben berufen wären. Die Erbteile dieser verbleibenden Erben verändern sich nach den Vorschriften, die für den Fall gelten würden, wenn das Kind überhaupt nicht vorhanden gewesen wäre.

Der Vollständigkeit halber sei noch darauf hingewiesen, dass ein Erbersatzanspruch auch gegeben sein soll, wenn der Vater des nichtehelichen Kindes nach dem Tode eben dieses Kindes als Erbe neben anderen Verwandten in Betracht kommen würde. Auch hier geht das Gesetz davon aus, dass zwischen dem nichtehelichen Kind und den väterlichen Verwandten in der Regel keine engen familiären Beziehungen bestehen. Deshalb soll in den Fällen, in denen der nichteheliche Vater und seine Verwandten neben der Mutter des nichtehelichen Kindes und deren Abkömmlingen zur Erbfolge berufen werden, ebenfalls nur ein Erbersatzanspruch in Betracht kommen, ein Erbersatzanspruch, der sich auf Geld bezieht und seiner Höhe nach dem Wert des Erbteils entsprechen soll.

Der Erbersatzanspruch ist freilich nicht das einzige neue Rechtsinstitut, dass das Nichtehelichengesetz eingeführt hat, um die Probleme um die Erbberechtigung des nichtehelichen Kindes zu lösen. Neben dem Erbersatzanspruch gibt es das Recht auf vorzeitigen Erbausgleich.

Um was geht es hier?

Vorzeitiger Erbausgleich des nichtehelichen Kindes
§ 1934d BGB a.F.:
(1) Ein nichteheliches Kind, welches das einundzwanzigste, aber noch nicht das siebenundzwanzigste Lebensjahr vollendet hat, ist berechtigt, von seinem Vater einen vorzeitigen Erbausgleich in Geld zu verlangen.

(2) Der Ausgleichsbetrag beläuft sich auf das Dreifache des Unterhalts, den der Vater dem Kinde im Durchschnitt der letzten fünf Jahre, in denen es voll unterhaltsbedürftig war, jährlich zu leisten hatte. Ist nach den Erwerbs- und Vermögensverhältnissen des Vaters unter Berücksichtigung seiner anderen Verpflichtungen eine Zahlung in dieser Höhe entweder dem Vater nicht zuzumuten oder für das Kind als Erbausgleich unangemessen gering, so beläuft sich der Ausgleichsbetrag auf das den Umständen nach Angemessene, jedoch mindestens auf das Einfache, höchstens auf das Zwölffache des in Satz 1 bezeichneten Unterhalts. (3) Der Anspruch verjährt in drei Jahren von dem Zeitpunkt an, in dem das Kind das siebenundzwanzigste Lebensjahr vollendet hat. (4) Eine Vereinbarung, die zwischen dem Kinde und dem Vater über den Erbausgleich getroffen wird, bedarf der notariellen Beurkundung. Bevor eine Vereinbarung beurkundet oder über den Erbausgleich rechtskräftig entschieden ist, kann das Kind das Ausgleichsverlangen ohne Einwilligung des Vaters zurücknehmen. Kommt ein Erbausgleich nicht zustande, so gelten für Zahlungen, die der Vater dem Kinde im Hinblick auf den Erbausgleich geleistet und nicht zurückgefordert hat, die Vorschriften des § 2050 Abs. 1, des § 2051 Abs. 1 und des § 2315 entsprechend. (5) Der Vater kann Stundung des Ausgleichsbetrages verlangen, wenn er dem Kinde laufenden Unterhalt zu gewähren hat und soweit ihm die Zahlung neben der Gewährung des Unterhalts nicht zugemutet werden kann. In anderen Fällen kann der Vater Stundung verlangen, wenn ihn die sofortige Zahlung des gesamten Ausgleichsbetrages besonders hart treffen würde und dem Kinde ein Stundung zugemutet werden kann. Die Vorschriften des § 1382 gelten entsprechend.

§ 1934e BGB a.F.

Ist über den Erbausgleich eine wirksame Vereinbarung getroffen oder ist er durch rechtskräftiges Urteil zuerkannt, so sind beim Tode des Vaters sowie beim Tode väterlicher Verwandter das Kind und dessen Abkömmlinge, beim Tode des Kindes sowie beim Tode von Abkömmlingen des Kindes der Vater und dessen Verwandte nicht gesetzliche Erben und nicht pflichtteilsberechtigt.

Durch das Recht auf vorzeitigen Erbausgleich soll dem nichtehelichen Kind eine besondere Chance eingeräumt werden. Es soll nur innerhalb eines bestimmten Lebensalters von seinem Vater einen bestimmten Geldbetrag verlangen können. Freilich muss es dafür einen Preis bezahlen: Es verliert nach dem Tod des Vaters jedes Recht auf Beteiligung an dessen Nachlass, siehe § 1934e.

Auf diese Weise soll den nichtehelichen Kindern ein Startkapital zufließen, mit Hilfe dessen sie eine Familie gründen oder eine eigene wirtschaftliche Existenz aufbauen können. Derartige Zuwendungen, derartige besondere finanzielle Hilfen von Seiten des Vaters sind ja auch für eheliche Kinder nicht unüblich in den Jahren, in denen sie sich selbstständig zu machen pflegen.

Das Gesetz gewährt das Recht auf vorzeitigen Erbausgleich konsequenterweise dem nichtehelichen Kind nur innerhalb einer bestimmten Altersspanne, nämlich zwischen 21 und 27 Jahren. Auf diese Weise berücksichtigt der Gesetzgeber die besondere Lebenssituation des nichtehelichen Kindes. Natürlich muss auch auf die Situation des vom Ausgleichsanspruch betroffenen Vaters Rücksicht genommen werden. Das Gesetz tut dies, indem es die Höhe des vorzeitigen Erbausgleichs an der Höhe der Unterhaltspflicht des Vaters orientiert. Dadurch wird die Vermögenssituation des Vaters berücksichtigt. Er soll nicht unangemessen belastet werden. Eine etwa vorhandene eheliche Familie soll nicht unangemessen beeinträchtigt werden. Andererseits soll das nichteheliche Kind, das während der Ausbildungszeit oder der Zeit einer Existenzgründung einen höheren Finanzbedarf haben mag, nicht mit einem zu geringen Betrag abgespeist werden können, zumal wenn ein höheres Erbe in der Zukunft zu erwarten wäre. Derartige Überlegungen haben zu einer Lösung geführt, die einerseits eine feste Orientierung bietet, andererseits flexibel genug ist, um Probleme des Einzelfalls zu berücksichtigen. Der Gesetzgeber hat festgesetzt, dass der Ausgleichsbetrag den dreifachen Jahresunterhalt umfassen soll, den der Vater dem nichtehelichen Kind zu zahlen hatte. In Einzelfällen soll allerdings auch eine flexible Bemessung möglich sein, § 1934d Absatz 2.

So einfach diese Lösung sich zunächst ausnimmt, so schwierig ist das Rechtsinstitut in seinen Einzelheiten zu bewältigen.

Man geht heute davon aus, dass dem Kind ein Gestaltungsrecht eingeräumt ist. Dies bedeutet, dass ein vorzeitiger Erbausgleich nur zustande kommt, wenn ihn das Kind verlangt. Der Vater seinerseits ist nicht berechtigt, diese Lösung zu erzwingen. Vorausgesetzt ist also ein Verlangen des Kindes. In diesem Verlangen kann man ein Gestaltungsrecht des Kindes erblicken; durch das Ausgleichsverlangen wird der Anspruch auf vorzeitigen Erbausgleich zur Entstehung gebracht. Diesem Anspruch kann in zweifacher Weise genügt werden. Man kann zum einen eine notariell beurkundete Vereinbarung treffen, zum anderen ein rechtskräftiges Urteil erwirken. Wenn dem Anspruch auf Vornahme des Erbausgleichs Genüge getan ist. ergibt sich aus der Ausgleichsvereinbarung oder dem rechtskräftigen Urteil ein Anspruch des Kindes auf Zahlung des Ausgleichsbetrages.

Die Regelung ist ziemlich kompliziert. Man muss alles in allem mehrere Phasen unterscheiden. In der ersten Phase macht das Kind sein Gestaltungsrecht geltend; es verlangt den vorzeitigen Erbausgleich. Ist dies geschehen, befinden wir uns in der zweiten Phase. Dort entsteht aus dem Verlangen der Anspruch auf Vornahme des Erbausgleichs. Diesem Anspruch wird Genüge getan durch die erwähnte Vereinbarung oder durch ein Urteil. Wenn auf diese Weise dem Anspruch auf Vornahme des Erbausgleichs entsprochen ist, kommen wir in die dritte Phase. Sie ist gekennzeichnet durch den Anspruch auf Zahlung.

Halten wir kurz inne und blicken wir auf die drei neuen durch die Reform eingefügten Regelungskomplexe oder Rechtsinstitute, so kommt man zu einem differenzierten Ergebnis. Soweit es um den pauschalen Zugewinnausgleich in der erbrechtlichen Lösung geht, bedient sich der Gesetzgeber einer relativ erbrechtskonformen Gestaltung. Die

pauschale Erhöhung des gesetzlichen Erbrechts des überlebenden Ehegatten um ein Viertel ändert am Instrumentarium des Erbrechts letztlich nichts. Nur der Zuschnitt des Erbteils, d.h. der Umfang des Erbteils wird neu fixiert.

Anderes gilt für den Erbersatzanspruch und das Recht auf vorzeitigen Erbausgleich. Hier geht es um völlig neue Rechtsgebilde, die der deutschen Rechtsordnung bislang nicht bekannt waren. Beim Erbersatzanspruch soll die Bildung einer Erbengemeinschaft verhindert werden und gleichwohl wertmäßig eine Gleichstellung des nichtehelichen Kindes mit dem ehelichen Kind erreicht werden. Darin liegt ohne Zweifel eine gewisse Schlechterstellung des nichtehelichen Kindes im Vergleich zum ehelichen. Anderes gilt für den vorzeitigen Erbausgleich; hier handelt es sich um ein Instrument, das lediglich dem nichtehelichen Kind zugesprochen wird. Es ist zwar an enge Grenzen gebunden, aber immerhin ist es eine Bevorzugung des nichtehelichen Kindes.

Im Folgenden soll nun von Problemen die Rede sein, die sich im Zusammenhang mit den drei genannten Instituten ergeben haben. Die Probleme lassen sich dabei in zwei Gruppen einteilen. Es sind zum einen Fragen nach der Verfassungsmäßigkeit der gefundenen Lösungen und zum anderen Fragen der praktischen Umsetzung der neuen Rechtsinstitute und ihre Einordnung in das dogmatische Gefüge des BGB.

III.

Auf die Probleme verfassungsrechtlicher Art möchte ich zunächst eingehen. Allerdings sind solche in Bezug auf die erbrechtliche Lösung des Zugewinnausgleichs nicht laut geworden. Wohl wurde immer wieder Kritik geübt, die noch heute nicht verstummt ist. Die Kritik bewegt sich auf rein rechtspolitischer Ebene. Ich will dazu später noch ein paar Worte sagen.

Verfassungsrechtlich fundierte Kritik wurde vor allem an den beiden Rechtsinstituten geübt, die das Nichtehelichengesetz eingeführt hat. Also an Erbersatzanspruch und Anspruch auf vorzeitigen Erbausgleich.

Zu beiden Instituten sind eine ganze Reihe von Entscheidungen des Bundesverfassungsgerichts ergangen, über die ich kurz berichten möchte. Trotz dieser Entscheidungen sind bis zum heutigen Tag nicht alle Streitfragen erledigt.

Eine erste Entscheidung erging im Jahre 1976[2]. Sie befasst sich mit einer Übergangsregelung des Nichtehelichengesetzes, die von drei Personen im Wege der Verfassungsbeschwerde angefochten worden war. Sie fühlten sich dadurch in ihren Verfassungsrechten verletzt, dass auf sie das neue Recht nicht anwendbar war. Ihr Erbrecht beziehungsweise ihr Erbersatzanspruch waren, da altes Recht anzuwenden war, ausgeschlossen. Hierin sahen die Kläger einen Verstoß gegen den Gleichbehandlungsgrundsatz. Artikel 6 Absatz 5 GG erlaube keine zeitliche Differenzierung nach dem Datum des Erbfalls (nur anwendbar auf Erbfälle nach Inkrafttreten des Nichtehelichengesetzes) beziehungsweise nach dem Tag der Geburt (nur anwendbar auf nichteheliche Kinder, die nach dem 1. Juli 1949 geboren sind).

Das Bundesverfassungsgericht war anderer Ansicht. Bei der Bewertung von Übergangsvorschriften sei dem Gesetzgeber ein gewisser Spielraum zuzubilligen, zumal hier immer ein Dilemma bestehe, da es einerseits unmöglich sei, alle alten Rechtsverhältnisse dem neuen Recht zu unterstellen, man aber andererseits klare schematische Entscheidungen über die zeitliche Abgrenzung treffen müsse. Entscheidend sei, ob die für die zeitliche Anknüpfung in Betracht kommenden Faktoren hinreichend gewürdigt seien und ob die gefundene Lösung sich im Hinblick auf den gegebenen Sachverhalt und das System der Gesamtregelung durch sachliche Gründe rechtfertigen lasse oder als willkürlich erscheine. An diesen Maßstäben messend, kommt das Verfassungsgericht dann zum Ergebnis, dass die angegriffenen Übergangsbestimmungen noch als verfassungsgemäß anzusehen.

Ging es in diesen Fällen um eine Kritik an der Übergangsregelung, so treffen die beiden anderen Entscheidungen die Sache selbst.

Eine weitere Entscheidung vom 3. November 1981[3] nahm Stellung zu einer strittigen Grundsatzfrage, die sich in der Zwischenzeit aufgetan hatte. Die Möglichkeit des vorzeitigen Erbausgleichs wurde in der Gerichtspraxis zumeist für verfassungskonform gehalten. Auch der BGH[4] hatte sich dieser Ansicht angeschlossen. Auf der anderen Seite hatten das Schrifttum, aber auch einzelne Instanzgerichte verfassungsrechtliche Bedenken gegen eine solche Bevorzugung des nichtehelichen Kindes geäußert. In einer Reihe von Vorlagebeschlüssen zu Artikel 100 Absatz 1 GG wurde die Verfassungsmäßigkeit der Neuregelung denn auch verneint.

Nun kam es zu einer Verfassungsbeschwerde, über die das Bundesverfassungsgericht zu entscheiden hatte. In dieser Entscheidung verneinte das Gericht die Verletzung von Verfassungsrechten. Das Gericht knüpfte zur Begründung an schon früher geäußerte Auffassungen an, wonach die von Artikel 6 Absatz 5 GG geforderte Gleichstellung nicht zu einer schematischen Gleichheit aller einzelnen Rechtspositionen führen müsse. Es genüge vielmehr einer Angleichung an die Situation der ehelichen Kinder insgesamt. Eheliche Kinder seien letztlich unerreichbar privilegiert, deshalb könne eine bevorzugte rechtliche Behandlung nichtehelicher Kinder in einzelnen Teilbereichen keinen Verstoß gegen den Gleichbehandlungsgrundsatz darstellen. Die Zubilligung des vorzeitigen Erbausgleichs nur an nichteheliche Kinder ist deshalb nicht schon eine an sich verfassungswidrige Ungleichbehandlung. Sie könnte es nur

[2] 8. Dezember 1976; Bundesverfassungsgericht BVerfGE 44, 1.
[3] BVerfGE 58, 377.
[4] BGHZ 76, 109.

sein, wenn die erbrechtliche Stellung nichtehelicher Kinder insgesamt günstiger wäre als diejenige ehelicher Kinder. Das Verfassungsgericht stellt mithin eine Art „Mischkalkulation“ an; es komme darauf an, das gesamte Regelungsspektrum zu bewerten und nicht bloß einzelne Elemente herauszugreifen.

Die Argumente, die in diesem Sinne vorgetragen werden, sind schon in der älteren Rechtsprechung[5] grundgelegt worden, die die Gesetzgebung überhaupt erst provoziert hat. Wie die herrschende Meinung betonte auch das Bundesverfassungsgericht, dass es um einen Ausgleich eines für die nichtehelichen Kinder bestehenden generellen Lebensdefizits gehe, bei dem der Gedanke der Starthilfe zur Existenzgründung besonders betont sei. Ein Ausgleich mit Abfindung, der dazu führe, dass das Kind aus dem Kreis der erbberechtigten Familienmitglieder ausscheide, bringe zudem den Vorteil, dass bei einem späteren Erbfall Konflikte vermieden werden. Bei alledem sei zu berücksichtigen, dass nichteheliche Kinder ein regelmäßiges Defizit an familiärer Berufsförderung im Vergleich mit Kindern vollständiger Familiengemeinschaften hätten. Das „Handicap“ des nichtehelichen Kindes bei der Realisierung des Erbrechts falle überdies ins Gewicht.

Aus alledem wird gefolgert, dass die Einräumung eines Anspruchs auf vorzeitigen Erbausgleich die nichtehelichen Kinder im Vergleich zu den ehelichen Kindern nicht in verfassungswidriger Weise bevorzuge.

Die Argumentation des Gerichts bezieht sich noch auf einige andere Punkte wie die Frage, ob es richtig sei, einen Erbausgleich zu gewähren, der ja vom Vermögen des nichtehelichen Vaters zum Teil völlig unabhängig sei. Dem nichtehelichen Kind können auf diesem Wege etwas zufließen, was die ehelichen Kinder beim Tod eines vermögenslos gewordenen Vaters nicht mehr bekommen würden. Zum Teil wird in diesem Bereich auch rechtstatsächlich argumentiert.

Die Ablehnung der Verfassungsbeschwerde sollte -so glaubte man damals- einen Schlussstrich unter die Diskussion ziehen. Dass dem nicht so ist, lehrt ein Blick in die neuere Aufsatzliteratur. Allerdings dürfte die Verfassungsmäßigkeit der jetzigen Lösung nicht mehr in Frage stehen. Es geht immer nur um die Frage, ob man aus rechtspolitischen Erwägungen eine andere Lösung vorziehen solle.

Die dritte Entscheidung des Bundesverfassungsgerichts, von der hier die Rede sein soll, stammt aus dem Jahre 1986[6]. Sie befasst sich mit dem § 1934c BGB:

> ***§ 1934c a.F. (nichtig, da verfassungswidrig)***
> *(1) War beim Tode des Vaters eines nichtehelichen Kindes die Vaterschaft weder anerkannt noch rechtskräftig festgestellt, so steht dem Kinde ein gesetzliches Erbrecht oder ein Erbersatzanspruch nur zu, wenn das gerichtliche Verfahren zur Feststellung der Vaterschaft bereits zur Zeit des Erbfalls anhängig war. Ist der Vater gestorben, bevor das Kind geboren oder sechs Monate alt war, so genügt es, wenn der Antrag auf Feststellung der Vaterschaft binnen sechs Monaten gestellt wird; die Frist beginnt mit dem Erbfall, jedoch nicht vor der Geburt des Kindes.*
> *(2) Im Falle des Todes eines Verwandten des Vaters gilt Absatz 1 Satz 1 entsprechend.*

Um Missverständnissen vorzubeugen, sei gleich darauf hingewiesen, dass es nicht um die Frage geht, ob die Feststellung der Vaterschaft erforderlich ist, um gesetzliche Erbrechte oder den Erbersatzanspruch geltend zu machen. Diese Frage ist unstreitig, § 1600a BGB erklärt die vorgehende Feststellung der Vaterschaft zur grundsätzlichen Voraussetzung für die Geltendmachung aller Rechte aus der Abstammung des Kindes vom nichtehelichen Vater. Daran sollte auch nichts geändert werden. § 1934c BGB verschiebt nur den für den Feststellungsbeschluss maßgeblichen Zeitpunkt. Während nach den allgemeinen Regeln die Vaterschaftsfeststellung auch nach dem Tode des nichtehelichen Vaters betrieben werden kann, sollte nach dieser Bestimmung ein gesetzliches Erbrecht oder ein Erbersatzanspruch nur existieren, wenn zu Lebzeiten des nichtehelichen Vaters wenigstens das Verfahren zur Feststellung der Vaterschaft anhängig gemacht worden ist.

War dies nicht geschehen, der Vater also vor der Eröffnung des Verfahrens gestorben, so blieben die nichtehelichen Kinder von jeder Beteiligung an der Erbschaft ausgeschlossen. Der Gesetzgeber war in diesem Zusammenhang also strenger als bei allgemeinen Statusfragen. Auf diese Weise sollte eine länger währende Rechtsunsicherheit im Interesse der Familie des Erblassers vermieden werden.

Schon früh wurde an dieser Entscheidung des Gesetzgebers Kritik geübt. Die Restriktion des § 1934c BGB sei sachlich nicht geboten und damit letztlich eine verfassungswidrige Einschränkung des Gebotes, allen nichtehelichen Kindern eine angemessene Beteiligung am väterlichen Nachlass in Form eines Erbrechts oder eines Erbersatzanspruchs zuzuerkennen.

In seiner Entscheidung stellt sich das Bundesverfassungsgericht auf die Seite der Kritiker. Die angegriffene Norm führe zu einer isolierten erbrechtlichen Schlechterstellung derjenigen nichtehelichen Kinder, deren Abstammung zu Lebzeiten des Erblassers nicht gerichtlich festgestellt war. Gründe für diese Schlechterstellung seien aber nicht ersichtlich. Im Übrigen müsse der Status eines nichtehelichen Kindes mit einheitlicher Wirkung festgestellt werden. Sonst käme man dazu, verschiedene erbrechtliche Klassen von nichtehelichen Kindern zuzulassen. Die Argumente des Gesetzgebers werden verworfen. Ein Schutz des gegebenenfalls im Hinblick auf sein nichteheliches Kind ahnungslosen Erblassers sei nicht gerechtfertigt. Ebenso wenig könne man die Idee gelten lassen, die Bestimmung sei zum Schutz der Erben des Vaters erforderlich, die sich

[5] BVerfGE 25, 167; 44, 1.
[6] BVerfGE 74, 33 ff. vom 18. November 1986.

gegenüber dem nichtehelichen Erbprätendenten regelmäßig in Beweisschwierigkeiten befänden. Eine nachträgliche Vaterschaftsfeststellung bringe keineswegs mehr Unsicherheit in die Nachlassregelung als sonstige später oder unverhofft angemeldete Nachlassverbindlichkeiten oder neu hinzutretende Erben. Alles in allem sah sich das Gericht außerstande, sachgerechte Kriterien für die unterschiedliche Behandlung im Sinne des § 1934c BGB anzuerkennen, mit der Folge, dass diese Bestimmung fallen musste.

Für die Zukunft gilt also zur Frage der Vaterschaftsfeststellung und ihres Zeitpunktes die allgemeine Regel des Familienrechtes.

IV.

Nun zum erbrechtlichen Zugewinnausgleich.

Die Probleme, mit denen sich der BGH befassen musste, werden nur verständlich, wenn man den ganzen § 1371 BGB in Augenschein nimmt. Absatz 1 enthält die mehrfach geschilderte pauschalierte erbrechtliche Lösung. Absatz 2 behandelt die Fälle, in denen der überlebende Ehegatte weder Erbe wird noch ein Vermächtnis bekommt. Er ist also nicht kraft Erbrechts am Nachlass beteiligt; schon deshalb kann der Ausgleich nicht durch eine pauschalierte Lösung erfolgen. In diesem Fall verbleibt es bei der klaren Trennung von güterrechtlichen und erbrechtlichen Fragen. Der überlebende Ehegatte hat einen Anspruch auf Ausgleich des Zugewinns einerseits und ein Recht auf Mindestbeteiligung am Nachlass, den sogenannten Pflichtteil andererseits.

Einen Pflichtteil bekommen nur bestimmte Personen, die an sich nach den Regeln des Intestaterbrechts Erben werden würden, aber durch den Erblasser übergangen worden sind. Der Höhe nach orientiert sich der Pflichtteil am versagten gesetzlichen Erbteil, und zwar soll er die Hälfte des Erbteils ausmachen. Will man nun den Pflichtteil des übergangenen Ehegatten berechnen, so stellt sich die Frage, an welchem gesetzlichen Erbteil man anknüpfen soll: an dem normalen nach § 1931 gewährten Ehegattenerbteil oder an dem mit Hilfe von § 1371 Absatz 1 BGB erhöhten Erbteil? Die Frage ist eindeutig entschieden durch das Gesetz; im zweiten Halbsatz des § 1371 Absatz 2 BGB heißt es: „Der Pflichtteil des überlebenden Ehegatten oder eines anderen Pflichtteilsberechtigten bestimmt sich in diesem Falle nach dem nicht erhöhten gesetzlichen Erbteil des Ehegatten."

Die Probleme, um die es dem BGH ging, haben nicht zuletzt mit Absatz 3 zu tun. Hier wird nun entgegen den erbrechtlichen Prinzipien eine Wahlmöglichkeit eröffnet. Der Ehegatte kann nämlich den erhöhten Erbteil ausschlagen und stattdessen den Ausgleich des Zugewinns und seinen Pflichtteil verlangen, und zwar selbst dann, wenn erbrechtliche Bestimmungen dies an sich gar nicht zulassen. Auf diese Weise erhält er ausnahmsweise einen Pflichtteil.

Halten wir an dieser Stelle einen Augenblick inne.

Der BGH hatte sich zunächst (im Jahre 1962[7]) mit der grundsätzlichen Frage zu befassen, wie sich die Erhöhung des Erbteils nach Absatz 1 auf die Beteiligung anderer Personen am Nachlass auswirkt. Der klare Wortlaut des § 1371 Absatz 1 einerseits und des § 1931 andererseits erfasst nur das Erbrecht: Die Erbteile der übrigen Beteiligten, etwa der Kinder, sind durch die Erhöhung des Erbteils des Ehegatten geschmälert. Gilt dies aber auch für das Pflichtteilsrecht? Wie ist etwa zu verfahren, wenn ein Kind durch Testament vom Erbe ausgeschlossen ist? Ist bei der Berechnung seines (also des Kindes) Pflichtteils der erhöhte Erbteil des überlebenden Ehegatten zugrunde zu legen oder nicht? Bei alledem kommt es entscheidend darauf an, ob die Pflichtteilsquote anderer Beteiligter durch § 1371 Abs. 1 gemindert wird.

Die Frage hat deshalb ein erhebliches Gewicht, weil die Mindestbeteiligung via Pflichtteil nach dem System des BGB immer als Quote zu verstehen war. Pflichtteilsquoten, so sagten zahlreiche Juristen, seien unveränderlich und situationsabhängig, und deshalb müsse die Erhöhung des Erbteils gemäß § 1371 bei der Berechnung des Pflichtteils unberücksichtigt bleiben. Dieser Lehre von der allgemeinen Unveränderlichkeit der Pflichtteilsquoten ist der BGH aber nicht gefolgt. Das Prinzip sei im BGB keineswegs so konsequent durchgehalten, wie seine Vertreter meinen. Die Folgen variabler Pflichtteilsansprüche, deren Umfang vom Verhalten des Erblassers und seines Ehegatten abhängt, sei zwar misslich und problematisch; es verstoße aber nicht gegen die Grundlagen des Pflichtteilsrechts. Denn das Prinzip der Unentziehbarkeit sei gewahrt, und über das Prinzip der festen Quote könne sich der Gesetzgeber hinwegsetzen. Dies sei in § 1371 BGB geschehen.

Mit dem Pflichtteilsrecht hat die Entscheidung des BGH noch in einer anderen Hinsicht zu tun. Dazu müssen wir nochmals genauer auf § 1371 schauen. Diese Vorschrift regelt ausdrücklich nur einen Teil der möglichen Konstellationen bei der Beendigung des Güterstandes durch Tod eines Ehegatten: Absatz 1 geht von der gesetzlichen Erbfolge (= Intestaterbfolge) aus; die Absätze 2 und 3 behandeln die Fälle, in denen der überlebende Ehegatte weder Erbe noch Vermächtnisnehmer wird. Nicht geregelt ist der Fall, in dem der überlebende Ehegatte durch Verfügung von Todes wegen, also namentlich durch Testament, als Erbe eingesetzt oder doch mit einem Vermächtnis bedacht wird (= sogenannte individuelle erbrechtliche Lösung). Der Ehegatte kann diese Zuwendung ausschlagen und damit die güterrechtliche Lösung wählen, welche Absatz 3 vorsieht. Wenn er dies aber nicht tut, so bleibt die Frage, ob er neben der erbrechtlichen Zuwendung einen Zugewinnausgleich verlangen kann. Nach den gesetzlichen Regeln in den § 1372/1371 Absatz 2 BGB muss man schließen, dass dies möglich, dass dies nicht möglich sein soll. Mit dem Erwerb von Todes wegen soll auch der Zugewinnausgleich

[7] BGHZ 37, 58.

abgegolten sein. Bis zu diesem Punkt besteht und bestand immer Einigkeit. Probleme ergeben sich dann aber im Hinblick auf das Pflichtteilsrecht. Dabei sind viele Varianten denkbar. Der Ehegatte kann Alleinerbe sein, d.h. zugleich, dass enterbte Kinder vorhanden sind. Sie bekommen dann ihren Pflichtteil. Wie soll dieser aber berechnet werden? Man muss sich auf das ohne Testament geltende Intestaterbrecht stützen. Ist hierbei nun vom erhöhten oder vom nicht erhöhten Erbteil des Ehegatten auszugehen? Nach dem, was vorhin zu Absatz 1 gesagt wurde, erscheint die Antwort leicht: Man muss vom erhöhten Erbteil ausgehen, denn es liegt im Ermessen des Testierenden, wieviel er dem überlebenden Ehegatten zuwenden will. Wendet er die gesamte Erbschaft zu, so hat es dabei zu verbleiben und Korrekturen im Interesse der übergangenen Kinder sind nur im Pflichtteilsrecht möglich.

Gilt dies aber auch im Hinblick auf die Beteiligung des Ehegatten selbst? Soweit er durch Testament nur einen geringwertigen Erbteil oder nur ein ganz kleines Vermächtnis erhält, stehen ihm pflichtteilsrechtliche Ergänzungsansprüche zu. Sie sollen dazu dienen, den Wert dieser Zuwendung zu erhöhen, bis zu der Grenze, die das Pflichtteilsrecht vorsieht. Wiederum stellt sich die Frage: An welchem gesetzlichen Erbteil ist dann Maß zu nehmen, am erhöhten oder am nicht erhöhten?

Bei solchen komplizierten Fragen hat sich relativ bald eine einheitliche Tendenz durchgesetzt: Maßstab sollte allenthalben der erhöhte Erbteil sein. Dies läuft auf die These hinaus, dass man beim Zugewinnausgleich streng zwischen erbrechtlicher Lösung einerseits und güterrechtlicher Lösung andererseits unterscheiden muss.

Ein anderes Urteil des BGH aus dem Jahre 1964[8] hat diese Linie in einem anderen Zusammenhang bekräftigt. Dieses Urteil betrifft die Wahlmöglichkeit von Absatz 3.

Der Ehegatte, der kraft Gesetzes Erbe wird, und auch derjenige, der durch Testament beteiligt ist, kann die Erbenstellung oder die sonstige Zuwendung ausschlagen und die güterrechtliche Lösung wählen, also den Ausgleichsanspruch geltend machen und überdies einen Pflichtteil verlangen.

Alle diese Wahlmöglichkeiten sind dem Absatz 3 zu entnehmen. Eine Frage, die in Absatz 2 eine so ausführliche Regelung gefunden hat, bleibt hier aber offen. Berechnet sich der nun mögliche Pflichtteil nach dem erhöhten oder dem nicht erhöhten Erbteil des Ehegatten? Um diese Frage ist heftig gestritten worden. Eine Gruppe vertrat die sogenannte Wahltheorie: Um eine gleiche Behandlung der verschiedenen Fallgestaltungen zu erreichen, könne der Ehegatte zwischen dem erhöhten Pflichtteil einerseits und einem kleinen Pflichtteil nebst Ausgleichsanspruch andererseits wählen. Für welche der beiden Möglichkeiten er sich entscheidet, ist eine Frage der Berechnung. Dem stand eine andere Ansicht gegenüber, die die sogenannte Einheitstheorie vertrat. Man sagte, dass der Ehegatte in diesem Fall nur den gleichen Pflichtteil nebst einem Ausgleichsanspruch geltend machen könne. Dieser Meinungsstreit tobte lange hin und her, bis der BGH 1964 entschied: Er schloss sich der Einheitstheorie an. Zur Begründung berief er sich ebenso wie die Literatur auf die Entstehungsgeschichte der Bestimmung, auch in dem Fall, dass der Ehegatte kraft Ausschlagung nicht Erbe wird, also den Ausgleich durch das Erbrecht unmöglich macht, und sich auf den kleinen Pflichtteil nebst Ausgleichsanspruch beschränken will. Wenn vom erhöhten Pflichtteil die Rede sei, habe dies der Gesetzgeber in aller Regel auch ausdrücklich gesagt. Neben diesem historischen Argument bedient sich der BGH noch einer ganzen Reihe anderer Argumente, auf die ich hier jedoch nicht näher eingehen kann.

1982 hat der BGH die Einheitstheorie bestätigt und damit in der Zwischenzeit laut gewordene Kritik zurückgewiesen. Es ist damit zu rechnen, dass diese Frage so schnell nicht wieder bis zum obersten Gericht gelangen wird.

Probleme um den erbrechtlichen Zugewinnausgleich haben sich noch in anderer Hinsicht ergeben; auf eines will ich hier hinweisen.

Es war mehrfach umstritten, wie in folgendem komplizierten Falle zu verfahren sei. Der überlebende Ehegatte war durch Testament nur sehr unzulänglich bedacht und berief sich im Verfahren zunächst auf den Pflichtteil, der nach dem an sich erhöhten gesetzlichen Erbteil zu berechnen gewesen wäre. Im späteren Verlauf des Verfahrens wechselte er jedoch auf ein Verlangen im Sinne des Abs. 3 über und verlangte nunmehr Zugewinnausgleich nebst kleinem Pflichtteil. Sodann stellte sich heraus, dass zwar nicht der Pflichtteilsanspruch, wohl aber der Anspruch auf Zugewinnausgleich verjährt sein könnte. Er unterliegt nämlich gemäß § 1378 Absatz 4 BGB der kurzen Verjährungsfrist von drei Jahren. Hier kam es nur darauf an, ob die zunächst eingereichte Klage zur Unterbrechung der Verjährung geführt hat oder nicht. Die Antwort auf die Frage hängt davon ab, ob die klageweise Geltendmachung des großen Pflichtteils eine Unterbrechung auch des Anspruchs auf Zugewinnausgleich im Sinne des Absatzes 2 bewirken könnte. Die Rechtsprechung hat diese Folge abgelehnt, und zwar konsequent, da es sich nicht um denselben Streitgegenstand handelt, also unterschiedliche Dinge geltend gemacht würden.

Eine andere Frage erscheint in der Praxis nicht weniger wichtig. So wurde vom OLG Saarbrücken 1979 die Frage entschieden, ob eine erbrechtliche Form des Zugewinnausgleichs auch in Betracht komme, wenn es sich nicht um Verheiratete handelte, sondern um Mann und Frau in einer eheähnlichen Lebensgemeinschaft. Man dachte an eine analoge Anwendung. Eine solche Überlegung wurde letztlich aber unter Verweis auf den Ehe und Familie schützenden Grundrechtsartikel 6 zurückgewiesen.

[8] BGHZ 42, 182.

Noch eine letzte Rechtsfrage sei hier erwähnt, die den BGH befasst hat. Im Jahre 1978 hatte er die schwierige Frage zu entscheiden, was zu geschehen habe, wenn beide Ehegatten gleichzeitig bei einem Flugzeugabsturz ums Leben kommen. Sollte in solchen Fällen ein Zugewinnausgleich stattfinden oder nicht?[9]

Nach diesem Blick auf die erbrechtliche pauschale Lösung des Zugewinnausgleichs noch einige Hinweise zu Problemen der Rechtsprechung beim Erbersatzanspruch.

In einigen Fällen ging es um folgende Konstellation: Ein nichteheliches Kind weiß um seine Nichtehelichkeit, kennt aber den Vater nicht, da die Mutter sich weigert, seinen Namen zu benennen. Infolgedessen besteht keine Chance, im Wege des Erbrechts oder des Erbersatzanspruches an das Vermögen des leiblichen Vaters heranzukommen. Die Frage, ob ein Auskunftsanspruch gegen die Mutter besteht, ist zwar mehr eine familienrechtliche, lässt sich aber, da sie der Vorbereitung eines Erbanspruches oder Erbersatzanspruchs dient, auch unter dem Gesichtspunkt des Erbrechts ins Auge fassen. Die Rechtsprechung hat einen solchen Auskunftsanspruch bejaht. Einige Untergerichte haben ihn sogar dann für gegeben erachtet, wenn die Mutter sich nicht sicher war, wer der Vater war und mehrere Personen für die Vaterschaft in Betracht gekommen sind. Dann sollte sie -so etwa das LG Münster- alle diese Personen benennen.

Andere Fragen wurden von Obergerichten entschieden, so etwa das Problem, ob ein nichteheliches Kind Erbe eines nichtehelichen Halbgeschwisters werden kann (sie stammten also vom gleichen vorverstorbenen Vater), wenn noch die Mutter des ehelichen, jetzt aber verstorbenen Kindes am Leben war. Dieser Fall ist in § 1934a BGB nicht erfasst. Hier geht es zwar um einen väterlichen Verwandten, der verstorben war; eheliche Abkömmlinge des vorverstorbenen Vaters waren indes nicht vorhanden, ebenso wenig ein überlebender Ehegatte des Erblassers. Vom Wortlaut des § 1934a Absatz 1 ist unser Fall, wie schon gesagt, nicht erfasst. Gleichwohl hat die Literatur mehrfach die Auffassung vertreten, dass in einem solchen Fall der nichteheliche Abkömmling ebenfalls auf den Erbersatzanspruch zu verweisen sei, denn eine Differenzierung, die eine Erbengemeinschaft zwischen den Beteiligten nach dem Tode des Vaters und Ehemannes ausschließt, sie aber nach dem Tode eines ehelichen Kindes zulässt, macht letztlich keinen Sinn. So kommt es zur entsprechenden Anwendung von § 1934a Absatz 1 BGB. Immer geht es um das Zusammentreffen der ehelichen Familie mit nichtehelichen Verwandten, was verhindert werden soll, da es in einer solchen Konstellation in aller Regel personenbezogene Spannungen geben wird. Das OLG Stuttgart hat sich dieser Argumentation angeschlossen und das überlebende nichteheliche Kind auf einen Erbersatzanspruch verwiesen.

Schließlich sei noch erwähnt, dass das vorhin besprochene Urteil des Bundesverfassungsgerichts zu § 1934c BGB einige Nachwirkungen hatte. Es musste entschieden werden, ob eine Wiederaufnahme solcher Verfahren möglich war, die vor der Entscheidung des Bundesverfassungsgerichts rechtskräftig entschieden worden waren. Das OLG Köln hat dies unter Hinweis auf die Sicherheit des Rechtsverkehrs und Rechtsfriedens abgelehnt.

Die Rechtsprechung zum vorzeitigen Erbausgleich ist relativ dürftig. Hier geht es meistens um die Bemessung der Ausgleichszahlungen und um vorbereitende Auskunftspflichten.

Nur eine Entscheidung (vom 23. Januar 1980) verdient noch besondere Erwähnung. In BGHZ 76, 109 lag eine besondere Konstellation zugrunde. Der Vater verweigerte den vorzeitigen Erbausgleich, da der nichteheliche Sohn einen ehrlosen und unsittlichen Lebenswandel geführt hatte: Der Sohn hatte den Ehemann seiner Freundin ermordet und war deshalb verurteilt worden. In dem anhängigen Rechtsstreit ging es wiederum um verfassungsrechtliche Fragen, die wir schon kennen, daneben aber auch um die Frage, unter welchen Voraussetzungen der Vater den vorzeitigen Erbausgleich verweigern konnte. Der BGH bekräftigte die im Schrifttum vertretene Auffassung, man könne die einschlägige Bestimmung über die Entziehung des Pflichtteils analog anwenden. In § 2333 BGB ist allerdings eine besondere Form (letztwillige Verfügung) erforderlich; diese sei aber im Falle des vorzeitigen Erbausgleichs entbehrlich. Dies hat zur Folge, dass die Entziehung dem Anspruch auf Erbausgleich im Wege der Einrede entgegengehalten werden kann.

V.

Doch genug der Einzelheiten, meine Damen und Herren. *De lege ferenda* ist vieles im Fluss.

Dies gilt zunächst für die erbrechtliche Lösung des Zugewinnausgleichs. Hier muss man darauf hinweisen, dass das Ehegattenerbrecht in jüngerer Zeit wieder stärker ins Blickfeld gekommen ist. Es handelt sich hierbei um ein altes Thema der Erbrechtspolitik. Schon Helmut Coing hat vor Jahren formuliert: „Die erbrechtliche Stellung des überlebenden Ehegatten zu gestalten, ist eines der schwierigsten Probleme des Erbrechts." Wenn nun in der Tat in den nächsten Jahren das Ehegattenerbrecht wiederum grundsätzlich diskutiert werden sollte, wäre auch die erbrechtliche Pauschallösung des Zugewinnausgleichs gefährdet, denn nur, wenn dem überlebenden Ehegatten ein wirkliches Erbrecht zuerkannt wird, kann die erbrechtliche Lösung des Zugewinnausgleichs bestehen bleiben. Will man, was einige fordern, zu anderen Gestaltungen zum Nutzen des überlebenden Ehegatten übergehen, so muss die Verquickung von Erbrecht und Güterrecht, wie sie in § 1371 Absatz 1 enthalten ist, fallen.

Die Kritik hat sich an dieser Lösung ja schon sehr früh entzündet. Man sprach geradezu von einem „Bastardgü-

[9] Vergleiche dazu JuS, 1978, S. 855 bis 856.

terstand“. Eine Reform sei notwendig und solle eine scharfe Trennung zwischen Eherecht und Güterrecht einerseits und Erbrecht andererseits ziehen. Die Pauschallösung des güterrechtlichen Ausgleichs bei Beendigung der Ehe sei ein „Etikettenschwindel“, da das Zusatzviertel nichts mit einem Zugewinnausgleich zu tun habe, denn es werde ja gerade nicht danach gefragt, wer bei einer Abschlussrechnung als Gläubiger oder Schuldner der Ausgleichsforderung anzusehen wäre.

Man kann also auch aus familienrechtsimmanenten Gründen die erbrechtliche Lösung in Frage stellen. Ich bin ziemlich sicher, dass dann, wenn das Ehegattenerbrecht erneut angegangen wird, die erbrechtliche Pauschallösung zu Fall kommt. Dann ist zwar das BGB um eine witzige Nuance ärmer, die, wenn ich recht informiert bin, im Wesentlichen auf die Initiative eines meiner alten Heidelberger Lehrer zurückgeht. Allerdings würde das BGB an Stringenz und Klarheit gewinnen.

Schwieriger ist die Diskussion um die beiden anderen Probleme zu beurteilen. Auch wenn man heute sagen muss, dass die verfassungsrechtlichen Fragen ausdiskutiert sein dürften, so mehren sich in jüngster Zeit doch verdächtig viele Stimmen, die eine Novellierung des Nichtehelichenrechtes einfordern. Nun ist zwar zuzugeben, dass der Schwerpunkt dieser Reformforderungen auf anderen Gebieten liegt, die ausschließlich mit dem Familienrecht zu tun haben. Es ist aber anzunehmen, dass in diesem Zusammenhang auch der Erbersatzanspruch und vor allem das Recht auf vorzeitigen Erbausgleich erneut diskutiert werden.

In der jüngsten Koalitionsvereinbarung der Parteien, die jetzt die Bundesregierung stellen, findet sich der Satz: „Verbesserungen der Rechtsstellung nichtehelicher Kinder sollen im Umgangs-, Sorge-, Erb- und Unterhaltsrecht geprüft werden.“ [10].

Noch ein Zitat aus einem kürzlich erschienenen Aufsatz zur Kritik des Erbersatzanspruchs: Hier wird abermals die Verfassungsgemäßheit der Regelung in Frage gestellt mit dem Argument, der Gesetzgeber habe, sieht man von § 1934a einmal ab, bei der Normierung von Erbauseinandersetzungen das Ziel des sozialen Friedens nicht berücksichtigt. Dass die einzige derartige Regelung für das nichteheliche Kind bestehe, setze diese dem Verdacht aus, dass hier ein willkürlicher Rechtsgüterschutz betrieben werde; es werde sonst im BGB der soziale Friede der Erbengemeinschaft nicht als absolutes Ziel angestrebt, das Argument habe hier lediglich den Störenfriede „nichteheliches Kind“ fernzuhalten.

Mag die hier überspitzt formulierte Intention auch den Gesetzgeber nicht geleitet haben, so haftet der Regelung objektiv doch ein derartiger Charakter an, womit ein negatives Image des nichtehelichen Kindes nicht nur geduldet, sondern sogar gefördert wird. Im Übrigen verweist der erwähnte Beitrag auf die Tatsache, dass nach dem in Deutschland geltenden Nebenerbrecht, das auf der sogenannten Höfeordnung beruht, nichteheliche Kinder immer noch benachteiligt werden, oder besser gesagt, ausgeschlossen werden, ohne dass ein vernünftiger Grund dafür vorhanden ist, es sei denn, man würde als einzig verbleibenden Grund der Zurücksetzung das traditionell geprägte Rechtsgefühl der betroffenen Kreise anerkennen, dass es als unerträglich betrachtet, wenn ein nichteheliches Kind den Familienhof erbt.

Soweit es um vorzeitigen Erbausgleich geht, steht allerdings weniger eine Novellierung zum besseren Schutz nichtehelicher Kinder zur Diskussion als vielmehr eine Ausdehnung des Ausgleichsanspruchs auf eheliche Kinder. Einer der jüngsten Aufsätze endet mit dem Satz: „Eher wäre hier daran zu denken, ehelichen Kindern einen ähnlichen Anspruch zu geben, allerdings ebenfalls begrenzt auf die wirtschaftliche Zumutbarkeit.“

Man wird sich in der Tat fragen müssen, ob eine solche die wirtschaftliche Situation einer Familie sehr stark tangierende Ausdehnung des Rechts auf vorzeitigen Erbausgleich angebracht ist.

Aber, das ist -wie gesagt- eine Frage der Diskussion, und damit ist das Stichwort geliefert für Sie. Die vielen Bestimmungen, über die ich referiert habe, und die vielen Probleme und Entscheidungen haben vielleicht das Bedürfnis nach Fragen geweckt. Ich stehe Ihnen gern zur Verfügung!

[10] Nummer 32 zu Innen- und Rechtspolitik, FAZ vom 25. Januar 1991.

Report on the research project (Dis)continuity of Legal Systems in Czechoslovakia, Hungary and Poland after WWII: Difficult Heritage

For the second time, the legal historians of the Faculty of Law of the University of Szeged participated in the international research group supported by the Visegrad Grant. The central topic of the project, which was implemented between 2021-2022, was the comparative study of the development of Polish, Czech and Hungarian legal systems between the two World Wars. The consortium project "*(Dis)continuity of Legal Systems in Czechoslovakia, Hungary & Poland after WWII: Difficult Heritage*", launched in February 2024, focused on the Sovietisation of the legal systems of Central and Eastern European countries, but the methodology remained the same, as the socialist legislation was examined using the methodology of comparative law, in which the international conference organised in the framework of the project played a significant role. Five universities were involved in the research: the Jagellonian University and the University of Bialystok in Poland, the University of Trnava in Slovakia, the University of Plzeň in the Czech Republic, the and the Hungarian Department of Legal History of the University of Szeged in Hungary.

The conference was held in the oldest building of the Jagellonian University, the stately 14th century *Collegium Maius*. The opening ceremony took place on 3rd February, where the opening speech was given by *Prof. Maciej Mikuła*, one of the consortium leaders of the project, reflecting on the importance of comparative methodology in the field of legal history. The first session (Law and Socialist State) focused on socialist constitutional law. The first session opened with a lecture by *Prof. Piotr Fiedorczyk* (University of Bialystok) on lawmaking in socialist countries, which focused on some of the specificities of socialist legislation, giving the audience a deeper insight into the shortcomings of prescriptive legislation and the role of Marxist ideology in legitimising it. This was followed by a presentation by *Prof. Norbert Varga*, Head of the Department of Hungarian Legal History (The Fundamental Rights of Citizens in Hungarian Socialist Constitutional Law), who spoke about the rights of citizens as declared in the Constitution of 1949, detailing the parliamentary debate on the law. The session was closed by *Katarzyna Krzysztofek-Strzała's* lecture (Jagellonian University), also focusing on citizens' rights (Selected Fundamental Rights in Polish Constitution of 1952), thus revealing the parallels and similarities between Polish-Hungarian constitutional history in the socialist period.

In the next session (Law and Justice Part I), *doc. Vilém Knoll* and *Marián Byszowiec* gave a joint presentation ("Socialist Legality" and Interference in th Independence of the Judiciary in the 1950s) on the relationship between socialist legality and judicial independence, with a special analysis of how socialist criminal law and criminal procedure became a tool illegalities committed by the state authorities. Closely related to this topic *Benedek Varga* (PhD student at the Department of Hungarian Legal History) presented his research findings, examining how socialist legislation destroyed the main principle of substantive criminal law, presenting this topic through archival economic crimes cases (The codification of socialist criminal law with special regard to economic crimes). The first day of the conference was closed by the Law and Justice Part II panel, which focused on different procedural topics: The section was opened by the joint presentation of Tomáš Gábriš (University of Trnava) and Peter Vyšný (University of Trnava), titled Judicial and Extra-Judicial Dispute Resolution in the Popular-Democratic Czechoslovakia: Transformations of Civil and Criminal Procedural Law 1948-1960, followed by *Jakob Maziarz* (Jagellonian University), who analysed the dismantling of judicial independence in the socialist era (System of Legal Protection Authorities in the People's Republic of Poland).

One of the central themes of the second day of the conference was the relationship between law and the socialist planned economy. The first lecture was given by *Peter Dostalík* (Palacký University in Olomouc/ University of West Bohemia), who gave a detailed presentation on the regulation of joint-stock companies in communist Czechoslovakia, followed by a presentation of *Dénes Legeza* (National Intellectual Property Office), who analysed the Sovietisation of copyright. *Máté Pétervári* (Senior lecturer, Department of Hungarian Legal History, also analysed the influence of socialist planned economy on the law (The Influence of Socialist Rearrangement on the Hungarian Insolvency Law), showing how bankruptcy law was transformed from a legal instrument for the protection of creditors to an an instrument for nationalisation. The economic session was closed by *Marek Strzała* (Jagellonian University), who analysed the legal aspects of agricultural collectivisation in the period.

After the session on the law-economy relationship, a panel on family law followed where the first speaker was *Prof. Mária Homoki-Nagy* (Professor of the Hungarian Department of Legal History), who presented the transformation of marriage law in the post-1945 period (Marriage and divorce in Hungary after 1945), presenting the changes in this area of law on the basis of specific archival sources.

This was followed by a presentation by *Miriam Laclavíková* and *Ingrid Lanczová* (University of Trnava), who spoke about the codification of socialist family law in post-war Czechoslovakia, followed by *Denisa Kotroušová'* presentation (University of West Bohemia, Pilsen), who gave a detailed lecture about the Czech inheritance law in the context of property and family law. The session was concluded by a presentation of *Paweł Kaźmierski* (Jagiellonian University/University of Jena), who presented some problems of marriage law in Poland between 1944 and 1950, based on archival research.

All members of the research team will publish their research results in a special issue of the journal Cracow Studies of Constitutional and Legal History.In addition to the conference, the project has also produced a collection of texts in English on the sources of Czechoslovak, Hungarian and Polish law from 1945-1989, which will be published in the IURA online database, thus contributing significantly to the understanding of the differences and parallels between socialist legislation in the international context.

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Jewish Law Moot Court in Torino (2025)

The Jewish Law Moot Court, organized by Dr. Stephan Wendehorst form the University of Vienna, is a unique opportunity uniting universities and students across multiple nations. This year, it took place between the 11th and 20th of August. Hosted in the Italian city of Turin, students engulfed themselves with the pursuit of knowledge in places still alive with the touch of Jewish history, which the city is well-known for.

Students from the Faculty of Law, Masaryk University Brno Karolína Chudíková, Boris Šabík, and Jitka Trávníčková were invited to participate and spend the week broadening their legal horizons under the guidance of Dr. Dr. Radek Černoch. It is no surprise that Jewish law is a field of study vastly differing from the continental legal system as we know it. Deeply intertwined with the historical and societal aspects, it offers a challenging yet rewarding topic to delve into. And who is to offer better understanding of the topic than experts from the universities of Vienna, Tel Aviv, Jerusalem, and New York?

The choice of the city was no accident either, as participants worked on cases from the 18th-century Rabbinical Tribunal of Turin. That allowed further immersion in the historical atmosphere, as the learning phase offered insights into the realities of the time, and we were able to participate in multiple excursions to places relevant to the case, including the Synagogue of Turin, or the Jewish cemetery. However, the visits to the most beautiful places did not stop there, as we not only discovered them from the tourist perspective, but were able to study in the conference rooms of the Royal Palace and State Archives, an experience that is unforgettable.

The programme is standardly divided into two phases. The first included working with materials that would give us the background knowledge needed to understand the case. The phase was initiated with warm welcomes and opening debates, then was followed by a few days of intensive study in groups led by experts in the area.

Then came the core of our work and the aspect that truly defined the competition – we received our cases and were divided into small, carefully balanced teams of three. Still highly motivated from the intense studying days we had completed, it was thrilling to start forming the arguments for our "client". All teams were determined to spare no effort, creating a spirit of friendly rivalry that carried on for the entirety of the second stage of the programme.

The case concerned two opposing printing houses, led by Rabbi Levi and his Maskilic counterpart, Mr. Artom. Their conflict spanned across multiple deep legal branches, including not only competition and copyright law, but community ordinance as well. The work had highlighted the societal and religious tensions of the time. There had been no clear decision in sight, so all teams had worked hard to persuade the tribunal in their favour.

When the time came to plead the cases before the court, it felt as if all the efforts were rewarded, as the atmosphere was incredibly immersive and everyone provided a performance to be proud of. The tribunal, comprising experienced lawyers, had soon made their decisions, which felt like a reward for the fruits of our labour, especially considering that Karolína Chudíková was member of the team which was awarded second place in the finals.

There had been plenty of time to foster deep connections with other participants. By the end of the nine days, a lively, amicable community was created, one that trans-

fers borders and cultures and makes a lasting impact on people's lives. The impact of other colleagues must not be underestimated, as the debates that sparked within the intersections of interactions not only created a bridge between different worldviews, but enhanced our learning as well.

Altogether, the moot court offers an insight into the world of historical Jewish law in a fashion that helps stretch the boundaries of our understanding of law. It is an intellectually stimulating topic, and has surely helped everyone deepen their interest in legal history and grow as people and future lawyers.

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