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Der Europäische Gedanke und der NS-Staat*
(The European Idea and the NS-State)

*Diemut Majer,** Wolfgang Höhne****

Abstract

In the Nazi-era the European ideas were strongly promoted in order to establish the German dominance over Europe. Since 1939 the NS-propaganda was established in all the occupied territories in northern and western Europe. This propaganda was spread by the two-weekly Magazine "Signal", it contained military, political and economic matters. This Magazine had over two mio. Readers and was translated in over 20 languages in Europe. The aim of this propaganda was to convince the people in the occupied territories that they live in a patrimonial state, which cared for the "working class", invested in infrastructure and energy etc. Since 1942 the NS-propaganda tried to inspire volunteers to join the Waffen-SS, saying that the war in the East was a war of all European people against "bolshevism". In the text, the reader will find an example of the front page of "Signal". However, the Nazi-authorities never thought of a state of autonomy for the occupied states (which fought disparately to keep their status, but were destined to be satellite states under Nazi-control.

Strangely enough, Hitler and his close followers like Himmler were strictly against any European idea, he considered the expansion in the East as a battle to get more "living space" (Lebensraum) for German settlers. He never spoke of Europe, but of the "Grossgermanisches Reich", which should unite all people with German origins or German Language.

Key words: *Nazi propaganda; European ideas; occupied territories; German dominance; Hitlers intentions for a "Lebensraum" for German settlers.*

1. Die Zeitschrift „Signal" (1940 – 1945) als Sprachrohr der offiziellen NS-Propaganda im besetzten Europa: Verbreitungsgebiet und politische Leitlinien

Die folgende Darstellung der europäischen Ideen im NS-Staat stützt sich (neben dem einschlägigen Schrifttum[1]) vor allem auf die Zeitschrift „Signal". Diese war eine Sonderausgabe der „Berliner Illustrirten" (der größten Wochenzeitschrift im Reichsgebiet) und wurde während des Krieges in ganz Europa und weit darüber hinaus verbreitet. Sie erschien 1940 bis 1945 in über fünfzehn Sprachen mit einer Auflage von fast zwei Millionen in den Jahren 1941/1942. Einen Grossteil davon bildete die französische Ausgabe[2], auf die hier Bezug genommen wird.

Signal war für das Ausland bestimmt. Die Zeitschrift wurde vom Oberkommando der Wehrmacht (OKW) im *Deutschen Verlag Berlin* herausgegeben, das sich damit ein eigenes Organ unabhängig von Staats- und Parteistellen schaffen wollte. Den besiegten Völkern sollten die deutschen Absichten für ein Großeuropa nahe gebracht werden und ohne Einmischung staatlicher Stellen (insbesondere des Reichspropagandaministeriums unter Joseph Goebbels) oder Parteiinstanzen vermittelt werden. *Signal* wurde in einer für damalige Verhältnisse sehr modernen Aufmachung herausgegeben, erschien 14-tägig und wurde durch die aufwendige Gestaltung[3] und das große Verbreitungsgebiet zur „führenden ausländischen Bilderzeitung" (so der Herausgeber)[4]. Verbreitung und Vertrieb von *Signal* begannen im April

* Die Abhandlung ist eine gekürzte Fassung der Studie „Europäische Einigungsbestrebungen vom Mittelalter bis ins 20. Jahrhundert", die in Kürze im Universitätsverlag Karlsruhe erscheinen wird. Vgl. hierzu auch Majer/Höhne, in: Journal on European History of Law 4/2013, S. 15 – 23.

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1 Vergleiche insbesondere: Rainer Rutz, Signal, eine deutsche Auslandsillustrierte als Propagandainstrument im Zweiten Weltkrieg, Essen 2007. Moll, Martin: Signal, die NS-Auslandsillustrierte und ihre Propaganda für Hitlers „Neues Europa", in: Publizistik Nr. 31 / 1986, S. 357ff. Wilke, Jürgen: Massenmedien und Journalismus, in: Geschichte und Gegenwart, Bremen 2009, S. 180ff.

2 Im Besitz der Verfasser.

3 Das Format betrug 27 x 36 cm (knapp DIN-A3) und war teilweise in Farbdruck gestaltet, damals eine Seltenheit. Sie enthielt zahlreiche Karten, Bilder von der Front, politische Aufsätze, Regionales, Mode, Freizeit, Karikaturen, aber auch leichte Unterhaltung (siehe z.B.: Cover: Das Kochen ist neben der Filmarbeit die Lieblingsbeschäftigung des Ufa-Stars Marika Rökk, Signal Heft 5, März 1944, S. 32.).

4 Entstanden war die Idee in einem Kreis von Werbefachleuten, Abwehrspezialisten und Psychologen, der Ende 1939 in der Abteilung für Wehrmachtspropaganda im OKW tätig war. In Kooperation mit der Presse und der Nachrichtenabteilung des Auswärtigen Amts hatte dieser Kreis schon Anfang 1940 diese Idee durchgesetzt. Zur Entstehungsgeschichte im Detail: Moll, Martin: Signal, die NS-Auslandsillustrierte und ihre Propaganda für Hitlers neues Europa, in: Publizistik S. 359ff, Fn.5.ff.).

1940, zunächst auf englisch, französisch, italienisch und deutsch, in mehreren zehntausend Exemplaren. Später (bis 1942) kamen Ausgaben in spanisch, bulgarisch, schwedisch, ungarisch, rumänisch, kroatisch, griechisch, finnisch, slowakisch, serbisch und russisch dazu. *Signal* war besonders in den Ländern des Balkans und des Mittelmeerraums, die bis dahin eine nur wenig entwickelte Presselandschaft kannten, populär. Die französische Auflage erreichte auf ihrem Höhepunkt 1943 eine Auflage von 800.000 von insgesamt 2,5 Millionen. *Signal* wurde nicht nur auf dem Kontinent, sondern auch im Nahen Osten, Südamerika, Japan und den USA verkauft. Über England wurde die Zeitschrift zu Propagandazwecken per Flugzeug abgeworfen. Die deutschsprachige Ausgabe erschien nicht im Reichsgebiet, sie war nur für Auslandsdeutsche sowie für die Schweiz bestimmt.[5]

Die Zeitschrift verfolgte zwei Strategien: Einmal in allen Ausgaben gleichlautende Aufsätze abzudrucken, die ein „Sonntagsgesicht" Deutschlands zeigten, sowie eine ausführliche Kriegsberichterstattung, die Deutschland auf dem siegreichen Weg in ganz Europa beschrieb. Autoren für die Kriegsberichterstattung waren Mitglieder der Propagandakompanien der Wehrmacht (PK), die nicht nur „spannende" Bilder vom Krieg, sondern auch vom Alltag in den besetzten Gebieten lieferten (z.B. Begrüßung der einmarschierenden Wehrmacht durch die einheimische Bevölkerung etc.)[6]. Für Politik und Unterhaltung war ein Heer von festangestellten und freien Mitarbeitern tätig, die nach strengen Kriterien, sowohl fachlich wie ideologisch, ausgewählt waren. In dieser für die Auslandspropaganda wichtigsten Zeitschrift wurden nur ausgesuchte Journalisten als Mitarbeiter berufen. Diese hatten, der üblichen Journalistenausbildung folgend, zunächst ein fachwissenschaftliches Studium, ein einjähriges Volontariat bei einer Zeitung, zusätzlich jedoch eine dreimonatige Ausbildung an der 1935 gegründeten sog. Reichspresseschule zu absolvieren. Diese Schule war eine Einrichtung des Reichsverbandes Deutscher Presse (des seit dem Kaiserreich bestehenden Berufsverbandes der Journalisten in Deutschland), der durch die Gleichschaltung in die Reichspressekammer eingegliedert wurde. Die Reichspresseschule galt als eine Art „Sieb" für erfolgreiche Karrieren. Es wurden praktische Schulungen betrieben (Recht, Lokales, Sport, Betriebsbesichtigungen, Paramilitärisches und Ideologisches), die u.a. „weltanschauliche Festigung" und „Erkenntnis des Ernstes unseres Berufes" vermitteln sollten. Die Journalisten sollten eine Art „schreibender Soldat" werden, dieser sollte „treu, gehorsam und tapfer" sein. Allerdings wurde die Schule schon 1943 wieder geschlossen.[7]

Es waren somit für *Signal* namhafte Autoren, Zeichner und Fotographen, alles „Spitzenkräfte des deutschen Bildjournalismus" tätig.[8] Außerdem schrieben über hundert Gastautoren aus Politik, Wissenschaft und Kultur, aus der SS, der Organisation Todt oder des Reichsarbeitsdienstes (RAD) für *Signal.*[9] Nicht wenige der Gastautoren zählten nach 1945 zu der ersten Garde der westdeutschen Medien[10]. In der diesem Abschnitt folgenden Dokumentation werden auszugsweise einige Artikel wiedergegeben, um den Originalton der damaligen Zeit zu charakterisieren.

Die hauptsächlich über *Signal* verbreiteten großeuropäischen Pläne der NS-Führung wurden in einer nach allen Regeln der Propaganda aufbereiteten Sprache[11] verbreitet, die die NS-Pläne für jedermann populär machen sollte. Die Texte enthielten nur positive Wendungen (z.B. „Vormarsch", „Aufbau", etc.); kritische Äußerungen sind nicht zu finden. Vielfach wurden Begriffe verwendet, wie sie auch heute in der europäischen Diskussion gebraucht werden (z.B. „europäische Einigung", „föderales Europa", „Europäische Wirtschaftsgemeinschaft"). Diese hatten aber damals, wie zu zeigen sein wird, oft eine gänzlich andere Bedeutung als heute in den Zeiten einer allgegenwärtigen Europäischen Union. Auch die Worte „Deutschland" und „Nationalsozialismus", wurden in *Signal,* entweder propagandistisch geschickt oder nur selten oder gar nicht verwendet. Es wurde immer von „europäischen Projekten und Plänen" gesprochen. Wo notwendig wird daher diesen NS-Begriffen die jeweilige „Übersetzung" nach den heutigen Begriffen beigegeben.

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[5] Näher: Moll.

[6] Vergleiche das Titelbild: „Es gibt auch Süßigkeiten. Italienische Jungen und Mädel umringen einen deutschen Marketenderwagen. Sie wissen, dass er – neben den üblichen Lebensmitteln – auch immer eine kleine Delikatesse für sie hat." Aufnahme PK Opitz, in: Signal, Heft 9 / 1944 (Mai), letzte Umschlagseite (Vergleiche auch das Cover mit einem Bild von Willi Ruge, Kameraden, Signal Heft 14 / 1941, S. 10), Bilder auf der Rückseite.

[7] Näher: Jürgen Wilke: Massenmedien und Journalismus, in: Geschichte und Gegenwart, Bremen 2009, S. 182ff, 191ff.

[8] Ausführlich: Rutz.

[9] Näher: Rutz, S. 148ff.

[10] Z.B. Walter Kiaulehn, Kurt Zentner, Hans Hubmann, Giselher Wirsing u.a. Die Schriftleitung bestand aus 10 bis 15 Personen, die Redaktion zählte ca. 200 Mitarbeiter. Die zur Wehrmacht eingezogenen und zur Dienstleistung beim Verlag abkommandierten Redakteure wurden zur „Signal-Staffel" zusammengefasst; dazu kamen noch Sondergruppen im Rahmen der Propaganda-Einsatzleitung, die auf die Kriegsschauplätze verteilt waren. Moll, S. 378 u. 386.

[11] Die Formulierungen wurde im Auswärtigen Amt mit Hilfe von Beratern aus dem Mitarbeiterstab von *Signal* erarbeitet.

Insgesamt sollte durch die Darstellung Deutschlands das Bild einer fürsorglichen Großmacht propagiert werden, die Ruhe, Ordnung und Wohlstand in Europa gewährleistete[12]. Die Kriegsberichterstattung zeigte Deutschland als Garanten der Sicherheit in ganz Europa. Der Abgrenzung gegen den „Feind" sind viele Polemiken gewidmet, wie z.B. der Diffamierung Englands und der USA und ihres „dekadenten Kapitalismus'"; auch wurden ständig Schreckensvisionen des „russischen Bolschewismus" beschworen. Ferner sollten neue Ideen zum Wohle aller verwirklichte werden. („Europa – ein blühender Garten", wie es in einem Artikel heißt). Die Zeitschrift griff viele populäre Tendenzen und Projekte auf, die schon in der Weimarer Zeit aktuell waren (neue Formen des Städtebaus) und als Vorzeigeobjekte dienten (sog. Gartenstädte). Neue Pläne und Infrastrukturmaßnahmen, Eisenbahnstrecken und andere große Projekte wurden angekündigt,[13] die Arbeiter sollten besondere Förderung erfahren (z.B. durch Wohnsiedlungen in gelockerter Bauweise mit Grünflächen, öffentliche Verkehrsmittel, damit kein Arbeiter länger als 15 Min. zu seiner Arbeitsstelle unterwegs sein müsse).

Man kann annehmen, dass solche staatssozialistisch orientierten Projekte offene Ohren fanden, zumal in vielen Staaten Europas ein hoher Rückstand an Modernisierungsmaßnahmen und Sozialstaatlichkeit bestand. Als „Rahmenbedingung" für solch eine „wohltätige" Politik wurde die Vormachtstellung Deutschlands betont, die alle Lebensbereiche durchdringe. Insgesamt gesehen sollte den europäischen Völkern das Leben unter der Besatzung schmackhaft gemacht, ja als Vorteil dargestellt werden – im Gegensatz zu den angeblich schlechten Lebensbedingungen in anderen Ländern. Neben Informationen über Städtebau, Verkehrswesen, Energieversorgung, Gartenkultur etc. fanden die Leser auch Aufsätze aus Wissenschaft und dem Sozial- und Wirtschaftsleben. Im Unterhaltungsteil versuchte die Redaktion trotz Pressenzensur[14] ein eigenes Profil zu gewinnen und sich vom uniformen Bild der deutschen Inlandspresse[15] abzugrenzen.

Was die Wirkung der politischen Propaganda von *Signal* betrifft, liegt kein Material vor. Die bisherigen Untersuchungen konzentrieren sich auf die Entstehungsgeschichte und die Kommentierung des Inhalts. Die 2010 erschienene Studie „Das Amt"[16] erwähnt *Signal* nicht einmal.[17] Empirische Untersuchungen fehlen. Die Wirkung der politischen Propaganda muss (neben der Propagierung wirtschaftlicher und sozialer Großprojekte) jedoch sehr groß gewesen sein. Dies zeigt allein die geschickte Aufmachung, die stets das Gemeinsame der europäischen Völker hervorhob, sowie die hohe Auflage, die von der englischen Propaganda neidvoll als sehr effektiv bezeichnet wurde, dem England nichts entgegenzusetzen habe.

2. Die Pläne der NS-Propaganda im besetzten Europa anhand der Leitartikel in *Signal*

Bei den nachfolgenden Erörterungen muss berücksichtigt werden, dass die in der Presse verlautbarten europäischen Pläne des Regimes für die Zeit nach dem Krieg nicht der eigentlichen Absicht der NS-Spitze entsprachen. Die in der Öffentlichkeit verbreitete Linie war, wie sie vor allem in *Signal* wiedergegeben wurde, auch diejenige, die vom OKW und vielfach auch vom Auswärtigen Amte verfolgt wurde. Intern standen diese Stellen jedoch in ständigem Widerspruch zur politischen Spitze. Hitler und Himmler waren, wie noch im einzelnen zu schildern ist, strikt gegen jedes europäische Projekt unter Beteiligung der europäischen Völker, und verfolgten ausschließlich auf Gewaltherrschaft beruhende Ziele eines nicht näher definierten *europäischen Großraumes* (der von deutschen Völkerrechtlern seit 1939 wissenschaftlich „aufbereitet" worden war).[18] Das theoretische Gerüst für diese Konstruktion lieferte die später noch zu erörternde Abhandlung des bekannten Staatsrechtslehrers Carl Schmitt: Völkerrechtliche Großraumordnung und Interventionsverbot raumfremder Mächte, Wien 1939. Schmitt führte dort aus, dass das westliche Völkerrecht in dem vom NS beherrschten Großraum (gemeint, aber nicht genannt war Osteuropa) keine Geltung habe und auch eine Intervention dritter

[12] Hier einige Beispiele dieser „Zukunftsvisionen": „Où va l'Europe" (Nr.12,1943, S. 23ff.) Ein Artikel über die historische Entwicklung des europäischen Kontinents. „Le bouclier devant l' Europe" (Nr.16, 1943, S. 2ff.) Die deutsche Armee bildet einen Schutzschild für den europäischen Kontinent, um den Bolschewismus und den Manchester-Kapitalismus abzuwehren.

[13] Dazu folgende Beispiele: „Un sensationel projet ferroviaire" (1943, Nr.6, S. 39ff.) Ein Artikel über ein künftiges europaweites Eisenbahn-Hochgeschwindigkeitsnetz auf Breitspur. Vorgestellt wird der künftige Superbahnhof von Paris unter den Champs-Elysées. „Les dimensions de l' Europe" (Nr. 8, 1943, S. 36ff.) Ein Artikel über europäische Dimensionen und Gemeinsamkeiten. Es soll sichtlich ein europäisches Bewusstsein und eine europäische Identität geschaffen werden. „L' Europe, centre de la circulation aérienne mondial" (Nr.1, 1942, S. 41ff.) Ein Artikel über die zu erwartende europäische zivile Luftfahrt nach dem Krieg. „L'Europe vous parle!" (Nr.6, 1942, S. 42ff.) Ein Artikel über die Entwicklung des europäischen Rundfunks, und das was technisch noch kommen wird. „Hier – aujourd'hui – demain. Trois chapitres d'économie européenne» (1942, Nr.23/24, S. 61ff) Europa als wirtschaftliche Einheit. «Nouvelles énergies pour l' Europe» (1941, Nr.18, S. 40ff) Ein Artikel über die Energiereserven Europas und die nach dem Krieg gesicherte gerechte Verteilung.

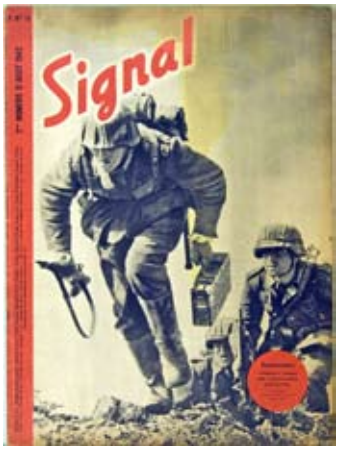
[14] Zur Presselenkung im III. Reich vergl. Rudolf Stöber, in: Bernd Heidenreich / Sönke Neitzel (Hg.) Medien im Nationalsozialismus, Paderborn 2010, S. 275ff. In dem Sammelband ist allerdings Signal nicht erwähnt, wohl weil es im Inland nicht verkauft wurde.

[15] Moll, S. 378.

[16] Eckhard Conze / Norbert Frei / P. Hayes / Moshe Zimmermann: Das Amt und die Vergangenheit, Berlin 2010.

[17] Das Werk befasst sich ausschließlich mit der Verfolgung und Ermordung der Juden. Die Mitwisserschaft des Amtes wurde dadurch gewährleistet, dass allen Armeeoberkommandos der besetzten Gebiete Vertreter des AA zugeteilt waren, die Material für Propaganda erfassen und die Militärs beraten sollten (Conze u.a., S. 208f). Frühjahr 1943 wurden diese Vertreter abgezogen, wohl deshalb, weil die Berichte der AA-Vertreter die ganze Brutalität der Besatzungsherrschaft zeigten (Conze u.a., S. 211). Andere Aspekte der Gewaltpolitik (Zwangsarbeiter, Kriegsgefangene) werden in der Studie nicht berücksichtigt. Sie vermitteln auch keinen Überblick: Geschäftsverteilungspläne und Organisationsschemata fehlen völlig. Vgl. die Kritik von Hans Mommsen, in: Süddt. Zeitung, 27.12.2010 und Frankfurter Rundschau 16.2.2011.

[18] Vergl. näher: Majer, Diemut: Die Perversion des Völkerrechts [im NS], Jahrbuch des Instituts für Deutsche Geschichte der Universität Tel Aviv, 1985, Bd. XIV S. 139ff.



Mächte (d.h. eine Invasion der Alliierten) ausgeschlossen sei. Im Großraum herrsche nur Deutschland wegen seiner „ordnungsstiftenden Kraft“, die besiegten Staaten müssten deutsches Recht anwenden. Diese Überlegungen ließen alle besiegten und verbündeten Staaten im Ungewissen, wie ihre Stellung in dem neuen „Großraum“ sein würde. Reduktion auf einen Satellitenstaat, föderale Mitwirkungsrechte, Verlust der Staatlichkeit insgesamt? Trotzdem klammerten sich die Verbündeten und die Verwaltungen der besetzten Gebiete [19] an diese als Fassade der in *Signal* veröffentlichten Bekundungen, während die eigentlichen Ideen Hitlers nie öffentlich erläutert wurden. Aufgrund dieses „Ideenvakuums“ schossen europäische Ideen und Entwürfe vielfältiger Art wie Pilze aus dem Boden. Alfred Rosenberg wollte den Begriff der Nation in den Mittelpunkt der europäischen Überlegungen rücken [20]. Der italienische Faschismus hingegen stellte die europäische Kultur als entscheidend für das neue Reich dar: Europa solle die Vorrangstellung in der Weltzivilisation wiedergegeben werden.

Signal präsentierte hierzu ab 1940 geradezu „schwärmerische Pläne“ zur Neuordnung Europas, es herrschte eine Aufbruchs- und Umbruchsstimmung unter Kaschierung der wirklichen Kriegsziele. Insbesondere stand die Sicherung wirtschaftsimperialer Pläne (Rohstoffe usw.) im Vordergrund; für Südosteuropa erhoffte man sich eine Revision territorialer Fragen [21]. Überhaupt waren die faschistischen Europaideen in die gängigen Ideen vom Abendland gut eingebunden.[22] Die NS-Propaganda nutzte diese Europavorstellungen auf höchst wirksame Weise in ihrer Polemik gegen die alliierten Mächte, indem, neben der Zeitschrift „Signal“, zahlreiche wissenschaftliche Gesellschaften und Forschungsinstitute, sowie durch die Kollaboration von Behörden und Einzelpersonen mit der Besatzungsmacht in den besetzten Ländern (die eher europafreundlich [23] denn deutschfreundlich war), eine Art NS-Europa-Ideologie, verschränkt mit konservativen Europavorstellungen in diesen Ländern, verbreitet wurde. Diese Europaidee wiederum wurde zu einer Art Begleitmusik zu den sonstigen politischen Bekundungen des Regimes. Der Europagedanke sollte auch auf die Wirtschaft, die Wissenschaft und die Jugendorganisationen, auf die Wehrmacht und die Partei ausgedehnt werden, denen sich in einer „Großraumwirtschaft“ völlig neue Perspektiven eröffnen sollten. All das stand, wie zu zeigen sein wird, auf tönernen Füßen. Das Regime duldete zwar einen gemäßigten Europakurs, alle eigenständigen Europainitiativen wurden jedoch im Keim erstickt. An eine ernsthafte Europapolitik wurde in der NS-Führung, überhaupt nicht gedacht.[24]

Nach Beginn des Russlandkriegs kam die „Kreuzzugidee“ auf; die Propaganda argumentierte verstärkt für ein „Europa gegen den Bolschewismus“. Hitler und Ribbentrop beschworen die „Vision eines neuen Europa“; wie sehr diese Gehör fand, zeigt die Tatsache, dass 125.000–200.000 Freiwillige (aus Norwegen, Spanien, Frankreich, Italien) der Waffen-SS beitraten. Ribbentrop schlug am 21. März 1943 einen „Europäischen Staatenbund“ vor, was aber kein Versprechen auf Verwirklichung bedeutete.[25]

In diesen „Europa-Träumen“ war keines der „aktuellen“ Probleme erwähnt, sei es, dass die NS-Propaganda Hitlers Pläne – völlig a-historische Vorstellungen von einem Lebensraum im Osten – nicht kannte oder einfach verschwieg. Fest stand nur, dass die Juden aus Europa verschwinden mussten. In „Grundgedanken eines Plans für das neue Europa“ vom 7. Juni 1943 schrieb der Gesandte des Auswärtigen Amts, Hans Frowein, dass zur Lösung der Judenfrage eine europäische Konvention sowie eine Durchführungsorganisation zu schaffen seien, die so lange zu bestehen habe, „bis die Frage durch völlige Ausscheidung des jüdischen Elements aus Europa gelöst ist“ [26] – also eine bürokratische Lösung mit geregelter „Ausführung“. Inzwischen hatte die Ermordung der Juden im Osten schon seit zwei Jahren begonnen. Derweil rührte die NS-Propaganda die Werbetrommel nach wie vor für eine schöne, neue Welt. Die offizielle Europapropaganda stellte die innere Struktur eines Nachkriegseuropas vor, das Grundrechte des Einzelnen enthalten sollte. Ausgerechnet das SS-Hauptamt, Gruppe D, Planungsstelle „Europa-Charta“ entwarf 1944/45 eine Europa-Charta, die u.a. sechs „Grundfreiheiten“ und sieben „Grundrechte“ formulierte, u.a. „Freiheit des Glaubens“ und „Recht des Menschen auf Eigentum“ sowie auf „freie Entfaltung seiner Kräfte und Zugang zu allen Berufen“ (!).

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[19] Vergl. näher: Wolfram Wette: Deutsche Kriegspropaganda im Zweiten Weltkrieg, Die Beeinflussung der südosteuropäischen Satellitenstaaten Ungarn, Rumänien und Bulgarien, in: Manfred Messerschmidt (Hg.) Militärgeschichte. Probleme – Theorie. Stuttgart 1982, S. 311f.

[20] Alfred Rosenberg, einer der Hauptideologen, sagte 1934: Ausgangspunkt sei die Tatsache der Nation, wie ein Volk seine Idee des Nationalismus prägt, stelle die entscheidende kulturgeschichtlich und politische Tatsache europäischer Geschichte dar. Dazu Wolfgang Schmale: Geschichte Europas, Wien-Köln-Weimar 2000, S. 115.

[21] Wette, Wolfram, S. 139ff.

[22] Schmale, S. 117ff.

[23] Die Kollaboration in den verbündeten und besiegten Staaten verfolgte ebenfalls das Ziel eines vereinten Europas, aber ohne Aufgabe nationaler Identität, so in Frankreich, Belgien, Rumänien.

[24] Schmale, S. 120.

[25] Schmale, S. 123.

[26] Schmale, S. 123.

Mit dem Kriegsverlauf seit 1943 lässt sich eine starke Visualisierung der Europaidee feststellen (Plakate, Karten, Filme), um deren Wirkung bei der Bevölkerung zu verfestigen. Auch die Propaganda trug dem Rechnung: Nach der Niederlage von Stalingrad im Februar 1943 kämpfte Deutschland nicht mehr, wie noch 1942, „gegen den Bolschewismus", sondern „für Europa".[27] Beide Schlagworte bedeuteten letztlich dasselbe: Mobilisierung aller Kräfte gegen die Sowjet-Union.

Die Europapropaganda von Signal war keineswegs nur für ausländische Leser bestimmt, sondern wurde auch im Reichsgebiet betrieben, wo Presseartikel und Fachzeitschriften die neue Reichsidee priesen, die mit den früheren paneuropäischen Bewegungen nichts gemein habe. Ein europäischer Zusammenschluss sei unmöglich, da dafür nur rassisch gleichwertige Völker in Frage kämen. Das neue Deutsche Reich sei einmalig, es bekenne sich zum *Ethos der Macht*, es vermittele das Bewusstsein der *Weite*. „Dabei hat das Reichsvolk erkannt, dass die ihm zugemessene Weite seit einem Jahrhundert der Großraum ist … Durch seinen Ausgriff … hat es … wieder höchste Verantwortung auf sich genommen. Mit dieser verbindet sich seit alters her der Auftrag zur Führung … Der erlesene Menschenschlag, dem dies gelingt, bildet den politischen Adel des werdenden Reiches, nur durch ihn wird das neue Europa geformt."[28] Die Europaideen in Weimar beruhten auf Illusionen, die europäischen Ideen, wie sie aus der verwandelnden Kraft dieses Krieges entstünden, (seien) eine Wirklichkeit der Aufgaben … „Zwischen Illusionen und Aufgaben (sei) Feindschaft gesetzt vom Anbeginn der Weltgeschichte."[29]

3. Die weitere Entwicklung der europapolitischen NS-Propaganda, insbesondere seit 1943

Das Russlandbild im NS-Staat

Ein wesentlicher Teil der offiziellen NS-Propaganda im Hinblick auf ein künftiges Europa bestand, wie bereits erwähnt, aus der Warnung vor dem „Bolschewismus". Der frühere Verbündete, der infolge des Nichtangriffspakts vom August 1939 bis 1941 als Freund Deutschlands betrachtet wurde, musste nun als Feind begriffen werden. Es wimmelte von negativen Schlagworten, eine neue „Russland-Forschung" wurde aufgebaut[30]. Diese Politik bedeutete allerdings nicht eine Kehrtwende, da schon die Russlandforschung in der Vorkriegszeit die Sowjet-Union trotz freundlicher Beziehungen zu Deutschland stets als eine Bedrohung für Europa gesehen hatte. Die „Forschung" im NS-Staat, wie sie in den damaligen Zeitschriften wie z.B. *Jahrbücher für die Geschichte Osteuropas* (bis 1935), *Jahrbücher für Kultur und Geschichte der Slawen*, *Zeitschrift für osteuropäische Geschichte* (die beiden letztgenannten später vereinigt in einer neuen *Zeitschrift für Osteuropäische Geschichte* bis 1941), *Historische Zeitschrift,* sowie *Nation und Staat* betrieben wurde, war allerdings pseudowissenschaftlicher Art. Im Vordergrund standen die Außenpolitik der Sowjetunion und ihr Verhältnis zu den anderen Staaten; die NS-Autoren machten daraus hochpolitische Aufsätze, oft ein Mischmasch aus deutschnationaler, antiliberaler und völkischer Blutideologie, insgesamt voll von rassistischen Vorurteilen.[31] Es ging darum, russische Geschichte als Geschichte einer Bedrohung Europas in Verbindung mit angeblicher Kulturlosigkeit und innerer Schwäche darzustellen; als Folge predigte man die Ausklammerung Russlands aus dem „europäischen Kulturkreis".[32] Seit Kriegsbeginn 1941 trat die „jüdisch-bolschewistische Komponente" hinzu, die als eine weitere Verstärkung der Bedrohung gesehen wurde. Die „normal", herkömmliche Russlandforschung entsprach mehr oder weniger diesem Negativbild. Schon seit Jahren hatte sie mangels Interesse und der Geringschätzung der Fachleute nur ein bescheidenes Dasein gefristet und das „traditionelle" Russlandbild als negativ festgeschrieben.[33] Nach Kriegsausbruch zog sich die Wissenschaft aus der Erforschung der russischen Geschichte zurück. Man beschränkte man sich auf die aktuellen Probleme seit der Russischen Revolution von 1917 (sog. Sowjetforschung), die aber nur höchst oberflächlich erörtert wurden. Man suchte nicht einmal die zahlreichen Negativ-Klischees weiter zu fördern, sondern Staats- und Parteistellen ignorierten einfach die Dinge und verzichteten auf eine Infiltration der Fachwissenschaft, die aber ebenfalls an langfristigen Russlandforschungen wenig Interesse zeigte.[34]

Hitlers Forderungen gegenüber der Sowjet-Union waren „eindeutig propagandistisch, nicht programmatisch" orientiert (Broszat); es herrschte in der NS-Führung ein Mangel an Konzeption und Neugestaltungswillen[35]. Die Theorie Hitlers von einem

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[27] Schmale, S. 128.

[28] In der o.g. Studie folgen Exzerpte aus Signal zu politischen, wirtschaftlichen und militärischen Themen.

[29] Karl Reichard Ganzer: Das Reich als europäische Ordnungsmacht, zit. n: Foerster, 1963, S. 247ff.,250,252. Der Autor war geschäftsführender Präsident des „Reichsinstituts für die Geschichte des neuen Deutschlands" (Anm.d.V.)

[30] Camphausen, Gabriele, Die wissenschaftliche historische Russlandforschung im Dritten Reich 1933–1945, Diss. Frankfurt / Bern / New York / Paris 1990 (Europäische Hochschulschriften Band 418). Das Buch ist im wesentlichen eine Geschichte der verschiedenen Forschungsinstitute und ihrer Veröffentlichungen; die bekanntesten Historiker schrieben in ihnen (S. 148, 246, 316f, 379). Inhaltlich werden negative Bilder ständig wiederholt, pseudowissenschaftliche Urteile werden erstellt (S. 317).

[31] So z.B. Ernst Seraphim: Der Sturz Bismarcks und die russische Politik, in: Vergangenheit und Gegenwart 31, 1941, S. 197ff.; ders.: Zar Nikolaus II. und Graf Witte. Eine historisch-psychologische Studie, in: Historische Zeitschrift 161/1940, S. 277 ff.; Werner Hasselblatt: Nie ist das russische Volk auch nur zur Vorstufe einer politischen Union gelangt. Die Russen als Volk, in: Nation und Staat 15/1942, S. 352 ff. Weitere antirussische Aufsätze in: Volk und Reich 1941, S. 368 ff.

[32] Camphausen, S. 367

[33] 1933 bestanden in Deutschland nur vier Lehrstühle für Russlandforschung, die 1939 auf nur noch zwei Lehrstühle und zwei Extraordinarien geschrumpft waren. Camphausen, S. 379ff.

[34] Insgesamt herrschte seit 1941 in den Zeitschriften Abneigung, Desinteresse und Planlosigkeit. Offenbar wenig beachtet, bestanden allerdings die „Jahrbücher für die Geschichte Osteuropas" mit einigermaßen wissenschaftlichen Niveau weiter fort; näher: Camphausen, S. 397. Vergl. zum Russlandbild auch: Hans-Erich Volkmann (Hg.), Das Russlandbild im Dritten Reich, zweite unveränderte Auflage, Köln – Weimar – Wien 1994.

[35] Camphausen, S. 398.

„Lebensraums im Osten“ sah keine staatlichen Strukturen vor; unklar blieb auch, was mit der Bevölkerung der besetzten Gebiete im Osten geschehen sollte. Die wahrscheinlichste Vermutung ist, wie man Andeutungen des sog. Generalplans Ost des RFSS entnehmen kann, ihre Vertreibung hinter den Ural, um Platz für deutsche Siedler zu schaffen. Hitler selbst hatte dies 1937 in einem Gespräch mit der Wehrmacht deutlich gemacht (sog. Hoßbach-Protokoll). Zusätzliche Faktoren für die Dezimierung der einheimischen Bevölkerung waren auch Hunger und Kälte, wie die deutsche Wehrmachtsführung schon im Herbst 1941 feststellte und „billigend in Kauf“ genommen hatte, da die Truppen unmittelbar aus den besetzten Gebieten versorgt werden sollten. Auch die in *Signal* enthaltenen Aufsätze über das Leben in der Sowjetunion gingen über Polemiken nicht hinaus. Die Bilder zeigen zerlumpte sowjetische Kriegsgefangene oder Wehrmachtssoldaten, die in den Dörfern eine Kommandozentrale einrichten und von den Einwohnern bestaunt werden.

Ab Juni 1941 wurden die Pläne zur Neuordnung Europas mit dem Kampf gegen den Bolschewismus gekoppelt. Es gehe nun, so Goebbels,[36] um einen „Aufbruch Gesamteuropas“ und um die Waffenbrüderschaft in einer europäischen Dimension. Im Rundfunk hieß es das, dass „Europas Soldaten“ im Osten kämpften; ein weiteres Kriegsziel war es, die Dauerkonflikte auf Balkan zu unterbinden.[37]

Europa sei eine „Kampfgemeinschaft“ („communauté de lutte“).[38] So beschwor die Zeitschrift die „Festung Europa“ gegen die Sowjetunion, die, wie seinerzeit die Hunnen und die Mongolen, die europäische Zivilisation bedrohten.[39] 1944 beschwor G. Wirsing ein Europa des Friedens: *Pourquoi nous nous battons?* – Wofür wir kämpfen? *Pour mettre un terme ŕ ces guerres civiles et fratricides.* – Um den all den Bürger- und Bruderkriegen der Vergangenheit ein Ende zu machen.[40] Ein gigantischer Prozess der europäischen Einigung, tönte es in *Signal*, sei im Gange; doch könne dieser nicht mit Gewalt, sondern nur mit Zustimmung aller Erfolg haben.[41]

Solange die Wehrmacht auf dem Vormarsch war, war diese Propaganda integrierend. Nach der Niederlage von Stalingrad entstand ein „machtleerer Raum“.

Die NS-Propaganda wurde wirkungsloser, je länger sie dauerte. Während des gesamten Krieges verschleierte die NS-Propaganda die wirklichen Kriegsziele: Europa war für Hitler, wie später näher zu erläutern ist, nur als ein „Germanisches Reich deutscher Nation“ (ohne Slawen) denkbar. Alle nichtgermanischen Völker waren nur „Hilfsvölker“; von einer irgendwie gearteten Autonomie konnte nicht die Rede sein.[42] Der Gegensatz zu den Verlautbarungen der offiziellen NS-Propaganda konnte nicht größer sein. Er durfte jedoch den Verbündeten nicht offenbar gemacht werden, da man die „Hilfsvölker“ dringend brauchte.

4. Die Bündnispartner des NS-Regimes: Finnland, Rumänien, Norwegen – Ein Europa unter deutscher Führung?

Die NS-Propaganda, wie sie in Signal verkündet wurde, war, wie ausgeführt, in gewisser Weise integrierend. Nach der Niederlage von Stalingrad entstand ein „machtleerer Raum“. Verstärkt warb die Propaganda um die Verbündeten, sowie um die kollaborationswilligen Kräfte in den besetzten Ländern. Von einer irgendwie gearteten Autonomie für diese Gebiete konnte jedoch keine Rede sein.[43] Die NS-Spitze verfolgte weiterhin unbeirrt ihr Ziel eines germanischen Reiches deutscher Nation (ohne Slawen). Der Gegensatz zu den offiziellen Verlautbarungen konnte nicht größer sein.

An diese Verlautbarungen von einem Kampf Europas gegen den Bolschewismus klammerten sich die Verbündeten auch noch nach der Niederlage von Stalingrad. Noch wähnte man sich auf der Seite des Siegers. Stalingrad wurde als einmalige Niederlage und nicht als Vorbote des künftigen Verlustes des gesamten Krieges betrachtet. Die Schlagworte von einer „europäischen Armee“ verdeckten die schlechte Behandlung der verbündeten Militärkräfte (Italien, Rumänien) durch die Wehrmacht. Das Schweigen Berlins über eine künftige europäische Ordnung hatte jedoch zur Folge, dass auch schon vor Stalingrad die Bündnispartner von Berlin nähere Erläuterungen über ein Nachkriegseuropa unter deutscher Hegemonie forderten. Die Unzufriedenheit der Verbündeten wurde noch dadurch verstärkt, dass immer mehr Beschwerden über die schlechte Behandlung durch die Wehrmacht bekannt wurden.[44] Im Auswärtigen Amt (AA) war man auf die Vorstellungen der Verbündeten vorbereitet: Eine kleine Gruppe hatte 1942 einen Friedensplan für die Nachkriegszeit entwickelt, der den besetzten Ländern eine gewisse Autonomie verhieß, der jedoch von Hitler verworfen wurde; solche Friedensvorbereitungen seien nicht notwendig. Er könne selbst in zwei Stunden diese diktieren, wenn „die Zeit reif sei“. Stattdessen gingen die NS-Propagandisten zu einer intensiven Kulturdiplomatie zur „Beruhigung“ der Verbündeten über, die als Ersatz für ernsthaftes politisches Engagement dienen sollte. (Gründung eines europäischen Jugendverbandes, Einigung über moderne Verwaltungsstrukturen, europäischer Schriftstellerkongress etc.) Besondere Aktivitäten zeigte Italien, das eine einheitliche politische Gemeinschaft auf dem ganzen Kontinent wünschte.

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[36] Zit. n. Wette, S. 323.
[37] Wette, S. 320.
[38] So die Überschrift eines Artikels in Signal Nr. 5 1942, S. 12ff.
[39] Sous la pression terrible venue des steppes orientales et de l’Atlantique, nos nations et notre entendement atteignent une maturité plus rapide. G. Wirsing: Nous autres, européens, in: Signal Nr.6 1943, S. 21ff., 38.
[40] Signal Nr.2 1944.
[41] G. Wirsing: Nous autres, européens, in: Signal Nr.6 1943, S. 21ff, 38.
[42] Wette, S. 325.
[43] Wette, S. 325.
[44] Zusammenfassende Darstellung bei: Mazower, Mark: Hitlers Imperium. Europa unter der Herrschaft des Nationalsozialismus, München 2009, S. 330ff., auf die sich der folgende Text stützt.

Hitler, der alle Autonomiebestrebungen auf dem Kontinent strikt ablehnte, befahl jedoch das Ende auch dieser „Ersatz"-Aktivitäten, d.h. das Ende aller pro-europäischen Kulturdemonstrationen – auch hier in völligem Widerspruch zu den Tatsachen, da solche Initiativen ohnehin viel zu spät kamen. Die alliierte Invasion 1943 in Nordafrika, die vollständige Besetzung Italiens 1944 (das im August 1943 auf die Seite der Alliierten übergegangen war) und Frankreichs (Besetzung von Vichy-Frankreich), versetzten Deutschlands Verbündete in weitere Unruhe. Das neutrale Spanien rief dazu auf, die Annektierungen im Osten aufzugeben und wieder unabhängige Nationalstaaten zu schaffen. In Ungarn und Rumänien begannen diplomatische Absetzbewegungen, deren die NS-Propaganda trotz aller „europäischen Visionen" nicht Herr wurde.[45]

Eine Beruhigung der aufgebrachten Verbündeten war nicht zu erreichen, da das Schicksal der kleinen Völker in Osteuropa nach wie vor im Unklaren blieb. Vermittlungsversuche des Auswärtigen Amts, das die Dinge nicht Goebbels überlassen wollte, scheiterten, wie erwähnt, da Außenminister Ribbentrop einerseits die Gespräche mit den Verbündeten nicht abbrechen und gleichzeitig Hitlers hartem Kurs (jedes Zugeständnis bedeutete nach ihm Schwäche) einer rücksichtslosen Repression folgen wollte – ja, den Verbündeten gegenüber auch folgen musste.[46]

Die Unfähigkeit Ribbentrops, der Sachlage gemäß zu handeln, zeigte sich schon im März 1943, als das Auswärtigen Amts eine Erklärung zugunsten einer europäischen Nachkriegsföderation herausgab, die Deutschland zur Wahrung der Rechte der kleineren Nationen verpflichtete. Ribbentrop propagierte auf dieser Grundlage den europäischen Staatenbund, sobald ein bedeutender militärischer Erfolg eingetreten sei. Dieser Staatenbund werde bei den Bundesgenossen Besorgnisse zerstreuen und die Neutralen beruhigen. Nach dem Entwurf sollten die Staaten einander Freiheit und politische Unabhängigkeit garantieren; das war nun nicht nur eine Flucht nach vorne, sondern vielmehr eine Realitätsblindheit ohnegleichen: „Es war, als hätte die NS-Revolution im Völkerrecht nie stattgefunden".[47]

Hitler konnte sich allerdings auch europäischer Phrasen bedienen, um die Verbündeten zu gewinnen bzw. für später „bei der Stange" zu halten. Hitler zum italienischen Außenminister Ciano am 25.10.1941: Bemerkenswert sei, dass sich zum ersten Mal ein Gefühl europäischer Solidarität entwickelt habe. Es gehe für die Zukunft nicht mehr um Deutschland, sondern um die gemeinsamen Interessen innerhalb des europäischen Wirtschaftsgebietes mit seinen nordafrikanischen Ergänzungen.[48] Die deutschen Pläne für Nachkriegseuropa, die im Auswärtigen Amt und anderen Dienststellen entwickelt wurden, hatten allerdings mit Europa nur den Namen gemein: Sie betrachteten konkret nur deutsche Bedürfnisse – Städteneubau, Kolonisation des Ostens, Infrastruktur, Verkehrswege – Pläne, die Hitler und Himmler sehr beschäftigten[49] und sie zu immer neuen Megastädten im Osten inspirierten. Rücksichtslose Verfolgung demographischer Ziele mit ausbeuterischem Nationalismus ohne Rücksicht auf andere Staaten machte Deutschlands Anspruch zum Hohn. Alle sonstigen Fragen überließen Hitler und Himmler anderen. Die NS-Spitze würde Frankreich, Belgien und Norwegen niemals erlauben, eigene politische Wege zu gehen oder Partner des Reiches zu werden. Wichtig waren diese Völker allein als Hilfe in ihrer Rolle für die Kolonisierung des Ostens. Schon während und nach dem Krieg fragten sich viele, wie es komme, dass ein Land in der Mitte Europas nicht geradezu eine Kunst entwickelt habe, den Frieden zu erhalten. Obwohl seit Frühjahr 1943 die Propaganda die positive Rolle der europäischen Nationen beim „Kampf gegen den Bolschewismus" herausstrich, wurde eine echte Beruhigung nicht erreicht.

Die generelle Unverbindlichkeit der Europa-Artikel in „Signal" und die Verlautbarungen anderer NS-Institutionen sorgte auch weiterhin für böses Blut bei den Verbündeten (Italien, Finnland), ohne dass das Auswärtigen Amt, wie erwähnt, etwas zur Beschwichtigung unternahm oder unternehmen konnte. Das Schlagwort der „europäischen Solidarität gegen den Bolschewismus und das Judentum" blieb eine Leerformel, auch wenn jetzt die fremden Völker noch mehr hofiert wurden: Man propagierte jetzt nicht mehr ein Europa unter deutscher Führung, sondern eine „freie Partnerschaft der (souveränen) Völker (Giselher Wirsing, ab 1943 Hauptschriftleiter von *Signal*)[50]. Tausende von Freiwilligen aus Frankreich, den Niederlanden und Norwegen strömten zu den Waffen. Sie glaubten an eine „Partnerschaft" mit festen Rechten und Pflichten. Wirsing verkaufte jedoch nur alten Wein in neuen Schläuchen, die grundlegenden Prämissen deutscher Europa-Propaganda sind nicht hinterfragt worden; auch Wirsing sagte nicht, was nach Kriegsende in dem Fabelreich des „europäischen Bundes" passieren

45 Mazower, S. 332f.

46 Zwar wollte er mit den Italienern enger zusammenarbeiten, da beide übereinstimmten, dass Europa nicht unbegrenzt mit Gewalt regiert werden könne. Mussolini, so der Vorschlag des Reichsaußenministers, sollte handeln und mit Hitler sprechen (näher Mazower, S. 333). Dieses Gespräch im April 1943 richtete nichts aus, da Hitler Mussolinis Idee eines Seperatfriedens mit Stalin ablehnte und sich mit keinem Wort zu den Plänen des AA äußerte, die nach Hitler nur ein Zeichen deutscher Schwäche sei. Die Italiener wurden von Hitler belehrt, dass die einzig wirksame Verwaltung besetzter Gebiete die militärische sei, ohne Kollaboration und ohne einheimische Helfer (Mazower, S. 335). Die Italiener hätten immer noch die „Krankheit der Politik", weil bei ihnen das Denken dem Handeln vorausgeht (!), während im Krieg nicht die Theorie die Realität hervorbringe, sondern die Realität die Theorie bestimme (zit. n. Mazower, S. 336 aus dem Tagebuch eines italienischen Diplomaten). Italien als Befürworter europäischer Kultur-Ideen wurde von ihm nicht ernst genommen. Ganz Europa revoltiere gegen Deutschlands Versuch der Hegemonie, die mit solcher Brutalität angestrebt werde. Mazower bezeichnet Ribbentropp als „politisch unfähig" (S. 333f.).

47 Mazower, S. 334.

48 Das europäische Solidaritätsgefühl müsse sich allmählich in eine europäische Erkenntnis von der europäischen Gemeinsamkeit umwandeln. Daher gehöre die Zukunft nicht dem lächerlichen halbkultivierten Amerika, sondern dem neuerstandenen Europa – unter der Voraussetzung, dass der Osten in den Dienst des europäischen Gedankens gestellt würde. De facto bedeutete dies freilich die totale Unterwerfung unter die deutschen Interessen. Mazower, S. 514f.

49 Speer: Spandauer Tagebücher, Berlin 1977, S. 237.

50 Signal Nr.15 1943, S. 8.

würde.[51] Das erzeugte Missmut bei den Verbündeten und Kollaborateuren. Offenbar bemerkte man, dass diese Appelle lediglich eine Beruhigungsstrategie darstellten.[52] War es dem Chefredakteur von *Signal* wirklich ernst, von der Hauptlinie des Auswärtigen Amts (keinerlei Rechte für die Verbündeten) abzuweichen und von Partnerschaft zu sprechen? 1944 häuften sich die Appelle; *Signal* sprach vom „völkischen Sozialismus", der zum Wohl der Menschen agieren solle („Europa ohne Proletarier"). Das Ideal des deutschen und preußischen Sozialstaats wurden beschworen (Menschenwürde, Persönlichkeit, Kultur), dies seien die Ideen der Zukunft.

Mit dem Näherrücken der Front, als die Niederlage immer deutlicher wurde, nahm die NS-Propaganda einen absurden Charakter an. Die besiegten Völker seien noch nicht reif für Europa, tönte das Blatt. Die Völker wollten nicht lernen.[53] Die bisherigen Opfer seien gering im Verhältnis zum Schicksal, das Europa drohe, wenn die Alliierten siegten. Diese wollten die Einigkeit Europas zunichtemachen.[54] Es drohe ein Rückfall in Kleinstaaterei mit neuen Kriegen. Das war ein Eingeständnis der Rückschläge, aber keine endgültige Aufgabe der Ziele. Die Einigung Europas, so *Signal*, lasse sich nicht aufhalten.[55] Die Naturkräfte des deutschen Volkes würden Deutschland als Teil des künftigen Europa ein Fortbestehen garantieren und könne nicht „ausgerottet" werden. Es gebe, so Wirsing in *Signal*, kein Europa ohne Deutschland. Ein Land könne nicht „ausgerottet" werden, das die „stärksten Konstruktionen und schöpferischsten Ideen" hervorgebracht habe.[56] Dies ähnelte Hitlers Ideen von April 1945, dass das deutsche Volk für die Herrschaft in Europa nicht „reif" gewesen sei und daher zu Recht untergehe.

Im folgenden wird versucht, die Reaktionen der Regierungen der Verbündeten auf die Pläne eines NS-Europa im einzelnen festzuhalten, weil an ihnen deutlich wird, wie groß der Glaube der Verbündeten an ein großeuropäisches Reich war – dafür war man sogar bereit, die deutsche Hegemonie in einem künftigen Europa zu akzeptieren.

Dass die Verbündeten auf die Versicherungen in den Europapläne des Auswärtigen Amts (AA), die eine Beteiligung der europäischen Verbündeten an einem künftigen „Großeuropa" vorsahen, auf großes Misstrauen stießen, wurde bereits ausgeführt. Sie sahen eine absolute Dominanz Deutschlands und das Ende ihrer Souveränität voraus.

Finnland

So befürchtete Finnland,[57] das 1941 an der Seite des Reiches in den Krieg gegen die Sowjet-Union[58] eingetreten war, trotz formeller Neutralität und eines „ungebundenen Verhältnisses" zu Deutschland, einen Totalverlust der Staatlichkeit, d.h. zu einer Provinz Deutschlands zu werden. Schon nach Kriegsbeginn 1939 schrieb der beunruhigte Marschall Mannerheim, dass „die Völker Europas zu weißen Negern verwandelt werden sollten"[59]. Dennoch plädierte Finnland für einen engeren Zusammenschluss Europas, damit dieses gegenüber dem asiatischen Raum und den USA bestehen könne. Bedingung war allerdings die Wahrung alles historisch Gewachsenen, ferner auf freiwilliger Basis eine gemeinsame Außen- und Militärpolitik, also ein Status mit reduzierter Souveränität (Autonomie)[60]. Ein Goebbels-Interview vom März 1943, wonach die europäische Neuordnung freiwillig unter Wahrung der Individualität der europäischen Nationen erfolgen solle, gab diesen Hoffnungen vorübergehend neuen Ausdruck[61]; sie wurden aber alsbald von Reichsaußenminister Ribbentrop vernichtet, der eine Einmischung in seine Kompetenzen befürchtete, selbst jedoch keine klare Konzeption hatte. So blieben die finnischen Bestrebungen eines gemeinsamen europäischen Reiches wie auch die Bemühungen der anderen verbündeten Staaten, zum Scheitern verurteilt.[62]

Rumänien

Ein ähnliches Schicksal war den Bestrebungen *Rumäniens* beschieden,[63] das die großdeutschen Pläne mit den eigenen Kriegszielen[64] verbinden wollte.

Marschall Ion Antonescu, der im Januar 1941 eine Militärdiktatur eingeführt hatte, vertrat eine autonome Außen- und Europapolitik mit dem Ehrgeiz, eine „lateinische Achse" (Italien, Frankreich, Portugal, Spanien, Rumänien) gegen das deutsche Übergewicht, eingebunden in eine größere Europäische Gemeinschaft mit europäischem Parlament und europäischer Zollunion zu entwickeln. Sein Außenminister Mihal Antonescu drängte gegenüber Deutschland auf positive Zielsetzungen und auf Präzisierung seiner Aussagen, indem er 1941 schon ziemlich konkrete Vorstellungen über die künftige Stellung Rumäniens entwickelte (z.B. Eintritt in einen noch zu schaffenden europäischen Wirtschaftsverband; Anhänger einer „europapolitischen Union unter Führung Deutschlands" etc.) und such-

[51] Rutz, S. 296f.
[52] Rutz, S. 293.
[53] Zusammenfassend: Wirsing in: Signal Nr.19 1944, S. 10f. Nr.16 1944, S. 10f, zit. n. Rutz, S. 303.
[54] Wirsing in Nr.16 1944, S. 10f., zit. n. Rutz 303.
[55] Wirsing in: Signal Nr.16 1944, S. 10, 11, 23, zit. n. Rutz S. 305.
[56] Wirsing in Signal Nr.19 1944 (Dez.) S. 10f. zit. n. Rutz 306.
[57] Vgl. näher Michael Jonas, NS-Diplomatie und Bündnispolitik, 1936–1944, 2011; Wipert von Blücher, das Dritte Reich und Finnland, Paderborn 2011.
[58] Jedoch nur mit dem Ziel, die der im Winterkrieg 1939/40 an die Sowjetunion abgetretenen Gebiete (Karelien und die Kola-Halbinsel) zurückzugewinnen.
[59] Neulen, Hans Werner, Europa im 3. Reich. Einigungsbestrebungen im deutschen Machtbereich 1939–45, München 1987, S. 369ff.
[60] Neulen, S. 370.
[61] Interview abgedruckt bei Neulen S. 105, Dok. Nr. 9.
[62] Neulen, S. 372.
[63] Rumänien trat am 23.11.1940 dem Dreimächtepakt bei. Dieses Bündnis dauerte bis zum Staatsstreich am 23.8.1944 (Sturz von Ion Antonescu, Übertritt zu den Alliierten).
[64] Wiedergewinnung der an Ungarn im August 1940 abgetretenen Gebiete von Nordsiebenbürgen und des Szekler Zipfels, sowie die Rückgängigmachung des im Juni 1940 an die Sowjetunion abgetretenen Bessarabiens und der Nordbukowina, näher Neulen S. 381ff.

te für seinen Plan einer „lateinischen Achse“ auch Italien als Mitstreiter zu gewinnen.[65] Nachdem dieser Plan 1943 mit dem Sturz Mussolinis scheiterte, setzte Rumänien seine Bemühungen fort, indem es eine Erklärung über die künftige Gestaltung Europas nach dem Krieg vorschlug und bei seinen deutschen Gesprächspartnern im Außenamt inständig auf ein Europaprogramm drängte.[66] Dort ließ man allerdings die Verbündeten im Ungewissen, die „am langen Arm“ verhungern sollten. Im August 1944 kam es sogar zu einer Unterredung zwischen dem rumänischen und dem deutschen Außenminister, die fast vier Stunden andauerte und in der es an deutlichen Tönen nicht mangelte. Mihal Antonescu sprach sich gegen eine nur auf Gewalt beruhende Herrschaft Deutschlands aus, an ihre Stelle sollte die Kooperation treten.[67]

Damit stieß er bei Ribbentrop auf taube Ohren. Wie im Falle Finnland hatte dieser dafür keinerlei Verständnis, weil er sklavisch der Linie Hitlers und Himmlers folgte;[68] noch angesichts des nahen Sieges der Alliierten äußerte er, jetzt könnten „nur noch die Waffen entscheiden“; mit Ribbentrop als Hitleranhänger konnte es keine Europapolitik unabhängig von NS-Deutschland geben. Die verbündeten Staaten waren zwar bereit, Deutschlands Führungsrolle anzuerkennen, beanspruchten in diesem neuen Europa jedoch eine Position der Gleichberechtigung untereinander, die mit Kooperation umschrieben wurde.[69]

Norwegen

Die Illusion über ein künftiges NS-Europa und die Stellung der besetzten Staaten wurde auch von einen der treuesten Hitler-Anhänger des seit April 1940 besetzten Norwegen, Vidkun Quisling, geteilt. Norwegen erfreute sich einer gewissen Scheinautonomie[70]. Aufgrund der „Rassenverwandtschaft“ des Landes im NS-Sinne schlug Quisling, seit Februar 1942 norwegischer Ministerpräsident, ein Föderativsystem vor, nach dem eine „germanische Harmonisierung“ in einem europäischen Bund geschaffen werden sollte. Die Eigenstaatlichkeit Norwegens mit Ausnahme unverzichtbarer Kompetenzen des föderativen Europas sollte nicht geschwächt werden.[71] Als solche Kompetenzen sahen diese Vorschläge die Handels- und Finanzpolitik vor. Auch die Skandinavier, Briten, Holländer und Deutschen, sogar die britischen Dominions und die USA sollten diesem Bund angehören (ohne Vorherrschaft einer einzelnen Macht); der Anschluss sollte freiwillig erfolgen. Ziel der Union sollte die „Eindämmung des Bolschewismus“ sein.

Diese Vorschläge waren reichlich nebulös, in vielem sogar widersprüchlich. Es lag jedoch von vornherein auf der Hand, dass Deutschland als die größte Macht auf dem Kontinent die Vorherrschaft haben würde. Andererseits waren die wirtschaftspolitischen Pläne Quislings, eine Art europäische Freihandelszone zu schaffen, nicht unvernünftig.[72]

Quisling sprach schon in seiner ersten Denkschrift vom Oktober 1940 den großgermanischen Bund an, mit einem Bundes-Kanzler, einheitlicher Außenpolitik, gemeinsamer Marine und Luftwaffe; jedem Mitgliedstaat sollte territoriale Integrität und nationale Freiheit garantiert werden; Europa sollte also eine Art Staatenbund (noch weitergehender als die heutige EU) werden. Damit traf er genau die Auffassung von Europa in abendländisch-national ausgerichteten Europäerkreisen“.[73]

Das Projekt hatte freilich, ähnlich wie die finnischen Vorstellungen, keinerlei Realisierungschance, da die NS-Führung sich nie mit der Idee autonomer Staaten (auch bei gemeinsamer Außen- und Militärpolitik) anfreunden konnte; „rassisch“ sollte Norwegen im Reich aufgehen. Das war der Standpunkt der NS-Führung und des Gauleiters Terboven, der Norwegen ins Reich eingliedern wollte. (Himmler 1941: „Hier sitzen wir und gehen nicht wieder hinaus“).[74]

Quisling war allerdings die Radikalität der Pläne der NS-Führung von Göring („Norwegen kommt zum Reich“) und Himmler nicht bekannt, und so predigte er unermüdlich die Vorteile einer germanischen Partnerschaft in Form eines Bündnisses zwischen Norwegen und Deutschland. Das Reichs-Kommissariat sollte aufgehoben werden und Norwegen sollte selbständig bleiben. Insofern muss Quisling nicht als Gefolgsmann Hitlers, sondern, wie viele andere leitenden Funktionäre in den verbündeten Staaten, als konservativer Nationalist bezeichnet werden.

Ähnlich wie gegenüber den Vorstellungen der Verbündeten, blieb Hitler auch gegenüber den norwegischen Vorschlägen vage und unentschlossen. Erbost über die zahlreichen Eingaben vertagte er alle Regelungen auf das Kriegsende. Die Wut und die Enttäuschung darüber (die sich seit 1943 bemerkbar machten) war bei den Norwegern groß. Hinzu kamen, dass die Nutzung der norwegischen Energiequellen einseitig durch die deutsche Seite geregelt wurde. Auch neue Ideen, die Quisling entwarf (so z.B. die Errichtung sozialistischer Bauernrepubliken in Russland)[75], brachten die Dinge nicht weiter.

Am 16. September 1943 gab schließlich Hitler eine Selbständigkeitserklärung für Norwegen ab, allerdings nur für die Nachkriegszeit,[76] was als großer Erfolg für Quisling galt, da dies

[65] Neulen, S. 383.
[66] Neulen, S. 389.
[67] Ihm (M. Antonescu) scheine es, „als würde Deutschland besser fahren, wenn es anstelle der kalten Gewalt den Anderen vermittelte, dass es mit ihnen zusammenarbeiten wolle.“ Zit. n. Neulen, S. 385.
[68] Neulen, S. 383f.
[69] Näher Neulen, Hans Werner, Europa im 3. Reich. Einigungsbestrebungen im deutschen Machtbereich 1939–45, München 1987, insbesondere, S. 397.
[70] Vidkun Quisling war Führer der 1933 gegründeten „Nasjonal Samling“ (Nationale Sammlungsbewegung).
[71] V. Quisling: Russland und wir, Oslo 1942, S. 220 ff. Zit. n. Neulen, S. 331.
[72] Zum ganzen vergleiche: Neulen, S. 333.
[73] So der Historiker Bernd Martin, zit. n. Neulen 1987, S. 334.
[74] Neulen, S. 334.
[75] Die Darstellung folgt Neulen, S. 334ff, insb. S. 334.
[76] Neulen, S. 337; Abdruck der Erklärung bei Neulen, Dok.-Nr. 16, S. 136.

die einzige deutsche Erklärung gegenüber Kollaborationspolitikern war. Quisling, dadurch beflügelt, schlug darauf die Bildung eines „Germanischen Commonwealth“ vor (Deutschland, Norwegen, Dänemark, Niederland sowie eine Option für Schweden) und fand damit viel Zustimmung bei seinen Anhängern. Himmler sprach sich aber auch jetzt gegen solche Pläne aus, da er eine Überstimmung Deutschlands in einem solchen Commonwealth fürchtete.[77]

Die letzte Denkschrift Quislings datiert vom 2. November 1944: „Entwurf eines Europa-Pakts“, der 16 Mitgliedstaaten umfassen sollte; aber auch diese Denkschrift fand kein Gehör, da der Pakt eine sog. innere Souveränität für alle Mitgliedstaaten in Fragen der Innenpolitik voraussetzte und daher keine Chance einer Realisierung hatte.

5. Die NS-Propaganda und die faschistischen Bewegungen im besetzten Westeuropa (Frankreich, Niederlande, Belgien). Übereinstimmung oder Widerspruch?

Die Überlegungen der deutschen Besatzungsmacht ab 1943 waren in den besetzten Gebieten Westeuropas keine neue Idee. Ähnliche Gedanken wurden schon vor 1939 in zahlreichen Ländern von faschistischen Bewegungen vertreten.[78] Allerdings waren deren Protagonisten stets auf den Gedanken der Autonomie bedacht. In sofern bestand diesen und den NS-Vorstellungen zwar Übereinstimmung in Hinblick auf die Akzeptanz der Führung Deutschlands, aber ein grundlegender Unterschied über die Form dieser Akzeptanz: Autonomie oder totale Unterwerfung.[79]

Einige Beispiele mögen dies verdeutlichen.[80] Nach der Wende des Kriegsglücks 1942 hatte sich Deutschland die größtmögliche Ausbeutung der besetzten Gebiete zum Ziel gesetzt. Angesichts dieser Situation sahen auch die faschistischen Bewegungen ihre Stunde gekommen, ihren Forderungen nach mehr Autonomie mehr Nachdruck zu verleihen, insbesondere die Nationalsozialistische Bewegung NSB/Mussert in den Niederlanden und des Vlaamschen Verbandes van Frankrijk in Belgien und der Partie Populaire in Frankreich.[81]

Wie im Fall der formell oder faktisch Verbündeten begegneten Staaten Finnland, Norwegen und Rumänien diese Bestrebungen zu einem Staatenbündischen Europa strikte Ablehnung in der Reichsspitze. Außer der Einrichtung eines Europa-Ausschusses im Auswärtigen Amt geschah nichts. Hinsichtlich der Niederlande war Endziel des SS und des Reichskommissars Seyss-Inquart die Auflösung des Landes und seine Eingliederung in das großgermanische Reich. Nordfrankreich und Belgien sollten ohne jede Selbstständigkeit als Glacis gegen englische Bedrohung ausgebaut werden. Grunert S. 73). Kernfrankreich sollte unter Belassung einer gewissen Autonomie „ehrenhaft in die Neue Ordnung eingegliedert werden“,[82] was immer das bedeuten. mochte. Die genannten Bewegungen sahen sich dadurch bitter enttäuscht, zumal ihre eindeutig pro-deutsche Haltung sie im Volk unbeliebt machte. Es wäre falsch sie als pro nationalsozialistisch zu bezeichnen, sie waren, wie die rechtsgerichteten Parteien in den verbündeten Staaten, bürgerliche Faschisten,[83] die aber nach dem Kriege wie die entsprechenden Kollaborationsbewegungen (in den verbündeten Staaten) die volle Härte der anti-NS-Stimmung traf (Vermögensbeschlagnahme, Gerichtsverfahren, soziale Ächtung).

Auch für die besetzten Gebiete Westeuropas gilt daher, dass eine Neuordnung Europas unter NS-Vorherrschaft im germanischen Großraum (das Wort Europa fehlt bezeichnender Weise) nur mit totaler Unterwerfung der besetzten Gebiete einher gehen konnte. Kleinere Zugeständnisse (wie Autonomie im Kulturellen und „Volkstumsbereich“) waren nur für die „rassisch verwandten Völker“ vorgesehen.[84]

6. Die eigentlichen Kriegsziele Hitlers: Wirtschaftliche Autarkie und Lebensraum

Alle vorgenannten Pläne der kollaborierenden oder sympathisierenden Gruppen wurden, wie ausgeführt, von der obersten Staats- und Parteiführung nicht aufgegriffen. Letztlich war es Hitlers ureigene Entscheidung, dass nicht die großeuropäische, sondern nur eine großgermanische Lösung in Betracht kam. Im Ergebnis bedeutete dies nichts anderes die Besiedelung des Raums mit deutschen Siedlern. Die besetzten Gebiete sollten einen „germanischen“ Charakter erhalten; letztlich sollte ein *deutschsprachiges* Europa entstehen. Dieses „großgermanisches Reich“, sollte von einem Kranz abhängiger Satellitenstaaten ohne eigene Befugnisse umgeben sein sollte, die je nach Sachlage territorial neu gegliedert bzw. zerschlagen (z.B. Polen) werden sollten. Es wäre demnach bei gelingen dieser Pläne ein antidemokratisches, völkisch-bündisches System entstanden, das die Grundlagen der abendländischen Zivilisation ablehnte und ausschließlich unter der Leitung Deutschlands stehen sollte. Nach seiner Schlussrede auf dem Reichsparteitag der NSDAP 1937 sagte Hitler zu seinem Rüstungsminister Albert Speer: „Wir werden ein großes Reich schaffen. Alle germanischen Völker werden darin zusammengefasst sein. Das fängt in Norwegen an und geht bis Norditalien.“[85]

Seine Ideen hatte Hitler in seinem zweiten, allerdings in der NS-Zeit nicht veröffentlichten Buch (1928) verdeutlicht und auch später nicht mehr geändert. Sie standen in offenem Widerspruch zu der bereits mehrfach geschilderten und von der offiziellen NS-Propaganda verbreiteten Idee eines „Großeuropa“

[77] Neulen, S. 339.
[78] Näher Robert Grunert, der Europagedanke westeuropäischer faschistischer Bewegungen 1940–1945, Paderborn, 2012.
[79] Zusammenfassend Grunert S. 25ff 299ff.
[80] Die Beispiele sind Grundert, a.a.O. entnommen.
[81] näher Grunert S. 25.
[82] Denkschrift Stuckart ausführte. Zit. n. Grunert, S. 79.
[83] Grunert S. 73.
[84] Grunert S. 288.
[85] Zit. nach: A. Speer, Erinnerungen, Frankfurt, 8. Aufl. 1970, S. 83.

unter Beteiligung der besiegten Gebiete. Gemeinsam war beiden Projekten lediglich die Idee eines künftigen „Großraums", sei es mit europäischem, sei es mit germanischem Charakter. Dieser „Großraum" sollte die gesamten osteuropäischen Gebiete bis zum Ural umfassen und von Deutschland beherrscht werden. Die entscheidenden Unterschiede lagen in der *Form* dieser Herrschaft. Die offizielle NS-Propaganda, wie sie von *Signal* und anderen Organen verbreitet wurde, versprachen eine Art „konservative Lösung", d.h. eine europäische Föderation (unter Einbeziehung auch nichtdeutscher Gebiete) mit begrenzter Autonomie, d.h. ein Überleben der kleineren Staaten, um dort die Akzeptanz der deutschen Oberherrschaft zu sichern.[86] Die Frage der Gewaltanwendung und der Autonomie der besetzten Staaten blieb offen und war Gegenstand ausführlicher Überlegungen in den NS-Führungsetagen. Denn wie sollte eine Föderation auf freiwilliger Grundlage unter gleichzeitiger Präsenz des deutschen Gewaltmonopols in dem künftigen Großraum entstehen? Ganze Abteilungen im Auswärtigen Amt und im Reichssicherheitshauptamt (RSHA) waren mit Europa-Plänen beschäftigt, die allerdings nicht konkrete Fragen behandelten, sondern sich auf abstrakte Ordnungsmodelle beschränkten.

Diese Konzeption Hitlers wurde öffentlich nie erörtert. Es gab kursierten jedoch zahlreiche ähnliche Lebensraumtheorien, die deutsche Siedler an den Küsten Norwegens und in den Wäldern des Ural sahen. So mancher Wehrmachtssoldat mochte sich als künftiger Besitzer eines Großbauernstelle im Osten sehen – Träume, die leicht Fuß fassen konnten, wenn man ständig den „Lebensraum des deutschen Volkes" beschwor. Ein Beispiel ist der Aufsatz von Karl Richard Gonzer *Das Reich als europäische Ordnungsmacht*,[87] der die Besiedlung vom Nordkap bis Sizilien beschrieb, Letztlich machten diese Ideen die Propagandaarbeit, wie die des Auswärtigen Amtes und anderer Behörden, zur Makulatur. Nicht geklärt ist, inwieweit diese Stellen in die endgültigen Pläne Hitlers eingeweiht waren. Jedenfalls wurde ihre Propagandapolitik mehr und mehr zur Farce. Sie meinten wohl, Hitler zur Einbindung der besetzten Staaten in ein Reich mit europäischem Charakter bewegen zu können; was Einbindung der verbündeten Staaten in irgend einer rechtlichen Form bedeutet hätte. Die in der Außenpolitik verwendete Tarnsprache von Gleichberechtigung und Mitsprache dieser Staaten stiftete daher in den betroffenen Gebieten nur Unruhe und nährte Hoffnungen, die sich als vergeblich erwiesen.

Die großgermanischen Gedankengängen Hitlers waren in ihrer Beschreibung in *Mein Kampf* sowie in Hitlers zweitem Buch (1928) anfangs nur mehr oder weniger wirre Ideenkonglomerate. Diese Ideologie zu erkennen oder gar nachzuvollziehen, fiel den politischen Gegnern Hitlers schwer. Ihre auf rationalem Kalkül beruhende Politik auf der Grundlage der technischen und wirtschaftlichen Realitäten des 20. Jahrhunderts konnte dem Irrationalismus abstruser Autarkievorstellungen nicht folgen.[88] Sie wurden aber blutige Realität, als Hitler sich seit 1938 anschickte, sich Europa einzuverleiben. Wie sollte das künftige Europa, das als Beute des Reiches vorgesehen war, aussehen?

Schon in „Mein Kampf" hatte Hitler ein ungefähres Bild des zukünftigen Europa vorgezeichnet: Im Süden das faschistische Italien als Verbündeter, im Westen ein entmachtetes Frankreich, Osteuropa als zukünftiger „deutscher Lebensraum", in Mitteleuropa ein starkes, weit über die Grenzen von 1914 hinausgehendes „Reich aller Deutschen".[89] Das Wort Europa kam Hitler nicht über die Lippen, außer dann, wenn es politisch opportun erschien. War damit der äußere Ramen vorgegeben, konnten im Inneren dieses Herrschaftsbereiches die drei Prinzipien, die Hitler beherrschten, nämlich Autarkie, Gewaltanwendung und Lebensraum verwirklicht werden. Hitler konnte sich sicher sein, dass eine willfährige Völkerrechtswissenschaft schon die „richtigen" Begriffe und Theorien finden würde, wie solche Räume zu beherrschen und wie seine Ideen in die Partei und staatlichen Stellen Eingang finden konnten.

Die folgenden Ausführungen zeigen, dass die NS-Staats- und Völkerrechtler die Annexionen seit 1939 zum Anlass nahmen, gänzlich neue Theorien und Begriffe für die neuen Formen der Besatzungsherrschaft zu entfalten. Diese Ausführungen wurden in öffentlich zugänglichen Zeitschriften gemacht, d.h. auch hier sollte mit einer Tarnsprache die NS-Eroberungspolitik verschleiert werden. Es eröffneten sich, wie später zu zeigen ist, für die NS-Planungsstäbe ganz neue Perspektiven, die neuen zukünftigen Formen der Besatzungsherrschaft näher zu konkretisieren, deren Rahmen die Wissenschaft lieferte. Es entwickelte sich geradezu ein Wettstreit, wer die „besten" Instrumente liefern konnte, um die „Beute" in dem neuen „Großraum" zu verteilen. In der Tat enttäuschte die Wissenschaft die in sie gesetzten Hoffnungen nicht, wie die folgenden Ausführungen zeigen werden.[90]

7. Das deutsche Völkerrecht im Dienste der NS-Expansion nach Osten: Reich und „Großraum"

Grundbegriffe der NS-Expansion nach Osten in der Wissenschaft waren „Reich" und „Großraum". Der Begriff „Großraum" war in der ursprünglich ökonomischer Natur. Er knüpfte an Vorstellungen von Zollunion, Meistbegünstigungsklausel und transnationaler Wirtschaftsstrukturen (Großkonzerne) an, die schon seit der Weimarer Zeit diskutiert worden waren.[91] Allerdings hatte dieser Begriff schon damals gewissen ideologische Komponenten, wie sie von Ideologen wie Karls Haushof-

[86] Für Mitteleuropa waren die Expansionspläne auf die früheren habsburgischen Gebiete gerichtet (Österreich, Tschechoslowakei / Protektorat Böhmen und Mähren).

[87] Abgedruckt bei Foerster, Hellmut: Die Idee Europa, Quellen zur Darstellung der politischen Einigung, München 1963, S. 247ff.

[88] Die Vertreibung der Indianer, bis heute ein dunkles Kapitel der US-Geschichte, erreichte niemals diese Ausmaße wie die Bevölkerungsverschiebungen in Europa im 20. Jh.

[89] Mein Kampf, München 1924, (20. Aufl. 1934, S. 704, 710f., 728ff., 739, 741f., 754ff., 766f). Näher: D. Majer, Fremdvölkische ... 1981/1993, S. 317 ff. Für Mitteleuropa vgl. näher: Elvert, Jürgen, Mitteleuropa! Deutsche Pläne zur europäischen Neuordnung (1918–1945), Stuttgart 1999, S. 9ff.

[90] Nachw. bei Dreier, Horst, Die deutsche Staatsrechtslehre in der Zeit des Nationalsozialismus, in: Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer (Hg.), Heft 60/2001, Ziff. IV: Großraumordnung und Europaidee, S. 62 ff. (Die Unterschiede der NS-Rechtslehre zwischen Staat, Reich und Großraum werden jedoch nicht klar herausgearbeitet, Anm. d. V.).

[91] Vergleiche Horst Dreier, Rechtszerfall und Kontinuität, in: Der Staat 2/2004, S. 237ff., mit weiteren Nachweisen.

fer verbreitet wurden. Nach der ökonomischen Interpretation sollte im Inneren des Großraums sollte ein Netz von Außenhandelsbeziehungen bestehen, während Energie, Verkehr und Kommunikation von einer Zentrale gelenkt werden sollten.[92] Die juristische Ausformung der NS-Herrschaft konnte dann den Juristen überlassen werden. Diese blieben nicht untätig. Schon in den Monaten vor Kriegsausbruch und nach der Besetzung der Tschechoslowakei im März 1938,[93] hatte einer der führenden NS-Juristen, der Staatsrechtslehrer Carl Schmitt, in seinem richtungsweisenden Vortrag „Völkerrechtliche Großraumordnung" am 1. April 1939 ausgeführt: „Heute ist ein machtvolles Reich entstanden [...] Die Tat des Führers hat dem Gedanken unseres Reiches politische Wirklichkeit, geschichtliche Wahrheit und eine große völkerrechtliche Zukunft verliehen". Diese Zukunft wurde von Carl Schmitt zum ersten Male der Öffentlichkeit vorgestellt. Die Begriffe, auf denen das neue NS-Völkerrecht aufbauen sollte, waren der bereits erwähnte Begriff des „Großraums", vor allem aber der des „Reiches" mit seinen zahlreichen historischen Anknüpfungen. Beide standen nach dieser Theorie im engsten Zusammenhang.

Oberbegriff war für Carl Schmitt der Begriff des *Reiches*, der den Begriff des Staates ersetzen sollte. Das Reich wurde als eine „von bestimmten weltanschaulichen Ideen und Prinzipien beherrschte Großraumordnung" definiert, „deren Garant und Hüter ein Volk [ist], das sich dieser Aufgabe gewachsen zeigt".[94] War der Reichsbegriff im juristischen Sprachgebrauch immer noch ein rechtlicher Begriff, so gewann der Großraumbegriff, der ursprünglich, wie ausgeführt, eine internationale, auf Verträgen beruhende Wirtschaftsordnung kennzeichnen sollte, zusätzlich eine im NS-Staat geographische und politische Dimension. Zwar wurde der Begriff zunächst mit ökonomischen Attributen aufgefüllt – insofern der Weimarer Tradition folgend –, eine lebhafte Diskussion um die Großraumwirtschaft im NS-Staat entbrannte.[95] Doch zeigte sich bald, dass der Hintergrund dieser Debatte politisch war: Volk und Raum waren nun die wesentlichen Bezugsgrößen.[96] Der Großraum – so die Theorie – beschrieb den Machtbereich eines Hegemonialstaates *außerhalb* des eigenen Staatsgebiets, also das von NS-Deutschland beherrschte Gebiet anderer Staaten, auf die das Reich seine politisch-weltanschaulichen Ideen ausgedehnt hatte und das es als „seinen Machtbereich" betrachtete, den es vor „raumfremden Interventionen" zu schützen galt[97,98]. Das neue Modell des „Reiches" war geschickt gewählt, weil es äußerlich an den alten Reichsbegriff des „Heiligen Römischen Reiches Deutscher Nation" anknüpfte, das bis zum Jahre 1806 die mitteleuropäischen Völker durch die Institution des Kaisertums vereinigt und damit wenigstens der Idee nach die Großmachtstellung des Reiches „Deutscher Nation" wachgehalten hatte. Ernst Rudolf Huber, wie C. Schmitt einer der führenden Staatsrechtler, führte 1941 dazu aus: „So ist die europäische Aufgabe des Reiches, mit deren Erfüllung wir an die Überlieferung des ersten Reiches der Deutschen unmittelbar anknüpfen, zwar ein Ausdruck der deutschen Machtüberlegenheit, zugleich aber ein Ausdruck der deutschen Verantwortung vor Europa, vor der Welt …".[99] Der Reichsbegriff des Nationalsozialismus sollte also Anknüpfungen an staatliche Strukturen und deutsche Geschichte vermitteln. De facto hatte er inhaltlich mit jenem historischen Begriff jedoch nichts gemein, sondern hatte, wie Carl Schmitt schon 1934 verkündete, lediglich den Zweck, irrationale Sehnsüchte nach einer Unterwerfung anderer Völker durch die Gewalt eines Eroberers, d.h. nach Nachahmung der Eroberungspolitik der antiken Großreiche (Perser, Römer usf.) zu wecken, als deren Nachfahren sich die NS-Strategen sahen.[100] Daher der propagandistisch aufgeladene Reichsbegriff als Tarnung. Der „Großraum" hingegen war kein rechtlicher Begriff, er war das Interessensgebiet einer Großmacht, wie später zu erläutern ist.

Das Verhältnis zwischen Reich und Staat, sowie zwischen Reich und Großraum war für die NS-Völkerrechtler allerdings schwierig zu bestimmen. Offensichtlich ging für Carl Schmitt der Reichsbegriff über den Staatsbegriff hinaus, d.h. umfasste auch nichtdeutsche Gebiete innerhalb der Reichsgrenzen (z.B. eingegliederte Gebiete). Andererseits gab es auch deutsche Gebiete außerhalb des Reichsgebiets (z.B. die besetzten Niederlande)[101]; gehörten sie zum Großraum? Das Reich jedenfalls wurde als Völkerrechtssubjekt erster Ordnung bezeichnet; der Staatsbegriff hingegen ging in ihm auf.[102] Die bisherigen Definitionen des Völkerrechts trugen dieser Frage nicht Rechnung; neue Begriffe mussten her. Carl Schmitt (der sich immer als Verfechter der Kontinuität staatlicher Strukturen des Reiches verstanden hatte) lehnte als erstes eine Souveränität der beherrschten Staaten in dem neuen Reich ab, wollte sie aber auch nicht vollständig untergehen lassen. Die Staaten müssten, so Schmitt, als eigene Größe und Völkerrechtssubjekte „zweiten Ranges" fortbestehen – ein Eiertanz zwischen verschiedenen

[92] So Walter Gräveli, Direktor des Statistischen Reichsamtes, in: Archiv für Rechts- und Staatsphilosophie, 27/1933-34, S. 59ff, zit. n. Horst Dreier, Wirtschaftsraum – Großraum, Lebensraum, in: Horst Dreier u.a. (Hg.) Raum und Recht, Berlin 2002, S. 47ff, 57ff.

[93] Erlass des Führers und Reichskanzlers vom 16.3.1939 (RGBl I 485) nach dem die Rest-Tschechoslowakei zum „Protektorat Böhmen und Mähren" erklärt und in das „Großdeutsche Reich" eingegliedert wurde (Art. 2 und 3).

[94] C. Schmitt, Der Reichsbegriff im Völkerrecht, in: Deutsches Recht, 1939, S. 341 ff.

[95] Dreier, Horst: Wirtschaftsraum, Großraum, Lebensraum, in: Dreier, Horst u.a. (Hg.) Raum und Recht, Berlin 2002, S. 47ff, 64 mit z.N.

[96] Dreier, S. 96.

[97] C. Schmitt, Völkerrechtliche Großraumordnung mit Interventionsverbot raumfremder Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht, Berlin-Wien 1939, S. 69ff., 88. Das Buch wurde für das nationalsozialistische Großraumdenken richtungsweisend und erreichte vier Auflagen, die letzte 1941 (Siehe dort S. 66f).

[98] Dabei wurde die Geschichte angerufen und „zurechtgebogen", so z.B. der Begriff des Reiches. Anm. d. Verf.

[99] Bau und Gefüge des Reiches, in: ders.(Hg.), Idee und Ordnung des Reiches, Bd.1, 1941, S. 5 ff.,14, 52.

[100] C. Schmitt, Nationalsozialismus und Völkerrecht, Berlin 1934, S. 73, gibt dies ganz unverhüllt zu: Der Begriff des „Reiches" knüpfe an die bekannten Reiche der Germanen, Perser, der Makedonier, der Römer an.

[101] In keiner der Äußerungen der NS-Rechtslehrer wurden konkrete Gebiete benannt. Dies eröffnete einen fast unbegrenzten Auslegungsspielraum.

[102] Dreier, S. 67, m.N.

Theorien, der sich in der Praxis als gänzlich wirkungslos erwies. Diese Konstruktion zeigt deutlich die NS-typische Linie, angesichts neuer Gegebenheiten vage Begriffe zu erfinden oder zu verwenden, die inhaltlich völlig leer waren.

Dies gilt auch für Vorstellungen, die gegen die Schmittschen Großraumvorstellungen agitierten: Der Vorwurf war, dass er an den staatsrechtlichen Kategorien des Staates und des reiches festhalte.[103]

Folgt man den Gedankengängen von Schmitt weiter, stellte sich die Frage:

Welche Position sollte in dieser Konstruktion der Großraum einnehmen? Carl Schmitt konnte sich einer Lösung nur durch abstrakte Umschreibungen nähern. Den Konflikt zwischen Großraum als Ganzes und Einzelexistenz der Staaten löste Schmitt, indem er behauptete: „Jede bündische Zusammenfassung politischer Einheiten könne weder rein zwischenstaatlich sein, sondern müsse eben etwas „Drittes, Anderes" sein, dass sich derartigen Alternativen entzieht".[104] Man erfand also neue Theorien, um die Ziele des NS-Staates mit den Gegebenheiten der besetzten Gebiete kongruent zu machen. Schmitt ließ immerhin einige Konkretisierungen der neuen Ordnung erkennen, indem er ausführte, dass die Beziehungen im NS-Großraum zwischen dem Reich und den nicht souveränen Staaten (nur) staatsrechtlicher Natur sein könnten.[105]

Der Staatsbegriff verwischte sich bei Schmitt allmählich mit dem Reichsbegriff und driftet in Richtung der neuen NS-Begriffe „Reich" und „Großraum": „Heute aber wird der Staatsbegriff des 19. Jahrhunderts von uns selbst durch den Reichsbegriff überwunden. Daher sind wir jetzt in der Lage, die überkommene dualistische Lehre unter neuen Gesichtspunkten zu überprüfen".[106] Wie war aber das Verhältnis Reich – Großraum? Reich und Großraum, so „unfertig" diese Begriffe auch waren, bildeten die perfekte juristische Grundlage für die Besetzung Mittel- und Osteuropas, wie diese durch Carl Schmitt in seinem oben erwähnten Vortrag am 1.4.1939 vorgestellt wurde. Dabei betonte er die Überordnung des Reiches über den Großraum im Einklang mit den rassentheoretischen Grundanschauungen von der Ungleichheit der Rassen, d.h. von der Vorherrschaft der germanischen Rasse.[107]

C. Schmitt hielt also immerhin noch an dem historisch-politischen Begriff des Reiches fest und rettet sich damit in die staatlich-juristische Sphäre. Das Reich war prioritär gegenüber allen Neuschöpfungen. Insofern konnte er seine Herkunft aus dem Staatsdenken des 19. Jahrhunderts nicht verleugnen. Immer noch galt es aber, den Begriff des (Groß-)Raums zu konkretisieren.

Nach seiner Auffassung könnten die Beziehungen zu den nicht souveränen Staaten nur staatsrechtlicher Natur sein. Dies bedeutete die Einführung des Rassenrechts und des sonstigen NS-Rechts in den besetzten Gebieten.

Der Großraum erhielt nunmehr in dieser Argumentation eine politische Komponente. Das Reich habe eine „Raumhoheit" über das vor fremden Interventionen bewahrte Territorium der Großrauminteressenssphäre, unterschied also zwischen „Raumhoheit" und „staatlichem Hoheitsgebiet". Die entscheidende Stelle war eine nicht näher bezeichnete „Führerzentrale" (des Reichs). Der Großraum war also nichts anderes als die Gebiete der Interessenssphären einer Großmacht gegenüber einer anderen Großmacht.

Hinsichtlich der inneren Ordnung in diesem Großraum fragte es sich: Was sollte als innerstaatliches Regiment gelten, so wie C. Schnitt es postulierte? Das des Nationalsozialismus oder das einheimische Recht?[108] Schmitt verfocht die Vorherrschaft des (innerstaatlichen) NS-Rechts auch in den besetzten Gebieten, da dieses immerhin noch gewisse formale Ordnungselemente (Verfahren) enthielt.[109] Er unterschied sich hier von den extremen Verfechtern eines Großraums, die die Existenz der besiegten Staaten gänzlich aufheben und nur (obwohl nicht ausdrücklich formuliert) als Verwaltungseinheiten mit gewissen autonomen Befugnissen (z.B. Lokales, Versorgung) fortbestehen lassen wollten.[110] Es sollten also in diesen Gebieten (z.B. in den besetzten sowjetischen Gebieten) nur staats- und nicht völkerrechtliche Grundsätze herrschen, d.h. nur deutsches Recht gelten. Das einheimische Recht sollte verdrängt werden (z.B. im besetzten Polen, Anm. d. V.), und da die Völker dann kein eigenes Recht hätten, besäßen sie auch keine eigene „ordnungsstiftende Funktion" mehr.

Können sich Völker im Großraum gegen ungleiche Behandlung wehren? Nach der NS-Lehre war dies ausgeschlossen, da die Völker kein jus belli hatten, d.h. nicht souverän waren. Jede Auflehnung gegen das Reich wäre ein Bruch der Großraumordnung gewesen. Dazu kamen die faktische Übermacht des Reichs sowie das Interventionsverbot für andere Mächte. All diese Beschreibungen dienten nur dem Zweck, die Vorherrschaft des „Prokurators" über den von ihm beschriebenen Raum zu sichern.[111]

Der Großraumbegriff im NS-Sinne war somit ein Versuch, sich von allen Bindungen des Rechts zu lösen, von Carl Schmitt mit den Ersatzbegriffen mit einer Politik der „Fürsorge" und der „Achtung fremder Völker" umschrieben. Damit hatte C. Schmitt die endgültige Verneinung des Völkerrechts (das bedeutete „Gnadenerweise" statt völkerrechtlich festgelegter Ver-

[103] näher Grunert, S. 55 m.N.
[104] C. Schmitt, Führung und Hegemonie, in: Schmollers Jahrbuch 1939, 516 f., zit. n. Gruchmann, S. 122.
[105] Genau dies hätte die Einführung des NS-Rechts in den besiegten Staaten bedeutet. Gruchmann, S. 132.
[106] Zit. n. Gruchmann, S. 141.
[107] Zit. n. Gruchmann, S. 141, 143.
[108] Grundlegend: Lothar Gruchmann, Nationalsozialistische Großraumordnung. Die Konstruktion einer „deutschen Monroedoktrin", Schriftenreihe der Vierteljahreshefte für Zeitgeschichte Nr.4, Stuttgart 1962, hier S. 121ff. Beschreibung des NS-Großraummusters sowie dessen staats- und völkerrechtliche Aspekte, S. 121ff., 124.
[109] Näher Majer, D., Fremdvölkische 1981/1993, S. 317 ff.
[110] Gruchmann, S. 150.
[111] Carl Schmitt, zit. n. Gruchmann, S. 137.

haltensweisen der Besatzungsmacht) im Großraum postuliert. Es galt nur noch das Recht der Besatzungsmacht. Zwar ging die völkerrechtliche Lehre auch in anderen Staaten von der dualistischen Lehre vom Recht aus, das neben dem Recht eines Staates einen eigenen völkerrechtlichen Rechtskreis mit eigenen Geltungsgründen und Normadressaten anerkennt (z.B. Haager Landkriegsordnung 1907). Die deutsche Lehre interpretierte dieses Prinzip jedoch nicht als universales, zwingendes Prinzip, sondern lediglich im nationalstaatlichen Sinne: Als Naturrecht und Staatsgrundrecht der Politik, das der Durchsetzung von Deutschlands Interessen dienen, d.h. dessen Ansprüche auf Gleichberechtigung durch Wiederherstellung der Wehrhoheit (1933–1936) sichern sollte. Das bedeutete: Anwendung des Völkerrechts im Kriegsfall nur, wenn es politisch opportun war, ansonsten Ablehnung.

Hinzu kamen weitere Argumente, die aus der Geschichte beschworen wurden: Deutschlands Ansprüche (auf die 1920 abgetretenen Gebiete) sollten als „naturgegeben" erscheinen. Schlagworte wie „Recht auf sichere Grenzen", „Selbstverteidigung" „Selbstbehauptung" oder „Anspruch auf Gleichberechtigung" sollten die deutschen Ansprüche, insbesondere die auf eine Wiederaufrüstung, verstärken[112]. Alle diese Ansprüche seien, so Hitler, „natürliche Grundrechte" eines Staates, von denen Deutschland zuvor zu Unrecht durch den Versailler Vertrag und die weiteren völkerrechtlichen Verträge (Vertrag von Locarno, Kellogg-Pakt) ausgeschlossen worden sei.[113]

Diese Einstellung wirkte sich auch auf die NS-Konzeptionen eines künftigen Europa aus. Daher betrachtete die radikale Richtung der NS-Völkerrechtler Verhandlungen mit den Vertragspartnern des Versailler Vertrags als überflüssig, da Deutschland diese „natürlichen Grundrechte" ohnehin habe.[114] Auf derselben Linie lagen die Angriffe der NS-Völkerrechtler auf die „ungerechte" Völkerbundordnung; diese sei keine Rechtsordnung gleichberechtigter Staaten, sondern nur eine von England und Frankreich beherrschte „Macht- und Herrschaftsordnung"[115], welche Deutschlands Recht und „konkrete Existenz" verletze[116] – was für die Nationalsozialisten das Streben nach unbeschränkter Souveränität ohne Bindung an völkerrechtliche Normen bedeutete.

Die entscheidenden Fragen für die besetzten Gebiete – Gewaltanwendung und Widerstand – wurden im Schrifttum allerdings nicht behandelt, sondern ergaben sich nur mittelbar aus dessen allgemeinen Bekundungen. Überhaupt sprach man lieber von „Räumen", als von der Bevölkerung. Jede Auflehnung gegen das Reich sei, so die NS-Juristen, ein Bruch der Großraumordnung.[117] Durch das Unterlassen, ja die bewusste Ablehnung normativer Vorgaben, schufen die NS-Völkerrechtler die Voraussetzungen, dass die Besatzungsbehörden in den besetzten Gebieten nach Willkür schalten und walten konnten, d.h. die Willkür durch Eingliederung vieler Gebiete in das Reichsgebiet (Warthegau, Danzig-Westpreußen usw.) oder durch Nichtanwendung der Haager Landkriegsordnung von 1907 (HKLO) (besetzte Ostgebiete) verfestigten. Der „Großraum" ging jedoch, wie ausgeführt, über die beherrschten Gebiete hinaus: Er war nicht abstrakt, sondern hochpolitisch: Er war letztlich nichts anderes als die Abgrenzung nach „Interessensphären", hier konnte nichts anderes gemeint sein, als die Interessenssphärenabgrenzung auf der Grundlage des deutsch-sowjetischen Nichtangriffspakts vom 23. August 1939, die die perfekte Vorlage für das dann folgende Kriegsgeschehen waren.

Zusammenfassend muss festgestellt werden, dass die oben beschriebenen Charakteristika des NS-Völkerrechts die vollständige Kapitulation des Rechts gegenüber allen eroberten Gebieten in Osteuropa bedeutete. Zudem zeigen sie die Willfährigkeit der Juristen im Erfinden immer neuer Begriffe, um sich mit der Theorie eines „Raums ohne Recht" profilieren zu können.[118] Wissenschaftler, die auf anderen Rechtsgebieten scharfsinnige Analysen entwickelten, hatten aus Opportunismus gerade auf dem Gebiet des Völkerrechts in auffälliger Weise nur niveaulose Begriffswelten geschaffen, um „flexibel" reagieren zu können, ohne sich festlegen oder gar „kompromittieren" zu müssen. Völkerrecht, Wissenschaft und Politik ergänzten sich im NS-Staat aufgrund dieser Konstellation in geradezu idealer Weise. Letztlich war damit eine klare Absage an das europäische Völkerrecht verbunden, wenn die Juristen argumentierten, dass die Interessen der nationalen „Volksgemeinschaft" absoluten Vorrang vor allen anderen rechtlichen, moralischen oder ethischen Erwägungen hätten.[119] Allerdings ist bemerkenswert, dass seit 1942 die völkerrechtliche Lehre im NS weithin verstummte – war es die Erkenntnis, dass die Leugnung allen Rechts durch die Politik das Ende der Rechtswissenschaft[120] bedeuten musste?

Hatten die oben beschriebenen Lehren der NS-Völkerrechtler die Kategorisierung und Substantivierung der seit 1939 im besetzten Osteuropa bestehenden Auseinandersetzungen

[112] Rede Hitlers am 7.10.1936, zit. nach: Des Führers Kampf um den Weltfrieden, München 1936, S. 29.

[113] N. Gürke, Volk und Völkerrecht, Tübingen 1935, S. 48–53.

[114] Für sie waren alle Klauseln des Versailler Vertrags, die die „Gleichberechtigung" Deutschlands beschränkten, nichtig, insbesondere die Entwaffnungsbestimmungen. C. Bilfinger, DJZ 1934, S. 881 ff., 883.

[115] V. Bruns, Rechtsgemeinschaft oder Herrschaftsgemeinschaft?, in: Völkerbund und Völkerrecht 1934/35, S. 15–17.

[116] C. Schmitt, Nationalsozialismus und Völkerrecht, in: Schriften der deutschen Hochschule f. Politik, Heft 9, Berlin 1934, S. 8; vgl. ferner C. Bilfinger, Gleichheit und Gleichberechtigung der Staaten, in: Nationalsozialistisches Handbuch für Recht und Gesetzgebung, 2. Aufl. 1935, S. 408–413.

[117] Gruchmann, S. 139.

[118] Näher: M. Messerschmitt, Revision, Neue Ordnung, Krieg. Akzente der Völkerrechtswissenschaft in Deutschland 1933–1945, in: Militärgeschichtliche Mitteilungen 9/1971, S. 61 ff., 76 m.w.N.

[119] H. Richter, Völkerrecht, in: Deutsches Recht (DR) 1934, S. 208.

[120] Diese Folgerung galt für beide Richtungen der NS-Völkerrechtslehre: eine politisch-staatlich orientierte Richtung unter Führung des prominenten NS-Juristen Carl Schmitt, nach der der Staat auch im NS-System eine durchaus eigenständige Rolle spiele, und eine mehr „völkische" Richtung, nach der der Staat nur eine Ausdrucksform des „völkischen" Daseins (des rassegleichen Volkes) sei. Überblick bei H. Held, Volk, Recht und Staat im Lichte der deutschen Rechtserneuerung, Berlin 1935. Vgl. auch G. A. Walz, Nationalsozialismus und Völkerrecht, in: Völkerbund und Völkerrecht, Jg. 1934/35, S. 473 ff. Diese Unterschiede waren jedoch hinsichtlich der Herrschaftsausübung im besetzten Europa ohne Belang. Am Ergebnis – Abdankung der Rechtswissenschaft – änderte sich dadurch nichts.

um die „richtigen“ Herrschaftsformen betrieben, ist über die eigentlichen *Kriegsgründe* – jenseits der völkerrechtlichen Vorwände, dass Deutschland „seine Rechte“ wahren müsse, kaum öffentlich diskutiert worden, sei es aus Unkenntnis, sei es aus politischen Gründen.

8. Auswirkungen der Europavorstellungen im NS-Staat auf die Europapläne der frühen Nachkriegszeit

Die NS-Pläne eines germanischen Großreichs wirkten auch über das Kriegsende hinaus. Die Alliierten beabsichtigten, nach den unermesslichen Zerstörungen durch das Deutsche Reich, dieses als staats- bzw. völkerrechtliches System vollständig zu zerschlagen. Ein deutscher Staat habe durch den Missbrauch des Nationalsozialismus jede Daseinsberechtigung verloren.[121] Stattdessen sollte eine Art europäische Föderation entstehen, in die Deutschland eingebunden werden müsse, um Sonderwege künftig zu verhindern. „Der Nationalismus“ (gemeint war Deutschland) wurde als gefährliches Phänomen der modernen Massenpsychologie angesehen. Andererseits wollten die Alliierten ein Machtvakuum in Deutschland verhindern, das in ihren Augen die Ausbreitung des Bolschewismus befördert hätte. Wie diese Föderation aussehen sollte, blieb vorläufig im Ungewissen. 1946 forderte Churchill die Vereinigten Staaten von Europa, einige Monate zuvor hatte er seine Rede über den „Eisernen Vorhang“ in Missouri gehalten[122]; eine völkerrechtliche Festlegung war allerdings daraus nicht zu erkennen.

Fest stand lediglich, dass das besiegte Deutschland keine politische Macht mehr haben sollte. Auch völkerrechtlich sollte Deutschland auf den Nullstatus reduziert werden. Die bedingungslose Kapitulation erlaubte den Siegermächten Eingriffe jeder Art. Die Haager Landkriegsordnung von 1909, nach der nach Besiegung eines Staates (debellatio) Eigentum, Leib und Leben der Bevölkerung zu schützen waren, fand keine Anwendung. Faktisch bedeutete dies das Ende Gesamtdeutschlands und die Aufteilung Deutschlands in verschiedene Besatzungszonen. Die Eingriffe der Alliierten erfolgten früh. Bereits Mitte 1945 begannen die Demontierungen der gesamten Fabrikproduktion und des Maschinenparks, oft auch Deportierung der jeweiligen Fachkräfte (wie z.B. die der Firma Zeiss aus Jena etc.). Noch war der Morgenthau-Plan, der aus Deutschland ein Agrarland machen wollte, nicht aufgegeben. Ihren Ausdruck fanden diese Pläne in der von den USA und Großbritannien beschlossene Atlantik-Charta vom 14. August 1941: Sie formulierte acht Kriegsziele,[123] darunter unter Punkt sechs die endgültige Vernichtung der „Nazi-Tyrannei“. Dieser Punkt wurde so interpretiert, dass Deutschland völlig entmachtet werden solle und keinerlei Bindung der Alliierten durch Vertrag gegenüber Deutschland bestehe.[124] Die Charta versprach, die souveränen Rechte und die Selbstbestimmung der Völker (außer Deutschlands) wiederherzustellen. Konkreter wurden diese Ziele auf der Konferenz von Casablanca am 24. Januar 1943, auf der die Alliierten die „bedingungslose Kapitulation“ Deutschlands gefordert hatten, sowie auf der Teherankonferenz von November 1943, als von Roosevelt, Churchill und Stalin die Teilung Deutschlands (in verschiedene Besatzungszonen – eine amerikanische, eine britische und eine sowjetische – (auf Drängen Frankreichs kam später noch eine französische Besatzungszone hinzu) beschlossen wurde. Allerdings war eine Einigung nur mühsam erreicht worden, weil die Westalliierten bei den Verhandlungen in Nordafrika das Datum der Landung gegen den Willen der Sowjet-Union möglichst lange hinausschieben wollten.[125] Bekräftigt wurde dies durch Beschluss auf der Konferenz von Jalta im Februar 1945, die zugleich für eine neue Weltorganisation auf der Grundlage der Kriegskoalition der gegen Deutschland verbündeten Nationen plädierte. Die erneute Bekräftigung des Selbstbestimmungsrechts der Völker wurde wiederum für Deutschland als nicht anwendbar erachtet, da das oberste Ziel „der Sieg über die Feinde“ (d.h. über den Nationalsozialismus) sei. Das Potsdamer Abkommen vom 2. August 1945 konkretisierte diese Ziele. Die Aufteilung Deutschlands in zunächst drei (später vier) Besatzungszonen, die Entnazifizierung verbunden mit dem Aufbau demokratischer Strukturen, die Entmilitarisierung, die Reparationsleistungen und der Umgang mit Kriegsverbrechern.

Die alliierten Pläne standen im Zusammenhang mit zahlreichen Überlegungen, die schon während des Krieges auf dem Kontinent diskutiert worden waren, da eine Teilung Deutschlands allein keine Lösung für eine neue Ordnung sein konnte. Als Option wurde z.B. von den Exilregierungen der Tschechoslowakei und Polens ein europäischer Bundesstaat in Erwägung gezogen, in den das geteilte Deutschland eingebunden werden sollte, allerdings nur mit beschränkten eigenen Rechten. Kleine Gruppen von Intellektuellen in Italien, Frankreich und den Niederlanden entwarfen Pläne zur Schaffung einer europäischen Gemeinschaft, die Jahrzehnte später von Historikern wieder aufgegriffen wurden, weil sie Vorbildfunktion hätten.[126]

Die Pläne einer europäischen Föderation wurden damals durchaus auch von einem „Europäismus“ in den Widerstandsbewegungen gegen den Nationalsozialismus unterstützt. Man erkannte, dass nur die europäische Einigung der Schlüssel zur Lösung mittel- und langfristiger Probleme war. In diesem Sinne forderte auch das „Manifest von Buchenwald“ vom 13. April 1943, das Sozialisten aus den USA, Schweden, Deutschland, Frankreich, Holland, Österreich, Polen, Italien verfasst hatten, ein föderatives Europa. Die europäische Gemeinschaft solle sich für Ordnung und Wohlstand verbürgen. Europa war damals aber noch keine Handlungsmaxime, nur Idee und Ziel.[127]

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[121] Vgl. im einzelnen: Mazower, Hitlers Imperium, 2010.
[122] Der Begriff „Eiserner Vorhang“ taucht schon in den frühen 1940er Jahren in der Zeitschrift *Signal* in Zusammenhang mit Stalin auf. Anm. d. Vf.
[123] Selbstbestimmungsrecht der Völker über territoriale Änderungen und die Regierungsform, freier Zugang zu allen Rohstoffen, dauernder Friede.
[124] So Churchill am 22. Feb. 1944 im Unterhaus; zit. n. Rainer Blasius: Vollständiger Sieg über die Feinde, in FAZ vom 15.8.2011, S. 8.
[125] Schließlich einigten sich Roosevelt und Churchill auf den Mai 1944, womit Stalin einverstanden war.
[126] Mazower, S. 516ff.
[127] Zit. n. Schmale, S. 131.

Auf die Alliierten warteten schwierige Aufgaben. Einerseits wollten sie ihr Terrain gegeneinander abstecken,[128] andererseits mussten sie sich der mühseligen Aufgabe unterziehen, Europa neu zu ordnen. Über die Struktur einer künftigen europäischen Föderation bestand allerdings damals, in der Entstehungszeit des „Kalten Krieges" ab 1947/48, keine Einigkeit. Der Europagedanke im Kalten Krieg inspirierte Föderalisten, die einen europäischen Bundesstaat anstrebten, ebenso Anhänger einer staatenbündischen Lösung, die einen Bund mit gleichberechtigten Mitgliedern anstrebten.[129] Welcher Option sollte die 1949 gegründete Bundesrepublik Deutschland zugeordnet werden? Zahlreiche Kongresse und Europagruppen in allen europäischen Ländern trugen die Idee eines föderativen Europa voran, oftmals gingen sie weiter als heute, so z.B. die Forderung der Linken (SPD und Labour) nach einer demokratisch gewählten Föderationsregierung, einer europäische Streitmacht usw.[130] Gegen „zuviel Europa", nur für eine „Europäische Union der Vaterländer" waren de Gaulle, de Gasperi (Italien) und Adenauer; es waren die führenden Persönlichkeiten, die Europa nach 1945 aufbauten, weil sie durch die gemeinsame Erfahrung von Krieg und Widerstand verbunden waren.

Die Entwicklung zeigt, dass die „kleine Lösung" gewählt wurde – nämlich eine Gemeinschaft in der Europäischen Gemeinschaft für Kohle und Stahl (EGKS, 1952), der die Europäische Wirtschaftsgemeinschaft (EWG, 1957) folgte.

[128] Dies gilt besonders für das russische Bestreben, einen Zugang zu den Weltmeeren zu haben, der Eisfrei war. So behielt die UdSSR die dänische Insel Bornholm ein ganzes Jahr lang besetzt (8.5.1945–8.5.1946), um neben Königsberg einen weiteren eisfreien Zugang zur Ostsee zu haben. Erst auf nachdrückliches Drängen der Briten räumten sie die Insel.

[129] Vergl. Peter Krüger, der diese europäischen Pläne (fälschlicherweise) als Integration bezeichnet: Das unberechenbare Europa, 2010, S. 14.

[130] Zit. n. Schmale, S. 133.

Eduard Sturm, Rechtsanwalt aus Brünn, „Schöpfer" der österreichischen Grundrechte?
(Eduard Sturm, an Attorney from Brno, "Creator" of the Austrian Fundamental Rights?)

Christian Neschwara *

Abstract

The reconstruction of the Hungarian Constitution of 1848 – following the "Compromise" of 1867 between the monarch and the Hungarian Diet – induced the Cisleithanian parliament likewise to return to former constitutional concepts. A Constituant Committee, set up by the House of Representatives of the Austrian Imperial Council, was guided along the content of the Imperial Constitution and was brought into force with oktroy in 1849. The liberal German representative Eduard Sturm, an attorney from Brno in Moravia, was appointed to prepare a draft about fundamental rights. A subcommittee of the Constituant Committee brought Sturm's draft to perfection. In essence only those fundamental rights enacted by an oktroy just in 1849 were left behind. Sturm pithily jotted down his notes about the results of the discussion within the Constituant Committee: "Everything 1849"!

Key words*: Austrian-Hungarian Compromise; Austrian-Hungarian Monarchy; Austrian Imperial Council; History of (Austrian) Constitution; fundamental rights.*

I. Allgemeines [1]

Das Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger war im Dezember 1867 als eines von insgesamt sieben Verfassungsgesetzen ins Leben getreten. Es blieb bis zum Ende der Monarchie ein unveränderter Bestandteil der Verfassungsordnung. Nach dem Zerfall der Monarchie wurde es gemäß § 16 Staatsgründungsbeschluss vom 30. Oktober 1918 ein impliziter Bestandteil der provisorischen Verfassungsordnung von Deutschösterreich. Es beeinflusste die 1919/20 laufenden Arbeiten an der definitiven Verfassung, insbesondere auch die Vorentwürfe von Hans Kelsen, auf deren Grundlage 1920 das Bundes-Verfassungsgesetz (B-VG) für die Republik Österreich ausgearbeitet wurde. Aufgrund der weltanschaulichen Gegensätze der politischen Parteien kam in der Konstituierenden Nationalversammlung jedoch keine Einigung über einen neuen Katalog von Grundrechten zustande. Es war daher notwendig, die Grundrechte des Staatsgrundgesetzes von 1867 beizubehalten: Sie wurden gemäß Art. 151 B-VG zum Bestandteil des Bundes-Verfassungsgesetzes erklärt.

Die Wurzeln der Grundrechte des Staatsgrundgesetzes von 1867 liegen ihrerseits in den frühkonstitutionellen Verfassungen des Kaisertums Österreich von 1848 und 1849 sowie im Entwurf des Konstituierenden Reichstags von Kremsier 1848/49; mit der Beendigung des Frühkonstitutionalismus wurden mit Jahresbeginn 1852 auch die Grundrechte weitgehend aufgehoben. Nach der Periode des Neoabsolutismus bis 1860 und der Periode einer ständisch beschränkten Monarchie kam es 1867 zur Wiederherstellung des Konstitutionalismus und damit auch zur der Restauration der Grundrechte. Den entscheidenden Anstoß dazu gab der „Ausgleich" über die verfassungsrechtliche Stellung der ungarischen Provinzen, wodurch sich die Österreichische Monarchie in zwei Verbände von Ländern mit unterschiedlicher Verfassungsordnung spaltete.

II. Die Verfassungssituation in der Österreichischen Monarchie im Jahr 1867

Die Verfassungssituation gestaltete sich in den ungarischen Ländern infolge des Ausgleichs völlig anders als in den cisleithanischen Ländern: Während die ungarischen Länder seit Jahresbeginn 1867, getrennt von den cisleithanischen, als unabhängiger Staat auf Grundlage der 31 Verfassungsartikel vom 11. April 1848 im Sinn einer konstitutionellen Monarchie organisiert waren, verblieben jene auf Grundlage der Reichsverfassung vom 26. Februar 1861 im Zustand einer ständisch beschränkten Monarchie: Landtage und Reichsrat besaßen nicht den Charakter moderner Parlamente, es gab keine Verantwortlichkeit der Minister den Parlamentskammern gegenüber, es bestand ein Manko strikter Gewaltenteilung zwischen Gerichtsbarkeit und Verwaltung auf erster Instanz; es existierte keine Verfassungsgerichtsbarkeit und es fehlte vor allem ein Katalog von Grundrechten. Das Parlament, der Reichsrat, war überdies seit Herbst 1865 „sistiert" – aufgelöst zum Zweck von direkten Verhandlungen der Regierung über die verfassungsrechtliche Stellung der ungarischen Länder mit den Landtagen als den

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[1] Zum Folgenden Brauneder, Wilhelm, Die historische Entwicklung der modernen Grundrechte in Österreich (St. Pölten 1987).

Vertretungen dieser Länder[2], welche schließlich an der Jahreswende 1866/67 zum Ausgleich führten.

Diese zwiespältige Verfassungssituation wurde zur Jahresmitte 1867 in einer zeitgenössischen Karikatur, im „Kikeriki", einer in Wien erschienen humoristischen Wochenschrift, so dargestellt: Die Szene – betitelt mit „Dießseits und Jenseits" – spielt am dieseitigen (cisleithanischen) Ufer der Leitha, dem Grenzfluss zwischen den cisleithanisch-österreichischen und den transleithanisch-ungarischen Ländern. Sie zeigt Friedrich Beust, den für den Ausgleich mit Ungarn verantwortlichen Ministerpräsidenten, in der Rolle eines Bauleiters („Polier"), umringt von einer Gruppe von Männern, ausgestattete mit Maurer-Werkzeug und gekleidet den verschiedenen Volks-Trachten der österreichischen Monarchie.[3] Beust, versucht die aufgeregt gestikulierenden Männer mit den Worten zu beruhigen: „Kinder – wir streiten jetzt g'rad' sieben Jahr' wegen unserem Plan; derweil sein die dort d'rüben [„Jenseits" der Leitha] fertig wor'n! Ich glaub', wir sollten jetzt wenigstens einmal anfangen; sonst lachen uns die dort aus, die Maurer auf der andern Seiten!". Beust wies damit auf die seit 1860 für die ungarischen Länder bestehende besondere Verfassungssituation hin, welche dort 1867 mit dem Ausgleich eine Rückkehr zum Konstitutionalismus möglich machte – in der Karikatur symbolisiert durch ein „jenseits" am (transleithanischen) Ufer der Leitha aufgezogenes elegantes, mit Fahnen festlich geschmücktes Bauwerk. Eine dieser Fahnen preist die für den ungarischen (Verfassungs-)Bau Verantwortlichen mit der Aufschrift: „Eljen [hoch] der König. Eljen Baumeister [Franz] Déak. Eljen Architekt [Julius] Andrassy", womit Kaiser Franz Joseph, König von Ungarn, der ungarische Ministerpräsident und der (spätere) Außenminister von Österreich-Ungarn gemeint waren.

Die seit 1861 in Cisleithanien bestehende Verfassungssituation musste den durch den Ausgleich veränderten Bedingungen angepasst werden – dafür gab es zwar noch keinen Plan, wie Beust bemerkte, aber die Notwendigkeit, mit einem Umbau zu beginnen, war unaufschiebbar.[4]

III. Berücksichtigung der Folgen des Ausgleichs in Cisleithanien

A) Vorlagen der Regierung an den Reichsrat: Anpassung der cisleithanischen Verfassung

In der Verfassungsordnung Cisleithaniens musste dem Ergebnis des Ausgleichs infolge veränderter Stellung des Reichsrats und der Notwendigkeit der Bildung von Parlamentsdelegationen für die Handhabung der gemeinsamen Angelegenheiten Rechnung getragen werden: Der Ende September 1865 sistierte Reichsrat wurde nach Neuwahl von Delegierten durch die cisleithanischen Landtage im Mai 1867 wieder einberufen – als engerer Reichsrat, also ohne Abgeordnete aus Transleithanien.

Mitte Juni 1867 brachte die Regierung im Abgeordnetenhaus mehrere Vorlagen zur Anpassung der Verfassung Cisleithaniens an die Wirkungen des Ausgleichs ein: und zwar zu einem Gesetz über die Ministerverantwortlichkeit, ferner über – durch den Ausgleich bedingte – Änderungen des Grundgesetzes über die Reichsvertretung, insbesondere die Novellierung des darin geregelten kaiserlichen Notverordnungsrechts, sowie zu einem Gesetz über die allen Ländern der österreichischen Monarchie gemeinsamen Angelegenheiten und die Art ihrer Behandlung, das später sogenannte Delegationengesetz. Damit kam der Stein ins Rollen, der zu Jahresende 1867 auch für den staatlichen Verband der Reichsrats-Länder die Rückkehr zum Konstitutionalismus bringen wird.[5]

B) Initiative des Abgeordnetenhauses: Revision der Reichsverfassung 1861

Im Abgeordnetenhaus, wo die Regierungsvorlagen knapp vor Mitte Juni 1867 eingebracht worden waren, wurden – ohne Ermächtigung durch die Geschäftsordnung – ein Verfassungsausschuss konstituiert und zur Vorberatung der einzelnen Gegenstände jeweils besondere Unterausschüsse gewählt, nämlich ein „Subcomité" für die (erste) Wahl der Delegationen der beiden Häuser des Reichsrates, Abgeordnetenhaus und Herrenhaus, sowie zwei weitere „Subcomités" für die Behandlung der Regierungsvorlagen über die Ministerverantwortlichkeit und über die durch den Ausgleich bedingten Änderungen der verfassungsrechtlichen Stellung des Reichsrats aufgrund des Grundgesetzes über die Reichsvertretung von 1861.[6]

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[2] Zur Verfassungssituation in der Habsburgermonarchie zwischen 1861 und Ausgleich Arbeitsgemeinschaft Österreichische Rechtsgeschichte (Hg.), Rechts- und Verfassungsgeschichte (Wien [2]2012) 216–221; Brauneder, Wilhelm, Verfassungsentwicklung in Österreich 1848 bis 1918, in: Rumpler / Urbanitsch, Habsburgermonarchie VII/1 (Wien 2000) 169ff.

[3] Kikeriki 6 .6. 1867, 4 [http://anno.onb.ac.at/cgi-content/anno?aid=kik&datum=18670606&seite=4&zoom=33] (abgerufen 27. 3. 2014).

[4] Zur Verfassungssituation in der Habsburgermonarchie zwischen 1861 und Ausgleich Brauneder, Verfassungsentwicklung 169ff; AÖRG (wie 2) 216–221 (Rz. 1608–1625).

[5] AÖRG (wie 2) 222; Brauneder (wie 2) 174; Stourzh, Gerald, Die österreichische Dezemberverfassung von 1867, in: Österreich in Geschichte und Literatur 12 (Wien 1968) 4.

[6] Brauneder, Wilhelm, Gesetzgebungsgeschichte der österreichischen Grundrechte, in: Machacek, Rudolf / Pahr, Willibald P. / Stadler, Gerhard (Hgg.), 70 Jahre Republik. Grund- und Menschenrechte in Österreich. Grundlagen, Entwicklung und internationale Verbindungen (Kehl / Rhein-Straßburg-Arlington 1991) 275ff; Haider, Barbara (Hg.), Die Protokolle des Verfassungsausschusses des Reichsrates vom Jahre 1867 (= Fontes rerum austriacarum II/88) (Wien-Köln-Weimar 1997) 167f; 173f; Stourzh (wie 5) 1ff – Mitglieder waren die Abgeordneten Rudolf Brestel (NÖ), Sebastian Froschauer (Vorarlberg) als Obmann, Moriz Kaiserfeld (Steiermark), Franz Klier (Böhmen), Ignaz Kuranda (NÖ), Eduard Sturm (Mähren), Florian Ziemialkowski (Galizien) sowie ab 24. 7. Rafael Kremer-Auenrode (Oberösterreich) und Josef Waser (Steiermark).

Nachdem die Vorlage über das Ministerverantwortlichkeitsgesetz Mitte Juli 1867 den Reichsrat erfolgreich passiert hatte, witterte die liberale Mehrheit des Verfassungsausschusses die Chance, auch in Cisleithanien die Weichen für eine Rückkehr zum Konstitutionalismus – auf Grundlage der Verfassung von 1849 – zu stellen: Hierzu wurde beschlossen, weitere Verfassungsgesetze auszuarbeiten, nämlich: ein Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger, ein Staatsgrundgesetz über die Einsetzung eines Reichsgerichts, ein Staatsgrundgesetz über die richterliche Gewalt sowie ein Staatsgrundgesetz über die Regierungs- und Vollzugsgewalt.[7] Für die Ausarbeitung jedes einzelne dieser Staatsgrundgesetze wurde ein eigenes Subkomitee bestimmt, für die Ausarbeitung der jeweiligen Entwürfe wurde jeweils ein eigener Referent bestellt.[8]

IV. Die Ausarbeitung eines Grundrechte-Katalogs

A) Bestellung von Eduard Sturm zum Referenten des Entwurfs

Für die Ausarbeitung des Entwurfs zu einem Grundrechte-Katalog wurde vom Verfassungsausschuss Eduard Sturm[9] als Referent des Subkomitees bestimmt. Mit 37 Jahren war er das jüngste Mitglied – ein Neuling im Wiener Parlament, aber mit politischen Erfahrungen als deutschliberaler Abgeordneter im Mährischen Landtag zu Brünn. Sturm, 1830 in Brünn geboren, war nach Absolvierung des juristischen Studiums an der Universität Olmütz 1852 zu Beginn des Neoabsolutismus mit Einführung der österreichischen Justizorganisation in Ungarn zum Landesadvokaten in Pest ernannt worden, musste aber 1861 – nach Wiederherstellung der früheren ungarischen Justizorganisation mit Beendigung des Neoabsolutismus – als „disponibel" gewordener österreichischer Justizfunktionär Ungarn wieder verlassen. Er wurde als Landesadvokat in seine Heimatstadt Brünn versetzt und machte dort Bekanntschaft mit Karl Giskra, dem politischen Führer der Deutschliberalen im Mährischen Landtag und einem ihrer Wortführer auch im Reichsrat in Wien. Sturm schloss sich der deutschliberalen Bewegung an, wurde 1865 in den Landtag gewählt und 1867 – unmittelbar nach Abschluss des Ausgleichs – als mährischer Delegierter in das Abgeordnetenhaus des Reichsrats nach Wien entstandt.[10]

Im Landtag trat Sturm als Befürworter des Ausgleichs hervor. Er begrüßte die Rückkehr Ungarns zum Konstitutionalismus und war daher auch positiv zu einer Entwicklung der cisleithanischen Verfassung in diese Richtung eingestellt.[11] Im Reichsrat wurde er daher auch Mitglied der konstitutionell orientierten, sogenannten Verfassungspartei; ihr Kern rekrutierte sich weitgehend aus deutschen Liberalen; einer ihrer Führer – neben Giskra, dem Präsidenten des Abgeordnetenhauses im Jahr 1867 – war der niederösterreichische Abgeordnete Adolf Pratobevera, „Nestor" des Abgeordnetenhauses.[12] Die Deutschliberalen hatten im Reichsrat – dank der Abstinenz der tschechischen Delegierten – die Mehrheit, im Verfassungsausschuss besaßen die Deutschliberalen ein eminentes Übergewicht, sie stellten mit Pratobevera auch den Vorsitzenden und mit Sturm den (ersten) Protokollführer.[13]

B) Ausarbeitung eines Entwurfs zu einem Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger

1. Sturms „erster" Entwurf

Im Anschluss an die Entscheidung des Verfassungsausschusses über die Revision der Verfassung wurden die weiteren Verhandlungen Ende Juli – zum Zweck der Ausarbeitung der Entwürfe zu den in Aussicht genommenen Staatsgrundgesetzen – vertagt.[14] Sturm kehrte – auch in Hinblick auf seine Tätigkeit als Anwalt in Brünn – nach Mähren zurück, wo er sich der Konzeption des Grundrechte-Entwurfs widmete.[15]

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[7] HAIDER (wie 6) 193ff; STOURZH (wie 5) 5; publiziert in der Wiener Zeitung vom 24. 7. 1867/Extra-Blatt zur Abend-Beilage. – Ein lithographiertes Exemplar des Originals in HAUS-, HOF- UND STAATSARCHIV, Abteilung des Österreichischen Staatsarchivs: Nachlass PLENER, Karton 44, Konvolut mit dem „Nachlass Sturm" (Zeitungsausschnitte, Korrespondenzen, Widmungen, insbesondere in einem zerschlissenen Umschlag mit der Aufschrift „Reichsrath 1867. Verfassungsausschuss" Aufzeichnungen und Notizen zu den Arbeiten von Sturm im „Revisions Comité des Verfassungsausschusses".

[8] Dazu HAIDER (wie 6) 195ff. passim sowie 261f (Verzeichnis der Mitglieder des Verfassungsausschusses). Lediglich zwei Subkomiteemitglieder, Franz Klier und Ignaz Kuranda sowie der Obmann des Subkomitees, Sebastian Froschauer wurden nicht als Referenten bzw. Berichterstatter eingesetzt. Am stärksten in Anspruch genommen war Josef Waser als Berichterstatter für die Novellierung des Notverordnungsrechts, für das StGG – richterliche Gewalt und das StGG – Regierungs- und Vollzugsgewalt sowie über das Kundmachungsgesetz zur Verfassung 1867. Rudolf Brestel war Berichterstatter für das Delegationengesetz und – gemeinsam mit Florian Ziemialkowski – auch mit der Ausarbeitung der Novellierung des StGG – Reichsvertretung betraut, wofür Moriz Kaiserfeld als Berichterstatter fungierte; Raphael Kremer-Auenrode war Berichterstatter für das StGG – Reichsgericht und Eduard Sturm schließlich fungierte als solcher für das Staatsgrundgesetz über die allgemeinen Rechte.

[9] ÖSTERREICHISCHEN AKADEMIE DER WISSENSCHAFTEN, Österreichisches Biographisches Lexikon 1815–1950 14, 13; STOURZH (wie 6) 10; WURZBACH, Constant, Biographisches Lexikon des Kaiserthums Österreich, Band 40 (Wien 1880) 224–227.

[10] MALIŘ, Jiři u.a. (Hg.), Biografický slvenik poslanců moravského zemského sněmu v letech 1861–1918 (Brünn 2012) 676ff.

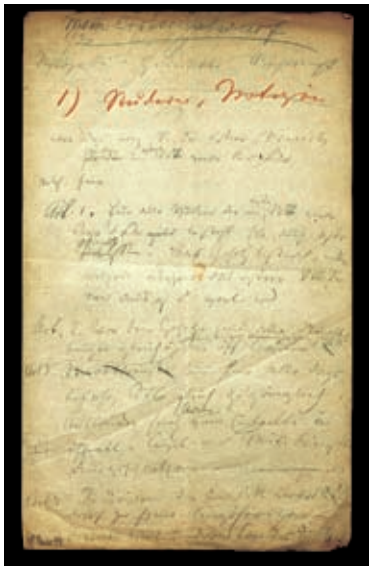
[11] Mährisches Landtags-Blatt über die Sitzungen des mit allerhöchstem Patente vom 18. September 1865 einberufenen mährischen Landtages, 2. Wahlperiode, I. Session (18. 2. 1867–4. 3. 1867), 7. Sitzung (27.2.1867) 148–151, insbesondere 151.

[12] BAYERISCHEN AKADEMIE DER WISSENSCHAFTEN (Hg.), Neue Deutsche Biographie, Band 20 (Berlin 2001), 676f (HÖBELT, Lothar, Adolf Pratobevera); GOTTSMANN, Andreas, Der Reichstag 1848/49 und der Reichsrat 1861 bis 1865, in: RUMPLER / URBANITISCH, Habsburgermonarchie VII/1 (Wien 2000) 632, 637f; ÖBL (wie 8) 8, 246f.

[13] HAIDER (wie 6) 166ff passim.

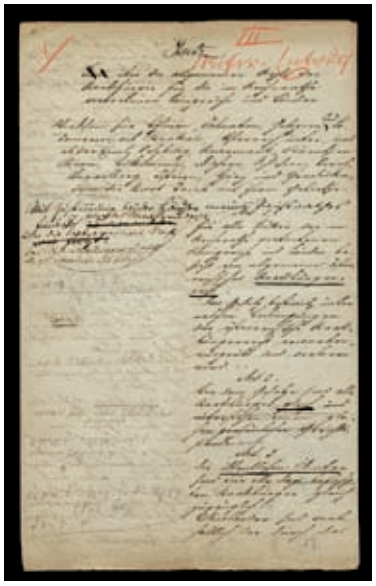
[14] HAIDER (wie 6) 195.

[15] BRAUNEDER (wie 6) 277f; ders. (wie 2) 174ff, besonders 181f; STOURZH (wie 5) 10f.



Die Materialien zu diesem Projekt, von Sturm eigenhändig verfasste „Studien und Notizen“, sind nach seiner Übersiedlung nach Wien irgendwann in den Besitz von Ernst Plener, einem der späteren Führer der Deutschliberalen im Reichsrat, gelangt; Pleners Nachlass befindet sich heute im Haus-, Hof- und Staatsarchiv in Wien.[16]

Die von Sturm hinterlassenen Materialien zeigen, dass er seinen „ersten“ Entwurf zunächst mit Bleistift zu Papier gebracht hat, die Handschrift wird im Verlauf der Aufzeichnungen zunehmend flüchtiger und es finden sich vermehrt eigenwillige Abkürzungen. In den beiliegenden „Studien und Notizen“ legte Sturm die seinem Konzept zugrunde gelegten Vorbilder offen:[17] Er stützte sich grundsätzlich auf die Grundrechte aus dem Entwurf des Österreichischen Konstituierenden Reichstags von Kremsier und auf die gleichzeitig (1848/49) ausgearbeitete Verfassung der Deutschen Nationalversammlung in Frankfurt sowie auf das cisleithanische Grundrechte-Patent aus dem Jahr 1849.[18]



In einem zweiten Arbeitsschritt fertigte Sturm eine Reinschrift seines Entwurfskonzepts[19] an, in welcher in einer zweigliedrigen Tabelle der Normtext in dunkler Tinte in der rechten Spalte fortlaufend aufgezeichnet ist, während die linke Spalte in Bleistift Anmerkungen zu den einzelnen Artikeln und Absätzen des Normtextes enthält.

Die meisten Anmerkungen beziehen sich auf den Kremsierer Entwurf, die Frankfurter Verfassung und auf die Österreichische Reichsverfassung von 1849; Anmerkungen zu anderen Verfassungstexten finden sich nur vereinzelt, etwa auf die Preußische Verfassung von 1850, nur einmal jedoch auf die ungarische sowie auf die österreichische Verfassung von 1848.

2. Überarbeitung im Subkomitee des Verfassungsausschusses

Nach Wiederzusammentritt des Verfassungsausschusses Anfang September 1867 wurde Sturms „erster“ Entwurf im Subkomitee einer Überarbeitung unterzogen:[20] Es kam insbesondere zur Streichung der Bestimmungen über spezifische

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16 Sein „Nachlass“ bildet einen Bestandteil des umfangreichen, mehrere Dutzend Kartons umfassenden NL Plener im HHStA; Ernst Plener, aus dem Sudetenland, war einer der Führungsfiguren des deutschliberalen Lagers seit Mitte der 1870er Jahren, u.a. 1893/94 auch Finanzminister (NDB [wie FN 12] 529f. [Rumpler, Helmut, Ernst Plener]; ÖBL [wie 9] 8, 122f); sein Vater war Ignaz Plener, 1860/65 Finanzminister, 1867 Mitglied des Verfassungsausschusses, dann 1867/68 Handelsminister und schließlich Vertreter der Altliberalen im Herrenhaus; in Karton 44 finden sich auch mehrere, meist ungeordnete Konvolute zu Sturms Arbeiten im Parlament, u.a. eines mit der Aufschrift „Reichsrath 1867. Verfassungsausschuss“, das 92 durchfoliierte Blätter umfasst, die Blätter 54–65 fehlen allerdings.

17 „Nachlass“ Sturm in NL Plener (wie FN 7) Karton 44, fol. 2ff.

18 „Nachlass“ Sturm in NL Plener (wie FN 7) Karton 44, fol. 7f: „1849 G[run]d[-]R[echte] über die d[urc]h die const[itutionelle] Staatsform gewährleisteten Rechte“ (Kaiserliches Patent vom 4. 3. 1849/RGBl. 11).
„Nachlass“ Sturm in NL Plener (wie FN 7) Karton 44, fol. 9f: „Oest: Grundrechte (= Entwurf der Grundrechte des österreichischen Volkes, in Wiener Zeitung vom 23. 12. 1848/Extrablatt); fol. 11f.: „Frankfurt ... Niederlande 1848 ... Kurhessen 1831 ... Hannover 1840 u[nd 18]48 ... Oldenburg 1849 ... Bremen 1849 ... Preussen 1850“; fol. 13: „Debatte 1848-49-Grundrechte“ von „3/1 49.“ bis „26/1“, also von 3. bis 26. Jänner 1849, im Kremsierer Verfassungsausschuss.

19 „Nachlass“ Sturm in NL Plener (wie FN 7) Karton 44, fol. 17–21.

20 Brauneder (wie 6) 278f. Sturm hat diese Veränderungen im Exemplar der Reinschrift seines Entwurfs mit Bleistift ersichtlich gemacht, durch Streichungen bzw. inhaltliche Hinweise, welche er zum Teil unmittelbar bei den entsprechenden Bestimmungen (bei Art. 4/gleicher Beitrag zu den „Staatslasten“ durch den Hinweis auf „Gemeindegenossen“ bzw. bei Art. 10/staatliche Gerichtsbarkeit durch den Hinweis auf „Niemand darf seinem ord[entlichen] Richter entzogen werden“ oder bei Art. 23/Verbot der Zeitungszensur anstatt des Terminus „Zeitungsstempel“: „Concessionssyst[em].“) angebracht hat bzw. in einer stichwortartigen Aufzählung in dem in seinem „Nachlass“ befindlichen Konvolut „Reichsrath 1867. Verfassungsausschuss“, hier 21v (Aufzählung von Materien, welche in „Spez[ial-].Gesetze“ gehören: „Unab[ängigkeit]. der Richter“, mit Verweis auf den Satz „Niemand d[ar]f s[eine]m ord[entlichen]: Richter entzogen werden“, der sich auf § 1 des Gesetzes zum Schutz der persönlichen Freiheit bezieht, wo anstelle von „ordentlichen“ freilich „gesetzlichen“ steht; ferner: „Schadenersatz des Staates“ im Rahmen der „Administr[ativ].Justiz[-]Conflicte“, „Lehen. 1862“, „Heimathrecht 1862 u[nd] 1863“ [bezugnehmend auf die Gesetze über die Lehensallodifikation sowie das Gemeinde- und Heimatrechtswesen: RGBl. 103/1862, bzw. 18/1862 und 105/1863).

Aspekte der Gleichheit der Staatsbürger (persönlicher Gerichtsstand; gleiches Zivil-, Straf- und Verfahrensrecht; gleiche Steuerpflicht), der Bestimmungen über die Justiz (Gerichtsorganisation; Grundsätze des Zivil- und Strafverfahrens; Zuständigkeit ordentlicher Gerichte für Militärpersonen in Zivilsachen) und über das Strafrecht (Aufhebung der Todesstrafe und einiger anderer Strafarten; Zuständigkeit in Preß-Delikten) sowie der Bestimmungen betreffend die Beziehungen zwischen dem Staat und den von ihm anerkannten Kirchen (Aufhebung von Privilegien einzelner Konfessionen; gesetzliche Bestimmung der Verhältnisse zwischen Staat und Kirchen; Einführung der obligatorischen Zivilehe). Die betreffenden Gegenstände sollten zum Teil in anderen Staatsgrundgesetzen (über Gerichtsbarkeit bzw. über die Regierungs- und Vollzugsgewalt) sowie zum Teil in besonderen Gesetzen neben den Staatsgrundgesetzen eine Regelung erfahren. Überdies wurde ein neues Grundrecht geschaffen: Allen Staatsbürgern sollte in jenen Gemeinden, in denen sie einer Steuerpflicht unterlagen, auch das Wahlrecht zur Gemeindevertretung und zum Landtag zugestanden werden. Außerdem kam es bei einzelnen Bestimmungen zu stilistischen Änderungen und Kürzungen im Wortlaut sowie zu Modifikationen ihrer systematischen Anordnung. Sturms Entwurf wurde infolge der Streichungen im Subkomitee im Umfang von 25 auf 19 Artikel reduziert, der Großteil blieb aber unverändert.[21]

3. Der Entwurf des Subkomitees im Verfassungsausschuss sowie im Plenum der beiden Häuser des Reichsrates

Die gegen Ende September 1867 anschließenden Verhandlungen im Verfassungsausschuss[22] brachten – von stilistischen Modifikationen und systematischen Umstellungen[23] abgesehen – kaum wesentliche Änderungen – ausgenommen einerseits die Streichung des Verbots der unbeschränkten Teilbarkeit von Grundeigentum (Art. 6, Absatz 2 des Subkomitee-Entwurfs) sowie der Bestimmung über die Einheitlichkeit der Unterrichtssprache in multinationalen Ländern (Art. 17, Absatz 3 des Subkomitee- Entwurfs); andererseits wurde auch ein neues Grundrecht kreiert, nämlich die Freiheit der Berufswahl (Art. 18 des Verfassungsausschuss-Entwurfs).[24]

Die Verhandlungen im Plenum der beiden Häuser des Reichsrats (von Anfang Oktober bis Mitte Dezember 1867) – in Verbindung mit den anderen Entwürfen zu den Verfassungsgesetzen, welche die neue Verfassung bildeten, – führten zu keinen wesentlichen inhaltlichen Änderungen des Verfassungsausschuss-Entwurfs.[25]

V. Ergebnis

Der Verfassungsausschuss kann – aufgrund der Initiative zum Ausbau der Verfassung im konstitutionellen Sinn – als „Träger und Motor der Verfassungsreform" von 1867 angesehen werden. Er wurde dadurch „zum eigentlichen Schöpfer" der neuen Verfassung. Ihr Herzstück – die Grundrechte – galten als das „ureigendste Werk" des Verfassungsausschusses. Das ihnen zugrundeliegende Konzept war Sturms „erster" Entwurf, sodass auch er als „Schöpfer" des Grundrechte-Katalogs von 1867 angesehen werden könnte.[26] Allerdings hatte er sich bei der Ausarbeitung seines Entwurfs sehr stark an Konzepten früherer Verfassungen orientiert, vor allem an den Grundrechten der österreichischen Verfassung von 1849. Am Schluss seiner „Studien und Notizen", welche der Ausarbeitung seines Entwurfes zugrunde lagen, brachte Sturm die lapidare Bemerkung „Alles 1849" an[27] – sie gibt die materielle Essenz seines Entwurfs freilich sehr stark verkürzend wieder: Sturm hat – außer dem cisleithanischen Grundrechte-Patent – auch den Grundrechten des Kremsierer Reichstags Beachtung geschenkt[28] und vereinzelt sogar den Frankfurter Grundrechten von 1848/49 den Vorzug[29] gegeben. Zwei Grundrechte waren überdies durch strafrechtliche Nebengesetze aus 1862 inhaltlich bereits festgelegt, nämlich der Schutz der persönlichen Freiheit sowie der Schutz des Hausrechts.[30]

Die Fassung, die der Entwurf Sturms im Subkomitee erhalten hatte, war im Verfassungsausschuss sowie im Plenum der beiden Häuser des Reichsrats nur mehr in Bezug auf Stilisierung und Stellung im System modifiziert bzw. inhaltlich marginal ergänzt worden, sodass der Großteil des 1867 in Geltung getretenen Inhalts des Staatsgrundgesetzes über die allgemeinen Rechte der Staatsbürger die Handschrift von Sturm trug: Insofern kann er

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[21] Im Konvolut „Reichsrath 1867. Verfassungsausschuss", fol. 22^{v} seines „Nachlasses"(wie 7) findet sich in Bleistift die Anweisung Sturms: „nur das mit Tinte Geschriebene gilt u[nd]. erbitte ich mir dieses Manuscript wegen der Bleistiftnotizen zurück". Ein gedrucktes Exemplar des Subkomitee-Entwurfs befindet sich im „Nachlass" Sturm in NL Plener (wie 6) im Konvolut „Reichsrath 1867. Verfassungsausschuss", fol. 23–25.

[22] BRAUNEDER (wie 5) 279; HAIDER (WIE 6) 118ff und 209ff; 121ff und 214ff.

[23] HAIDER (wie 6) 210–218 passim.

[24] HAIDER (wie 6) 214, 217f.

[25] BRAUNEDER (wie 6) 276f, 277ff; HAIDER (wie 6) 122f, 124ff, 257ff, 261f; StenProtAH, 32. Sitzung, 8. 10. 1867, 778ff, 799–818; 33. Sitzung, 9. 10. 1867, 780–795; 58. Sitzung, 4. 12. 1867, 1571; 59. Sitzung, 7. 12. 1867, 1598ff, 1626f; StenProtHH, 17. Sitzung, 28. 11. 1867, 267–288; 21. Sitzung, 12. 12. 1867, 373; 22. Sitzung, 13. 12. 1867, 388ff. Die Sanktion erfolgte am 21. 12. 1867: RGBl. 141–147.

[26] STOURZH (wie 5) 4.

[27] Bleistiftnotiz Sturms auf der Rückseite eines Blattes, das im Anschluss an die Reinschrift seines Entwurfs in dem mit „Reichsrath 1867. Verfassungsausschuss" bezeichneten Konvolut in seinem „Nachlass" (wie 7), hier fol. 21^{v}.

[28] Dem Kremsierer Entwurf folgen Art. 19 (Gesetzliche Regelung des Verhältnisses von Staat und Kirche) und Art. 22 Abs. 2 (Einheitlichkeit der Unterrichtsprache) von Sturms Entwurf.

[29] Beschränkungen der „toten Hand" (Art. 7, Abs. 2 in Sturms Entwurf); Aufhebung der Todesstrafe (Art. 11 in Sturms Entwurf), Verbot des Zwangs zu kirchlichen Handlungen oder Feiern (Art. 18 in Sturms Entwurf).

[30] Gesetz zum Schutz der persönlichen Freiheit (Art. 9 in Sturms Entwurf) bzw. Gesetz zum Schutz des Hausrechts (Art. 12 in Sturms Entwurf), jeweils vom 27. 10. 1862, RGBl. 35 und 36.

doch als „eigentlicher Schöpfer“ der Grundrechte von 1867 angesehen werden[31] – im Hinblick die Methode der Verwertung der von ihm benutzten Vorlagen vielleicht aber „doch eher nur im formellen Sinn als Kompilator“.[32]

Abkürzungen

Abs.	Absatz
AÖRG	Arbeitsgemeinschaft Österreichische Rechtsgeschichte
Art.	Artikel
fol.	folio
hg.	herausgegeben
Hg./Hgg.	(Einzel-) / (mehrere) Herausgeber
HHStA	Haus-, Hof- und Staatsarchiv, Abt. des Österreichischen Staatsarchivs
NDB	Neue Deutsche Biographie
NÖ	Niederösterreich
ÖBL	Österreichisches Biographisches Lexikon
OÖ	Oberösterreich
RGBl.	Reichsgesetzblatt für das Kaiserthum Österreich (1852–1869); Reichsgesetzblatt für die im Reichsrath vertretenen Königreiche und Länder (1870–1918)
StenProtAH	Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten des österreichischen Reichsrates (1861ff.)
StenProtHH	Stenographische Protokolle über die Sitzungen des Herrenhauses des österreichischen Reichsrates (1861ff.)
StGG	Staatsgrundgesetz
u.a.	und andere

Anhang: Synopsen zur Textgenese des Staatsgrundgesetzes über die allgemeinen Rechte der Staatsbürger von 1867

A) Entwurf Sturm – Entwurf Subkomitee

Die in der linken Spalte durchgestrichenen Passagen weisen auf Streichungen hin, kursiv gesetzte Passagen betreffen inhaltliche Änderungen. Die rechte Spalte enthält die jeweilige Artikelnummer der im Entwurf des Subkomitees verbliebenen Bestimmungen.

Entwurf Sturm: Änderungen im Subkomitee	Entwurf Subkomitee
Art. 1 Einheitliches Staatsbürgerrecht	= Art. 1
Art. 2 Gleichheit aller Staatsbürger vor dem Gesetz; ~~gleicher persönlicher Gerichtsstand~~	= Art. 2
Art. 3 Gleiche Befähigung zu öffentlichen Ämtern; Ausnahmen für Ausländer	= Art. 3
~~Art. 4 Einheit des Justizrechts; gleiche Steuerpflicht der Staatsbürger~~	
Art. 5 (1) Freizügigkeit (von Person und Vermögen); *(2) Verknüpfung von Steuerleistung am Wohnsitz und Wahlrecht;* *(3)* Beschränkung der Auswanderungsfreiheit durch Wehrpflicht; *(4)* Abfahrtsgelder bei Reziprozität zulässig	= Art. 4
Art. 6 Eigentumsfreiheit; Enteignung nur gegen Entschädigung;	= Art. 5
Art. 7 (1) Freiheit von Aufenthalt / Wohnsitz, Verfügung über Liegenschaften und Ausübung jeden Erwerbszweigs; (2) Grundsatz der Teilbarkeit von Grundeigentum (3) Beschränkung des Liegenschaftserwerbs für die „tote Hand“	= Art. 6
Art. 8 Aufhebung von Grunduntertänigkeit und Hörigkeit; Grundentlastung	= Art. 7
Art. 9 Freiheit der Person; Schadenersatz bei rechtswidriger Verhaftung	= Art. 8
~~Art. 10 Grundsatz staatlicher Gerichtsbarkeit; Grundsatz des mündlich-öffentlichen Gerichtsverfahrens; Anklageprozess in Strafsachen; Schwurgerichte; Heeresangehörige unter staatlicher Ziviljustiz~~	
~~Art. 11 Abschaffung der Todesstrafe; Aufhebung des bürgerlichen Todes, der Vermögenskonfiskation, des Prangers, der Brandmarkung, Kettenstrafe und körperlichen Züchtigung~~	

[31] STOURZH (wie 5) 10.
[32] BRAUNEDER (wie 6) 278.

Art. 12 Schutz des Hausrechts	= Art. 9
Art. 13 Schutz des des Briefgeheimnisses	= Art. 10
Art. 14 Petitionsrecht	= Art. 11
Art. 15 Vereins- und Versammlungsfreiheit	= Art. 12
Art. 16 (1) Glaubens- und Gewissensfreiheit inkl. *Recht der häuslichen Religionsausübung = Art. 15* (2) Unabhängigkeit der Rechtsstellung vom Glaubensbekenntnis *(3) Kein Zwang zu kirchlichen Handlungen oder Feiern*	= Art. 13 (1) = Art. 15 = Art. 13 (2) = Art. 13 (3)
Art. 17 (1) Öffentliche Religionsübung und Anerkennung innerer Autonomie für staatlich anerkannte Bekenntnisse; ~~(2) keine Vorrechte für bestimmte Bekenntnisse~~	= Art. 14
Art. 18 = *Art. 16 (3)*	= Art. 13 (2)
~~Art. 19 Gesetzliche Regelung des Verhältnisses von Staat und Religionsgesellschaften~~	
~~Art. 20 Grundsatz der obligatorischen Ziviltrauung;~~ ~~Aufhebung der Religionsverschiedenheit als Ehehindernis~~	
Art. 21 (1) Freiheit der Wissenschaft und ihrer Lehre; (2) Gründung von Schulen / Erziehungsanstalten nach Gesetz; (3) Freiheit des häuslichen Unterrichts *(4) Organisierung des Religionsunterrichts durch Kirchen* *(5) staatl. Leitung und Aufsicht über Unterricht / Erziehung*	= Art. 16
Art. 22 *(1) Gleichberechtigung der Volksgruppen in Nationalität und Sprache*; (1) = *(2)* ~~Allgemeine Volksbildung als Staatsaufgabe und~~ Gleichbehandlung der Volksgruppen im öffentlichen Unterricht inklusive Verbot des Sprachenzwangs; (2) = *(3)* Grundsatz der einheitlichen Unterrichtssprache (3) = *Art. 16 (4)* (4) = *Art. 16 (5)*	= Art. 17
Art. 23 Rede-, Presse-, Meinungsfreiheit; Aufhebung der Zensur	= Art. 18
Art. 24 = *Art. 22 (1)*	
Art. 25 Suspension bestimmter Grundrechte	= Art. 19

B) Entwurf Subkomitee: Änderungen im Verfassungsausschuss – Beschluss des Reichsrats

Die in der linken Spalte durchgestrichenen Passagen weisen auf Streichungen hin; kursiv gesetzte Passagen betreffen inhaltliche Änderungen. Die rechte Spalte enthält die jeweilige Artikelnummer der im Beschluss des Reichsrates verbliebenen Bestimmungen.

Entwurf Subkomitee: Änderungen im Verfassungsausschuss	**Reichsratsbeschluss**
Art. 1 Einheitliches Staatsbürgerrecht	= Art. 1
Art. 2 Gleichheit aller Staatsbürger vor dem Gesetz	= Art. 2
Art. 3 Gleiche Befähigung zu öffentlichen Ämtern; Ausnahmen für Ausländer	= Art. 3
Art. 4 (1) Freizügigkeit (von Person und Vermögen); (2) Verknüpfung von Steuerleistung am Wohnsitz und Wahlrecht; (3) Beschränkung der Auswanderungsfreiheit durch Wehrpflicht; (4) Abfahrtsgelder bei Reziprozität zulässig	= Art. 4
Art. 5 Eigentumsfreiheit; Enteignung nur gegen Entschädigung	= Art. 5
Art. 6 (1) Freiheit von Aufenthalt / Wohnsitz, Verfügung über Liegenschaften und Ausübung jeden Erwerbszweigs; ~~(2) Grundsatz der Teilbarkeit von Grundeigentum~~ (3) = *(2)* Beschränkung des Liegenschaftserwerbs für die „tote Hand“	= Art. 6
Art. 7 Aufhebung von Grunduntertänigkeit und Hörigkeit; Grundentlastung	= Art. 7
Art. 8 Freiheit der Person; Schadenersatz bei rechtswidriger Verhaftung	= Art. 8
Art. 9 Schutz des Hausrechts	= Art. 9
Art. 10 Schutz des des Briefgeheimnisses	= Art. 10

Art. 11 Petitionsrecht	= Art. 11
Art. 12 Vereins- und Versammlungsfreiheit	= Art. 12
Art. 13 = *Art. 14* (1) Glaubens- und Gewissensfreiheit (2) Unabhängigkeit der Rechtsstellung vom Glaubensbekenntnis (3) Kein Zwang zu kirchlichen Handlungen oder Feiern	= Art. 14
Art. 14 = *Art. 15* Öffentliche Religionsübung und Anerkennung innerer Autonomie für staatlich anerkannte Bekenntnisse	= Art. 15
Art. 15 = *Art. 16* Recht der häuslichen Religionsausübung	= Art. 16
Art. 16 = *Art. 17* (1) Freiheit der Wissenschaft und ihrer Lehre; (2) Gründung von Schulen / Erziehungsanstalten nach Gesetz; (3) Freiheit des häuslichen Unterrichts (4) Organisierung des Religionsunterrichts durch Kirchen (5) staatl. Leitung und Aufsicht über Unterricht / Erziehung	= Art. 17
Art. 17 = *Art. 19* (1) Gleichberechtigung der Volksgruppen in Nationalität und Sprache; (2) Gleichbehandlung der Volksgruppen im öffentlichen Unterricht inklusive Verbot des Sprachenzwangs ~~(3) Grundsatz der einheitlichen Unterrichtssprache~~	= Art. 19 (=1) *(2) Gleichberechtigung der Landessprachen* *= (3)*
Art. 18 = *Art. 13* Rede-, Presse-, Meinungsfreiheit; Aufhebung der Zensur	= Art. 13
Art. 18 Recht auf freie Berufswahl	= Art. 18
Art. 19 = *Art. 20* Suspension bestimmter Grundrechte	= Art. 20

The Reception of the Code Civil (Napoléonic Code) of 1804: An Example of "Juridical Migration"?*

Thomas Gergen **

Abstract

The Civil Code (Napoléonic Code), a codification of natural law (Naturrecht) of 1804, knew a large reception all over the world. The question is whether it was also an example of "juridical migration" that rendered possible human migration, too.

Key words: *Civil Code/Napoléonic Code (CC) of 1804; Peculiarities of the CC; Reception of the CC; Migration.*

The Civil Code (CC) or rather Napolian code, which became effective on March 21st, 1804 ("30th ventôse", the 30th month of the Republican calendar of the year XII), became an "export hit" in the juridical field in France just like the declaration of civil rights in 1789.

Napoléon Bonaparte himself was very proud of this achievement and did everything to assure himself the authorship and rights for this body of law, although he owed much to the legislative meetings of the revolution and to their editors. Predominantly, the code was received with great enthusiasm in Europe. Since 1804, the code had become the law of the territories annexed by France such as Piemont, Genua, and today's Belgium and Luxembourg. Until today, the code exists in Belgium and Luxembourg, despite the modifications in the last two centuries, and forms the basis for their civil rights system. In addition, the European code developed into a model for later enacted civil rights codifications. The main idea of the French code is the freedom and the assurance of property as an all-embracing right of disposition. The property owner has the right to use his property and the power of disposal of his property, which are only restricted by legal barriers and the fact that the law does not allow misusage (Missbrauchsverbot). But numerous other alterations and innovations made the code so well-liked, which is why it had continued to be popular, even after Napoléon's failure, and has been kept in existence ever since. In our context, the reception of the code itself can be considered as a juridical example for migration, above all in Luxembourg and Belgium.

I. The Civil Code – a Codification of Natural Law

The Civil Code of 1804 belongs to the three classic codifications of natural law (= Naturrecht, Naturrechtskodifikationen). The other two are the common law of 1794 of the Prussian states (Allgemeines Landrecht für die Preußischen Staaten), and the Austrian code of law of 1811. Supported by the ideas of enlightenment, these codifications wanted to codify the law through the aim of completeness.

Rational law postulates became concrete legal rules of conduct. For example, the demand "neminem laedere", meaning not to hurt anyone, developed into concrete rules about forbidden actions. Rational law or rather the secularized right of nature developed from the Christian natural justice and moral theology because numerous jurists were of the opinion that over-positive criteria concerning justice and equity existed.

1. Development of the Civil Code (CC)

The old French feudal law was overturned during the French Revolution in 1789 in favor of an initial supremacy of the third estate in France. Estate-related social regulations and privileges were abolished. After the re-formation in 1792, the (new) French republic became one of the strongest powers in Europe due to the involvement in political and military exercise of powers of the third estate.

As a consequence of Napoléon's political and military success Europe came under France's supremacy. This was reflected in the end of the German empire and the "Rheinbund" (Confederation of the Rhine) of 1806. In 1795, France in fact had the sole reign over the land left of the River Rhine. In 1801, this reign was recognized by the Treaty of Lunéville.

In 1803, the Reichsdeputationshauptschluss (Principal conclusion of the Extraordinary Imperial Delegation) of Regensburg resulted in the secularization and mediatization in order to compensate land owners who had lost their property in the

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area left of the River Rhine. They were given property on the right side of the Rhine.

Secularization means secularizing ecclesiastic issues, particularly the nationalization of church property. In 1803, about 10,000 square kilometers of church property with more than 3 million subjects were secularized.

Mediatization here is concerned with the imperial estates, imperial cities, and imperial knighthoods whose imperial immediacy was abolished. They then became simple, mediatized imperial members because their territorial possessions became part of an imperial principality.

The demands of enlightenment are particularly present and visible in this process of secularization as well as in the course of the French Revolution after the abolition of the secular powers of the church.

In the new French, or French-influenced, territories, the French way of thinking had a strong impact on the administration and introduction of the French law.

It is important to add that Franz the Second of Germany resigned in 1806 by laying down the imperial crown of the Holy Roman Empire. In addition, 16 princes from southern and western parts of the German empire bonded with Napoléon through the Rheinbund (Confederation of the Rhine) after they had left the German empire.

The "Rheinbund" was a federation of different states under the protectorate of Napoléon. The Confederation of the Rhine was a treaty between France (with Napoleon as their leader) and German princes, designed by the French foreign minister Charles Maurice de Talleyrand.

In 1808, another 23 members joined the confederation. Through reforms and the establishment of new laws, Napoléon managed to end the fragmentation of the legal system in France. During the time of the "Ancien Régime" (the old, ancient regime), the River Loire marked the language boundary of the country as well as a judicial and legal border.

In the South of France, a modified Roman (written) law was still in effect, while in the North, the so-called "coutumes" (legal customs) still applied. Napoléon personally took part in the consultation meetings of different commissions concerning the Civil Code and had a great impact on the regulations of several details. He even led 57 of 102 meetings of the legislative commission. It is said that one of his standard questions to the editors was whether the regulation was not only dogmatically correct but also just and fair.

2. Peculiarities of the CC

In contrast to the Prussian law (Allgemeines Landrecht für die Preußischen Staaten) with over 19,000 articles, the CC only has 2,281 paragraphs (the Austrian code of law only had 1,502). It structures civil law in two ways: On the one hand, in accordance with egalitarian and liberal proclamations of the French Revolution; on the other hand, in correspondence with Napoléon's authoritarian ideas. All estate-related barriers were henceforth abolished.

In addition to the "Code Civile" (1804), the "Code de procédure civile" (1807), the "Code de commerce" (1803), the "Code d'instruction criminelle" (1809), and the "Code pénal" (1811) were established under Napoléon's reign. Together they constituted the "Les Cinq Codes" – the five codes.

According to the CC, the marriage ceremony was no longer performed by a priest but by the secular registrar of the "État civil", the civil registry office. However, Napoléon structured the relationship between husband and wife, as well as between parents and children, in a patriarchic order as before. According to Article 213 of the CC, the wife and children had to be absolutely obedient to their husband or father, respectively: Le mari doit protection ŕ sa femme, la femme doit obéissance ŕ son mari.

The secularization of the civil marriage and the possibility of a consensual divorce were considered modern. They were beneficial to Napoléon himself who wanted to divorce his first, childless wife. In 1816, however, divorce in France became prohibited again by law and was re-introduced in 1884 (called "Loi Naquet" – divorce law).

Today, the article 213 points out:

Les époux assurent ensemble la direction morale et matérielle de la famille. Ils pourvoient ŕ l'éducation des enfants et préparent leur avenir.

Further, it is worth mentioning that, in contrast to the Civil Code of Germany, the CC does not comply with the abstraction principle until today. This means that the disposition and executory agreements are separated (principle of separation).

The abstraction principle is an abstract version of the disposition agreement without "causa" (cause) which is essential in the executor agreement. That is why the former can be used to fulfill different causes. According to article 1583 of the CC, the property of a seller is immediately transferred to the buyer as soon as both have agreed on the price – **without** the object or money having to be **transferred** in advance. Hence, the CC represents the principle of unity.

- Article 1583, created by the original Code civil March 16th 1804:

Elle (= La vente) est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé.

The CC is based on the conventional institutional system: *the personae-res-actiones*-order. 2,281 articles are composed in three books: First, personal rights (including family rights); second, property law (regulation of property and restricted user rights); third, different kinds of regulations concerning acquisition of property (law of succession, marriage law, law of obligations, lien (Pfand), mortgages (Hypothek), and limitation of liability over time).

All mortgages are strictly accessory; therefore, a mortgage for the benefit of the owner or a land charge is not possible as in Germany. Hence, the ideas of equality, personal freedom, independence of property, as well as elementary laws of freedom of contract were achieved. The new rationale, i.e. logical basis, coincided with a clear vision of the needs of law in legal practice and resulted in the excessive popularity of the CC.

The main idea of the CC lies in the freedom and assurance of property as an overall right of ownership. According to article 544 of the CC, the owner has the right of disposal for his

property, only restricted by legal restrictions and the law against misusage: La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.

The CC got rid of the bondage of peasants and all the connected legal relationships. Rent charges were replaced and property was basically tax-exempt.

Concerning the legal position of illegitimate children, the **recognition principle** applied: The illegitimate child had no degree of biological relationship to the parents and was therefore considered parentless. The biological relationship with the illegitimate child was only accepted through the recognition principle. While the child could sue for motherhood recognition infinitely, it was practically impossible to file a suit for a fatherhood claim. Allegedly, this was supposed to protect soldiers from any possible claims or demands!

The law of guardianship was also re-constructed. Napoléon did not only want to realize separation of state and church but also separation of state and society.

The CC took away jurisdiction from the government to a high degree and supported the idea of the family council. This led to a strengthening of the family and its protection from the actions of the government. The family council became the actual guardianship authority. If the guardian was not assigned by law or testament, the family council would decide about guardianship. The council also approved of all important legal transactions.

Concerning the law of succession, the CC considered legal heirs as valid as well as freedom of testation; testamentary appointment, however, usually were considered as a bequest (so-called legacy of vindication). The CC names three forms of the final will: by one's own hand, public, and the sealed testament. The testament signed personally (holographic) found its way to the German law. This holographic testament was not created by witnesses and therefore was different from the Roman law *testamentum holographum.* The testament written by oneself reflected in article 970 of the CC finds its counterpart in article 2,247, paragraph 1, in the German law (this is where the self-written and personally signed final will and testament can be found. It is considered a must and has to include statements about the time and location).

Le testament olographe ne sera point valable s'il n'est écrit en entier, daté et signé de la main du testateur : il n'est assujetti à aucune autre forme. (Art. 970, since 2007).

BGB § 2247 Eigenhändiges Testament

(1) Der Erblasser kann ein Testament durch eine eigenhändig geschriebene und unterschriebene Erklärung errichten.

(2) Der Erblasser soll in der Erklärung angeben, zu welcher Zeit (Tag, Monat und Jahr) und an welchem Ort er sie niedergeschrieben hat.

(3) Die Unterschrift soll den Vornamen und den Familiennamen des Erblassers enthalten. Unterschreibt der Erblasser in anderer Weise und reicht diese Unterzeichnung zur Feststellung der Urheberschaft des Erblassers und der Ernstlichkeit seiner Erklärung aus, so steht eine solche Unterzeichnung der Gültigkeit des Testaments nicht entgegen.

(4) Wer minderjährig ist oder Geschriebenes nicht zu lesen vermag, kann ein Testament nicht nach obigen Vorschriften errichten.

(5) Enthält ein nach Absatz 1 errichtetes Testament keine Angabe über die Zeit der Errichtung und ergeben sich hieraus Zweifel über seine Gültigkeit, so ist das Testament nur dann als gültig anzusehen, wenn sich die notwendigen Feststellungen über die Zeit der Errichtung anderweit treffen lassen. Dasselbe gilt entsprechend für ein Testament, das keine Angabe über den Ort der Errichtung enthält.

The reception of the CC is consequently very important to the German and European history of law as well as that of the rest of the world.

II. The Reception of the CC

1. Reception in Germany

Four different cases concerning the reception of the CC in Germany can be named:

1. Territories in which the CC was never introduced, such as Bavarian who held on to the *Maximilianeus Bavaricus Civilis* code from 1756 until 1900; or Württemberg who kept its common law from 1743.
2. Territories in which the CC in its original form applied only for a very short time and was then abolished. These territories include the Kingdom of Westphalia, the Hanseatic departments, the Lippe-department, East Frisia, and the Grand Duchy Berg and Frankfurt (Main) between 1810 and 1814.
3. Territories in which the CC applied until the introduction of the German Civil Code (BGB) in 1900; for example in the Rheinland (Rhine area) where no one wanted Prussian laws!
4. Territories in which the CC was translated to a large extent and adapted (for example Baden with the Badense common law from of 1809, in effect since January 1st, 1810).

Consequently, the entire territory left of the River Rhine was governed by the French common law. This area of mostly French territory was divided into four departments in 1798: The Ruhr department with the "Arrondissements" (electoral districts) of Aachen, Cologne, Krefeld, and Kleve; the Rhine-Mosel department with the districts of Koblenz, Bonn, and Simmern; the Saar department with the districts of Trier, Saarbrücken, Prüm, and Birkenfeld, as well as eventually the department of Donnersberg with the districts of Mainz, Speyer, Kaiserslautern, and Zweibrücken.

The **prefect** (préfet) was a representative of the central government and formed the head of each department. He governed a strict hierarchical system of state official – from the subordinate prefect to the head of the arrondissements and cantons, to the individual mayors. A "juge de paix", justice of the peace was assigned to each canton. He was in charge of jurisdiction of civil and criminal trifles, i.e. things of little importance and value. At a certain amount of dispute, people could appeal against a decision of the justice of the peace and the case could be transferred to a higher level of jurisdiction. A "court of first instance" usually included three to five judges and as located in the capital

of an Arrondissement. They were in charge of civil and criminal matters insofar as the justice of the peace was not in authority. The court of justice for appeals functioned as the revision authority, consisting of at least seven judges. This "Cour d'appel", responsible for the territory left of the River Rhine, was located in Trier.

In 1809, a version of the CC was translated into German in the Grand Duchy Baden. It was adapted to the local needs, published as the "Badisches Landrecht", and became effective in January 1810. The Imperial Court in Mannheim then became head in charge of jurisdiction. After the imperial court in Leipzig took up its judiciary functions on October 1st, 1879 (as a consequence of the imperial judiciary laws), their second civil court of appeal (the so-called "Rheinische Zivilsenat", the Rhinish civil court of appeal) was in charge of securing legal entities in terms of the French law.

Chairs in French law were introduced at the Universities of Bonn, Freiburg, Heidelberg, and Würzburg. The professors in charge did considerable editing and adaptations of the French civil law. Particularly, Karl Salomo Zachariae von Lingenthal's deserves special mention. In his **"Handbuch des französischen Civilrechts"**, handbook of French civil rights, Von Lingenthal tried to develop a system or classification of the French law, independent of the order of articles of the code of law, and based on common law science.

Due to the distinguished translation of this work by Professor Aubry and Rau from Strasbourg, Von Lingenthal's handbook attracted great interest in France. As a consequence, a systematic-dogmatic adaptation of the Civil Code was undertaken.

2. Reception of the CC outside of Germany

The CC became the role model for civil right codifications of almost all states with a Romanic culture other than the French, for example, Italy, Spain, Romania, and most South American states, such as Argentina and Chile, as well as Louisiana in the USA; and, later, Africa and Asia.

In 1804, the Code was already law for territories annexed by France, such as Piedmont, Geneva, today's Belgium and Luxembourg; and, later, the empires of Naples and Warsaw.

The civil code of the Kingdom of Sicily from 1819 as well as the Albertinian Civil Code of the Kingdom of Sardinia from 1837, were based on the model of Civil Code and the "Code de commerce", the Commercial Code, to a great extent – particularly, when it came to laws of contract and obligation, reflected in the third book of the Civil Code. The Albertinian Civil Code from Sardinia was in turn a role model for the civil right codification for all of Italy in 1865. However, not only the **legislation process but also the legal commentary, literature, and practice** of all Italian states made direct reference to the former French law. We can therefore speak of an "indirect" application of the French law to the Italian Peninsula.

The Netherlands, who had introduced their civil law code ("Burgerlijk Wetboek") in 1838, felt obliged to the idea and content as well as the solutions and formulations of Napoléon's civil rights codification – in particular, to the laws of contract and obligation. This also applied for the western cantons of Switzerland. In the Grand Duchy of Warsaw, a Polish translation of the third book of the CC concerning the law of contract and tort applied, even during the Russian reign and until reconstruction of the Polish Republic in 1919. The presence of the French law on Polish territory was terminated only through the introduction of the Polish Code of Obligations in 1933.

The special influence of the French case law is crystallized in the legal developments in Portugal during the first half of the 19th century. The formation of the modern, Portuguese civil right is the result of a slow development which started in the middle of the 18th century. The Portuguese law underwent a fundamental change as a consequence of the famous law about natural reason, the "Lei da Boa Razão" – Law of Good Reason – from August 18th, 1769.

In order to end legal uncertainty in Portugal which was connected to the common law practice, it was prohibited to revert to authorities of the common law, the so-called *communis opinio doctorum.*

Regress to the Roman common law as a subsidiary source of law was only allowed for those legal Roman common laws that were in accordance with the Law of Good Reason, meaning which corresponded with the "Boa Razão". Regarding this reform, legal reference to the "Boa Razão" was first understood in terms of the inspiration of the Law of Good Reason. Due to the recourse to the "Boa Razão" as a subsidiary source of law, the teachings of the former systematic Law of Good Reason found their way into the Portuguese legal practice.

A few decades later, however, the "Boa Razão" could not be found in the regulations of the Law of Good Reason anymore but it was now concretized in the regulations of the modern codifications, especially the Napoléon regulations.

Mediated through the "Repertoires" of Merlin, Sirey, and Dalloz, the common French law and case law found great acceptance in the Portuguese jurisdiction. For example, in contrast to Roman common law, the principle of invalidity of a contract of sale was simply adopted.

When in 1833 the code of commercial (law) and in 1867 the Portuguese Civil Code were enacted, they did not exactly bring legal innovations, rather, they consisted of a now codified and practiced reception of the French law. In the 20th century, the CC was superseded by the German Civil Code (BGB) because the Portuguese Civil Code of 1966 adopted the idea and the content of the German role model completely.

As in other Romance countries, the Romance legal family, which oriented itself with the Napoléon code, was abolished. New texts evolved which obliged the German pandectists and the German, Swiss codifications (Swiss law of obligation).

An almost identical process can be observed in the Romanian legal developments. In 1817, the **"Code de Callimaque"** was enacted in Romania. This code was a compilation of laws based on the Austrian Civil Code (ABGB).

In terms of practicing this legislation, however, it was not the Austrian but the **French legal practice** that acted as a role model. In the following years, the French law gained more and more authority due to well-known "Repertoires" by Merlin, Sirey, and Dalloz. When a civil code based on the French CC was enacted in 1867, it already largely mirrored the reception of the French law in Romania.

Through the treaty of Campo-Formio France annexed Belgium and the Napoléon code was introduced in 1804. When **Belgium** joined the Netherlands in 1815, a civil code was considered but the Dutch "Burgerlijk Wetboek" (see above) only became effective in 1838. In 1830, however, Belgium became independent as a consequence of a revolution. The young state decided to maintain the achievements of the French Civil Code for private property, liberty of contract, the reforms of marriage law, family law, and law of succession. Although plans for an independent civil code existed, they never made it past the stage of drafting. Therefore, the French code remained in effect, resembling Napoléon's code not only in its titles and the numbering of the articles.

The countries influenced by the Cc, who was itself an object of migration, became a center of attraction for ideas of enlightenment and freedom on a legal level – a fundamental reason for migration of people.

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Der philosophisch argumentierende Jurist – Versuch einer philosophischen Deutung der Irrtumskategorien des römischen Kaufrechts

(The philosophically arguing Jurist – An Attempt to interpret the Categories of Error in the Roman Law of Sale philosophically)

David Bartlitz *

Abstract

It was in ancient Rome, if not before, that Jurisprudence had separated from all-embracing mother Philosophy and became an independent academic discipline. The article points to this descent trying to construe the categories of error in the Roman Law of Sale from a philosophical perspective. It shall be examined how classical Roman jurists sustained their reasoning using philosophical ways of thinking.

Key words: *error; corpus; substantia; materia; qualitas; Plato; Aristotle; Epicurus; Stoicism.*

I. Jurisprudenz und Philosophie in der Antike – ein Gegenseitigkeitsverhältnis?

Es ist ebenso offenkundig wie unbestritten, dass Philosophie und Jurisprudenz wissenschaftsgeschichtlich in untrennbarem Zusammenhang stehen. So kann die seit der Antike gepflegte Philosophie, die alles menschlich Vorstellbare umfassende „Liebe zur Weisheit", gleichsam als „Mutter" der heute selbständigen Wissenschaftsdisziplinen angesehen werden. Unter jene fällt – neben vielen anderen – auch die Jurisprudenz, welche sich spätestens seit der römischen Antike als Disziplin verselbständigt hatte.[1] Wie aber gestaltete sich in der antiken Praxis das Verhältnis der Philosophie zur Jurisprudenz und wie umgekehrt das Verhältnis der Jurisprudenz zur Philosophie?

Der vorliegende Versuch einer philosophischen Deutung der Irrtumskategorien des römischen Kaufrechts soll exemplarisch zeigen, inwiefern die klassischen römischen Juristen ihre Argumentation durch Rückgriff auf philosophische Erwägungen gestützt haben.

Die Abhandlung wird insbesondere anhand des insoweit zentralen *Irrtumstraktates*[2] aus dem 28. Buch des Sabinuskommentars des spätklassischen römischen Juristen Domitius Ulpianus (gest. wohl 223 n. Chr.) erfolgen.

In einem ersten Schritt der Untersuchung sind zunächst die maßgeblichen Irrtumskategorien aus den einschlägigen Quellentexten zu ermitteln. Im zweiten Schritt wird sodann der Versuch einer philosophischen Einordnung derselben unternommen.

II. Der Begriff des Irrtums in seinen einzelnen Kategorien

Die ersten Passagen des ulpianischen Irrtumstraktates, die Quellentexte D. 18.1.9 pr. und D. 18.1.9.1, befassen sich primär mit dem Gegensatz Konsens – Dissens und nennen lediglich eine philosophisch interessante Kategorie des Irrtums (*error*), den Irrtum im Kaufgegenstand (*error in corpore*).

Es stellt sich jedoch die Frage, ob in den weiteren Passagen noch andere kaufrechtliche Irrtumskategorien erkannt werden können. Dabei bietet es sich an, die insoweit zentralen Quellentexte D. 18.1.9.2, D. 18.1.11 und D. 18.1.14 gemeinsam zu untersuchen, da ein systematisches Verständnis der Irrtumskategorien nur aus der Synopse aller drei Texte gewonnen werden kann.

D. 18.1.9.2 (Ulp. 28 ad Sab.): "Inde quaeritur, si in ipso corpore non erratur, sed in substantia error sit, ut puta si acetum pro vino veneat, aes pro auro vel plumbum pro argento vel quid aliud argento simile, an emptio et venditio sit. Marcellus scripsit libro sexto digestorum emptionem esse et venditionem, quia in corpus consensum est etsi in materia sit erratum. ego in vino quidem consentio, quia eadem prope οὐσία est, si modo vinum acuit: ceterum si vinum non acuit, sed ab initio acetum fuit, ut embamma, aliud pro alio venisse videtur. in ceteris autem nullam esse venditionem puto, quotiens in materia erratur."

Dann ist fraglich, ob ein Kauf existiert, wenn man sich nicht im Kaufgegenstand selbst, aber in der Substanz irrt, wie zum Beispiel, wenn Essig anstelle von Wein, Kupfer anstelle von Gold oder Blei oder etwas anderes, das Silber ähnelt, anstelle

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1 Statt vieler: Dihle, Albrecht, Die griechische und lateinische Literatur der Kaiserzeit: von Augustus bis Justinian, München, 1989, S. 328.

2 Diese zusammenfassende Bezeichnung für die in D. 18.1.9, D. 18.1.11 und D. 18.1.14 überlieferten Rechtstexte geht zurück auf Lenel, Otto, Palingenesia iuris civilis, Iuris consultorum reliquiae quae Iustiniani digestis continentur ceteraque iurisprudentiae civilis fragmenta minora secundum autores et libros, Bd. II, Leipzig, 1889, Neudr. Aalen, 2000, S. 1119 f. Nr. 2714, welcher die drei Quellentexte als ursprünglich zusammenhängende Einheit auffasste.

von Silber verkauft wird. Marcellus hat im sechsten Buch der Digesten geschrieben, dass ein Kauf existiere, weil in Ansehung des Kaufgegenstandes eine Willenseinigung vorliege, auch wenn man sich in der Materie geirrt habe. Ich stimme beim Wein freilich zu, weil es beinahe dieselbe *oúsía* ist, wenn der Wein nur sauer geworden ist: Sonst, wenn der Wein nicht sauer geworden ist, sondern von Anfang an Essig war, wie Essigbrühe, scheint das eine anstelle des anderen verkauft worden zu sein. Bei den übrigen Dingen aber meine ich, dass kein Kauf existiert, sooft man sich im Stoff irrt.

Der Text kreist um die Rechtsfrage, wie es um die Gültigkeit des Kaufes bestellt ist, wenn zwar kein *error in corpore*, aber ein Irrtum über die Substanz (*e.i. substantia*) vorliegt. Nach der bei Ulpian geschilderten Ansicht des hochklassischen römischen Juristen *Ulpius Marcellus* (geb. ca. 110 n. Chr.) liege in solchen Fällen stets ein wirksamer Kauf vor, weil man sich trotz Irrtums über die *materia* hinsichtlich des *corpus* geeinigt habe. Ulpian dagegen differenziert: In dem geschilderten Beispiel, dass Essig als Wein verkauft wird, sieht auch er den Kauf unter der Voraussetzung als wirksam an, dass der Essig ursprünglich Wein war, der nur aufgrund der Säuerung zu Essig geworden ist. Grund sei, dass es sich bei solchem Essig, also sauer gewordenem Wein, beinahe um dieselbe *oúsía* handle wie bei Wein. In dem Fall aber, dass der als Wein verkaufte Essig schon von Anfang an Essig war, sieht Ulpian keinen gültigen Kauf, weil dann das eine anstelle des anderen (*aliud pro alio*) verkauft worden sei. Auch bei den übrigen Beispielen, dass Kupfer anstelle von Gold und Blei anstelle von Silber verkauft wird, sieht Ulpian den Kauf angesichts des Irrtums über die *materia* als unwirksam an.

Die zentralen Begriffe in D. 18.1.9.2 *substantia*, *materia* und *oúsía* blieben bislang – bewusst – unübersetzt. Welche Bedeutung ihnen beizulegen ist und wie sich ein entsprechender *error* auswirkt, soll im Fortgang der Ausführungen noch ermittelt werden. Zu diesem Zweck ist der nächste ulpianische Rechtstext heranzuziehen:

D. 18.1.11 (Ulp. 28 ad Sab.): „Alioquin quid dicemus, si caecus emptor fuit vel si in materia erratur vel in minus perito discernendarum materiarum? in corpus eos consensisse dicemus? et quemadmodum consensit, qui non vidit? Quod si ego me virginem emere putarem, cum esset iam mulier, emptio valebit: in sexu enim non est erratum. ceterum si ego mulierem venderem, tu puerum emere existimasti, quia in sexu error est, nulla emptio, nulla venditio est."

Was werden wir außerdem sagen, wenn der Käufer blind gewesen ist oder wenn man sich in der Materie irrt oder bei einem, der im Unterscheiden von Materien weniger kundig ist? Werden wir sagen, dass diese in Ansehung des Kaufgegenstandes einig gewesen sind? Und wie hat derjenige zugestimmt, der nicht gesehen hat? Wenn ich meinte, dass ich eine Jungfrau kaufe, während sie hingegen schon eine Frau ist, wird der Kauf Gültigkeit haben: Es liegt nämlich nicht ein Irrtum im Geschlecht vor. Sonst, wenn ich eine Frau verkaufte und du glaubtest, einen Knaben zu kaufen, existiert kein Kauf, weil ein Irrtum im Geschlecht vorliegt.

Im ersten Teil des Textes wirft Ulpian die Rechtsfrage auf, ob ein Konsens hinsichtlich des *corpus* in folgenden drei Fällen vorliege: erstens: Der Käufer ist blind; zweitens: Es liegt ein Irrtum hinsichtlich der *materia* vor; drittens: Der Käufer ist wenig kundig im Unterscheiden verschiedener *materiae*. Im zweiten Teil schildert Ulpian den Fall, dass eine Frau – gemeint ist eine nicht mehr jungfräuliche Frau – als Jungfrau verkauft wird. Der Kauf sei in diesem Falle gültig, weil kein Irrtum über das Geschlecht (*sexus*) vorliege. Im zweiten Fall, in welchem eine Frau als Knabe verkauft wird, liege aber kein wirksamer Kauf vor, weil hier gerade ein Irrtum über das Geschlecht (*in sexu error*) vorliege.

Wiederum taucht der Begriff *materia* auf. Wie wirkt sich aber ein *error in materia* auf die Frage des Konsenses hinsichtlich des Kaufgegenstandes aus? Und wie verhält sich der neu hinzugetretene Begriff *sexus*, hinsichtlich dessen offenbar auch ein *error* möglich ist, gegenüber den bereits erwähnten *materia*, *substantia* und *oúsía*? Noch ein weiterer Quellentext ist vor Beantwortung dieser Fragen zu betrachten:

D. 18.1.14 (Ulp. 28 ad Sab.): „Quid tamen dicemus, si in materia et qualitate ambo errarent? ut puta si et ego me vendere aurum putarem et tu emere, cum aes esset? ut puta coheredes viriolam, quae aurea dicebatur, pretio exquisito uni heredi vendidissent eaque inventa esset magna ex parte aenea? venditionem esse constat ideo, quia auri aliquid habuit. nam si inauratum aliquid sit, licet ego aureum putem, valet venditio: si autem aes pro auro veneat, non valet."

Was jedoch werden wir sagen, wenn sich beide in der Materie und der Qualität irrten? Wie zum Beispiel, wenn sowohl ich meinte, dass ich Gold verkaufe, als auch du meintest, dass du Gold kaufst, während es hingegen Kupfer war? Wie zum Beispiel, wenn Miterben einem Erben ein Armgeschmeide, welches man für golden hielt, zu einem ansehnlichen Preis verkauft hatten und dieses sich als zu einem großen Teil aus Kupfer erwiesen hatte? Deshalb, weil es irgendetwas an Gold gehabt hat, steht fest, dass ein Kauf vorliegt. Denn wenn irgendetwas mit Gold überzogen ist, wenn ich es auch für golden halte, hat der Kauf Gültigkeit: Wenn aber Kupfer anstelle von Gold verkauft wird, hat der Kauf keine Gültigkeit.

Wie ist die Wirksamkeit des Kaufes zu beurteilen, wenn sich beide Parteien in der *materia* und in der Qualität (*qualitas*) irren? Geschildert werden zwei Fälle: Im ersten glauben Käufer und Verkäufer, Gold zu kaufen bzw. zu verkaufen, obwohl es sich um Kupfer handelt. Nach Ulpian liegt kein gültiger Kauf vor, weil Kupfer anstelle von Gold, also wiederum *aliud pro alio*, verkauft worden sei. Im zweiten Fall verkaufen Miterben einem Erben ein Armgeschmeide, das – beiderseits – für golden gehalten wurde. Tatsächlich enthält das Geschmeide zwar Gold, ist jedoch zu einem großen Teil aus Kupfer. Nach Ulpians Meinung sei der Kauf als gültig zu beurteilen, da das Geschmeide ja zumindest irgendetwas Goldenes an sich hatte. Beide Fälle zeichnen sich dadurch aus, dass es sich um Konstellationen gemeinschaftlichen Irrtums beider Parteien handelt.

Ein weiterer zentraler Begriff, der auch Gegenstand eines *error* sein kann, wird eingeführt: *qualitas*. Wie aber verhält sich dieser zu den bereits ermittelten „unbekannten Größen"?

Aus den zuletzt dargestellten Rechtstexten lassen sich vor allem drei zentrale Begriffe ermitteln, die, wie man an den diskutierten Fällen sieht, nicht unerhebliche rechtliche Probleme aufwerfen: *substantia, materia* und *qualitas*. Hinsichtlich aller kann offensichtlich ein *error* vorliegen. Wie aber sind die jeweiligen *errores* zu verstehen? Wie verhalten sie sich zu den Begriffen *oúsía* und *sexus* sowie zu dem bereits erwähnten *error in corpore*?

III. Versuch einer philosophischen Deutung der Irrtumskategorien

Es gilt also, den Versuch einer schlüssigen Systematisierung der Irrtumskategorien des römischen Kaufrechts zu unternehmen. Zu diesem Zweck soll geprüft werden, ob eine philosophische Deutung Aufschluss über die einzelnen Irrtumskategorien bietet.[3] Es stellt sich konkret die Frage, ob sich die römischen Irrtumskategorien philosophisch bestimmen lassen. Dazu erscheint es notwendig, zu untersuchen, welche Bedeutungen den einzelnen Begriffen in unterschiedlichen philosophischen Systemen zukommen.

1. Der Begriff *materia*

Am häufigsten von den hier zu untersuchenden Begriffen war wohl der Begriff *materia* Gegenstand philosophischer Gedankengänge. Vor Beginn seiner philosophischen Deutung stellt sich jedoch die Frage, wo, d.h. bei welchem Vertreter der antiken Philosophie, eine Deutung sinnvollerweise zu beginnen hat. So beschäftigten sich bereits die vorsokratischen Naturphilosophen mit der Frage nach der *ἀρχὴ τῶν ὄντων*, dem Urgrund aller seienden Dinge, und ebneten dadurch erst den Weg für diejenigen, die explizit den Materie-Begriff einführten und erörterten. Doch ist festzustellen, dass sich erst die Gedankengänge der klassischen griechischen (Natur-)Philosophie seit Platon bis in die Zeit der klassischen römischen Jurisprudenz erhalten haben.[4] Demnach erscheint es sinnvoll, auf Ausführungen zu früheren philosophischen Ansichten zu verzichten und mit den Betrachtungen bei Platon zu beginnen.

Das Denken Platons ist maßgeblich beeinflusst von der Unterscheidung zweier Bereiche:[5] zum einen der Bereich der Ideen, der allein als *τὸ ὂν* (wahrhaft seiend) beschrieben werden kann; zum anderen der Bereich des τὸ *γιγνόμενον* (Gewordenen), also der Sinnendinge, d.h. der augenfälligen Gegenstände der sinnlich wahrgenommenen Welt. Während ersterer „ungeworden", d.h. statisch, ist und nur durch die Vernunft wahrgenommen werden kann, ist letzterer einem ständigen Werden und Vergehen unterworfen und wird durch die Sinneswahrnehmung erkannt. Dabei stellt der Bereich der Sinnendinge lediglich Abbilder der Welt der Ideen dar und ist demnach nur eine Welt des Scheins und nicht der Wahrheit.[6] Das Werden und Vergehen der Sinnendinge ist nur möglich, weil es eine *ὑποδοχή* (Aufnahme) gibt, die erst den Raum bietet, in welchen hinein das Werden erfolgen kann.[7] Platon bezeichnet dieses Aufnehmende als *μήτηρ* (Mutter), wobei das statische, wahrhaft Seiende als Vater und das werdende Sinnending als Sprössling vorzustellen sei.[8] Später verwendet Platon für das Aufnehmende den Begriff *χώρα* (Raum).[9]

Könnte nun unter dieser *χώρα* das zu verstehen sein, was in den römischen Rechtsquellen mit *materia* bezeichnet wurde? Diese Frage wird im Schrifttum kontrovers diskutiert und teilweise bejaht.[10] In folgender Überlegung könnte man einen Beleg dafür sehen: Wenn *materia* tatsächlich dem Raum, dem Aufnehmenden, was Platon auch als „Mutter" bezeichnet, enspricht, deckt sich dies mit einer etymologischen Untersuchung. So wird überwiegend angenommen, der Begriff *materia* stamme ursprünglich von dem Wort *mater* ab.[11] Es sei also anzunehmen, dass in dem Wort *materia* stets die Bedeutung von etwas „Mütterlichem" anklinge. Teilweise wird die Frage, ob mit *materia* die platonische *χώρα* gemeint sei, allerdings auch verneint.[12] Diese Ablehnung wird u.a. damit begründet, dass Platon einen technischen „Materie"-Begriff nicht verwendet habe.[13] Wie sich aus der Kontroverse ergibt, finden sich in den platonischen Texten sowohl Indizien für als auch gegen die Annahme, unter *materia* sei die platonische *χώρα* zu verstehen. Zu einer zweifelsfreien Entscheidung der Kontroverse reicht jedoch weder die Quellenlage noch die Argumentation im Schrifttum aus.

Andere Überlegungen, ob die platonischen Elementarteilchen, welche dieser als geometrische Körper verstand[14], möglicherweise mit *materia* gemeint sein könnten,[15] können mit relativ knappen Worten zurückgewiesen werden. So sind die platonischen Elementarteilchen vielmehr als nichtstoffliche, geometrische Grundeinheiten, d.h. als Formprinzip und gerade nicht als Materie-Prinzip zu begreifen.[16]

Es ist ferner zu fragen, ob sich der Begriff *materia* als aristotelisches Philosophem bestimmen lässt. Die aristotelische

[3] Bereits vorweg ist jedoch klarzustellen, dass sowohl jede philosophische Deutung nur dann als zweifelsfrei und gesichert angesehen werden kann, wenn sich die Begriffe eindeutig einer philosophischen Strömung zuordnen lassen.

[4] Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 58.

[5] So u.a. Plat. Tim. 27d ff.

[6] Ob es tatsächlich richtig ist, diese dichotomische Weltsicht Platons als dualistisch zu bezeichnen, erscheint zweifelhaft. So erkennt Platon nur die eine Welt, die der Ideen, als wahres Sein an und könnte folglich auch als Monist bezeichnet werden.

[7] Plat. Tim. 49a.

[8] Plat. Tim. 50d.

[9] Plat. Tim. 52a.

[10] Etwa Bäumker, Clemens, Das Problem der Materie in der griechischen Philosophie, Eine historisch-kritische Untersuchung, Münster, 1890, Neudr. Frankfurt a.M., 1963, S. 177; Düring, Ingemar, Aristoteles, Darstellung und Interpretation seines Denkens, Heidelberg, 1966, S. 315; Eslick, Leonard J., The material substrate in Plato, in: McMullin, Ernan (Hrsg.), The Concept of Matter in Greek and Medieval Philosophy, Notre Dame (Indiana), 1965, S. 39.

[11] Walde, Alois, Lateinisches etymologisches Wörterbuch, Heidelberg, 1954, S. 50 f.; Thesaurus linguae Latinae, Editus auctoritate et consilio academiarum quinque Germanicarum Berolinensis, Gottingensis, Lipsiensis, Monacensis, Vindobonensi, Vol. VIII/1: M – Menus, Nachdr. Leipzig, 1900, S. 448; Ernout, Alfred, Remarques sur l'étymologie latine, Revue des Études Latines 3, 1925, S. 124 f.; gegen die Ableitung von *mater* spricht sich Walde, Alois, Vergleichendes Wörterbuch der indogermanischen Sprachen, Bd. II, Berlin 1927, Neudr. Berlin, 1973, S. 230 aus.

[12] Solmsen, Friedrich, Aristotle's Word for Matter, in: Didascaliae, Studies in Honor of Anselm M. Albareda, New York, 1961, S. 395.

[13] So aber Sandbach, Francis Henry, Aristotle and the Stoics, Cambridge, 1985, S. 36.

[14] Plat. Tim. 53c ff.

[15] Etwa Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 63 f.

[16] Happ, Heinz, Hyle, Studien zum aristotelischen Materie-Begriff, Berlin/New York, 1971, S. 118 f.

Ontologie ruht im Wesentlichen auf drei Säulen:[17] Erste Säule ist die *ὕλη* (Materie). Diese nennt Aristoteles auch *ὑποκείμενον* (Zugrundeliegendes), wie in Arist. phys. 192a 31 deutlich wird: *λέγω γὰρ ὕλην τὸ πρῶτον ὑποκείμενον* – Denn Materie nenne ich das erste Zugrundeliegende. Unter der *ὕλη* versteht Aristoteles das nur der Möglichkeit nach Seiende. Gerade der *ὕλη* kommt eine wichtige Bedeutung für die Dinge der Welt zu. So ist sie eine der vier *τρόποι* (Arten), durch welche alle Dinge der Welt näher beschrieben werden können:[18] die *causa materialis* (Materialursache)[19]. Interessant erscheint die Frage, ob der einstige Platon-Schüler Aristoteles richtig urteilt, wenn er in seiner *ὕλη* dasselbe sieht wie in der platonischen *χώρα*.[20] Doch besteht durchaus die Möglichkeit, dass Aristoteles Platon insoweit missverstanden hat:[21] Freilich ist Aristoteles zuzugeben, dass sich auch bei Plat. Tim. 69a der Begriff *ὕλη* findet. Aus seiner Verwendung im Zusammenhang mit Zimmerleuten muss jedoch der Schluss gezogen werden, dass *ὕλη* dort nur „Baustoff" bedeuten kann.[22] Allenfalls könnte man *ὕλη* bei Plat. Phil. 54c, wo es um den Schiffsbau geht, eine Bedeutung iSd aristotelischen *ὕλη* beilegen. Doch auch dort ist wohl davon auszugehen, dass Platon den Begriff eher gegenständlich verstand und noch nicht, wie Aristoteles, zu einem ontologischen Prinzip erhob.[23]

Zweite Säule ist das *εἶδος* (Form), der wahrhafte Seinsgrund, das Seinsprinzip. Das *εἶδος* stellt den zweiten *τρόπος* dar: die *causa formalis* (Formursache)[24] iSd verwirklichten, „fertigen" Gestalt eines Dinges. Insbesondere in der Unterscheidung von Materie und Form wird teilweise eine Parallele zur Gegenüberstellung von Nichtseiendem und seiender Idee gesehen und damit ein platonischer Einfluss auf aristotelisches Denken angenommen.[25] Das Zusammenwirken von *ὕλη* und *εἶδος* ist bei Aristoteles nun folgendermaßen vorzustellen: Die *ὕλη*, in welcher die Fähigkeit zum Sein steckt, nimmt das *εἶδος* in sich auf und erhält dadurch Seinsqualität.[26] Solange aber die *ὕλη* das *εἶδος* noch nicht aufgenommen hat, verbleibt sie im Zustand der *στέρησις* (Beraubung), d.h. im Zustand des Nichtseins.

Die *στέρησις*, welche *ὕλη* und *εἶδος* miteinander verknüpft, indem sie den Zustand der nicht vollkommenen, um das *εἶδος* beraubten *ὕλη* bezeichnet, kann als dritte ontologische Säule gelten. Wichtig erscheint, dass Aristoteles sich die *ὕλη* per se vollkommen eigenschaftslos vorstellt: *λέγω δ΄ ὕλην ἣ καθ΄ αὑτὴν μήτε τὶ μήτε ποσὸν μήτε ἄλλο μηδὲν λέγεται οἷς ὥρισται τὸ ὄν*[27] – Ich aber nenne Materie das, was an sich weder als irgendetwas noch als quantitativ noch durch irgendeine andere von den Aussagen bezeichnet wird, durch welche das Seiende definiert wird. Alle vorstellbaren Eigenschaften, die Dinge aufweisen können (z.B. Farbe, Höhe, Position im Raum), beziehen sich also nur auf das Seiende und betreffen daher gerade nicht die *ὕλη*, sondern nur das *εἶδος*, also die Form.[28] Sein ontologisches Konstrukt, nach welchem alle Dinge gerade aus der *ὕλη*, der Möglichkeit zum Sein, hervorgehen, wird in Arist. met. 1062b 24 f. damit begründet, *τὸ γὰρ μηδὲν ἑκ μὴ ὄντος γίγνεσθαι πᾶν δ΄ ἐξ ὄντος* – dass nämlich nichts aus Nichtseiendem entsteht, sondern jedes Ding aus Seiendem.

Sind das ontologische System nach Aristoteles und der insofern wichtige Begriff der *ὕλη* nun zumindest in Grundzügen umrissen, stellt sich die für die vorliegende Untersuchung wesentliche Frage, ob die römischrechtliche *materia* der aristotelischen *ὕλη* entspricht. Ein Indiz dafür wird zum Teil darin gesehen, dass beide Begriffe gleichermaßen eine Bedeutungsentwicklung von „Holz" bzw. „Baumaterial" hin zu einem „allgemeinen Grundstoff von Dingen" durchliefen.[29] Wie dieser These zurecht entgegengehalten wurde, gibt jedoch die Textüberlieferung darauf keinen eindeutigen Hinweis, sodass es sich ebenso gut um lediglich zufällige Parallelentwicklungen gehandelt haben könnte.[30] Problematisch ist jedoch vor allen Dingen noch ein weiteres: Aristoteles spricht von *ὕλη* noch in einer anderen, vom bisher Gesagtem abweichenden Bedeutung. So verwendet er in Arist. met. 1044a 18 den Begriff *πρώτη ὕλη*, meint in diesem Fall mit *ὕλη* aber nicht die Möglichkeit zum Sein, sondern die ganz allgemein definierte, seiende Materie, d.h. die ursprüngliche, einer einzelnen Sache zugrundeliegende stoffliche Substanz. Als Beispiel findet sich in Arist. met. 1044a 15 ff.: Der Schleim ist die

[17] Arist. phys. 191b 35 ff.
[18] Arist. phys. 193a 28 ff.
[19] Hügli, Anton/Lübcke, Poul (Hrsg.), Philosophielexikon, Personen und Begriffe der abendländischen Philosophie von der Antike bis zur Gegenwart, Reinbek, 2000, S. 117.
[20] Arist. phys. 209b 11 f. sowie auch 210a 1.
[21] So sieht das offenbar Sandbach, Francis Henry, Aristotle and the Stoics, Cambridge, 1985, S. 36.
[22] Solmsen, Friedrich, Aristotle's Word for Matter, in: Didascaliae, Studies in Honor of Anselm M. Albareda, New York, 1961, S. 403.
[23] Solmsen, Friedrich, Aristotle's Word for Matter, in: Didascaliae, Studies in Honor of Anselm M. Albareda, New York, 1961, S. 404.
[24] Hügli, Anton/Lübcke, Poul (Hrsg.), Philosophielexikon, Personen und Begriffe der abendländischen Philosophie von der Antike bis zur Gegenwart, Reinbek, 2000, S. 117.
[25] Happ, Heinz, Hyle, Studien zum aristotelischen Materie-Begriff, Berlin/New York, 1971, S. 295.
[26] Das damit in direktem Zusammenhang stehende Spannungsverhältnis von *δύναμις* und *ἐνέργεια* (etwa in Arist. met. 1048a 25 ff.) sowie der Bezug zu *causa efficiens* und *causa finalis* soll hier zum Zwecke der Fokussierung der Untersuchung auf die Frage nach der *materia* nicht behandelt werden.
[27] Arist. met. 1029a 20 f.
[28] Owens, Joseph, Matter and Predication in Aristotle, in: McMullin, Ernan (Hrsg.), The Concept of Matter in Greek and Medieval Philosophy, Notre Dame (Indiana), 1965, S. 88; Fitzgerald, John Joseph, Matter in Nature and the Knowledge of Nature: Aristotle and the Aristotelian Tradition, in: McMullin, Ernan (Hrsg), The Concept of Matter in Greek and Medieval Philosophy, Notre Dame (Indiana), 1965, S. 67 f.
[29] So Solmsen, Friedrich, Aristotle's Word for Matter, in: Didascaliae, Studies in Honor of Anselm M. Albareda, New York, 1961, S. 406 Anm. 34; Puelma, Mario, Die Rezeption der Fachsprache griechischer Philosophie im Lateinischen, Freiburger Zeitschrift für Philosophie und Theologie 33, 1986, S. 64 f.; darüber hinaus versucht Luyten, Norbert, Matter as Potency, in: McMullin, Ernan (Hrsg.), The Concept of Matter in Greek and Medieval Philosophy, Notre Dame (Indiana), 1965, S. 102, Schlüsse aus der Bedeutungsentwicklung des Wortes *ὕλη* zu ziehen.
[30] Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 72.

Substanz von Süßem und Fettigem, wobei die Galle wiederum als Substanz des Schleimes angesehen werden kann usw., bis man letztendlich zur *πρώτη ὕλη*, der ursprünglichen Substanz, vorgedrungen ist. Mag man nun auch in *ὕλη* einen Relationsbegriff sehen,[31] stellt sich für vorliegende Untersuchung dennoch das Problem, dass es für den Vergleich der römischrechtlichen *materia* mit der aristotelischen *ὕλη* einer konsequenten, stets gleichbleibenden Verwendung von *ὕλη* bedürfte.[32] Ohne diese Konstante wäre niemals klar, welcher *ὕλη*-Begriff unter dem römischrechtlichen *materia* zu verstehen ist. Eine einheitliche Terminologie für den aristotelischen *ὕλη*-Begriff wurde aber wohl erst in der Zeit nach Aristoteles festgelegt[33] und kann daher nicht zur Beantwortung der Frage verhelfen.

Denkbar wäre neben *ὕλη* noch ein zweiter Anknüpfungspunkt in der Philosophie des Aristoteles: der Begriff *οὐσία* (Wesen). Vielleicht ist mit der römischrechtlichen *materia* gerade die aristotelische *οὐσία* gemeint. Eine derartige Überlegung liegt insbesondere deshalb nahe, weil in D. 18.1.9.2 ebenfalls der Begriff *οὐσία* verwendet wird. In Arist. cat. 1b 25 ist *οὐσία* die Bezeichnung für die erste von zehn aristotelischen Kategorien. Unter Kategorien sind bestimmte grundsätzliche Merkmale zu verstehen, durch welche alle seienden Dinge beschrieben werden können.[34] Die erste Kategorie *οὐσία* bezeichnet dabei das Wesenhafte einer Sache, das ihr grundsätzlich Eigentümliche.[35] Doch auch eine andere Bedeutung legt Aristoteles dem *οὐσία*-Begriff bei. So bezeichnet er in Arist. cat. 2a 11 ff. das konkrete Einzelding, etwa das konkrete Pferd, als *οὐσία*.[36]

Die Ungewissheit über die Bedeutung der aristotelischen Philosopheme wird dadurch gleichsam auf die Spitze getrieben, dass Aristoteles bisweilen nicht einmal zwischen *ὕλη* bzw. *ὑποκείμενον* und *οὐσία* differenziert. So heißt es in Arist. met. 1029a 1f.: *μάλιστα γὰρ δοκεῖ εἶναι οὐσία τὸ ὑποκείμενον πρῶτον.* – Denn es scheint, dass das erste Zugrundeliegende am meisten Wesen ist.

Die Überlegungen zur aristotelischen Philosophie abschließend bleibt zu konstatieren, dass Aristoteles zwar ohne Zweifel große Wirkung auf alle späteren Vorstellungen von Materie entfaltete.[37] Angesichts der in seinen Schriften zu beobachtenden Mehrdeutigkeit der einzelnen Philosopheme ist es aber trotz mancher Indizien – v.a. die Verwendung des Begriffes *οὐσία* sowohl in den Rechtsquellen als auch bei Aristoteles – nicht möglich, die hier untersuchte römischrechtliche *materia* bzw. die ebenfalls in D. 18.1.9.2 erwähnte *οὐσία* zweifelsfrei einem seiner Philosopheme zuzuweisen.

Lässt sich aber *materia* möglicherweise den naturphilosophischen Vorstellungen Epikurs zuweisen? Die Natur beschreibt Epikur wie folgt:[38] *Ἀλλὰ μὴν καὶ τὸ πᾶν ἐστι σώματα καὶ κενὸν* – Das Ganze aber besteht aus Körpern und Leerem. Unter den *σώματα* (Körpern) sind die einzelnen Dinge der sinnlich wahrnehmbaren Welt zu verstehen. Diese Körper bestehen aus *ἄτομοι* (unteilbare Teilchen, Atome), welche die Grundelemente aller Körper bilden. Die Atome, von denen es unendlich viele gibt, befinden sich in dauernder Bewegung, die sich grundsätzlich wie ein Herabfallen von oben nach unten darstellt. Sie besitzen keine Eigenschaften außer Gestalt, Schwere und Größe.[39] Die *ἄτομοι* bewegen sich im *κενόν* (leerer Raum), welcher als unendlich weit vorzustellen ist. Bisweilen kommt es nun dazu, dass die grundsätzlich parallel zueinander von oben nach unten fallenden Atome minimal von ihrer Fallbahn abweichen und infolgedessen mit anderen Atomen kollidieren.[40] Aufgrund dieser Kollisionen kommt es zu Zusammenballungen von Atomen, d.h. zum Entstehen von Dingen.[41] Lösen sich diese Zusammenballungen der *ἄτομοι* wieder auf, vergehen die Dinge. Die Unterschiedlichkeit der Dinge in der Welt erklärt sich aus einem jeweils unterschiedlichen Mischungsverhältnis der miteinander zusammenhängenden Atome.

Könnte nicht mit dem *materia*-Begriff auf die epikureischen *ἄτομοι* angespielt sein? Allein der Umstand, dass *ἄτομοι* von *materia* terminologisch doch recht weit entfernt scheint, kann als Gegenargument nicht ausreichen. Doch genügen auch hier die Indizien nicht, welche dafür sprechen. So findet sich in den relevanten römischen Rechtsquellen insbesondere kein dem epikureischen *κενόν* entsprechender Gegenbegriff, der eindeutig auf das Modell Epikurs hindeuten würde. Demnach könnte auch eine Zuweisung des *materia*-Begriffs zu Epikur nur Spekulation bleiben.

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[31] Düring, Ingemar, Aristoteles, Darstellung und Interpretation seines Denkens, Heidelberg, 1966, S. 31.

[32] Eine eingehende Suche nach den Gründen dieser – und gerade als solche muss sie bezeichnet werden – terminologischen Inkonsequenz würde keinen Ausweg aus diesem „Dilemma" weisen und soll deshalb hier unterbleiben. Zu möglichen Gründen ausführlich: Marx, Werner, Einführung in Aristoteles' Theorie vom Seienden, Freiburg, 1972, S. 30; Hertling, Georg von, Materie und Form und die Definition der Seele bei Aristoteles, Ein kritischer Beitrag zur Geschichte der Philosophie, Bonn, 1871, S. 74.

[33] Happ, Heinz, Hyle, Studien zum aristotelischen Materie-Begriff, Berlin/New York, 1971, S. 308.

[34] Hügli, Anton/Lübcke, Poul (Hrsg.), Philosophielexikon, Personen und Begriffe der abendländischen Philosophie von der Antike bis zur Gegenwart, Reinbek, 2000, S. 343.

[35] Ries, Wiebrecht, Die Philosophie der Antike, Darmstadt, 2005, S. 103 f.

[36] Insoweit ganz anders als Platon, der nur Ideen, niemals einzelnen Sinnendingen Seinsqualität zubilligt.

[37] Sambursky, Samuel, Das physikalische Weltbild der Antike, Zürich, 1965, S. 419; Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 77.

[38] Epic. ep. ad Her. 39 ff.

[39] Auf der Hand liegt, wie Ries, Wiebrecht, Die Philosophie der Antike, Darmstadt, 2005, S. 124 richtig feststellt, ein starker Einfluss der vorsokratischen Atomistik nach Leukipp und Demokrit auf die Lehre Epikurs. Mitunter wurde Epikur sogar der Plagiatsvorwurf gemacht (so etwa Cic. fin. 1.17).

[40] Lucr. 2.216 ff.

[41] Lucr. 1.540 ff.

Schließlich ist der Frage nachzugehen, ob *materia* möglicherweise stoischem[42] Gedankengut entsprungen ist. Die Stoa kennt zwei ontologische Prinzipien, welche durch ihr Zusammenwirken alles Werden und Vergehen in der Welt verursachen:[43] *ὕλη* (Materie) und *θεός* (Gott). Das erste Prinzip, *ὕλη*[44], wird teilweise auch als *οὐσία* bezeichnet[45] und verkörpert das Leidende. Die Stoiker stellten sich die *ὕλη* als körperlichen, zugleich aber form- und eigenschaftslosen Stoff vor, der den gesamten Raum ausfüllt[46]. Die Bedeutung der *ὕλη*, welcher volle Seinsqualität zukommt, besteht gerade darin, dass sie als *ὑποκείμενον* (Zugrundeliegendes) quasi die stoffliche Voraussetzung für alle Dinge darstellt. In dieser Eigenschaft werden die Begriffe *ὕλη* bzw. *οὐσία* bzw. *ὑποκείμενον* als Bezeichnung für die erste stoische Kategorie[47] verwendet.[48] Das zweite Prinzip, *θεός*, vorwiegend als *πνεῦμα* (Hauch) bezeichnet, verkörpert das Tätige. Dieser göttliche Hauch ist als Inbegriff des *λόγος*, d.h. der ordnenden, gestaltenden und alles durchdringenden Weltvernunft vorzustellen und wird häufig mit dem schaffenden Feuer des Vorsokratikers Heraklit in Verbindung gebracht.[49] Dabei ist das *πνεῦμα* nicht als rein geistiges Prinzip zu verstehen:[50] Es ist zwar von der *ὕλη* gedanklich zu trennen,[51] besteht aber selbst aus körperlicher *ὕλη*. Erst das Wirken des *πνεῦμα*, teilweise auch als *φύσις* (Natur) bezeichnet, verleiht der Materie äußere Form und Eigenschaften. Nur durch das Zusammenwirken des Leidenden und des Tätigen können also die vielen Dinge der Welt entstehen und vergehen.

Entspricht nun die römischrechtliche *materia* den Begriffen *ὕλη* bzw. *οὐσία* bzw. *ὑποκείμενον*? Wie bereits bei Aristoteles zu beobachten war (s.o.), so ist auch bei der Stoa eine Mehrdeutigkeit der Philosopheme zu konstatieren: Nach den bisherigen Ausführungen wäre *ὑποκείμενον* als mit *ὕλη* und *οὐσία* gleichbedeutend einzustufen iSd Bezeichnung für die erste stoische Katgorie. Nun wird aber *ὑποκείμενον* teilweise iSd bereits im Wesentlichen Bestimmten verwendet und entspricht in dieser Bedeutung der zweiten stoischen Kategorie, dem *ὑποκείμενον ποιόν*.[52] Eine derartige Doppeldeutigkeit der stoischen Philosopheme *ὕλη, οὐσία* und *ὑποκείμενον* macht es aber unmöglich, sie mit der römischrechtlichen *materia* zu identifizieren.

Festzuhalten bleibt also, dass sich der römischrechtliche *materia*-Begriff keinem der relevanten philosophischen Systeme der Antike zweifelsfrei zuordnen lässt.[53]

2. Der Begriff *corpus*

Das Wort *corpus* entspricht dem griechischen Wort *σῶμα*. Darunter wurde in der stoischen Philosophie alles räumlich Ausgedehnte verstanden.[54] Der Begriff des Körpers wurde dabei in der Stoa derartig weit interpretiert, dass alles Seiende als körperlich betrachtet wurde.[55] Teilweise wird behauptet, die Stoiker hätten den Begriff des Körpers (*σῶμα*) mit dem der Materie (*ὕλη*) gleichgesetzt.[56] Als Beleg ließe sich Sext. Emp. adv. math. 10.312 anführen: *ἐξ ἀποίου μὲν οὖν καὶ ἑνὸς σώματος τὴν τῶν ὅλων ὑπεστήσαντο γένεσιν οἱ στωικοί· ἀρχὴ γὰρ τῶν ὄντων*

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[42] Einheitlich von „stoisch" zu sprechen, ist dabei bereits problematisch. So lässt sich die Stoa in ältere, mittlere und jüngere Stoa untergliedern, wobei jede „Epoche" teilweise neue Denkansätze entwickelt hat. Im Übrigen sind die Lehrsätze der älteren Stoiker zum großen Teil nur mittelbar überliefert. Die folgenden Ausführungen sollen jedoch nur Grundstrukturen aufzeigen, welche sich, zumindest grob, weitgehend einheitlich durch die Geschichte der Stoa zogen.

[43] Sext. Emp. adv. math. 9.11 ff.

[44] Auf die Kontroverse, ob die Stoa diese Konzeption der *ὕλη* von Aristoteles übernommen hat, soll hier nicht näher eingegangen werden. Dazu eingehend: Bäumker, Clemens, Das Problem der Materie in der griechischen Philosophie, Eine historisch-kritische Untersuchung, Münster, 1890, Neudr. Frankfurt a.M., 1963, S. 330; Pohlenz, Max, Die Stoa, Geschichte einer geistigen Bewegung, Bd. I, Göttingen, 1978, S. 68; Sandbach, Francis Henry, Aristotle and the Stoics, Cambridge, 1985, S. 16.

[45] Etwa Plut. an. procr. 1013c sowie 1014b ff.

[46] Bäumker, Clemens, Das Problem der Materie in der griechischen Philosophie, Eine historisch-kritische Untersuchung, Münster, 1890, Neudr. Frankfurt a.M., 1963, S. 332 f.

[47] Als Begriff für „Kategorie" wird in der Stoa üblicherweise der Begriff *genus* (Geschlecht) verwendet. Eine derartige ontologische Systematisierung entspricht jedoch inhaltlich dem, was Aristoteles als Einteilung nach „Kategorien" bezeichnete.

[48] Etwa Plot. enn. 6.3.

[49] Etwa Cic. nat. deor. 3.35

[50] Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 81.

[51] Todd, Robert B., Alexander of Aphrodisias on Stoic Physics, A Study of the De Mixtione with Preliminary Essays, Text, Translation and Commentary, Leiden, 1976, S. 34 ff.; Überweg, Friedrich, Grundriss der Geschichte der Philosophie, Bd. I: Die Philosophie des Altertums, Nachdr. Berlin, 1926, S. 419; Bäumker, Clemens, Das Problem der Materie in der griechischen Philosophie, Eine historisch-kritische Untersuchung, Münster, 1890, Neudr. Frankfurt a.M., 1963, S. 363.

[52] Trendelenburg, Adolf, Geschichte der Kategorienlehre, Zwei Abhandlungen, Hildesheim, 1963, S. 226 mit Verweis auf den Kommentar des Simplicius zu den Kategorien des Aristoteles.

[53] Untersuchungen zu weiteren philosophischen Systemen der Antike sollen nicht angestellt werden. So kam es, wie Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 90 ff. richtig feststellt, insbesondere vom ersten Jhdt. vor bis ins zweite Jhdt. n. Chr. zu einer Vermischung der unterschiedlichen philosophischen Ansichten. Ausführungen zur philosophischen Diskussion des *materia*-Begriffes in dieser Epoche wären also angesichts der geringeren Trennschärfe der einzelnen Philosopheme mit Blick auf das vorliegende Untersuchungsziel wenig gewinnbringend.

[54] Etwa Phil. opif. mund. 36.

[55] Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 139.

[56] Bäumker, Clemens, Das Problem der Materie in der griechischen Philosophie, Eine historisch-kritische Untersuchung, Münster, 1890, Neudr. Frankfurt a.M., 1963, S. 333.

κατ' αύτούς έστιν ἡ ἄποιος ὕλη καὶ δι' ὅλων τρεπτή - Aus einem qualitätslosen und einzigen Körper haben sich die Stoiker die Entstehung des Alls gedacht. Ursprung der seienden Dinge ist nämlich nach ihnen die qualitätslose und durchwegs veränderliche Materie.

Gegen diese These wird vorgebracht, dass der Körper lediglich die Materie als Substrat benötige, er selbst aber – im Gegensatz zur eigenschaftslosen Materie im stoischen Sinne – gewisse Eigenschaften aufweisen müsse.[57] Als Beleg für letztere Ansicht kann etwa Plot. enn. 6.1.26 herangezogen werden: *πᾶν σῶμα ἐξ ὕλης καὶ ποιότητος* – Jeder Körper besteht aus Materie und Eigenschaft. Der Begriff des Körpers ist also zweifelsohne Gegenstand stoischer Erörterungen gewesen. Eine klare Identifikation des *corpus* mit stoischem Gedankengut, die mit Blick auf die römischen Irrtumskategorien fruchtbar gemacht werden könnte, lässt sich jedoch nicht feststellen.

Vorstellbar wäre es ferner, den Begriff des *corpus* mit dem epikureischen *σῶμα*[58] in Verbindung zu bringen. Unter „Körper" im epikureischen Sinne wäre dann das einzelne Ding, der konkrete Gegenstand der sinnlich wahrnehmbaren Welt zu verstehen. Dies erscheint auf den ersten Blick vernünftig, stellt man sich doch auch im modernen Sinne unter dem *corpus*, d.h. dem Kaufgegenstand, regelmäßig den konkreten, vor Augen stehenden Gegenstand vor, welcher zum Kauf bestimmt ist. Doch wäre eine derartige Argumentation zum einen anachronistisch, zum anderen käme man über das schon beim *materia*-Begriff festgestellte Hindernis nicht hinweg, dass weitere, klare Anhaltspunkte für eine Adaption der epikureischen Naturphilosophie in der römischen Jurisprudenz fehlen (s.o.).

3. Der Begriff *qualitas*

Qualitas entspricht dem griechischen Wort *ποιότης*. Gerade Cicero verwendet *qualitas* stets im Zusammenhang mit der stoischen Philosophie.[59] Insofern gäbe es eine Parallele zu dem ebenfalls in der Stoa behandelten *corpus*. Wenn in der Stoa alles Seiende als körperlich gilt (s.o.), so müssen auch die Eigenschaften (*qualitates*) körperlich sein.[60] Ein strikter Gegensatz zwischen *corpus* und *qualitas* lässt sich also in der Stoa gerade nicht feststellen.[61]

Anders liegt es offenbar im römischen Recht, wie D. 19.1.21.2 (Paul. 33 ad ed.) zeigt: *Quamvis supra diximus, cum in corpore consentiamus, de qualitate autem dissentiamus, emptionem esse, tamen venditor teneri debet, quanti interest non esse deceptum, etsi venditor quoque nesciet: veluti si mensas quasi citreas emat, quae non sunt.*

Hier wird gerade ein Gegensatz – *autem* (!) – zwischen *corpus* und *qualitas* errichtet, sodass man wohl nicht davon ausgehen kann, der juristische Begriff *qualitas* sei iSd stoischen Ontologie zu verstehen.[62] Daher muss wohl auch die Annahme ausscheiden, unter *qualitas* könne die dritte stoische Kategorie, das *πῶς ἔχον* (das sich irgendwie Verhalten)[63], zu verstehen sein. Selbst der Stoiker Seneca ist sich offenbar nicht ganz sicher, wie er den Begriff *qualitas* verwenden soll.[64]

Möglich wäre es noch, die *qualitas* mit der dritten aristotelischen Kategorie, dem *ποῖον* (wie beschaffen)[65], in Verbindung zu bringen. Doch auch dafür kann die Quellenlage keinesfalls als ausreichend betrachtet werden.[66]

4. Der Begriff *substantia*

Einen möglichen Anknüpfungspunkt für die philosophische Deutung des Begriffes *substantia* bietet Sen. ep. 58.15: *Primum genus Stoicis quibusdam videtur quid: quare videatur, subiciam. In rerum, inquiunt, natura quaedam sunt, quaedam non sunt, et haec autem, quae non sunt, rerum natura complectitur, quae animo sucurrunt, tamquam Centauri, Gigantes et quicquid aliud falsa cogitatione formatum habere aliquam imaginem coepit, quamvis non habeat substantiam.*

Wenn nun ein Stoiker von *substantia* spricht, liegt es nahe, dass er diesen Begriff auch im Sinne der stoischen Philosophie verwendet. So ließe sich unter *substantia* die stoische *οὐσία* verstehen, d.h. die erste stoische Kategorie, welche teilweise mit den Begriffen *ὑποκείμενον* und *ὕλη* gleichgesetzt wurde (s.o.). Doch ist mitunter auch die zweite stoische Kategorie, das *ὑποκείμενον ποιόν*, mit diesen Begriffen bezeichnet worden (s.o.).

Müssen also in Bezug auf eine Zuordnung zu stoischen Gedanken angesichts der Mehrdeutigkeit der Philosopheme gewisse Zweifel bleiben, mag vielleicht eine Einordnung in das aristotelische Denken gelingen. So wird teilweise Aristoteles ein starker Einfluss auf die stoische Kosmogonie und Ontologie attestiert.[67] *Substantia* könnte also auch im Sinne der Philosophie

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[57] Pohlenz, Max, Die Stoa, Geschichte einer geistigen Bewegung, Bd. I, Göttingen, 1978, S. 66.
[58] Epic. ep. ad Her. 39 ff.
[59] Etwa Cic. ac. 1.24 ff. sowie Cic. nat. deor. 2.94.
[60] Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 139.
[61] Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 139.
[62] Dass *qualitas* seinen Ursprung im philosophischen Sprachgebrauch hatte, sei Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 139 zugestanden. Jedoch verbietet es sich angesichts D. 19.1.21.2, *qualitas* als Irrtumskategorie iSd stoischen Systems zu verstehen.
[63] Etwa Plot. enn. 6.1.25 ff.
[64] So findet sich *qualitas* in Sen. ep. 112.2 iSv *natura*, dagegen in Sen. ep. 118.15 iSv *proprietas*.
[65] Etwa Arist. cat. 1b 29 oder 8b 25 ff.
[66] Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 147.
[67] Statt vieler: Bees, Robert, Rezeption des Aristoteles in der Naturphilosophie Zenons: Die kosmische Lebenskraft im Rahmen der Gottesbeweise bei Cicero, De natura deorum 2.20 – 44, in: Föllinger, Sabine (Hrsg.) Was ist Leben?, Aristoteles' Anschauungen zur Entstehung und Funktionsweise von Leben, Akten der 10. Tagung der Karl und Gertrud Abel-Stiftung vom 23.–26. August 2006 in Bamberg, Stuttgart, 2010, S. 339; Happ, Heinz, Hyle, Studien zum aristotelischen Materie-Begriff, Berlin/New York, 1971, S. 809 f.; Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 85; Bäumker, Clemens, Das Problem der Materie in der griechischen Philosophie, Eine historisch-kritische Untersuchung, Münster, 1890, Neudr. Frankfurt a.M., 1963, S. 330; anders sieht dies Sandbach, Francis Henry, Aristotle and the Stoics, Cambridge, 1985, Vorw.

des Aristoteles verstanden werden: Der Begriff ließe sich etwa iSd ersten aristotelischen Kategorie, der *ούσία* (s.o.), verstehen. Doch auch die aristotelische *ὕλη*, teilweise auch als *ὑποκείμενον* bezeichnet, könnte mit *substantia* gemeint sein. Problematisch an diesen beiden möglichen Zuweisungen ist jedoch wiederum die Mehrdeutigkeit der Begriffe: So verwendet Aristoteles zum einen *ούσία* auch in der Bedeutung des konkreten, einzelnen Gegenstandes (s.o.). Zum anderen legt Aristoteles auch dem Begriff der *ὕλη* mehr als nur eine Bedeutung bei. Schließlich wird sogar die Unterscheidung der Begriffe *ὕλη* bzw. *ὑποκείμενον* einerseits und *ούσία* andererseits aufgehoben (s.o.).

Auch eine philosophische Herleitung der Irrtumskategorie *substantia* müsste damit als äußerst unsicher gelten.

IV. Fazit

Es lässt sich festhalten, dass schon in den griechischen Quellen die Philosopheme *materia*, *corpus*, *qualitas* und *substantia* nicht stets in je einer einzigen Bedeutung verwendet wurden.[68] Um nun deren Verwendung in den die Irrtumsproblematik behandelnden Rechtstexten eindeutig einem bestimmten philosophischen System zuschreiben zu können, müsste man wohl zeigen, dass Ulpian oder ein anderer mit den verschiedenen Irrtümern befasster Jurist einer konkreten philosophischen Strömung bzw. Schule angehörte. Dies wird schon in Ansehung des in Rom herrschenden – und sicher maßgeblich durch Cicero beförderten – Eklektizismus mehr als nur unerheblich erschwert.[69] So müssen derartige Zuweisungen dort mit großer Vorsicht behandelt werden, wo dem Pluralismus unterschiedlicher Geisteshaltungen generell der Vorzug vor der persönlichen Entscheidung für eine bestimmte Geisteshaltung gegeben wurde. Unterstellt, diese eklektische Praxis hätte gerade in der Zeit der klassischen römischen Jurisprudenz bisweilen die Schwelle zum Synkretismus überschritten,[70] wäre das Vorhaben einer klaren philosophischen Deutung juristischer Begriffe ohnehin zum Scheitern verurteilt.

Überdies ist zu berücksichtigen, dass die römischen Juristen philosophische Modelle, wenn überhaupt, sicherlich nur in vulgarisierter Form übernommen haben.[71] Es besteht also durchaus die Gefahr, dass die bereits ursprünglich mehrdeutig gebrauchten Philosopheme als Vulgärphilosopheme noch weniger Trennschärfe aufwiesen.

Im Ergebnis lässt sich zwar als gesichert ansehen, dass die untersuchten Begriffe ihren Ursprung in philosophischen Erwägungen hatten[72] und spätestens seit Lukrez und Cicero auch im philosophischen Sinne gebraucht wurden.[73] Die Frage, ob diese sich philosophisch eindeutig zuweisen lassen, muss aber verneint werden. Trotzdem lässt sich aus dem Versuch der philosophischen Deutung ein Erkenntnisfortschritt gewinnen: Es lässt sich feststellen, dass voneinander abweichende Entscheidungen einzelner Juristen gerade nicht auf die Differenzen von hinter ihnen stehenden philosophischen Systemen bzw. Schulen zurückzuführen sind.[74]

Bei der Frage nach der Kategorisierung der unterschiedlichen Irrtümer spielte die antike Philosophie, insbesondere die antike Naturphilosophie, gleichwohl eine bedeutende Rolle: zwar nicht dergestalt, dass man einzelne römische Juristen pauschal einer bestimmten philosophischen Schule zuweisen könnte, aber sehr wohl dergestalt, dass sich die Juristen dann, wenn es um die Entscheidung problematischer Rechtsfälle ging, bisweilen zur Unterstützung ihrer Argumentation bestimmter Begriffe bedienten, die teilweise über lange Zeit Gegenstand philosophischer Reflexion gewesen sind. Jene Philosopheme stellten sich für die Juristen als differenziertes Instrumentarium dar, welches sie dabei unterstützte, den konkreten Fall einer angemessenen und interessengerechten Entscheidung zuzuführen, d.h. der Gerechtigkeit Geltung zu verschaffen.

Insofern ist dem an die Spitze der Digesten gestellten Text Ulpians zuzustimmen und der philosophisch argumentierende Jurist wahrhaftig zu bezeichnen als *sacerdos iustitiae veram philosophiam affectans*.

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[68] Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 142 f.

[69] Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a. 1992, S. 55.

[70] So Martin Schermaier, Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 91.

[71] Richtig ist daher die Feststellung von Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 56.

[72] Wieacker, Franz, Spezifikation: Schulprobleme und Sachprobleme, in: Kunkel, Wolfgang/Wolff, Hans Julius (Hrsg.), Festschrift für Ernst Rabel, Bd. II: Geschichte der antiken Rechte und allgemeine Rechtslehre, Tübingen, 1954, S. 284 f.

[73] Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 55.

[74] Harke, Jan Dirk, Si error aliquis intervenit – Irrtum im klassischen römischen Vertragsrecht, Berlin 2005, S. 46; Schermaier, Martin Josef, Materia, Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht, Wien u.a., 1992, S. 56.; anders sieht dies für bestimmte Fälle Sokolowski, Paul, Die Philosophie im Privatrecht, Bd. I: Sachbegriff und Körper in der klassischen Jurisprudenz und der modernen Gesetzgebung, Halle a.S., 1902, S. 92 ff.

Von *societas* des Römischen Recht zur *societas europaea*. Kurzer Überblick
(From societas of Roman Law to societas europaea: An Overview)

Carmine Galloro *

Abstract

The term ‚partnership' generally means persons' association. By moving the focus to the company law, further elements – such asset or responsibility, reveal themselves to be relevant. In such context, an analysis of the societas of Roman law shows the origin of those rights. On the other hand, the continuity between the Roman societas and new figures of companies is represented by the societas europaea, according to the Council Regulation (EC) No 2157/2001 of 8 October 2001. This figure is in fact consistent with the Roman concept of societas and the recovery of the European legal tradition. That is why the whole discussion is concentrated upon the evolution of legal person's definition.

Key words: *Roman law; societas; Regulation (EC) No 2157/2001; societas europaea.*

1. Einführung

Unter den verschiedenen Arten von Gemeinschaftsverhältnissen taucht vor allem die Gesellschaft auf, da sie die meisten Berührungspunkte mit den anderen Personenverbänden aufweist, die heutzutage in erster Linie in diesem Feld verbleibt. Der entsprechende Begriff verhält sich zum solchen des Rechtssubjekts eigentlich nicht, denn das Rechtssubjekt bedeutet eine Relation zu Rechtsobjekten, während die Gesellschaft eine Relation unter Rechtssubjekten bildet. Da ein Gesellschaftsvermögen nicht begriffliche Voraussetzung der Gesellschaft ist, kann das Wesen der Gesellschaft nur darin bestehen, dass es ein obligatorisches Band um die Gesellschafter schlingt [1]. Die Gesellschaft ist ein Vertrag und nur wenn es ein Vermögen gibt, kann daher die Frage aufgeworfen werden, ob die Gesellschaft Rechtssubjekt ist oder nicht. Ist aber ein Gesellschaftsvermögen vorhanden, so besteht neben dem Inbegriff von Relationen, die sich als Gesellschaft bezeichnen lassen, ein weiterer Inbegriff von Relationen, der als Gemeinschaft, und zwar Gemeinschaft zur gesamten Hand, bezeichnet. Für deren Gestaltung war allerdings der Umstand maßgebend, dass ihre Teilhaber Gesellschafter sind, die mit dem gemeinschaftlichen Vermögen gemeinschaftliche Interessen verfolgen.

Dass die Mitglieder einer Rechtsgemeinschaft Gesellschafter sind, ist für den Gesetzesgeber der legislative Grund, sie als Gesamtverwalter zu behandeln, obwohl das Rechtsverhältnis der Gemeinschaft ein anderes als das der Gesellschaft immer sein kann. Dies entspricht nicht der herrschenden Auffassung, die schon für das *ius commune* die Vermögensgemeinschaft auch bei der Gesellschaft in den Vordergrund stellte, wie sich aus der allgemeinen Unterscheidung von *societas* und *communio incidens* ergibt. In Wahrheit steht das Gemeinschaftsvermögen mit der Gesellschaft in keinem deutlichen Zusammenhang, weil gerade die Gesellschaft des bürgerlichen Rechts sehr häufig keine Kapitalgesellschaft ist und vielleicht niemals in die Lage kommen wird, Vermögen zu erwerben. Nichtdestotrotz, erblickt doch die *communis opinio* in dem Gesellschaftsvermögen den Hauptpunkt des ganzen Gesellschaftsrechts und ergibt die richtige Auffassung unmittelbar aus den Vorschriften des Gesetzes, die zunächst nur das Rechtsverhältnis unter den Gesellschaftern regeln, bzw. Rechte und Pflichten der Gesellschafter.

Die *societas* konnte sowohl die Herstellung einer allgemeinen Gütergemeinschaft wie den gemeinschaftlichen Betrieb eines einzelnen Erwerbsgeschäfts oder gar nur die gemeinschaftliche Erledigung einer einzigen Angelegenheit zum Ziel haben. Als solches hatte sie nur Innenwirkung, das heißt, sie ließ nur Ansprüche der Gesellschafter untereinander entstehen. Dritten gegenüber bildete die Gesellschaft keine Einheit, wie die juristische Person, und auch die Eigentumsverhältnisse der Gesellschafter wurden nicht unbedingt von der Existenz der Gesellschaft betroffen. Es entstand jedoch – zumeist durch die Beitragsleistungen der Gesellschafter – ein Gesellschaftsvermögen, das dann allen Teilhabern anteilsmäßig gehörte [2].

Der rechtliche Zustand der Person, der beim Gesellschafter als solcher in Betracht kommt, also das *socium esse*, ist ebenso wenig wie andere ähnliche Zustände. Vor allem ist das subjektive

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1 In diesem Bezug, s. GOWER, *Principles of Modern Company Law*, London, 1992, S. 552 ff.; HAPP, *Aktienrecht. Handbuch – Mustertexte – Kommentar*, Köln, 2004, S. 211 ff.; HOPT, WYMEERSCH, *European Company and Financial Law*, Berlin, 1994, S. 345; HÜFFER, *Aktiengesetz. Kommentar*, München, 2004, S. 71; SEALY, *Cases and Materials in Company Law*, London, 1993, S. 340 ff.; WEIGMANN, *Concorrenza e mercato azionario*, Milano, 1978, S. 13.

2 Über das Argument der sog. Drittwirkung, s. SCHERMAIER, *Schatten des gemeinen Rechts. Moderne Einschränkungen beim Vertrag zugunsten Dritter*, in: *Recht als Erbe und Aufgabe* (Saar, Roth, Hattenhauer Hrsg.), Berlin, 2005, S. 395 ff.

Erbrecht, *heredem esse* oder *hereditas* im subjektiven Sinne, nicht ein einheitliches Recht, sondern ein Inbegriff der verschiedenartigsten Rechte und rechtlichen Situationen, die durch gewisse Momente, wie die Einheit der Person, des Erwerbstatbestandes und des Zweckes, werden [3]. Wenn man den Inbegriff dieser sämtlichen Relationen, in denen ein Gesellschafter als solcher steht, im Begriff „Personenrecht" zusammenfasst, so wäre es der Fall, auch die ganze privatrechtliche Stellung des einzelnen Menschen nach dieser Bedeutung zu analysieren. Diese ist die Konsequenz der ganzen Theorie: Die rechtliche Stellung des Gesellschafters ist kein einheitliches Recht, auch wenn sie als Personenrecht oder Mitgliedschaftsrecht irgendwann bezeichnet werden kann. In Wahrheit ist dies ein Kollektivbegriff, der sachliche und obligatorische Beziehungen, und nicht nur Rechte, umfasst. Die Charakteristik dieses Verhältnisses besteht dann nur darin, dass der Gesellschafter mit dem Eintritt in die Gesellschaft am Gesellschaftsvermögen anteilsberechtigt wird und mit seinem Ausscheiden auch diese *quota* verliert und dieser Tatbestand zugleich zwei Folgerungen ableitet: Dass er nicht nur für das Verhältnis des ein- oder austretenden Gesellschafters zu den anderen Gesellschaftern, sondern auch für das Verhältnis des ersteren zu den Bestandteilen des Vermögens von eigenen Wirkung ist [4].

Nur in den §§ 714, 715, 718 ff. BGB werden heute andere Rechtsverhältnisse normiert, nämlich die Vertretungsmacht der geschäftsführenden Gesellschafter und das Rechtsverhältnis am Gesellschaftsvermögen [5]. Dabei darf allerdings die Behauptung des § 718 BGB *„Die Beiträge der Gesellschafter und die durch die Geschäftsführung für die Gesellschaft erworbenen Gegenstände werden gemeinschaftliches Vermögen der Gesellschafter"* mit zu der Vorstellung beigetragen haben, dass das Gesellschaftsvermögen das Wesentlichste an der Gesellschaft sei. Besteht aber ein solches Gesellschaftsvermögen, so gehört es natürlich den Gesellschaftern als diejenigen, so dass ein ausscheidender Gesellschafter mit seinem Austritt zugleich aufhört, Gemeinhändler zu sein und auf einen rein, obligatorischen Auseinandersetzungsanspruch beschränkt wird [6]. Jedenfalls können hier einige Unterscheidungen getroffen werden: Vor allem aber ist fraglich und bestritten, von welchem Zeitpunkt an die Beiträge „gemeinschaftliches Vermögen werden". Und zwar, ob erst mit der Erfüllung der Beitragspflicht oder schon vorher, eine Frage, die mit der anderen identisch ist, ob das Recht, die Leistung der Beiträge zu fordern, den einzelnen Gesellschaftern oder der Gesellschaft als solcher zusteht. Es ist jedoch zu beobachten, dass das Gesellschaftsvermögen ein nach allen Seiten beschränktes, einheitliches Ding ist, eine Art von verschlossener Kasse, die nur von sämtlichen Gesellschaftern gemeinsam geöffnet werden kann [7].

Auch wenn eine Gesellschaftsforderung gegen ein Mitglied der Gesellschaft vorliegt, wie im Fall der Kreditgewährung an einem Gesellschafter, ist dieser Anspruch als eines von aller übrigen Mitgliedern gegen den Begünstigten vorzulegen. Wie umgekehrt einer Person, die Gesellschafter ist, Forderungen gegen die Gesellschaft nur zustehen können, wenn sie gegen die übrigen Gesellschafter vorgesehen sind. Aus solchen Gründen sind Rechtsverhältnisse zwischen den einzelnen Gesellschafter und der Gesellschaft als solcher, wie sie die sämtliche Gesellschafter umfassen, überhaupt nicht denkbar. Es kann jedoch sich nur um Rechtsverhältnisse zwischen den einzelnen Gesellschaftern, oder zwischen einzelnen und den übrigen zusammen handeln. Dies zeigt aber auch, dass es ein Inbegriff ist, der sich teils aus Rechten aller Mitgliedern gegen dritte, teils aus Rechten der Mehrheit gegen den einzelnen Gesellschafter, teils möglicherweise aus Rechten der einzelnen Gesellschafters gegen die Gesellschaftsmehrheit, zusammenfasst [8].

Als Subjekt der zum Gesellschaftsvermögen gehörenden Rechte könnte man entweder die als Summe der Gesellschafter gedachte Gesellschaft endlich bezeichnen, oder die einzelnen Gesellschafter. Dies bedeutet keinen dinglichen, sondern nur einen formellen Gegensatz, weil es um zwei Seiten desselben Verhältnisses geht, dass sich kollektiv u.a. disjunktiv, auffassen lässt. Soll der Inhalt des Rechts bildende Macht als eine gemeinsame daher auftauchen, so kann man von einem gemeinsamen Recht der Gesellschafter, von einem Recht der Gesellschaft reden. Als Beispiel nimmt man den Anteil des einzelnen an dieser Macht, einen Anteil, der selbst wieder eine von der Rechtsordnung gewährte und geschützte Macht ist: Dies berechtigt, von Rechten der einzelnen Gesellschafter zweifellos zu sprechen [9].

2. Hinweise zum Römischen Recht

Was die heutige Definition der juristischen Person anbelangt, tauchte sie wie bekannt aus der Fortentwicklung des römischen Rechts der romanistischen und kanonistischen Konzeption auf [10]. In Wahrheit, kannte das antike römische Recht Körperschaften und Anstalten mit eigener Rechtsfähigkeit aber ohne

[3] Dazu MEISSEL, *Societas. Struktur und Typenvielfalt des römischen Gesellschaftsvertrage in Vertragspraxis und Jurisprudenz*, Frankfurt a.M., 2004, S. 417 ff.

[4] HEYMANN, *Handelsgesetzbuch*, 2. Auf., Berlin, 1995, S. 84 ff.

[5] Vgl: BINDER, *Das Problem der juristischen Persönlichkeit*, Leipzig, 1907, S. 52.

[6] Im Hinblick auf dieser Meinung s.: GIERKE, *Genossenschaftstheorie und Rechtsprechung*, Berlin, 1887, S. 343; ID., *Deutsches Privatrecht*, Leipzig, 1895, S. 660; SOHM, *Gegenstand: Ein Grundbegriff des Bürgerlichen Gesetzbuches*, Leipzig, 1905, S. 65 ff.

[7] BINDER, *ibidem.* In Italien wurde betrachtet, dass die Unterscheidung zwischen Finanzierung und Kapitalerhöhung nicht immer einfach ist. Um diesen Fall zu bestimmen, sollte man sich dem Willen der Parteien verweisen. Wenn solche Willigung nicht eindeutig festgelegt werden kann, sind der konkrete Zweck des Unternehmens sowie die Interessen der Aktionäre zu berücksichtigen, die zur Entwicklung des Geschäftsverhältnisses verfolgt wurden (Cass. Civ., sez. I, 19. März 1996, Nr. 2314).

[8] Es wurde betrachtet, dass alle unterhalb von der einfachen Mehrheit restlichen Anteilsgrößen folglich eine Generalisierung vermeiden. Was den vorgesehen Fortbestand anbelangt, muss der Minderheitserwerber grundsätzlich die Entscheidungen der Mehrheit zustimmen. Dies lässt sich als übliche Beschaffenheit doch nicht erachtet werden. Ehrlich gesagt, die Struktur der Aktionär oder Gesellschaftsform kann zwar auch eine geringere Beteiligung einen großen Einfluss vermitteln. Kapitalmarktrechtlich oder kartellrechtlich begründete Grenzwerte sagen jedoch über die übliche Beschaffenheit oder gewöhnliche Verwendung einer Unternehmensbeteiligung wenig aus. Unterhalb von der genannten Grenzen sei die Anwendung des Sachmängelrechts nicht zu bestimmen oder zu verweigern (s. dazu THIESSEN, *Unternehmenskauf und Bürgerliches Gesetzbuch*, Berlin, 2005, S. 209).

[9] HEYMANN, *Handelsgesetzbuch*, 3. Auf., Berlin, 1999, S. 46 ff.

[10] MEHR, *Societas und universitas. Römischesrechtliche Institute im Unternehmensgesellschaftsrecht in 1800*, Köln, 2008, S. 27 ff.

juristische Persönlichkeit. Infolgedessen enthalten die literarischen Rechtsquellen selten etwaige Zitate über die juristischen Personen, abgesehen von einzelnen Stellen mit Bezug auf die Körperschaften. Dies führte zu einer ausreichenden Definition der Verbände vom öffentlichen Recht aber zu keiner deutlichen Idee über die Rolle der privaten Vereinigungen. Man sprach dafür von *universitates* als Körperschaften, die in irgendeiner Weise eine Form von Rechtsfähigkeit ausdrückte [11]. In diesem Bereich stand vor allem der Staat, neben ihn traten die Gemeinden wie *municipia* und *coloniae*, sodann etliche bekannte Entitäten wie *collegia* und *sodalitates* [12]. Die *sodalitates* waren Assoziationen mit religiösen Zwecken, bzw. um *pro populo* ursprünglich beobachtete Kulte zu bewahren, als auch neuen öffentlichen Kulten auszuüben. In dieser Perspektive konnte das Verhältnis *gentiles* und nicht *gentiles* beinhaltet sein. Mit der Zeit hätte der Name *sodales* den von *gentiles* in einem solchen Ausmaß ersetzt, dass in der *lex repetundarum* von 123 v. Chr. die Diktion *„sodales ubi exspectaveris gentiles"* nächsten *„cognati"* und *„adfini"*, Platz genommen hätte [13].

Der Zweck der *sodalitas* wäre wesentlich sakral gewesen und zuerst in der Gentilgesellschaft und dann in der Realität des *populus* eingefügt. Diese *sodalitates* hätten sich sowohl den Verbänden der *sodalicia* als auch die *collegia*, d.h. anderen Verbänden verschiedener Art (berufliche, religiöse), im Gegensatz gestellt. Diese wurden in der archaischen Zeit mit dem *collegia opificum* identifiziert [14]. Unter diesen Figuren, deren öffentlicher Charakter noch bestritten ist, findet man einige uralte Verbände der einzelnen Stadtquartiere, die Gesellschaften der Steuerpächter und Pächter von öffentlichen Arbeiten wie die *societates publicanorum,* außer den religiösen Vereinigungen. Das gemeinsame Merkmal war daher die Unabhängigkeit der Mitglieder vom Vermögen: Dieselben konnten Eigentum haben oder Gläubiger und Schuldner sein, hafteten aber nicht für die Schulden der Assoziation. Und diese sind genau die zwei Punkten, die noch heute die juristische Person erkennbar machen, bzw. die Unabhängigkeit vom wechselnden Bestand der Mitglieder und die Haftbegrenzung [15].

Eine Analyse der *societas*, durch die Perspektive der Rechtswirkung durchgeführt, bestätigt die Nützlichkeit des Begriffs, ermöglicht aber auch die Prinzipien und Konzepte zu prüfen, damit der Zusammenhang zwischen *ius privatum* und *ius publicum*, für die allgemeine Rechtsordnung, erklärt wird. Allerdings, ist das eigentliche Problem der rechtlichen Rahmenbedingungen für den Vertrag heute die Willensbegrenzung der Einzelnen als Begrenzung der Privatautonomie. Das ist zwar, die Dichotomie privat-öffentliches Recht [16].

Mit besonderem Bezug auf die Rechtsgrundlage der *societas*, wird dort, mehr als woanders das Thema der Rechtfertigung von Kapitalverkehr, und dessen Nützlichkeit für Einzelne und Gesellschaften, betrachtet. Dies stellt ebenso, die Beziehung zwischen Privatakten und das Rechtssystem in dem solche Handlungen begangen werden, dar [17].

Im Rahmen des römischen Rechtes, ist es interessant, einen Vergleich zwischen die societas als Vertrag und die verschiedenen Formen von Vereinen anzustellen [18]. In einer umfassendere Sicht, taucht die Verbindung mit anderen grundlegenden Kon-

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[11] MEHR, *Societas*, zit., S. 372 ff.

[12] In allgemeinen, über das Thema s. JÖRS, KUNKEL, WENGER, *Römisches Recht*, Berlin, 1987, S. 76 ff.; MITTEIS, RP, I, S. 339 ff.; SCHNORR VON CAROLSFELD, *Geschichte der juristischen Person*, I, München, 1933.

[13] TH. MOMMSEN, *De collegiis et sodaliciis Romanorum*, Kiliae 1843, S. 1 ff. Von gleichen Autoren, s. über das Argument, *Zur Lehre von den romischen Korporationen*, in: *Gesammelte Schriften*, 3, Berlin 1907,S. 53 ff.

[14] Mit Bezug auf der assoziative Phänomen in der römischen Welt vgl. COLI, *Scritti di diritto romano*, I, Milano 1973, S. 1 ff.; DE ROBERTIS, *Scritti varii di diritto romano*, IV, Bari, 2000, S. 51 ff. Was die *sodalitates* insbesondere anbelangt s. FIORI, *Sodales. Gefolgshaften e diritto di associazione in Roma arcaica (VIII-V sec. A.C.)*, in: *Societas-Ius. Mununscula di allievi a Feliciano Serrao* (versch. Hrsg.), Napoli 1999, S. 101 ff.; SERRAO, *Diritto privato economia e societŕ nella storia di Roma, 1, Dalla societŕ gentilizia alle origini dell'economia schiavistica*, Napoli 2006, S. 358 ff.

[15] Im Allgemeinen dazu s. CIMMA, *Ricerche sulla societŕ dei pubblicani*, Milano, 1981. Was das Thema der Gesamtheit anbelangt, sei hier der *populus romanus* als Beispiel ähnlich ausgeführt, als nicht völlig verselbständigte Einheit, sondern organisierte Entität der jeweiligen Mitglieder als Rechtsträger (vgl. SCHNORR VON CAROLSFELD, *Geschichte*, zit. S. 54 ff. S. auch *infra*).

[16] Einmalig ist die Leistung der Römer auf dem Gebiet, *ius privatum* oder *ius civile*. Sie rechneten mit den Begriffen und gelangten damit für unterschiedlichsten und kompliziertesten Fälle zu gerechten Ergebnissen. Römisches Recht galt im Mittelalter und in der Neuzeit fast in ganz Europa, so dass man vom *ius commune* sprach. Dieser Einfluss des Römischen Rechts wird deutlich etwa bei Einleitungen in *persona* (Mensch), *res* (Gegenstand), *actio* (Handlung/Klage/Anspruch), *proprietas* (Eigentum) etc. Die Institutionen wie *emptio-venditio* (Kauf), *locatio-conductio* (Miete) und *societas* (Gesellschaft) sind ganzheitlich entwickelt, viele Elementen sind erfasst, ebenfalls sind die Praxis und Theorie der sonstigen rechtlichen Argumentation bekannt. Die Rechtsprechung war in Rom immer Sache weltlicher Hoheitsträger, die Kenntnis und Fortentwicklung des Rechts gehörte demgegenüber jahrhundertlang zum Geheimwissen der Priester. Dann aber wurden Rechtsberatung und Rechtswissenschaft von weltlichen Privatleuten ausgeübt. Die Begriffe und Regeln des Vermögensrechts, das Rechtssystem und die allgemeinen Rechtssprichwörter wurden von Rechtskennern aus der höchsten Gesellschaftsschicht erarbeitet, die sich aus persönlicher Neigung mit Rechtsproblemen und tatsächlichen Fällen befassten, diese diskutieren und schrieben darüber. Sie sind also nicht das Ergebnis der Gesetzgebung oder der Rechtsprechung: Hierhin liegt eine Erklärung für die auffällige Bemerkung der Klassischen Juristen, die *auctoritas prudentium* (Autorität der Rechtslehrer) sei eine Rechtsquelle. In den römischen rechtlichen Diskussionen ist die theoretische Abhandlung immer sinnvoll. Dies ist z. B. in dem Lehrbuch über die Rechtseinrichtungen, die *Institutiones* von Gaius, ebenfalls in den *Institutiones* Kaiser Iustinianus im *Corpus Iuris Civilis*, nachweisbar. Eigentlich charakteristisch ist daher die Diskussion einzelner Fälle (s. auch weiter unten).

[17] Mancher hat behauptet dass, der Rechtsgrund eine Möglichkeit sei, die allgemeine Rolle der Handlungen der Privatautonomie (Verträge und Geschäfte) und ihrer allgemeinen Beziehungen mit dem individuellen Interesse der Parteien und dessen allgemeinen Beziehungen mit den Vorschriften der Rechtsordnung, festzustellen (DI MAJO, *Causa del negozio giuridico*, in: Enc. Giur., VI, Roma, 1988, S. 2). S. auch GIORGIANNI, *Causa (diritto privato)*, in: Enc. Dir., VI, Milano, 1960, S. 563 ff.; NUZZO, *Utilitŕ sociale e autonomia privata*, Milano 1974, S. 91 ff.

[18] Um die Notwendigkeit, zwischen den Unternehmen und diversen Formen von Assoziation zu unterscheiden, vgl. TALAMANCA, *Societŕ. (Diritto romano)*, in: Enc. Dir., XLII, Milano 1990, S. 814 Nt. 2.

zepte und Institutionen auf. Es handelt sich unter anderem um die Begriffe von *populus*, *res publica*, *civitas* und *coniugium*, deren Verständnis jedoch, neue und interessante Lesungen von der gleichen societas ableiten[19].

Es ist weiterhin anerkannt, dass die Rechtsgrundlage der *societas* dazu gewirkt hätte, das *negotium* zu bewerten und die gestimmten Interessen zu reglementieren, gemäß dem Prinzip der Schutzwürdigkeit des Geschäftsgrundes. Der Schwerpunkt der aktuellen Beobachter hat damit eine erneute Konzentration auf das Vertragsverhältnis vorgestellt. Man denke nur an die Diskussionen, stets eingeschaltet, über *synallagma*[20]. Mit diesem Bezug, würde es einen funktionalen Aspekt dort bevorzugen wollen, der aus der Willigung der Parteien, durch einen Austausch von entsprechenden Leistungen, dargestellt wird. In der Literatur wurde bisher angenommen, den Rechtsgrund mit *datio* als Dienstleistungslieferung zu identifizieren, die ihrerseits die Gegenleistung zu beantragen erlaubt[21].

In der römischen Jurisprudenz gilt daher ein Begriff von Rechtsgrund als tatsächlich verfolgtes Interesse, das eine gewisse Kontinuität mit den jüngsten Meinungen, die über „Synthese von Interessen der Parteien" jedoch sprechen, darstellt[22]. Zuerst wurde die italienische Lehre vom angelsächsischen zivilrechtlichen Konzept von *consideration* beeinflusst[23]. Nachfolgend kamen der Austausch und die Synthese von Eigeninteresse der Parteien als Bindeglieder mit dem römischen Begriff heraus, da sie nicht als abstrakte Elemente, sondern als Grundelementen wie Balance oder Einigung, betrachtet wurden. Das Thema ist so wichtig, weil es Angelegenheit zur Diskussion zwischen Romanisten und anderen Juristen darstellt, im Hinblick auf die Entstehung des Rechts[24] welche die Phase der Erzeugung, Auslegung und Anwendung umfasst. In diesem Sinne ist der Begriff „Rechtsgrund" ein Ausgangspunkt, wonach wichtige Erkenntnisse zur Bildung des europäischen Rechts herausgekommen sind[25].

Es ist weithin akzeptiert, dass der Konsensualvertrag von *societas* verschiedenen Quellen hat[26]. Es wird angenommen, dass er nicht nur an das *consortium ercto non cito* zurückverfolgt werden soll[27], sondern auch an solchen Formen von Vereinen, die aus der internationalen Praxis kommen. Dann fiel diese Sache unter der Jurisdiktion von *iudicia bonae fidei* aus, im Rahmen von *iusticia peregrina* (um den dritten Jahrhundert v. Chr.). Mit Bezug auf dem innerstaatlichen Recht, hatte es die Zuständigkeit ab dem zweiten Jahrhundert v. Chr[28].

Die *societas* war der vertragliche Zusammenschluss zweier oder mehrerer Personen, um mit gemeinsamen Mitteln einen gemeinsamen wirtschaftlichen Zweck zu erreichen. Es war ein

[19] Über die Definition des *populus* als *coetus multitudinis iuris consensu et utilitatis comunione sociatus* s. LOBRANO, *La Respublica romana, municipale-federativa e tribunizia: modello costituzionale attuale*, in: Diritto@Storia, 3. Mai 2004 (http://www.dirittoestoria.it/3/Memorie/Organizzare-ordinamento/Lobrano-RespublicaRomana-modello-costituzionale-attuale.html). Dieser Meinung zufolge, wird die Grundlage des römischen öffentlichen Rechts, die als Element von Kontinuität gilt, aus Cicero nochmals gezeichnet, der sowohl den *populus* als auch die *civitas „societas"* nennt, d.h. als Ergebnis eines einvernehmlichen Vertrages der Gesellschaft, die nach der Verwirklichung von gemeinsamen *utilitas* orientiert ist. Auch die *societas* ist eine Erfindung, dessen Potenzial wahrscheinlich die Römer faszinierte. Sie interpretieren rechtlich komplexen menschlichen Beziehungen in gesellschaftlicher Hinsicht: die Ehegattung, die ganze Menschheit, als Elemente von *urbis* und *res populi.* In spezieller Bezugnahme auf die republikanische Ordnung, erlaubt das Schema des Partnerschaftsvertrages, die Bürger als *soci* und das Volk als *societas* zu definieren. Auf dieser Basis wird die Bürgerbeteiligung theoretisch gegründet, nachdem jeder privat Bürger auch Souveränen *cum potestate* ist. Dies rechtfertigt für die *res publica* die Notwendigkeit von *virtus*, d.h. die Redlichkeit seitens der Bürgern und nicht nur der zensorischen Justiz. Über die Begriffe von Staat und Bevölkerung im römischen Recht, s. KUNKEL, SCHERMAIER, *Römische Rechtsgeschichte*, Köln, 2005, S. 1 ff.

[20] Zum Thema s. GALLO, *Synallagma e conventio nel contratto. Ricerca degli archetipi della categoria contrattuale e spunti per la revisione di impostazioni moderne. Corso di diritto romano*, II, Torino 1995, S. 241 ff.; MELILLO, *Contrahere pacisci transigere. Contributo allo studio del negozio bilaterale romano*, Napoli, 1994, S. 207 ff.

[21] GALLO, *zit.*, S. 234.

[22] DALLA MASSARA, *Alle origini della causa del contratto. Elaborazione di un concetto nella giurisprudenza classica*, Padova 2004, S. 26 ff.

[23] Dazu s. ALPA, *Contratto nei sistemi di common law*, in: Dig. Disc. Priv., Torino 1989, S. 169 ff.; GORLA, *Consideration*, in: Enc. Dir., Milano 1964, S. 176 ff.

[24] Nach der Meinung von Savigny, entspräche diese Idee den Grundelementen der menschlichen Natur, der Freiheit mit der ihr innewohnenden Individualisierung und der Bewegung, d.h. der Betätigung und notwendigen Beobachtung jener Freiheit. Wie diese Gedanken, so geben auch die dann anschließend folgenden Begründungen nur die Tatsache dar, dass es für die Bürger bald sinnvoll, bald zweckmäßig erschien, solche Gedanken zu schaffen (s. SAVIGNY, *System des heutigen Römischen Rechts*, Band III, Berlin, 1840, S. 258).

[25] Wenn es um die römischen Quellen handelt, lässt der Begriff „causa" sich in der Regel als tatsächlich verfolgtes Interesse, interpretieren. Dies kommt aus den Behandlungen und Erklärungen der Parteien oder dem selber Gesamtbilanz deren Interessen her. Es gibt also eine Art von Entsprechung zwischen den ältesten Lehren der römischen Juristen und die aktuelle Orientierung von modernen Zivilisten, die frei von dem abstrakten Begriff des Rechtsgrunds um die konkrete Einstellung des Konzepts zu verfolgen haben (vgl. PALMA, *Note critiche sul concetto di causa*, in: *Roma e America diritto romano comune*, 12/1, 2001, S. 325).

[26] Zum Thema s. auch ARANGIO-RUIZ, *La società in diritto romano*, Napoli, 1988; BIANCHINI, *Studi sulla societas*, Milano 1967; BONA, *Studi sulla societŕ consensuale in diritto romano*, Milano, 1973; CANCELLI, *Società (Diritto romano)*, in: Novissimo Dig. It., XVII, Torino, 1970, S. 495 ff.; CIMMA, *Ricerche sulla società di pubblicani*, Milano, 1981; DEL CHIARO, *Le contrat de société en droit privé romain*, Paris, 1928; A. GUARINO, *La società in diritto romano*, Napoli, 1972; KASER, *Neue Literatur zur "societas"*, in: SDHI, 1975, 41, S. 278 ff.; SANTUCCI, *Il socio d'opera in diritto romano. Conferimenti e responsabilità*, Padova, 1997; TALAMANCA, *Società. (Diritto romano)*, in: Enc. Dir., XLII, 1990, S. 814 ff.; WIEACKER, *Societas. Hausgemeinschaft und Erwerbsgesellschaft*, Weimar, 1936.

[27] D.h. Erbengemeinschaft ohne Erbteilung, die im römischen Recht die Eigentümermehrheit der Erben bezeichnet, bei der alle Beteiligten gleichberechtigt waren und jeder alleine mit Wirkung für alle über die einzelnen Gegenstände verfügen konnte. S. dazu ARANGIO-RUIZ, *zit.*, S. 7, Nt. 2; BETTI, *Istituzioni di diritto romano*, I, Padova, 1942, S. 426 ff.; MC CORMACK, *Hausgemeinschaft und "consortium"*, in: ZWR, 1977, 76, S. 1 ff.; SOLAZZI, *"Societas" e "communio"*, in: Scr. Dir. Rom., 1960, 3, S. 427 ff.

[28] KUNKEL, SCHERMAIER, *Römische Rechtsgeschichte*, zit., S. 114 ff.; dazu vgl. auch A. GUARINO, *L'ordinamento giuridico romano*, Napoli, 1990, S. 106 ff.

schuldrechtliches Verhältnis unter den beteiligten Personen, da der gleiche Gesellschaftsvertrag ein auf Dauer angelegtes Schuldverhältnis begründete. Die Anteile der Gesellschafter an Gewinn und Verlust bestimmten sich in erster Linie nach der besonderen Abrede unter den Parteien. Meist werden sie vom Beitrag des einzelnen zur Gesellschaft abhängig gewesen sein. Das Gesellschaftsverhältnis endete wegen der Höchstpersönlichkeit der Beziehung mit dem Tod eines der Gesellschafter oder mit dem Konkurs. Die Gesellschaft konnte auch durch die – jederzeit mögliche – Kündigung oder den Ablauf einer vorgesehenen Frist oder das Erreichen des angestrebten Zieles beendet werden. Diese Abrechnung zwischen jeweils zwei *socii* ging auf Teilung des ermittelten Gewinns oder Verlusts, unter Berücksichtigung von Ansprüchen und Gegenansprüchen wie nicht geleisteten Beiträgen, Auslagen für die Gesellschaft und Schadenersatz. Die Verurteilung bewirkte Infamie[29].

Der geschichtliche Ausgangsfall war die ungeteilte Erbengemeinschaft des altrömischen Rechts, bzw. das *consortium ercto non cito*. Nach dem Tode des Hausvaters blieben die Kinder auf dem ererbten Gut und bewirtschafteten es gemeinsam. Für eine solche Erbengemeinschaft galten besondere Grundsätze: Jeder einzelne Miterbe konnte mit Wirkung für alle über die zum gemeinschaftlichen Gut gehörenden Gegenstände verfügen, z.B. eine Sache veräußern oder einen Sklaven freilassen. Ein Gemeinschaftsverhältnis dieser Art konnte später auch durch Vertrag begründet werden. Die *societas* der klassischen Zeit war ein Konsensualkontrakt und wurde durch Willensübereinstimmung der Gesellschafter (*socii*) begründet. Sie bestand solange, als der Dauerkonsens vorhanden war. Sie gehörte zu den *negotia bonae fidei* und war im Gegensatz zum *consortium* ein Institut des *ius gentium*, das auch Nichtrömern zugänglich war[30]. Das im modernen Gesellschaftsrecht viel berufene besondere Treueverhältnis der Gesellschafter war auch dem römischen Recht geläufig[31]. Die Römer sprachen geradezu von einem *ius fraternitas*, von einem Recht, wie es unter Brüdern gilt[32]. Bekannt war aber auch die große Streitanfälligkeit von Gemeinschaftsverhältnissen.

Externen Aspekten der gesellschaftlichen Beziehungen sind die oben betrachteten *societates publicanorum*, deren Tätigkeit Ende des dritten Jahrhunderts v. Chr. bewiesen sind. Es handelte sich um Kapitalgesellschaften die öffentlichen Bau- oder Steuereinziehungsaufträge aufnahmen. Mit Bezug auf die römische Verfassung scheint es, dass solche Gesellschaften fast als Fortsetzung der Organe des Staates für die Abwicklung der öffentlichen Finanzen galten. Einige gewannen Ausschreibungen, andere mit ihnen verbundenen entfielen, andere wurden zur Verfügung von Kapital oder Garantien für die Erfüllung der Verpflichtungen gegenüber dem Staat, eingestellt. Diese Unternehmen hatten eine große Organisation und Mengen an Kapital, dank einem quasi bürokratischen Statut und einer subjektiven Struktur, die diejenige der juristischen Person hervorrief. In Wahrheit ist es aber nicht richtig, von einer juristischen Person im Sinne des modernen Rechts zu sprechen. Die kollektive Entität für diese Art von Unternehmen war allerdings ein typisches Element, das die Abwechslung der Mitglieder möglich machte[33].

In Bezug auf die angeblich rechtliche Persönlichkeit der *societas*, findet man einigen Daten die sich während des Prinzipats dann ausbildeten. [Gaius in D. sind 3.4.1.pr. (3 ad ed. Prov.)]. Ein klares Beispiel für autonomen Mittelpunkt des Interesses ist gerade die *societas publicanorum*, neben *collegia*, *naviculari*, *pistorum* und *quorundarum*[34]. Es ist jedoch nicht bekannt, ob die Autonomie gleich für Unternehmen und professionelle Kollegien galt. Natürlich ist es unvorstellbar, dass eine solch komplexe juristische Form nicht zu einem Bildungsprozess der gesellschaftlichen Entität geführt hätte[35].

Neben der schuldrechtlichen Gesellschaft trat dann eine sachenrechtliche Gemeinschaft (*communio*)[36]. Die Beiträge bestanden in Geld oder in Sachwerten, gelegentlich auch in Arbeitsleistungen. Eine Gesellschaft, die unerlaubte Handlungen zum Gegenstand hatte, war nichtig. Die Anteile der Gesellschafter an Gewinn und Verlust waren im Zweifel gleich groß, doch konnten ungleiche Anteile und selbst eine unterschiedliche Beteiligung an Gewinn und Verlust vereinbart werden, wenn die verschiedene Höhe der Kapitaleinlagen oder der besondere Wert der von einem der Gesellschafter zu erbringende Arbeitsleistung dies rechtfertigte. Nichtig war dagegen ein Gesellschaftsvertrag, bei dem der eine Teil nur den Verlust trug, der andere den Gewinn erhielt: Das ist der Fall der *societas leonina*[37].

Das Gesellschaftsverhältnis endete durch *renuntiatio*, die jedem Gesellschafter jederzeit freistand, mit der Maßgabe jedoch,

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[29] In Bezug auf den modernen Körperschaften, wurde es ebenfalls beobachtet, dass die Bestimmung der Erhöhung des Gesellschaftsvermögens einer Kapitalgesellschaft die Mitgliederbeteiligung, bzw. den Umfang der entsprechenden geschäftliche- und Eigentumsrechte, massiv beeinflusst. Der Anstieg bringt in der Tat neue Auszahlungen mit. Sollte das Optionsrecht eingeräumt werden, gilt es für den Mitglieder ähnlich wie eine *capitis deminutio*, die dessen Position in der Gemeinschaftsstruktur ausübt und die Änderung des relativen Gewichts und Gewinnbeteiligung verwickelt (s. GIORDANO, *Crisi delle societŕ bancarie, aumento di capitale e poteri dell'assemblea: l'"Unternehmen an sich" al vaglio della Corte di Giustizia*, in: Foro it., 1997, IV, S. 131).

[30] WIEACKER, *Bonae fidei iudicia*, in: Labeo, 1966, 12, S. 250 ff.

[31] Dazu s. SCHERMAIER, *Bona fides und "relative" bona fides*, in: *Festschrift für Ulrich Huber* (BAUMS, KUTTER, SCHMIDT, WERTENBRUCH Hrsg.), Tübingen, 2006, S. 405 ff.

[32] ARANGIO-RUIZ, *zit.*, S. 63; A. GUARINO, *La societŕ, zit.*, S. 35 ff.

[33] CIMMA, *Ricerche sulla societŕ dei pubblicani,* zit., S. 88 ff.

[34] BADIAN, *Publicans and Sinners. Private Enterprise in the Services of the Roman Republic*, London, 1983, S. 101 ff.

[35] KASER, *Das römische Privatrecht*, 2, München, 1971, S. 308 ff.; SCHNORR VON CAROLSFELD, *Geschichte der juristischen Person*, zit. S. 266, Fn. 2.

[36] Die Art der undifferenzierten Kommunion wird in der Regel in der Lehre als *„communio iuris Germanici"* genannt, weil sie eine charakteristische Institution des alten Gewohnheitsrechts der germanischen Völker ist. Ihre Daseinsberechtigung war es, die Gemeinschaft zur gesamten Hand der Teilnehmer zu verwickeln. Da die theoretische Teilung der Rechten ehrlich kaum geeignet war, wurde sie nicht einmal in Erwägung gezogen. Diese Figur wird auch als *„communio iuris Romani"* genannt, um sie dem oben beschriebenen Fall entgegenzusetzen. Sofern nichts anders vereinbart, hat jeder Teilnehmer das Recht zur Nutzung und trägt die wirtschaftliche Belastung im Verhältnis zu seinem Anteil (s. auch *infra*). Dazu s. SOLAZZI, *zit.*, S. 427 ff.

[37] Dazu s. ARANGIO-RUIZ, *zit.*, S. 93 ff.; WIEACKER, *zit.*, S. 237 ff.

dass er sich dadurch seinen Pflichten nicht entziehen und die Mitgesellschafter nicht willkürlich schädigen dürfte. Grundsätzlich wie eine Kündigung wirkte die Erhebung der Klage aus dem Gesellschaftsverhältnis. Weitere Auflösungsgründe waren Tod, *capitis deminutio* und Konkurs eines Gesellschafters. Die Erhebung der *actio pro socio* führte zur Auflösung der Gesellschaft. Ob die Klage in Ausnahmefällen auch während bestehender Gesellschaft (*manente societate*) möglich war, ist strittig. Da sie, jedenfalls in der Mehrzahl der Fälle, zu einer endgültigen Liquidation der Gesellschaft führte, war sie eine auf den Saldo gerichtete Abrechnungsklage, bei der Forderungen und Gegenforderungen der Gesellschafter berücksichtigt werden konnten. Mit der Klage konnten ausstehende Beiträge, Teilung des Gewinns, Ersatz von Aufwendungen oder von Schäden verlangt werden. Von einem etwaigen Gewinn waren allfällige Verluste vorweg abzuziehen. Dies galt freilich nicht, wenn ein *socius* den Schaden verschuldet hatte. Dieser sollte Schadensersatz leisten und konnte sich nicht darauf berufen, dass er auch Gewinn erzielt hatte. Der Gesellschafter haftet zunächst nur für *dolus*, aber schon in klassischer Zeit auch für *culpa* und *custodia*. Das Verschulden beschränkte sich jedoch auf Verletzung der eigen üblichen Sorgfalt (*diligentia quam in suis*). Eine Verurteilung aufgrund der *actio pro socio* wirkt infamierend[38]. Seinerseits lässt die gleiche Infamie sich *cum grano salis* mit dem Verlust der bürgerlichen Ehrenrechte eigentlich vergleichen, der heute gelegentlich im Strafverfahren als Nebenstrafe ausgesprochen wird[39].

Zur Teilung des gemeinschaftlichen Eigentums war die *actio pro socio* nicht geeignet. Hierzu diente vielmehr die *actio communi dividundo* (Teilungsklage). Es ist allgemein gehaltener Behauptung, dass die Gründe in konsensuellen Verträgen der *societas* unterschiedliche Herkünfte haben[40]. Es wird ebenfalls angenommen, dass solcher Vertrag nicht nur auf das alte *consortium ercto non cito* zugeschrieben werden soll, sondern auch einigen assoziativ verschiedenen Erfahrungen, mit Bezug auf den internationalen Rechtsgeschäften durch *iudicia bonae fidei* eigentlich geschützt, bzw. die Gerichtsbarkeit der o.g. *iurisdictio peregrina*. Chr. Natürlich ist es hier nicht möglich, über den Vertrag der Gesellschaft und seinen ursprünglichen Verbindungen mit der *consortium ercto non cito* exhaustiv zu diskutieren, allerdings notiert man eine gewisse Kontinuität: Dies ist die *fraternitas*, die in dieser Perspektive als ein Schlüssel zum Verständnis der Dynamik von Unternehmen gilt. Nach Gaius bekannt ist es, dass *consortium ercto non cito* der unter *heredes* bestand, als der *pater familias* starb. In diesem Sinne, beobachtet man zugleich eine Form von Legitimation und *societas naturalis*[41].

Hinsichtlich der *hereditas iacens*, d.h. die Erbschaft in der Zeit zwischen dem Tod des Verstorbenen und der *aditio* von den Erben, wurden die Gegenständen des Nachlasses außer den *res nullius* gehalten, damit diese fern von Aneignungsobjekten blieben. So wurde beschlossen die *fictio* anzuwenden: in der Tat, wurde die Inbesitznahme des Grundstücks von den Erben fiktiv zurück zum Zeitpunkt des Todes des Verstorbenen gestellt. Alles war zunächst aufgrund der Identifizierung der Vererbung und Erben, dann der Überlappung zwischen Erben und Verstorbenen, und schließlich der Berücksichtigung der Vererbung als juristische Person, legitimiert[42].

Das *consortium ercto non cito* umfasste nur materielle Güter, auf denen es die wesentlich wirtschaftliche Herrschaft des *dominus* ausübte. Um den fünften Jahrhundert war die *ipso iure* Verteilung zwischen Kollegen jedoch schon vorgesehen, mit Bezug auf erblichen Schulden und Forderungen. Außerhalb dieses Bereiches blieben persönliche Beziehungen wie *manus maritalis*, *patria potestas* und *tutela*. Die Rechtsfähigkeit solches uralten Institut lag daran, dass die Vermögenswerte aus den ursprünglich angebrachten Güter bestehen konnte, ließ sich aber auch durch Einkäufen der *consortes* ebenfalls anreichern: Das ist der Aspekt, an dem sich die Miteigentumsform der *societas omnio bonorum* nähert – obgleich mit unterschiedenen Effekten (3 Gai 154)[43].

Es handelt sich um eine Qualifikation, mit der der Jurist andeuten soll, dass der *consortium* wie in den zwölf Tafeln vorgesehen, auf die Bedürfnisse und Wirkungen der Natur entspricht und für seine Errichtung keine konkrete Handlung benötigt[44]. Hier sieht man eine gewisse Analogie (weit davon entfernt, Identifikation) mit der *naturalis ratio*, als sie den konsensualen Vertrag beeinflusst. Ähnlich rechtfertigt die *fraternitas* die Einheit der Gruppe, und der Fortbestand dieses Verhältnis wirkt einfach als wirtschaftlichen Grund. Da der Einbau des *consortium* auf der Grundlage der *fraternitas* eingelegt ist, ist man infolgedessen geführt zu glauben, dass das Paradigma des *condominium* am Ende nicht genügend ist, um die gesamte rechtliche Realität

[38] MEHR, *Societas und universitas.*zit., S. 30 ff.

[39] Vgl. ARANGIO-RUIZ, *zit.*, S. 51, Nt. 3; A. GUARINO, *zit.*, S. 69 ff.; SANTUCCI, *zit.*, S. 12, Nt. 21.

[40] In der klassichen und pre-klassischen Rechtsprechung, hatte der einvernehmliche Vertrag von *societas* die typische Funktion die Parteien unmittelbar und rechtmäßig zu vinkulieren, damit sie im gemeinsamen Interesse Betrieb und Vermögen verliehen und Gewinn und Verlust verteilen können (A. GUARINO, *zit.*, S. 59).

[41] Gai. 3,154: *Item si cuius ex sociis bona publice aut privatim venierint, solvitursocietas. Sed ea quidem societas, de qua loquimur, id est quae nudo consensu contrahitur, iuris gentium est, itaque inter omnes homines naturali ratione consistit. Est autem aliud genus societatis proprium civium Romanorum. Olim enim mortuo patre familias inter suos heredes quaedam erat legitima simul et naturalis societas, quae appellabatur ercto non cito, id est dominio non diviso: erctum enim dominium est, unde erus dominus dicitur; ciere autem dividere est: unde caedere et secare et dividere dicimus. Alii quoque qui volebant eandem habere societatem, poterant id consequi apud praetorem certa legis actione. In hac autem societate fratrum ceterorumve qui ad exemplum fratrum suorum societatem coierint, illud proprium erat, quod vel unus ex sociis communem servum manumittendo liberum faciebat et omnibus libertum adquirebat: item unus rem communem mancipando eius faciebat, qui mancipio accipiebat* (in: ARANGIO-RUIZ, *zit.*, S. 7. S: auch oben Nt. 22).

[42] A. GUARINO, *Diritto Privato Romano*, Napoli, 1981, S. 405.

[43] A. GUARINO, zit., S. 793 ff.

[44] Mit Bezug auf das Zwölftafelrecht, s. KUNKEL, SCHERMAIER, *Römische Rechtsgeschichte*, zit., S. 31 ff.

archaischer Institution hinreichend darzustellen. Deshalb kann man die Breite der Befugnisse einzelner *fratres* im Hinblick auf den eigenen Familienvermögen[45] verstehen.

Die Prominenz der Familie als Grundelement jeder Gesellschaft hatte dann der Freiheit der individuellen, bzw, deren wirtschaftliche Initiative, den Vortritt zulassen müssen. In diesem Zusammenhang war die Priorität, die wirtschaftliche Kraft der Einzelnen zu verdichten. Das natürliche Rechtsinstrument wurde also der Vertrag von *societas*, damit sich die Zustimmung aller Aktionäre nicht aus ihrem Status, sondern aus ihrem Willigungsausdruck, darstellen ließ[46]. Hier ist der Abstand zwischen *fraternitas* und *consensus* wirklich groß: Es gibt die rechthistorische formale Realität, in der das Individuum wichtig ist als Mitglied der Gruppe und seine Individualität gleichzeitig vorzuziehen bekam[47].

Maßgeblichen Stellungnahmen zufolge, hatte das Römische Recht die *societas re contracta*, d.h. die auf die Bündelung von materiellen Dingen gegründete Gesellschaft, nie erkannt. Manche hätten darüber eine Art von Parallelen zwischen *der societas consensualis* und der *communio incidens* gefunden. In der Herstellung von Iustinianus waren die *obligationes quasi ex contractu* etwas Ähnliches (I. 3.27.3). Das Argument ist noch heute widersprüchlich: Das Missverständnis rührt von der Tatsache, dass im juristischen Latein die Begriffe *socius* und *societas* sich auf die *societas re contracta* beziehen können. Dieselben klassischen Juristen, Gaius und Ulpian, hatten dies sehr deutlich erklärt[48].

Das *consortium* (Gai 3154 a) als *legitima simul naturalis societas* war eine besondere Art von *condominium*. Dies führte dazu den sogenannten *transitus legalis* der *societas omnium bonorum* als wesentliches Element des Gesellschaftsvertrag, zu betrachten. Mit anderen Worten würde es bedeuten, dass die ursprüngliche Verbindung zwischen *societas* und *condominium* über die Zeit behalten blieb. In der klassischen Periode war die präventive Konstitution eines *condominium* zur Gründung der *societas*, außerhalb der *societates publicanorum*, nicht erforderlich. Die Verfügbarkeit von notwendigen finanziellen Ressourcen für das Erreichen des Sozialzweckes, anders vom bloßen gemeinsamen Eigentum solcher Mittel blieb bestehen[49].

Der Begriff *aliud genus societatis*, zur Beschreibung des *consortium* in der Gegenüberstellung von *societas quae nudo consensu contrahitur*, zeigt dass *communio* und *societas* in Bezug auf die Struktur unterschiedlich bleiben, auch wenn etwaige Kombinationen aus funktionaler Art zwischen einer und der anderen Rechtslage möglich sind. In diesem Sinne galt die *fraternitas* als Voraussetzung und ebenfalls als fundamentaler Teil des *consortium*, damit scheint der Ansatz zu *consensualis societas* ermöglicht und gerechtfertigt. Die Entwicklungen nach dem *consortium ercto non cito* sind sehr umstritten, so weit dass hier eine derartige Diskussion umfangreich und in jedem Fall schwierig einzusetzen sein kann. Mit Bezug auf das Thema *fraternitas*, hielten die römischen Juristen für die nicht natürlich gebundene Angehörige ein gemeinsam verfolgendes Ziel als erlaubt, ähnlich wie das ursprüngliche *consortium ercto non cito*. In einer ersten Phase, wurde das Modell des antiken *consortium* zwischen den *fratres* aus dem *fraternitas* beeinflusst, was die entsprechende Einschränkung anbelangt, die aufgrund einer bestimmten *legis actio* zwischen nicht *„sui heredes"* Personen bestand. Die Stärke von *fraternitas* hat auch weiterhin neue Erfahrungen inspiriert, dass nicht mehr auf der Grundlage einer einfachen Familienbeziehung, sondern in Folge der Erteilung des *consensus* bilden würden. Wie bekannt, bestimmten die römischen Juristen solche Figur, wenn sie Bezug auf die konsensuale Gesellschaft nahmen und sich sie auf dem *beneficium competentiae*[50] hinwiesen.

In Fall der *causa societatis* tauchte das Engagement der Mitglieder zur Belegung von Vermögen und Aktivitäten auf, das außerdem dazu diente Gewinne und Verluste nach vorgegeben Proportionen zu verteilen. Wie in der Konfiguration der Interessen von alten *consortium*, der Verweis auf die *fraternitas* scheint also nicht lediglich eine formale Erinnerung sondern eine praktische Lösung. Der Lehre zufolge, brauchte die Einschusspflicht nicht immer die Einrichtung eines gemeinschaftlichen Vermögen Erbes für die Erreichung der Unternehmensziele. Es muss jedoch berücksichtigt werden, dass die *societas omnium bonorum* für die Umsetzung des *consortium ercto non cito* auf die Dimension der *societas consensu contracta* stand. Infolgedessen taucht automatisch ein *condominium* zwischen den verschiedenen *socii*, mit Bezug auf die Sachen, die deren Eigentum zur gleichen Zeit des Vertrages war[51].

Auf der Suche nach einem sozialen Zweck, betrachtet man die Linie der Kontinuität zwischen der *consensualis societas* und dem antiken *consortium*, trotz der besonderen Unterschiede aus den entsprechenden historischen Forschungen. Dies gilt auch wenn solche Bildung vom sozialen zur gesellschaftlichen Niveau bewegt, die aus dem konsensuellen Vertrag eigentlich dargestellt wird. Was den Charakter anbelangt, sprechen die Quellen dass der Konsensus von einem Verhältnis von *fraternitas* abstammt. Also ist es vorzuziehen, eine übermäßige Widersetzung zwischen *fraternitas* und *consensus* nicht zu betonen,

[45] Die Brüderlichkeit ist ein Personenverband, der die Kommunion rechtfertigt und regelt. Unter dem römischen-Konzept, werden die Befugnisse der Mitglieder in den Außenbeziehungen erkannt, wenn es um eine gemeinsame auch gerichtliche Sache geht. Man muss aber nicht glauben, dass solche unabhängige und gleichzeitig konvergente Vollmacht willkürlich und zum Nachteil der gemeinsamen Interessen gehen könnte. Dem römischen Konzept zufolge, könne der Bruder wahrscheinlich nicht seinen Bruder verraten, sowie der Vormund gegen seinen Mündel. Die Verpflichteten müssen das gemeinsam, oder diese von anderen Interesse als ihr eigenes Interessen fühlen und die entsprechende Verantwortung übernehmen. Die Brüderlichkeit legitimiert sowohl solche weitgehenden Vollmacht, wie rechtfertigt auch ein völlig gegenseitiges Vertrauen (vgl. BETTI, zit., S. 426 ff.).

[46] MEHR, *Societas und universitas*, zit., S. 27 ff.

[47] BRETONE, *" Consortium" e "Communio"*, in: Labeo, 1960, 6, S. 195 ff.

[48] ARANGIO-RUIZ, *La società*, zit., S. 35 ff.

[49] CIMMA, *Ricerche*, zit., S. 43 ff.

[50] Dazu s. ARANGIO-RUIZ, zit., S. 122 ff.; GILDEMEISTER, *Das beneficium competentiae im klassischen römischen Recht*, Göttingen, 1986; A: GUARINO, zit., S. 8 ff.; LITEWSKI, *"Das 'beneficium competentiae' im römischen Recht"*, in: St. Edoardo Volterra, Milano, 1971, S. 469 ff.

[51] S. TALAMANCA, *zit.*, S. 823 ss., Nt. 105, wo im Rahmen des Titels *Pro socio*, D. 17,2,1,1 (Paulus 32 ad.) wird erwähnt: *In societate omnium bonorum omnes res quae coeuntium sunt continuo communicantur.*

da beide Figuren gleiche gesellschaftliche Elementen tragen, die auch wenn das Konsortium wahrscheinlich von den artikulierter Gesellschaften verdrängt werden, überleben werden. Man könnte sagen, dass es innerhalb der *consensualis societas* eine gemeinschaftliche Beziehung sogar größer sein kann. Hier steht in Wahrheit eine Beziehung zwischen Fremden, die durch Konsens nicht nur den Zweck oder Vermögenswerte gemeinsam zu verwalten sondern auch ein gemeinsames Ziel zu erreichen, ausdrücken. Bei der Schaffung des gemeinsamen Vermögens sind die Mitglieder mit der entworfenen gesellschaftlichen Zwecke einverstanden, deren Verwirklichung durch die Synthese von individuellem Nutzen möglich ist: Solche Synthese ist letztlich die eigentliche Disposition dieser Interessen somit – im Hinblick auf die flexibel beschriebene Modalitäten, die Auswirkung der *causa*. Der Vertrag von *societas* ergab sich dann von einer Beziehung, die aus der kontinuierlichen Zusammenarbeit charakterisiert war, damit der Parteien die Verfolgung egoistischer Interessen verhindert wurde. Weshalb ist die Gesellschaft auch nicht konfigurierbar, wo die Parteien den sozialen Zweck nicht gemeinsam haben [52].

Ein weiteres Element des Gesellschaftsvertrages war die *affectio societatis*. Woraus solches eigentlich bestand, ist nach der Sicht der Rechtslehre aber nicht leicht zu erkennen. Falls ein Fond neben zwei Eigentümern zum Verkauf ist, kann einer den anderen entweder kaufen oder gemeinsam stellen. Dies ist aber nicht genug um die o.g. *affectio* zu konkretisieren, weil das Geschäft für den Auftraggeber jedenfalls unverbindlich ist; dafür spricht dass, dieser für sich selbst den Fond einfach kaufen konnte. Für die Konfiguration einer *societas* wäre notwendig, dass die Parteien die Absicht *zu gerere commune negotium* hätten, wo die Verantwortung des Vermittler bleibt, falls die *affectio societatis* nicht Teil des betreffenden Geschäfts [53] ist.

Die bilaterale Vereinbarung der *societas* unterscheidete sich von anderen bilateralen Abkommen, wie insbesondere der *emptio-venditio* und *locatio-conductio*. Im ersten Fall ist der homogene Charakter der aus den Parteien tragenden Verpflichtungen zu unterstreichen, wo die andere Figuren zum heterogenen Charakter der Verpflichtungen tendenziell zu verbinden sind. Mit Bezug auf der *causa societatis*, scheint daher ein wichtiges Element die Ausgleichung der Interessen. Aus diesem Grund müssen die Parteien auf der gleichen Ebene theoretisch gestellt werden, da sie genau mit dem gleichen Namen *socii* allerdings definiert werden. Aus der *emptio-venditio* tauchten wie bekannt einige Rechtsmittel auf, wie die *actio empti* und *actio venditi*. In diesen Tatbestände waren die Interessen zu einander entgegengesetzt, so dass, die einzelne gegenüberliegende Position auch nominell von der anderen wirklich unterschiedlich, scheint: *Emptor* gegen *venditor*. Im Falle der *locatio-conductio* wurden verschiedene Aktionen erlaubt: Die *actio locati* und *actio conducti*. Hier sind die Parteieninteressen gegenüber ebenso gestellt, weshalb der Bestand einer Seite auch in diesem Fall von den anderen getrennt ist: *Locator* gegen *conductor*. Im Rahmen der *societas*, sind die *socii* stattdessen gleichberechtigt. Solche Qualifikation wird durch die Anerkennung der gleichen Aktion – *actio pro socio*, für alle Parteien bestätigt [54]. Dies findet seinen Ursprung in der einvernehmlichen Natur der Gesellschaft und kommt nicht aus externen Elementen her, wie z.B. die angehörige Beziehung [55].

Eine bedeutende Rolle dazu spielte ebenfalls der *consensus*, dessen Sinn durch die Vermittlung von *fraternitas* traditionell definiert und nach der Verfolgung von gemeinsamem Zweck orientiert war: Die *socii* waren hier nicht mehr aus einer natürlichen Verbindung zusammengeschlossen und wählten, in einem Zustand der Gleichheit zu sein. Die *causa societatis* bestand also aus der konkreten Beziehung, die zwischen den *socii* liegte und für einen gemeinsamen Zweck gehalten wurde. Wenn etwaige Gewinne erzielt wurden, dienten sie somit für das Erzielen des gemeinsamen Zweckes. Die *societas* wirkt so als Mittel für das Streben des *lucrum*, mit dem die *socii* über die Summe der Einzelkapazitäten ihre Kräfte zusammenfassen konnten. Aufgrund dieser Entwicklung erreichten sie den Vorteil, den einzelnen Nutzen durch das Streben nach Gemeinwohl die auch ihre eigene *utilitas* darstellt, zu überwinden [56].

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[52] Das Prinzip ist bekannt. Es genügt, auf die berühmte Passage in Ulpian hinzuweisen, der die Meinung von Iulianus über den Fall der beiden Eigentümer äussert, der die Vereinbarung für den Erwerb eines angrenzenden Landes stellte: D. 17,2,52 pr. (Ulpianus libro trigensimo primo ad edictum): *Cum duobus vicinis fundus coniunctus venalis esset, alter ex his petit ab altero, ut eum fundum emeret, ita ut ea pars, quae suo fundo iuncta esset, sibi cederetur: mox ipse eum fundum ignorante vicino emit: quaeritur, an aliquam actionem cum eo vicinus habeat. Iulianus scripsit implicitam esse facti quaestionem: nam si hoc solum actum est, ut fundum Lucii Titii vicinus emeret et mecum communicaret, adversus me qui emi nullam actionem vicino competere: si vero id actum est, ut quasi commune negotium gereretur. Societatis iudicio tenebor, ut tibi deducta parte quam mandaveram reliquas partes praestem* (in: SCHIPANI, *Iustiniani Augusti Digesta seu Pandectae*, Milano, 2007, S. 309). Die Vereinbarungsbedingungen sehen vor dass, manch einer das Grundstück kaufte um den eigenen Fonds grenzenden Teil des anderen zu erwerben. Einmal erworben, behielt aber der Käufer für sich das ganze Grundstück. Iulianus, befragt um seine Meinung über den Fall zugeben, nahm Bezug auf das *id quod actum est* und hielt den Fall zu unterschieden: wenn die Parteien einen Verkauf und dann die Übertragung des Grundstück oder den Kauf gemeinsam vereinbart hatten. Im ersten Fall gab es keine Möglichkeit der Inanspruchnahme der Erfüllung der Verpflichtung. In der zweiten Hypothese, wäre es jedoch möglich, sich auf die *actio pro socio* zu beziehen, auf der Basis des Zweckes eines gemeinsamen Erwerbes, die zur *societas* auch zurückgeführt werden konnte.

[53] PRINGSHEIM, *Id quod actum est*, in: ZSS, 1961, S: 31 ff.; ARANGIO-RUIZ, zit., S. 51, Fn. 3.

[54] MEHR, *Societas*, zit., S. 30 ff.

[55] Mit Bezug auf die *actiones ex empto vendito* s. ARANGIO-RUIZ, *Diritto puro e diritto applicato negli obblighi del venditore romano*, in: FS. Koschaker, 1939/2, S. 141 ff.; KASER, *Die römische Eviktionshaftung nach Weiterverkauf*, in: FS von Lübtow, S. 481 ff.; PETERS, *Die Verschaffung des Eigentums durch den Verkäufer*, in: ZSS, 1979, S. 173 ff.; SCHINDLER, *Die Bedeutung der Kaufpreiszahlung im nachklassischen römischen Recht*, in: FS. Duden, 1977, S. 555 ff.; STEIN, *False Measures in the Roman law of sale*, in: Cambridge LJ, 1955, S. 226 ff. Mit Bezug auf die *actiones ex locato et conducto* s. KASER, *Periculum locatoris*, in: ZSS, 1957, 74, S. 155 ff.; LONGO, *Sul regime delle obbligazioni corrispettive nella „locatio-conductio rei"*, in: St. Arangio-Ruiz, 1953/2, S. 379 ff.; MEDICUS, *Id quod interest*, Köln – Graz, 1962, S. 182 ff.; VON LÜBTOW, *Die Haftung des Pächters nach D., 19.2.30.4*, in: St. Betti, 1962/3, S. 367 ff.

[56] Das Erfordernis der *utilitas* wird dabei als Eigenschaft der *res* verstanden, die die Bedürfnisse der menschlichen gesellschaftlichen Leben ideell einschließt. In allgemeinen lässt sich solche Definition auf die Parteien der Rechtsbeziehungen ehrlich verbinden. (A. GUARINO, *Diritto Privato Romano*, Napoli, 1981, S. 288).

3. Entwicklung des Konzepts der juristischen Person

Was die Rechtspersönlichkeit anbelangt, soll man den Aspekt von *ius privatum* von solchem von *ius publicum* trennen. Die Ausarbeitung einer Idee von *societas*, wo Mitglieder die Erreichung ihrer *utilitas* durch die Verfolgung der gemeinsamen *utilitas* erzielen, ist eine revolutionäre Idee der römischen Rechtswissenschaft. In diesem Sinn darf das Konzept von *societas*, die historische Antwort auf die grundsätzliche Frage über den Charakter der von mehreren Personen einheitlich durchgeführt rechtlichen Handlungen, darstellen. Aus dieser Idee wurden in Wirklichkeit die Begriffe *„populus"* (Cic. rep. 1,25,39) und *civitas* (Cic. rep. 1,32,49) allerdings gleichzeitig definiert. Dies stellt solchen Prozess dar, wo im Hinblick *des ius naturale* einige soziale Elemente wie *„principium urbis"* (Grund der Bürgerlichkeit) und *„seminarium rei publicae"* (Keim von Republik) deutlich umgerissen sind. Auf dieser Basis bewegt sich die Begriffe, die vom *coniugium* zur *societas hominum* führen [57].

Diese Idee, die nach späteren Entwicklungen der *ius romanum von Iustinianus* mit spitzer Kraft in erster Linie im Rechtsfeld einbrach, stellte im Mittelalter ebenfalls eine fundamentale Quelle dar. Im großen Teil hat sie auch noch die historische Bildung der Kommune und die Kontinuität mit dem römischen *municipium* dargestellt. Im Nachhinein besteht solche Kontinuität aus der Suche nach dem Gemeinwohl zwischen den *cives* [58].

Das moderne Konzept der einheitlichen Handlungen einer Vielzahl von Personen ist jedoch der Bau einer juristischen Kategorie, die der *persona ficta vel repraesentata* entspricht [59]. Dies ruft die Idee der Leviathan-Staat Person, im siebzehnten Jahrhundert, von Thomas Hobbes entwickelt, die beschreibt insbesondere wie die egoistische Natur des Menschen sich zu ihren individuellen Nutzen beugt. Infolgedessen sind sie unfähig, das öffentliche Interesse zu verfolgen: Die Erkenntnis solcher Natur führt zwangsläufig, die Bürgerbeteiligungsverfahren abzusprechen, aus dem die Notwendigkeit eines Souverän auftaucht, der außerhalb der Bevölkerung steht, ähnlich wie Der Leviathan von Hobbes [60].

Das Mittelalter wurde als Alter des Vereins definiert. Während dieser Zeit brachten die Invasionen von Goten, Langobarden und Franken den Niedergang des römischen Rechts, mit dem Ergebnis, dass sich die indigenen Völker selbst in einer Situation extremer Unsicherheit befanden. Dies bedeutete das Fehlen einer geeigneten staatlichen Macht, die die Rechte des Einzelnen vor Missbrauch schützte. Gleichzeitig führte die kräftige und kollektivistische Auffassung der germanischen Völker, dass der Schutz des Einzelnen nur als Teil einer Gruppe, Familie, Stamm, Staat anerkannt worden wäre, d.h. in einigen Formen von Assoziierung. Es kam nämlich aus der Notwendigkeit, den Schutz von Grundstück und die körperliche Unversehrtheit von Individuen zu verstärken [61].

In dieser Zeit wurden einige Begriffe wie *fraternitas, consortium commune, communitas* benutzt, damit man die assoziative Typen jedenfalls beschreiben konnten. Diese waren Ausdrücke von einzelnen Kräften, die mit der Verwirklichung eines gemeinsamen Zieles verbunden waren. Oft findet man den Begriff *„consortes"* wo es heißt, dass eine Entität von einzelnen Personen ausgebildet werden, die mit Eigentum- Territorium- oder Kapitalerhöhung beschäftigt sind. Es wurde über die Zivilgesellschaft viel diskutiert, mit besonderem Bezug auf die brüderliche Gesellschaft. Teil der Rechtslehre bezieht die Zivilgesellschaft, obwohl von germanischen Einflüssen charakterisiert, in der römischen Rechtstradition ein. Andere Beobachter halten diese Art von Gesellschaft als direkte Ableitung der *gesamten Hand* oder *manus communis*, vom dieselbe Genossenschaft abgeleitet wurde. Der Konflikt zwischen der römischen und der germanischen Auffassung der Gesellschaft ist nicht eine bewährte historische Tatsache. Überdies ist es interessant, die Zeugnisse einer üblichen Praxis in wesentlichen kontrastierenden Prinzipien zu analysieren, wo sich die gemeinsame rechtliche Tradition endlich ausbilden kann [62].

Auf irgendeiner Weise ist es allerdings möglich, in der Zivilgesellschaftsbildung die römischen und germanischen Elemente

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[57] Cic. off. 1,17,53-54: *Gradus autem plures sunt societatis hominum. Ut enim ab illa infinita discedatur, proprior est eiusdem gentis, nationis, linguae qua maxime homines coniunguntur; interius etiam est eiusdem esse civitatis: multa enim sunt civibus inter se communia, forum, fana, porticus, viae, leges, iura, iudicia, suffragia, consuetudines praeterea et familiaritates multisque cum multis res rationesque contractae. Artior vero colligatio est societatis propinquorum; ab illa enim immensa societate humani generis in exiguum angustumque concluditur. Nam cum sit hoc natura commune animantium, ut habeant libidinem procreandi, prima societas in ipso coniugio est, proxima in liberis, deinde una domus, communia omnia; id autem est principium urbis et quasi seminarium rei publicae* (s. JOHNSON, *The Offices of Cicero*, London, 1828, S: 42). Vgl. auch CATALANO, *Populus Romanus Quirites*, Torino, 1974, S. 97 ff.; LOBRANO, *Res publica res populi. La legge e la limitazione del potere*, Torino, 1996, S. 113 ff.; MANCUSO, *Sulla definizione ciceroniana dello Stato*, in: *Sodalitas*. Scritti in onore di Antonio Guarino, II, Napoli, 1984, S. 609 ff.; PEPPE, *Popolo (diritto romano)*, in: Enc. Dir., XXXIV, Milano 1985, S. 319 ff.; SCHNORR VON CAROLSFELD, *Geschichte*, zit., S. 348 ff.

[58] Zum Thema s. LOBRANO, *Dell'homo artificialis -deus mortalis dei Moderni comparato alla societas degli Antichi*, Roma, 2003, S. 161 ff.

[59] Die *persona ficta vel repraesentata* wurde – wie bekannt, im dreizehnten Jahrhundert aus Sinibaldo dč Fieschi, Papst Innozenz IV Gewiss, entwickelt. Dieser Theorie zufolge, ist die juristische Person eine *persona ficta*, die nicht mehr von der Bildfläche verschwindet. Zudem ist die Korporation „ein unleibliches Begriffswesen", ein *„nomen iuris et non personarum"*, ein *„fiomen intellectuale et res incorporalis"*, da sie willensunfähig ist und *„nihil facere potest, nisi per membra sua"* (vgl. LOBRANO, *Res publica*, *zit.*, S. 62 ff; ORESTANO, *Il problema delle persone giuridiche in Diritto romano*, I, Torino, 1968, S. 11 ff.; RUFFINI, *La classificazione delle persone giuridiche in Sinibaldo dei Fieschi e in Carlo Federico di Savigny*, in: St. Francesco Schupfer, II, Torino, 1898). Als parallele Konsequenz folgt, dass nur eine solche mit Körper, Willen und Selbstbewusstsein ausgestattete Person fähig ist die Sakramente zu erhalten, und kann Objekt geistlicher und weltlicher Strafen sein. Während die Korporation eine Abstraktion ist, die nicht nur der Seele, sondern auch der Körperlichkeit entbehrt, weil sie *„corpus animatum non habet ad hoc aptum"*. Eine weitere Konsequenz dabei ist es, dass einerseits die Rechtsfähigkeit in den denkbar schärfsten Gegensatz zu der Rechtsfähigkeit der Mitglieder tritt, andrerseits wird die juristische Person für überhaupt handlungsunfähig erklärt. Dies geht so weit, dass nicht nur das Handeln der Organe nach außen, sondern sogar die Korporationsbeschlüsse im Innern unter dem Gesichtspunkt der Stellvertretung behandelt werden wird (s. BINDER, *Das Problem*, *zit.*, Leipzig, 1907, S. 3 ff.).

[60] LOBRANO, *Dell'homo artificialis*, *zit.*, S. 161.

[61] ASTUTI, *I contratti obbligatori nella storia del diritto italiano,* Milano, 1952, S. 373 ff.; SCHUPFER, *Il diritto privato dei popoli germanici*, II, Roma, 1907, S. 72 ff.

[62] SCHUPFER, *Il diritto privato*, zit., S. 72 ff.

zu unterscheiden. Die Idee, auf dem das römische Recht gegründet wurde, lag grundsätzlich daran, dass ein Vertrag von *societas* aus konstitutiven Beziehungen zwischen den Parteien ohne externe Relevanz der gesellschaftlichen Bindung bestand. Die wesentlichen Punkten waren die *affectio societatis*, das soziale Ziel, die Zahl der Teilnehmer und die Dauer der Gesellschaft, der Beitrag in Waren und Werke, der gemeinsame rechtmäßige Zweck, damit *lucrum* und *damnum* zwischen den Mitgliedern zu gleichen Teilen bestimmt wurden, wenn es kein *pactum contrarium* gab[63].

Auch im Mittelalter waren verschiedene Arten von Unternehmen, bereits in das römische Recht bekannt: *societas omnium bonorum, quae ex quaestu veniunt, alicuius negotiationis, unius rei*. Die *societas omnium bonorum* hatte seinen Ursprung im *consortium*. Die *communio*, das von den Mitgliedern beigetragene Vermögen wurde mit dem Abschluss der Gesellschaft automatisch gebildet, ohne zusätzliche formale Beiträge seitens der einzelnen Mitglieder. Jedes Mitglied hatte die Verwaltung des Unternehmens und der betreffenden Waren. Es war für solche Geschäfte aus *dolus* und *culpa* verantwortlich, während die Gewinne in den gemeinsamen Fonds verliehen wurden. In anderen Arten von Unternehmen trag besondere Beachtung die *operae socii*[64].

Das germanische Element in diesem Zusammenhang hatte jedoch nicht die Natur des Willens, also die, wie gesagt, die Grundlage der *societas* darstellte. Basierend auf dem Fehlen dieser Voraussetzung, formulierte die Rechtslehre die Theorie, nach deren im Mittelalterrecht die Bürgergesellschaft aus der assoziativen Gemeinschaft der germanischen Völker stark beeinflusst wurde. Nach solcher Aufgabenstellung wurde das Konzept von Organisation weiter entwickelt. Der Einzelne war daher nicht imstande, seine wirtschaftliche und rechtliche Autonomie auszudrücken: Er hatte die Genussfreiheit des Eigentums, aber keine alleinige Verfügungsbefugnis. Der Unterschied zwischen dem germanischen Begriff des kollektiven Eigentums und der römischen *communio* lag daran, dass im ersten Fall auf Grund der Einheit des selben Eigentums es keine Quote auszuteilen gab; im zweiten Fall konnte eine virtuelle Zuteilung von Aktien entstehen, bzw. durch die *actio communi dividundo*[65].

Die Idee von *societas* wird allerdings im Mittelalter, trotz der Entwicklung der Kategorie der juristischen Person, beibehalten und perfektioniert. In der Praxis wurde die Verwendung des Begriffs mit solchen von *utilitas* verbunden, während die Grenzen zwischen *ius publicum* und *ius privatum* unterzugehen begann. Da das Konzept von *utilitas* nicht mehr die Dialektik zwischen öffentlichem und privatem Interesse reflektierte, neigt es aber zu einem zulegenden Kontrast zwischen dem einen und anderen Gebiet[66].

Das Problem der juristischen Persönlichkeit ist heute ein anderes als im Mittelalter. Damals war es ein Problem der Rechtsgestaltung, ein im Wesentlichen praktisches Problem. Danach hängt es mit den ursprünglichen Grundbegriffen zusammen, weil es ein wesentlich erkenntnistheoretisches Problem bleibt. Generell sucht man bei der juristischen Person „die Person an sich", wo dies vereinzelt verstanden wird, als eine eben in der juristischen Welt vorhandene Realität die das „Ding an sich" selbst ist, für das das Problem naturgemäß überhaupt nicht existiert[67]. Solche Auslegung ist durchaus begründet, wenn man die Struktur der subjektiven Rechte beschreiben wolle. Ebenso, wie in diesem Ausgangspunkt ist das Problem aber auch über seine Unlösbarkeit motiviert. Dies ist kein juristisches, sondern ein metaphysisches Problem. Da die Erkenntnisdrange die juristische Person nicht genügt, sucht man irgendwie eine andere, ohne doch eine solche physische Person zu finden. Was für das normale Rechtssubjekt gilt, irgendwie entspricht. So beschrieben betrachtet ist die „Person an sich" etwas Transzendentes, da es in der traditionellen Bedeutung allerdings unzugänglich ist.

Ab dem Mittelalter geriet das klassische Axiom, das die Gleichwertigkeit des Ganzen zu jedem seiner Teile bestimmte, in Krise. Es war klar, dass irgendein Teil der Körperschaft das Ganze allein nicht darstellen konnte. Die Voraussetzung, wobei man innerhalb einer Gruppe die prominenten Mitglieder unterscheidet, ließ sich für die Identifizierung eines in Stufen strukturierter Verbund nicht benutzen. Im Mittelalter stellte ein Verein eine Einheit dar, wenn sein Statut die natürliche Hierarchie zwischen dem Kopf und den Mitgliedern entgegenstellte: Solches Schema drückte die *repraesentatio identitatis* aus und spiegelte immer den Schaltplan *corpus-caput*. Dies deutet darauf hin, dass die rechtliche Gleichheit nur in einer repräsentativen Weise, bzw. durch Stellvertreter innerhalb der Kollegialität des Vorstandes existiert, gem. der Regelung, die manche als privilegierte Vertreter aller Bürger, vorsieht[69].

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63 Vgl. dazu SOLAZZI, *"Societas" e "communio"*, zit., S. 427 ff.

64 SOLAZZI, *ibidem*.

65 SCHUPFER, *Il diritto privato*, zit., S. 72 ff.

66 BIROCCHI, *Causa e categoria generale del contratto. Un problema dogmatico nella cultura privatistica dell'etŕ moderna: Il Cinquecento*, Torino, 1997, S. 95 ff.

67 Diese Definitionen stammen aus dem kantianischen Denken über den sog. Noumen. Insb. s. MEURER, *Die juristischen Personen nach dem Reichsrecht*, Stuttgart, 1977, S. 43 ff. Was das Handelsrecht deutlich anbelangt, gab es Anfang des zwanzigsten Jahrhunderts die Meinung, die den Niedergang des Konzepts von großen Unternehmen als Organisation der wesentlichen privaten Interessen, erkannte. Im Vordergrund der Wichtigkeit der Volkswirtschaft, steht sie definitiv auf privatrechtlichen Modell der reinen Profit-Unternehmen, ist aber seit langem nach dem Zwecke eines öffentlichen Charakters, die eine neue und andere Daseinsberechtigung erworben hat, immer mehr orientiert. In einer Branche mit enormen Fortschritten des Finanzkapital im Welthandel, wird die moderne Struktur der Gesellschaft am besten im Licht der Theorie von „Unternehmen an sich" dargestellt. Dieselbe wirkt noch heute, auch nur aktualisiert, als Maßstab für die vergleichende Forschung über die großen Konzerne, aus. In diesem Rahmen, verliert das Unternehmen seinen Charakter als einzigartiges Instrument der privaten Nutzenmaximierung, Ausdruck der schöpferischen Tätigkeit des Unternehmers, so dass es der Treffpunkt der Interessen von eigentümlichen Personen oder von Kategorien traditionell unbeteiligten an Entscheidungsprozess, gewesen ist. Diese Meinung ist von Walther Rathenau am höchsten dargestellt und effektiv zusammengefasst in: GRAF-KESSLER, *Walther Rathenau. Sein Leben und sein Werk, Gesammelte Schriften in drei Bänden* (Blasberg u. Schuster, Hrsg.), Frankfurt a. M., 1988.

68 SAVIGNY, *System des heutigen römischen Rechts*, Berlin, 1840, S. 7 ff.

69 H. HOFMANN, *Rappresentanza-rappresentazione: parola e concetto dall'antichitŕ all'Ottocento*, Milano, 2007, S. 253 ff.

So gesehen, passt die *repraesentatio* mit der Solidarität nicht zusammen. Die letzte besteht aus einem Komplex von gegenseitigen Garantien, mal aktiv, mal passiv, und stellt die notwendige Voraussetzung für die Entwicklung der exklusiven sozialen Beziehungen innerhalb einer bestimmten Gemeinschaft dar. Mit dem Ausdruck "*repraesentatio identitatis*" ist in der Regel, der unter den Strukturelementen der Assoziation theoretische Versuch nach einer bestimmte Ordnung gemeint, im Gegensatz zu der wesenseigene Mitgliederwechselhaft der Körperschaft. Hier ist eine artikulierte Entität, durch die Versöhnung von Begriffen wie juristische Persönlichkeit und Gemeinschaft, doch zu skizzieren. Mit anderen Worten, hat der Beobachter die Synthese zwischen (mittelalterliche) *universitas* und kollektive Einheit, tatsächliches Verbund und rechtliche Person zu erstellen [70].

Wenn die *universitas* mit der *person ficta vel repraesentata* verglichen werden sollte, dann wäre es angemessen, wenn man sich die Frage über Mitglieder und natürlichen Personen, d.h. das persönliche Körperschaftssubstrat und dessen Integration, auf jeden Fall stellt. Der zentrale Punkt ist nicht notwendigerweise auf die Körperschaft als Gegenstand einer autoritären Verwaltung, oder auf die rechtlichen Beziehungen nach außen, zu fokussieren. Das wichtige Element ist vielmehr die Identifizierung von Personen mit dem kollektiven Charakter der Institution. Das Bild des Körpers als eine für Funktionen artikulierte und differenzierte Einheit wird hier viel nützlicher als das Prinzip der *persona ficta*, weil die letzte von anderen natürlichen Menschen eigentlich vertreten ist. Es heißt, dass in der *repraesentatio identitatis* sich die Fragen über das persönliche Substrat und den Bildungsprozess der Willigung innerhalb der *universitas*, stellen lassen. Auf dieser Weise überschneidet sich das Prinzip der kollektiven Entität mit dem Mehrheitsprinzip, auch wenn beide letztendlich in einer undifferenzierten Weise zusammenlaufen. Die Dichotomie zwischen öffentlich- und privaten Rechts hat zwar während des gesamten Mittelalters die Körperschaften, als juristische Person gehalten. Infolgedessen konnte dafür ein globaler und exklusiver Begriff auch nicht hervorgehen. Erst um den siebzehnten und achtzehnten Jahrhundert, hat der Verein verschiedene Begriffe erhalten und wurde auf autonomes Element der Rechtsordnung aufgehoben [71].

Andererseits bleib die *societas* das notwendige Ergebnis jeder Untersuchung, die vom gemeinsamen Begriff des Rechtssubjekts als Träger von Rechten ausgeht. Aber man fragt sich, ob dieses Problem nur ein theoretisches ist, und nicht zugleich ein irrationales, bzw. ob die Abstraktion der Diskussion nicht darauf beruht, dass es falsch gestellt ist. Dies wird heute allerdings behauptet, nebenbei gesagt. Es ist dazu jedoch zu sehen, dass der Weg zum richtigen Ziel führen muss, wenn die richtigen Voraussetzungen einmal gegeben sind. Es handelt sich hier in erster Linie um das Verhältnis der Persönlichkeit im Rechtssinn zur Persönlichkeit im ethischen Sinn. Beide sind in ihren Voraussetzungen und ihrem Wesen verschieden, so entfällt die Notwendigkeit, bei den juristischen Personen das „Subjekt an sich" zu identifizieren. Zudem verwandelt das Problem sich aus einem erkenntnistheoretischen in ein juristisch-technisches Problem. Dem modernen Interpreter des sog. positiven Rechts, können einige Ausdrücke abgeleitet werden, die die Tendenz dem Unternehmen eine echte Rechtspersönlichkeit zu geben, immer deutlicher herausstellen. Das Unternehmen wurde in der Tat schon beschrieben als die lebende Zelle in der Welt der Produktion und des Verkehrs. Der einschlägige rechtliche Tatbestand beruht auf zwei wesentlichen Komponenten, Betrieb und Organisation, wobei die letztere als Funktion der Nebenleistung zur ersten steht [72]. Berücksichtigung der historischen Wurzeln der beiden verschiedenen Lösungen und deren antithetischen Charakter zu haben, dient auch dazu, die Möglichkeit der Identifizierung eines Interessens der *societas* auszuschließen, das sich von dessen der Mitgliedern doch differenziert [73].

Im neuen Gesellschaftsrecht der Europäischen Union bleiben einige grundlegende Spannungen noch ungelöst. In erster Linie gibt es die Orientierung, der einvernehmlichen Gesellschaft Bedeutung von juristischen Person beizumessen, ohne Vorwarnung der Unvereinbarkeit der Lösungen: Ein altes, das Unternehmen, und die andere modern, die juristische Person [74]. Der zweiten Tendenz zufolge, lässt sich das Unternehmen auch durch den Willen einer Partei, bzw. durch einen einseitigen Akt, gründen: Es ist die sog. Einpersonengesellschaft. Was eindeutig ein Widerspruch an sich darstellt, da eine Gesellschaft ohne eine Vielzahl von Mitgliedern doch nicht denkbar ist [75].

[70] Vgl. H. HOFMAN, *ibidem*; MEHR, *Societas*, zit., S. 372 ff.; SCHNORR VON CAROLSFELD, *Geschichte*, zit., S. 54 ff.

[71] QUARITSCH, *Staat und Souveränität*, I, Frankfurt a. M., 1970, S. 474 ff.

[72] Solche Definition findet sich in: TRABUCCHI, *Istituzioni di diritto civile*, Padova, 1988, S. 317.

[73] Die *societas* ist eine juristische Person, die aus dem gemeinsam eingebracht Erbe besteht. Die gemeinsame Handlung wird als Entität an sich, anders als die physischen Personen der *socii,* von außen wahrgenommen. Mit Bezug auf modernen Gesellschaftsrecht stellt man fest, dass der Gesellschaftsvertrag eigentliche juristische Person nicht immer realisiert, aber mindestens eine Körperschaft mit eigenen rechtlichen ständig Vermögen (vgl. A. GUARINO, *zit.*, S. 71). S. auch ARANGIO-RUIZ, zit., S. 79; JÄGER, ANGELICI, GAMBINO, COSTI, CORSI, *Cassazione e contrattualismo societario: un incontro?*, in: Giur. Comm., 1996, 2, S. 334 ff.

[74] Insbesondere vgl. Art. 54 AEUV: „Für die Anwendung dieses Kapitels stehen die nach den Rechtsvorschriften eines Mitgliedstaats gegründeten Gesellschaften, die ihren satzungsmäßigen Sitz, ihre Hauptverwaltung oder ihre Hauptniederlassung innerhalb der Union haben, den natürlichen Personen gleich, die Angehörige der Mitgliedstaaten sind. Als Gesellschaften gelten die Gesellschaften des bürgerlichen Rechts und des Handelsrechts einschließlich der Genossenschaften und die sonstigen juristischen Personen des öffentlichen und privaten Rechts mit Ausnahme derjenigen, die keinen Erwerbszweck verfolgen".

[75] S. dazu die Zwölfte Richtlinie (89/667/EWG) des Rates vom 21. Dezember 1989 auf dem Gebiet des Gesellschaftsrechts betreffend Gesellschaften mit beschränkter Haftung mit einem einzigen Gesellschafter. Durch die Verabschiedung des Gesetzes für kleine Aktiengesellschaften und zur Deregulierung des Aktienrechts wurde das deutsche AktG in seinem § 2 erheblich modifiziert. Einerseits regelt § 2 AktG die Mindestanzahl der Gründer und bestimmt andererseits die zur Errichtung einer Gesellschaft erforderlichen Rechtshandlungen. Gem. § 2 AktG müssen sich an der Feststellung des Gesellschaftsvertrages, bzw. der Satzung, eine oder mehrere Personen beteiligen, welche die Aktien gegen Einlagen übernehmen. In Italien wird es auf der Grundlage dieser Richtlinie durch D. Lgs. 3. März 1993, Nr. 88 und dann mit D. Lgs. 17. Januar 2003, n. 17, die Möglichkeit vorgesehen, sowohl die Aktiengesellschaft (Art. 2328, Abs. 1, cod. civ.) als auch die Gesellschaft mit beschränkter Haftung (Art. 2463, Abs. 1, cod. civ.) per einseitigen Akt zu gründen. Wenn ein einziger Mitglieder Gründer des Unternehmens gleichzeitig ist, wird dies durch einseitigen Akt konstituiert (Art. 2328, Abs. 1, cod. civ.).

4. Die societas europaea: Ein Ausblick

Eine Regulierung an dem EU-Niveau müsste man erwarten, trotz detaillierter Regimekonkurrenz, wenn Dinge, Personen oder Rechtspersonen sich besonders über Gesellschaftsgrenzen hinweg bewegen. Bei vielen sachlichen Dingen ist diese Normierung auch leicht gefallen, selbst wenn sie angesichts komplementärer Verschiedenheiten in nicht der EU-Regulierung unterworfenen Gebieten, kontrovers ist. Trotzdem wurden Agrarnormen und gewerblich-technische Normen eingeführt oder an die Stelle nationaler Normierungen gesetzt. Die Regelung über das Instrument der Richtlinie wurde ausgeführt, die, wie bekannt, die Staaten verpflichtet, entsprechende Normen zu schaffen. Allerdings hat die EU sehr wohl Gesellschaft normiert, sehr viel zurückhaltender aber Arten und das Verhalten der Rechtspersonen, die sich über teilgesellschaftliche Grenzen hinweg so frei bewegen können sollen. Anfang der siebziger Jahre wurde der erste Ansatz zu einer Europäischen Aktiengesellschaft für multinationale Unternehmungen gemacht. Sie sollte durch Fusion oder Neugründung von Unternehmen aus verschiedenen Mitgliedsländern gebildet werden können. Für solche Unternehmen mit hoher Bewegungsfreiheit und überstaatlicher Rechtsform war aber auch eine Verbindung der überstaatlichen Normierung mit völlig verschiedenartigen sozialen Normen zu bewerkstelligen. Deshalb wurde es bei denjenigen Sachverhalten in den Mitgliedsländern, die mit den europäisch normierten interdependent sind, ein spezifisches Rechtsfeld gegründet[76].

Seit der ersten *societas europaea* hat die institutionelle Heterogenität der EU-Mitglieder durch Aufnahme neuer Länder noch sprunghaft zugenommen. Auf Grund der politischen Konjunkturschwankungen in den siebziger Jahren waren Gesellschaften eher gegenüber der Trennung von Vorstand und Aufsichtsrat auf gesetzlicher Grundlage aufgeschlossen, während in den neunziger Jahren eine Auffassung des Unternehmens um sich griff. Infolgedessen gab man dem Verwaltungsrat als Leitungsgremium den Vorzug vor der Trennung zwischen Vorstand und Aufsichtsrat. All dies machte die Geschichte des SE-Statuts vom ersten Kommissionsentwurf bis zur Rechtskraft, mit ständig neuen Entwürfen in verschiedene Situationen von Mitgliedsländern und politisch-ökonomischen Konjunkturen. Dies dauerte nämlich dreißig Jahre, bis zum Jahre 2001[77].

Den Prioritäten des EU-Rates zufolge, ging das Gesellschaftsrecht in die unmittelbare gesetzeswerdende und einheitlich normierende Regelung ein. Danach fanden die Beteiligung der Arbeitnehmer in Gesellschaftsorganen und einer europäischen Interessenvertretung sich in der wirkenden Richtlinie gleichfalls. Materielle Rechte sowie auch normierende Vorschriften gelangten in deren Anhang und regelten Einzelheiten oder Bestandsschutz von lokal zustehenden Arten der Mitbestimmung. Diese war vom Element eines Entwicklungsprogramms zum nachrangigen Artenschutzprogramm verändert worden. Gemäß den bestehenden Regelungen wäre bei Verlagerung des Sitzes zu erwarten, dass dann wiederum eine Verhandlung eintreten sollte, bei der natürlich die Regeln eines neuen Sitzes ins Gewicht fielen. Die EU-Verordnung 2157/2001, die am 8. Oktober 2004 in Kraft trat, enthält die Regeln der *societas europaea*, eine Entität aufgrund der Form der Aktiengesellschaft. Die Gründung solcher Unternehmen wird durch die Beteiligung der Arbeitnehmer in der Führung des Unternehmens gekennzeichnet. Eine ist damit für die Arbeitnehmer die Möglichkeit, Entscheidungen zu beeinflussen, und die Kooperation zu garantieren[78].

Die Beteiligung der Arbeitnehmer stärkt die Kontinuität zwischen dem neuen Unternehmen und die römische *societas*. Die Verwendung der Bezeichnung *societas europaea* steht außerdem im Einklang mit dem römischen Begriff der *societas* und die „recovery" der europäischen Rechtstradition. Die Struktur solcher *societas* besteht darin, dass einer öffentlichen GmbH mit eigener Rechtspersönlichkeit, durch Eintragung in einem Register in dem Staat der Hauptsitz des Unternehmens, daran eingesetzt

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[76] Dazu s. MIOLA, *Lo statuto di Societŕ europea nel diritto societario comunitario: dall'armonizzazione alla concorrenza tra ordinamenti*, in: Riv. Soc., 2003, 2/3, S. 322.

[77] Insbesondere weist man auf den ersten Vorschlag für ein Statut der Europäischen Gesellschaft (SE) vom 1970 hin als Alternative zu den Satzungen der nationalen Aktiengesellschaft, von einer zweiten im Jahr 1975 gefolgt. Die ursprüngliche Fassung bestand aus 284 Artikeln, die nach und nach mit den überlappenden Versionen aktualisiert und dezimiert wurden. Zum Thema s. CONDINANZI, LANG, NASCIMBENE, *Cittadinanza dell'Unione e libera circolazione delle persone*, Milano, 2006, S. 145 ff.; MOCK, *Harmonization, Regulation and Legislative Competition in European Corporate Law*, in: GLJ, 2002, 12, S. 3; MUCCIARELLI, *Libertŕ di stabilimento comunitaria e concorrenza tra ordinamenti societari*, in: Giur. Comm., 2000, II, S. 559 ff.; WOUTERS, *European Company Law: Quo Vadis?*, in: CMLR, 2000, 37, S. 269.

[78] Ziel der Einführung einer solchen europäischen Gesellschaftsform ist es, europaweit tätigen Unternehmen die Möglichkeit zu geben, mit nur einer einzigen Gesellschaft anstelle einer komplizierten Konzernstruktur bestehend aus einem Netz von Holding- und Tochtergesellschaften zu operieren. Vor diesem Hintergrund sollen mit der neuen Gesellschaftsform grenzüberschreitende Unternehmenszusammenschlüsse, Konzernierungsvorgänge und Unternehmenskooperationen erleichtert werden. Aufgrund der aktuellen Entwicklung der europäischen Rechtsprechung gewinnen Gesellschaftsformen anderer Mitgliedstaaten mehr und mehr an Bedeutung. Man erinnert dabei die Centros-Entscheidung des EuGH (Urt. v. 09. März 1999, Rs. C-212/97, in: NJW, 1999, S. 2027), die Überseering-Entscheidung (Urt. v. 05. November 2002, Rs.C-208/00, in: DB, 2002, S. 2425 ff.) und Inspire-Art-Urteil (Urt. v. 30. September 2003, Rs.C-167/01, in: NJW, 2003, S. 3331) Endlich notiert man die Vale-Entscheidung des gleichen Gerichtshofes, wo die Grundsätze der Äquivalenz und der Effektivität, mit Bezug auf das Thema der Niederlassungsfreiheit, noch einmal betont werden. Insbesondere gelten solche Bedingungen dafür, dass das ausländische Gesellschaftsrecht, im Sinne von Artt. 49 u. 54 AEUV, mit dem innerstaatlichen Recht harmonisiert werden soll. Mit seinem Urteil vom 14. März 2005 (Az.: II ZR 5/03, in: NJW, 2005, S. 1648 ff.) hat sich der BGH erstmals zur Rechtsstellung von EU-Auslandsgesellschaften im deutschen Recht geäußert. Zum Thema s. auch BAUMS, ULMER, *Unternehmens-Mitbestimmung der Arbeitnehmer im Recht der EU Mitgliedsstaaten*, in: ZHR, 2004, 1, S. 72; HENSSLER, *Bewegung in der deutschen Unternehmensmitbestimmung*, RdA, 2005, 6, S. 330; ID., *Tagungsband der Stiftung Gesellschaft für Rechtspolitik*, in: Bitburger Gespräche (Jahrbuch) I, München, 2006; JUNKER, *Europäische Aktiengesellschaft und deutsche Mitbestimmung*, in: ZfA, 2005, 2, S. 211; ID., *Sechsundsiebzig verweht – Die deutsche Mitbestimmung endet in Europa*, in: NJW, 2004, 11, S. 728; OECHSLER, *Globales Management und lokale Mitbestimmung. Hat das deutsche Regelungssystem eine Zukunft im internationalen Wettbewerb?*, FS. Hartmut Wachter, München, 1999, S. 29–45; OETKER, *Unternehmensmitbestimmung in der rechtspolitischen Diskussion*, in: RdA, 2005, 6, S. 337 ff.; REBHAHN, *Unternehmensmitbestimmung in Deutschland, Zukunft der Unternehmensmitbestimmung*, München, 2004, S. 42 ff.

werden kann[79]. Die Komponenten von Körperschaften können zudem auch aus Unternehmen oder anderen juristischen Personen bestehen, wenn es kein Abbruch des nationalen Rechts des Orts der *societas europaea* darstellt[80]. Außerdem, kann sie sich in Form von Einzelunternehmen zu einer weiteren Tochtergesellschaft bilden[81].

Dies beruft sich auf die Kontinuität mit der *consensualis societas* und gleichzeitig auf die moderne Lösung der juristischen Person. Auf diese Art hätte man sicher ein formal ebenes Spielfeld für alle SE gefunden, jedoch ein bestimmtes Gebiet für über Rechtsformen hinweg konkurrierende Unternehmen im Verhältnis zu Gesellschaften mit national unterschiedlichen Sitzen und Rechtsformen. Damals ging es in der Kommission mehr oder weniger um die Frage, dass Mitbestimmung für die Arbeitgeberseite gleichwertig oder sogar ein Vorteil sei. Sie sollte nicht nur den Arbeitnehmer Einfluss, sondern auch die Bedeutung der Entscheidungsfindung und -implementation zulegen. Endlich taucht dies aus Untersuchungen in Deutschland und autoritative Meinungen wie aus der Biedenkopf-Kommission[82] auf. Mitbestimmung galt damals als den Weg, der gleichzeitig zum Allgemeinwohl und zum langfristigen Unternehmenswohl hätte führen sollen. Bis dahin gab es in politischer Landschaft nur Diskussion über die relative Figur zwischen den Parteien[83].

In Italien hat die jüngste Reform des Gesellschaftsrechts (D. lgs. vom 17. Januar 2003, Nr. 5 u. Nr. 6) neue Diskussionen geöffnet. Die Frage ist nämlich: Sind Personen- und Kapitalgesellschaft, die Namen, Sitz, Vermögen, Verhandlungs- und Prozess Fähigkeiten haben, als juristische Personen zu betrachten? Nach der Reform, ist der Vertrag nicht mehr die einzige Quelle der Unternehmensgründung. Zwei Arten von Unternehmen, mit beschränkter Haftung- und jetzt auch -Aktiengesellschaft, per einziger Partei Willen ähnlich wie eine Stiftung önnen festgestellt werden (Art. 2328, Abs. 1; 2463, Abs. 1, cod. civ., in neuen Text des D. Lgs. 17. Januar 2003, Nr. 6)[84]. Infolgedessen wurde eine jahrhundertalte Tradition, aus dem Begriff vom Art. 2247 cod. civ. dargestellt, auch gebrochen: *„Mit dem Gesellschaftsvertrag bringen zwei oder mehrere Personen Sachen oder Dienstleistungen zur gemeinsamen Ausübung einer wirtschaftlichen Tätigkeit mit dem Zweck ein, den daraus erzielten Gewinn zu teilen“*. Aus solcher Definition taucht nicht der profitgierige Zweck oder die rechtliche Persönlichkeit auf, sondern die Vereinbarung zwischen den Parteien zur gemeinsamen Ausübung einer Tätigkeit und damit zur Teilung des Gewinns. Es ist daran zu erinnern, dass die Bedeutung in der säkularen Tradition der Partnerschaftsvereinbarung, den gemeinsamen Interessen der Aktionäre noch heutzutage entspricht. Dies erlaubt das Kriterium zur Lösung von Konflikten allerdings zu wählen und das Argument, dass die Gesellschaft selbst eine juristische Person ist und etwas anders als die Aktionäre, einzustellen[85].

5. Schlussbemerkungen

Etliche Elemente der Gesellschaft finden sich bei aller Verschiedenheit der römischen und der heutigen Gesellschaftsformen noch im modernen Recht, z.B. die Regel, dass die Anteile an Gewinn und Verlust im Zweifel gleich hoch sind (§§ 706, 722 BGB; § 1184 ABGB, Art. 531, 533 OR); ferner die Beschränkung der Haftung auf eigenübliche Sorgfalt (§ 708 BGB; Art. 538 OR; § 110 HGB) bestimmt, dass dem Gesellschafter Zufallsschaden zu ersetzen sind, die er unmittelbar durch seine Geschäftsführung erlitten hat. Das Thema ist daher eine wichtige Gelegenheit für den Vergleich zwischen Romanisten und anderen Juristen, mit Bezug auf die Funktion des römischen Rechts in der Bildung der Juristen und damit letztlich in die grundlegenden Phasen, in denen das Recht Auslegung, Herstellung und Anwendung ist. In diesem Sinne wird der Begriff *societas* der Ausgangspunkt für den Einfluss über EU-Recht[86]. Im neuen Gesellschaftsrecht bleiben einige grundlegende Fragen noch offen. Vor allem gibt es die Meinung, der einvernehmlichen Gesellschaft die Bedeutung von juristischen Person beizumessen: Ein altes, das Unternehmen, und eine andere moderne, die juristische Person[87]. Der zweiten Orientierung zufolge, lässt sich das Unternehmen auch durch den Willen einer Partei, bzw.

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[79] Art. 12, 16 Abs. 1 Verordnung 2157/2001.

[80] Art. 47 Abs. 1 Verordnung 2157/2001.

[81] Art. 3 Abs. 2 Verordnung 2157/2001.

[82] D.h. Sachverständigenkommission zur Auswertung der damaligen Erfahrungen bei der Mitbestimmung, die in der Regierungserklärung des Bundeskanzlers Kurt Kiesinger vom 13. Dezember 1966 angekündigte, am 14. Juni 1967 vom Deutschen Bundestag beschlossene und am 24. Januar 1968 konstituierte wurde.

[83] KIRSCH, SCHOLL, *Was bringt die Mitbestimmung: Eine Gefährdung der Handlungsfähigkeit und/ oder Nutzen für die Arbeitnehmer? Ergebnisse einer empirischen Untersuchung*, in: DBW, 43, S. 541 ff.

[84] S. oben an Nt. 48.

[85] Im Rahmen des Gemeinschaftsrechts, ist der Begriff „juristische Person“ breiter als andere nationale Systeme, da er z. B. auch noch die Kollektivgesellschaft und die Kommanditgesellschaft vorsieht. Diese Unternehmen müssen jedoch auf der Grundlage der gesetzlichen Regelungen eines Mitgliedstaats erstellt worden sein. Es ist wichtig, dass der satzungsmäßige Sitz, ihre Hauptverwaltung oder ihre Hauptniederlassung innerhalb der EU behoben werden. Dazu s. ADOBATI (Hrsg.), *Il massimario annotato,* in: Dir. Com. Sc. Int, 2006, 1, S. 61–82; BONINI, HARATSCH, KOENIG, *Diritto europeo*, Milano, 2000, S. 240; FERRARI-BRAVO, RIZZO, Codice dell'unione Europea, Milano, 2008, S. 386; PREITE, *Atti notarili – Diritto comunitario e internazionale – Diritto internazionale privato*, Torino, 2011, S. 417 ff.

[86] Vgl. GAROFALO, *Scienza giuridica, Europa, Stati: una dialettica incessante*, in: *Europa Dir. Priv.*, 2004, S. 907 ff.; MANFREDINI, FERRETTI, ZAMORANI (Hrsg.), *Fondamenti del diritto europeo. Atti del Convegno (Ferrara, 27 febbraio 2004)*, Torino, 2005, S. 47 ff.; SOLIDORO-MARUOTTI, *La tradizione romanistica nel diritto europeo*, Torino, 2010, S. 290 ff.

[87] Insbesondere vgl. Art. 54 AEUV: „Für die Anwendung dieses Kapitels stehen die nach den Rechtsvorschriften eines Mitgliedstaats gegründeten Gesellschaften, die ihren satzungsmäßigen Sitz, ihre Hauptverwaltung oder ihre Hauptniederlassung innerhalb der Union haben, den natürlichen Personen gleich, die Angehörige der Mitgliedstaaten sind. Als Gesellschaften gelten die Gesellschaften des bürgerlichen Rechts und des Handelsrechts einschließlich der Genossenschaften und die sonstigen juristischen Personen des öffentlichen und privaten Rechts mit Ausnahme derjenigen, die keinen Erwerbszweck verfolgen“.

durch einen einseitigen Akt, gründen. Was eigentlich ein Widerspruch an sich konkretisiert, da eine Gesellschaft ohne eine Vielzahl von Mitgliedern doch nicht vorstellbar ist.

Diese Frage bleibt natürlich nicht beantwortet. Nur so viel steht darüber fest, dass das Recht auf Leistung zum Vermögen, also auf einen Punkt geht, dass die Ausführung mit den Leistungsempfängern gemeinschaftlich wird. Da aber die Gesellschaft bereits mit dem Abschluss des entsprechenden Vertrags existiert und die Erfüllung des Zwecks eine Gesellschaftsangelegenheit ist, die durch die Beitragsleistung ermöglicht werden soll, so ist abzulehnen, dass das Recht, den versprochenen Beitrag zu fordern, der Gesellschaft, bzw. den sämtlichen Mitgliedern mit Ausnahme des Verpflichteten, vorliegt. Solche Auffassung würde in dem *argumentum a contrario* liegen, das dem Recht der Erbengemeinschaft entnommen werden kann. Gehört eine Forderung zum Nachlass, so kann jeder Miterbe für sich allein die Leistung an die Erbengemeinschaft beantragen. Eine entsprechende Vorschrift für die Gesellschaft fehlt, und deshalb wird man annehmen können, dass sie für die Gesellschaft keine Geltung haben soll. Aber überzeugend ist diese Argumentation eigentlich nicht, weil sie eben voraussetzt, dass das Leistungsanspruch der Beiträge als Gesellschaftsforderung zu betrachten ist. Indessen bestehen dagegen kaum sachliche Bedenken[88].

Dies gilt sofern es sich um Forderungsrechte handelt, dass das zu Leistende allen Gesellschaftern gemeinschaftlich betrifft. Darin scheint es das eigentliche Kriterium der Bestandteile des Gesellschaftsvermögens zu liegen. Gleichfalls ergibt sich aber wieder, wozu es schon auf anderem Wege gesehen ist, dass der Begriff des Rechtssubjekts nur ein allgemeiner Begriff ist. Was das Subjekt eines zum Gesellschaftsvermögen gehörigen Rechts anbelangt, besteht die Tatsache darin, dass es dazu gehört, überhaupt nicht zu bestimmen. Es sind die Personen, alle oder nur einzelne Gesellschafter, denen die den Inhalt des Rechts bildende Befugnis zusteht. Solche Macht ist unter den Mitgliedern geteilt, insoweit nimmt jeder von ihnen daran teil. Es handelt sich um eine gemeinsame Macht, die nur gemeinsam ausgeübt werden kann und ihre Ausübung auch immer der Gesamtheit der Gesellschafter zukommt. Auch wenn nach dem Gesellschaftsvertrag die Geschäftsführung nicht allen, sondern nur einigen Gesellschaftern zukommt, stellt dies nicht anders vor. Denn sie üben ihre Geschäftsführungsbefugnis nicht für sich allein aus, sondern für sich und die anderen Mitgliedern, als ein Vertreter wie die Geschäftsführung einer Einzelperson. Gewährt das Gesetz ihnen im Umfang ihrer Geschäftsführungsbefugnis auch die Vertretungsmacht nach außen, so gilt es doch nur für den Fall, so dass auch diese Vertretungsmacht nur als eine durch den Vertrag dem Gesellschafter übertragene und folgerecht vom Willen seiner Genossen abhängig, gehalten werden kann[89].

Im römischen Recht sind im Allgemeinen die kollektive Entität, Teil der Klassifizierung von *personae* eigentlich nicht gewesen, weil die gleiche Rechtsordnung sich auf die Unterscheidung zwischen Sklaven und freien Personen, bzw. *alieni iuris*- und *sui iuris personae*, begrenzte[90]. Das grundsätzliche Element der rechtlichen Persönlichkeit lag nicht auf die Person oder das Unternehmen sondern auf die *universitas*. Das Grundelement der *societas* – wie oben analysiert, war jedoch der Vertrag[91].

Unter den Gesichtsaspekt ist die Auffassung dieser juristischen Personen als fingierte Rechtssubjekte nichts anderes als logische Konsequenz. Ist der Mensch als Träger einer formellen Persönlichkeit Rechtssubjekt, so kann auch nur er ein wirkliches Rechtssubjekt sein. Soweit lässt sich solcher ursprüngliche Begriff der Person durch das positive Recht anerkennen, wie in der aufgestellten Formel bereits enthaltene Modifikationen. Es kann nämlich erstens manche einzelnen Menschen die Rechtsfähigkeit ganz oder teilweise versagt werden. Zweitens kann es die Rechtsfähigkeit auf irgendwas außer den einzelnen Menschen übertragen, also eine fingierte juristische Person vorgestellt werden[92].

Infolgedessen wäre es für die Rechtsbegriffsbildung sehr wohl möglich gewesen, dieses Zweckvermögen anders als das Personenvermögen und selbständig zu gestalten. In der Tat hat das deutsche Recht diesen Weg teilweise eingeschlagen, das römische Recht aber nicht. Darüber spricht man über die Rechte und Rechtsgeschäfte des Zweckvermögens dermaßen, als ob diese einer Person gehören, und die Rechte, die die Vertreter der juristischen Person ausüben, sind nicht ihre eigenen Rechte, sondern subjektlos, bzw. *res nullius* lediglich für den Zweck da[93].

Mit dieser Argumentation aber wird das Problem nicht gelöst. Daher kommen die Fragen,

a) wie solche einer physischen Person nicht zustehenden Rechte begriffen werden können, die andere substituiert und
b) wie eine positive geschichtliche Rechtsordnung das Problem lösen konnte.

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88 BINDER, zit., S. 91.

89 BINDER, *zit.*, S. 91 ff.; HEYMANN, *zit.*, S. 3 ff.

90 A. GUARINO, *Diritto privato*, zit., S. 257 ff.

91 MEHR, *Societas*, zit., S. 372 ff.; SCHNORR VON CAROLSFELD, *Geschichte*, zit., S. 54 ff.

92 Das bekannteste Beispiel hierfür dürfte der *populus romanus* selbst sein (s. SCHNORR VON CAROLSFELD, *Geschichte*, S. 202 ff. und *passim*). Seinerseits bestimmt die Fiktionstheorie, mit der die entsprechende Begründung von der *communis opinio* angenommen und über ein halbes Jahrhundert festgehalten wurde, dass rechtliche und ethische Persönlichkeit zusammenfallen müssen. Angesichts der unbestreitbaren Tatsache, ist es zu beobachten, dass es außer den Menschen noch andere Rechtssubjekte gibt, anderes übrig als die kritiklose Verständigung dieser Tatsache und die Erkenntnis, dass sie mit dem als selbstverständlich betrachteten Ausgangspunkte nur durch eine Fiktion und also in Wahrheit überhaupt nicht hinzunehmen sei. Solche Beziehung wird natürlich von außen bei oberflächlicher Betrachtung kaum wahrgenommen (Diese Analyse findet man in: SAVIGNY, *zit.*, S. 235 ff.). Der Staat und die anderen Personenverbände werden jedoch als soziale Organismen bezeichnet, als Gesamtorganismen, deren Teile die Menschen sind und die über den Einzelorganismus herrschen (s. GIERKE, *Das deutsche Genossenschaftsrecht*, Graz 1854). Selbstverständlich sind beide Theorien für den Juristen von fundamentaler Bedeutung, nichtdestotrotz werden diese aus Platzgründen nur zitiert.

93 S. oben Nt. 46. Außerdem zum Thema s. BINDER, *zit.*, S. 3 ff.; BRINZ, *Lehrbuch der Pandekten*, Leipzig, 1873, S. 30, 979 ff.; SIMONETTO, *Concetto e composizione del capitale sociale*, in: Riv. Dir. Comm., 1956/1, S. 48 ff. Der italienischen Rechtsprechung zufolge, würde die gesamtschuldnerische Haftung der Verwalter/Geschäftsführer oder der Vertreter der juristischen Person sowie der juristischen Person selbst festgelegt, sofern die unerlaubte Handlung exorbitant ist und unkontrollierte Folgen mitbringt, ihnen zugeschrieben (Cass. Civ. II sez., 30. März 2009, Nr. 7666).

In der Tat konnte dieser Weg nicht zum Ziele führen, da vom Ausgangspunkt kein Weg zur Persönlichkeit von Nichtmenschen führt. Heutiger Konzept sieht Menschen als zu Rechtssubjekten geeignete Willensträger vor, nachdem können die Menschen entweder als Einzelne oder als Verbände das Recht der Persönlichkeit besitzen. In beiden Fällen ist die Persönlichkeit ein Rechtsbegriff, der Dank einer vom „Rechtsbewusstsein vollzogenen Abstraktion" zustande kommt. Die Natur der einzelnen Menschen kommt nicht aus der Frage hervor, ob der Einzelne als Person oder anders betrachtet werden kann, da man nicht seine Persönlichkeit sieht. Was relevant darüber noch bleibt, ist die Verbandspersönlichkeit[94].

Zudem lässt sich die Willensfähigkeit fallen, sodass daher kein Grund auf dem Menschsein des Subjekts scheinbar ist. Dieser Meinung zufolge, seien Sachen und unkörperliche Beziehungen gleichwohl am Platze, wie Menschen. Die Charakteristik der juristischen Personen liegt darin: hier ist der Mensch, der für sie tätig werden soll und kann, den Benutzer, neben dem ein noch näher zu bestimmender Genießer steht. Es handelt sich dabei im Wesentlichen um Zweckvermögen, die eben durch den Verfüger verwaltet werden. Sollen es juristische Personen sein, so handelt es sich nur um eine theoretische Entität, damit die komplizierteren Einrichtung der Gemeinschaft in der derselben Einrichtung von Benutzer und Genießer, eingeleitet werden kann. Da die letzte ein und dieselbe physische Person ist, scheint dann an diesem Punkt das Fokus des Themas gestellt und den Begriff des Rechtssubjekts einige Beweglichkeit und Flexibilität entwickelt. Dies ermöglicht, etliche Fälle, aus der Plattform der handlungsfähigen Menschen über die Gemeinschaft und das gemeinsame Vermögen bis zur rechtsfähigen Korporation, unter gleichem Gesichtspunkt einzuschließen[95].

[94] GIERKE, *Deutsches Privatrecht*, I, Leipzig, 1895, S. 265 ff. Obwohl diese Meinung abgelehnt wurde, konnte sie doch die Dogmatik des privaten Persönlichkeitsschutzes bis zu ihrer heutigen Fassung grundlegend ausrichten. Ob auch Unternehmen, also juristischen Personen und Personengesellschaften, ein Persönlichkeitsrecht besitzt, wird innerhalb der deutschen Rechtswissenschaft noch umstritten. Der Bundesgerichtshof spricht auch Unternehmen ein solches „Unternehmenspersönlichkeitsrecht" zu. Dieses soll als „sonstiges Recht" im Sinne von § 823 Abs. 1 BGB, so das Gericht, den sozialen Geltungs- und Achtungsanspruch von Unternehmen schützen (BGH, Urteil vom 11. März 2008 – VI ZR 7/07, in: NJW, 2008, S. 2110 ff.). Ihrerseits hat das Bundesverfassungsgericht die Frage zuletzt ausdrücklich offen gelassen (Beschluss vom 8. September 2010 – 1 BvR 1890/08, in: NJW, S. 2010, S. 3501; 3. Mai 1994 – 1 BvR 737/94, in: NJW 1994, S. 1784).

[95] BINDER, *zit.*, S. 21 ff. S. auch AMATUCCI, *Societŕ e comunione*, Napoli, 1971; FERRARA, *Le persone giuridiche*, in: Trattato Vassalli, Torino, 1956; GALGANO, *Persone giuridiche*, in: Comm. Cod. Civ. (SCIALOJA, BRANCA, Hrsg.), Bologna-Roma, 2006; GIORGI, *Dottrina delle persone giuridiche esposta con speciale considerazione del diritto moderno italiano*, Firenze, 1913; MONTALENTI, *Persona giuridica, gruppi di societŕ, corporate governance*, Milano, 1999, S. 142; RESCIGNO, *La persona giuridica e la capacitŕ di ricevere per testamento*, Riv. Dir. Civ., 1964, 2, S. 343; SERICK, *Forma e realtŕ della persona giuridica*, Milano, 2000.

Evolution of Law and Justice from Ancient to Modern Times

*Georg W. Oesterdiekhoff**

Abstract

The contention traces back to the 19th century that developmental psychology be helpful or necessary to understand human's history. Nearly every early scholar in developmental psychology and many early ethnologists, sociologists, and historians contributed to this central idea. Despite the prevalence of cultural relativism in the past generation, some scholars have continued to conduct corresponding researches. For example, C. Radding published two articles in 1978 and 1979, which outlined the explanatory power developmental psychology has regarding the history of law. This article here extends and deepens these endeavours. It shows that developmental psychology explains the evolution from archaic to modern law and justice right across the whole world. The evolution from ordeals to rational proof systems in trials, from objective to subjective forms of responsibility, from sadistic to humane forms of punishment, from the holy law to democratic legislation, and the abolishment of trials against animals are to explain in terms of developmental psychology. The conclusions to be drawn go far beyond the area of the history of law. They rather touch both the foundations of historical research and the foundations of the humanities and social sciences.

Key words: *developmental psychology; objective responsibility; immanent justice; ordeal; customary law; legislation; punishment law; trials against animals.*

1. Introduction

The characteristics of law and justice have changed a lot from ancient and medieval to modern times, not only in the Western world but more or less worldwide. Change of social, economic, and institutional phenomena may have caused some of the juridical changes in order to adopt functionally law and justice to some newer institutional requirements. Though, the abolishment of body humiliation and torture in the official punishment systems, which ruled right across the whole premodern world up to modern times, the abolishment of trials against animals, the cancellation of ordeals as valid methods of juridical procedures across the continents, and many other juridical phenomena reveal that not only economic, institutional, juridical, and functional factors caused these changes. Countless historians of law especially in previous generations have described that mental changes have had a tremendous influence both on shaping the core traits of ancient law and justice and on the rise of their modern successors. Generations of historians of law especially from the era of Enlightenment up to 1945/1980 contended that forms of primitive thinking caused and penetrated the ancient phenomena of law and justice right across the whole range of juridical phenomena. Basically, they described that the whole culture of ancient or premodern law originated in primitive forms of psyche and mind, regarding both the entire spirit that governs the various manifestations of law and justice and down to the smallest details. Consequently, they saw the rise of modern law and its continuous amendment over the past generations as a manifestation of higher stages of reason, consciousness, morals, empathy, and humanity. Many historians of law presented more or less clearly formulated "theories" of a moral and mental evolution of law, which differ a lot from merely functional and systemic approaches (Fauconnet 1920; Post 1891, 1895; Schild 2004; Planitz 1971; Gutmann 1929; Schmidt 1965; Brunner 1961; His 1964; Huizinga 1972; Kaufmann 1958; Radding 1979, 1985).

However, historians (of law) have never developed a comprehensive, systematic, and flamboyant theory of the mental evolution, which caused the actual or alleged mental evolution of law and justice. Besides, general trends in humanities and social sciences have deeply influenced the work of historians. Theories of mental or psychological evolution, which strongly distinguished between premodern and modern societies regarding levels of mind, civilization, and rationality, were elaborated and presented between 1850 and 1945/1980 (Tylor 1871; Frazer 1994; Lévy-Bruhl 1930, 1923, 1935; Piaget 1950; Elias 1982; Schultze 1900; Hallpike 1979; Habermas 1989; Lurija 1982; Lurija & Vygotski 1992). After 1980, however, the mental landscape across humanities and historical disciplines changed a lot. Ideologies of "cultural relativism" and "universality of rationality" effectively and radically replaced the prevailing former theories of a mental evolution from primitive to civilized minds and cultures. Most scholars of today seem to believe that the former theory of the evolution of mind and civilization was only a co-

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lonial myth to justify the Western preponderance (see overview in Oesterdiekhoff 2011, 25–40, 1997, 11–44).

Historians of law should ask whether the both theories mentioned are able to answer to the questions why premodern people tried against animals, sometimes punished shadows instead of persons believing like children that shadows are their true parts, used ordeals, regularly tortured and killed delinquents by barbarian methods, punished representatives of delinquents instead of the guilty persons, etc. Even at first glance, many or even most premodern juridical phenomena reveal their origin in traits of a primitive psyche and mind. Though, there are still today many historians who emphasize that primitive forms of mentality shaped the mind of premodern people, thus also causing the astonishing, irrational, and deviating forms of ancient law and justice. Moreover, some authors have described that (only) the cognitive-developmental approach, originating in child psychology, is able to deliver the key to understanding both the history of mind generally and the history of law and justice specially. Correspondingly, lower stages of psyche may have caused the historically earlier forms of law and justice, whereas the higher psychological stages gave birth to the emergence of the modern law and justice. Thus, cross-cultural and historical psychology basing on developmental psychology is said to be the key to understanding some main trends in the history of law (Schild 2004; Radding 1979, 1985; Hallpike 2004; Habermas 1989; Oesterdiekhoff 2002a, b, 2009c, b, 2009a, 333–409, 2011, 118–126; Piaget 1973; Rousset 1948).

In the following, I am going to present and to analyse the decisive data that back this theoretical programme. After having done this I will reconstruct some main trends of the history of law against this promising background. I demonstrate the evolution of law with reference to the use of ordeals and its abolishment, the change from objective to subjective forms of responsibility, trials against animals and its abolishment, the change from the punishment of body to more humane punishment forms, and the change from the "good, old law" to procedural and democratic forms of legislation.

2. Developmental Psychology and History

The idea is very old that premodern law systems may root in primitive cognitive functions. For example, classical sociologists such as É. Durkheim or M. Weber described ancient law systems basing on this idea. The broader view, according to it premodern nations across the continents have stood on primitive psychological stages, was shared by main representatives of the social sciences and humanities through several generations. Moreover, numerous scholars strictly understood "primitive" or "archaic" structures more or less as "childlike" structures, maintaining that premodern humans stood more or less on childlike psychological stages, and thus basing the insight into the nature of both "primitiveness" and "civilization". This idea may be strange according to currently prevailing views but was widespread during the 19th and 20th centuries, especially between 1850 and 1945. Hegel, Feuerbach and Cassirer in philosophy, Bastian, Tylor, Schultze, Murphy, Allier, and Hallpike in ethnology, and Comte, Spencer, Elias, Vierkandt, and Habermas in sociology, Schneider, Brunner-Traut, Lamprecht, and many others in several historical disciplines supported the idea of the childlike psyche of premodern man. Nearly all (!) representatives of the early child or developmental psychology described the resemblances between children and premodern humans. The early psychoanalysts did so, too. During the past generation, authors such as Ziégler, Habermas, Hallpike, LePan, Gablik, Oesterdiekhoff, Weiler, Ibarra, and others contributed to this theory (see overview in Oesterdiekhoff 1997, 2009a, 2011, 2012a, b, 2013a, b).

To my opinion the first great book that completely evidenced the theory of the childlike psychology of premodern man was Werner's *Comparative Psychology of Mental Development*. He described the parallels regarding every aspect of psyche, cognition, perception, categories of time, space, causality, volition, magic, morals, etc. Piaget was the next big step because he described the parallels in most of his books covering the slightest details, thus enriching and improving Werner's pioneer work. With Werner and Piaget the evidence became obvious that premodern humans operated on lower levels regarding every aspect of logical, physical, social, and moral issues and that a psychogenetic evolution has taken place, manifesting a grown distance between children and adults rising especially during the past centuries.

Between 1932 and today, Piagetian cross-cultural psychology (PCCP) has conducted more than 1000 empirical surveys across numerous cultures and milieus, evidencing the previous insights. The fourth stage of human development, the stage of formal operations, emerges only in humans of modern societies during their adolescence, stepwise between the 10th and 20th years of age. Adults of illiterate or semiliterate milieus, traditional or archaic milieus remain bound to the second (preoperational) or third (concrete operational) stage of human development and do not reach the adolescent stage of formal operations. This result is valid across the whole range of cognitive functions and world understanding (Dasen & Berry 1974; Eckensberger 1979; Lurija 1982; Mogdil & Mogdil 1976; Oesterdiekhoff 1997, 2009a, 2011, 2012a, c, 2013a, b; Poortinga 1977; Flynn 2007; Hallpike 1979). "In particular it is quite possible (and it is the impression given by the known ethnographic literature) that in numerous cultures adult thinking does not proceed beyond the level of concrete operations." (Piaget 1974, 309)

Children and premodern humans share the same psychological structures but differ in life experience and knowledge. While modern humans stay on stages typical for adolescents, premodern humans occupy stages typical for children, leaving space for all kinds of transitional stages in-between them, especially in educated pre-modern milieus and the long period of modernization. Children and premodern humans share the animistic interpretation of objects and beings, the belief in the magical power over occurrences, and the belief in ghosts and fairy tales. They have similar forms of fantasy and imagination. They share the same categories of causality, chance, and probability. They share the same logical and physical concepts and the same basic forms of world understanding. They have the same forms of social, political, and moral thinking, down to the smallest details, as many authors have described (Werner 1948; Schultze 1900; Lurija & Wygotski 1992; Hallpike 1979, 2004; Oesterdiekhoff

1997, 2009a, 2011, 2013a, b; Ellwanger 1980; Zeininger 1929; Piaget 1959, 1969, 1950; Piaget & Garcia 1989; Lévy-Bruhl 1930, 1923, 1935).

The history of population, economics, social structures, politics, philosophy, sciences, law, religion, superstition, gender relations, education, everyday manners, customs and morals can only be understood against the background of this theory programme. The new theory is decisive in explaining the long duration of Pleistocene, main structures of ancient civilizations, and the emergence of the modern, industrial civilization. I have written 11 books accomplishing this work. Some other authors contributed to this task, too, among them Habermas (1989) and Hallpike (1979, 2004). The new theory preserves the great traditions of humanities and social sciences on the one side and delivers a radically new key to base these disciplines and to understand history on the other side. Radding (1978, 1979) published two articles regarding the link between developmental psychology and history of law and presented conclusions I am going to deepen now.

3. Immanent Justice and Ordeals

Rousset (1948) could have been the first who applied the children's belief in "immanent justice" to the explanation of the use of ordeals in judicial procedures in premodern societies. However, already Tylor (1871) named ordeals as "hazard games" revealing the childlike mentality of premodern man, likewise Künssberg (1920). More recently, Hallpike (1979), Radding (1978, 1979, 1985), and Oesterdiekhoff (1997, 2002 a, b, 2007, 2011, 2013a) explained the judicial ordeal practice in terms of developmental psychology.

Piaget (1973, 286) told Swiss children that two children had stolen apples in an orchard. As a guard appeared they ran away across a bridge, which collapsed in the same moment the children passed, so that they fell into the river. The test persons were asked then why the bridge collapsed. 86% of the children aged six, 73% of the children aged seven and eight, 54% of the children aged nine and ten, and 34% of the children aged 11 and 12 maintained that the bridge had broken in order to punish the apple thieves. They usually explain that the bridge had seen the theft and wanted to punish, either on own will (animism) or on god's behest (magic). Often, they tell and add that the wind or the clouds informed the bridge, which decided then to hinder the fleeing children.

This story reflects that the children's worldview bases on ideas and concepts that diverge a lot from views of modern adults. Children believe that objects, things, rocks, mountains, rivers, plants, and animals know what humans do, participate into human activities, and feel obliged to execute moral and parental functions. All phenomena and beings are involved into a moral cosmos, which is governed by god, nature, or a holy order. Thus, children do not differ between moral and natural laws believing that moral laws govern nature and society as well. Every incident happening in the world does not stem from causality and chance but from higher and mystical decisions. Thus, children believe that fate and morals govern every kind of occurrence. The younger the children are the stronger this magical-animistic view prevails. Numerous surveys have replicated these facts, showing that this belief system vanishes only among adolescents in modern societies (Caruso 1948; Medinnus 1957; Hart 1962; Dennis 1940, 1943, 22ff; Mogdil & Mogdil, vol. 6, 24–56; also see Ellwanger 1980; Zeininger 1929; Piaget 1959, 1969).

Empirical surveys conducted in traditional or backward regions have shown that adolescents and adults adhere to the immanent justice belief system the same way as children do. Traditional adults answer as children do that the bridge collapses in order to punish the thieves and give the same commentaries, in Afghanistan, Libanon, West-Africa, China, among American natives, and elsewhere (Jahoda 1958, 241ff, Medinnus 1957; Najarian-Svajian 1966; Havighurst & Neugarten 1955, 150; see overview in Oesterdiekhoff 1997, 95, 2009a, 345–348, 2011, 118–126).

That is the reason why children apply ordeals and oracles in similar ways as premodern adults do. When children want to decide in a quarrel who is in the right or who is guilty or what should be done next then they like to draw matches or sticks, watch which colour has the next passing car or from which direction it approaches, cross their fingers a certain way, walk certain distances in a limited time, enumerate numbers, try to accomplish certain exercises such as hitting a post or climbing a tree. Or, children let a fight decide what should be done or who is in the right. Even modern children practice these oracles during their first decade of life. It is part of their culture due to their immaturity (Ellwanger 1980, 21, 25, 33, 34, 36; Zeininger 1929; Werner 1948; Opie 1967; Oesterdiekhoff 2002a, b, 2009a, 2013a).

Australian Aborigines, Native Americans, Black Africans, Ancient Asians, or Medieval Europeans mainly based their activities on such oracles (for the planning of actions) and ordeals (to decide what happened in the past). Every premodern nation used such ordeals in judicial trials, very often as the main instrument in the justice system or what it precedes in case the respective culture had not yet installed official trial systems. Mostly, the ordeal was not the single instrument of jurisprudence but very often it was the most frequent and most prominent juridical proof system. For example, the person charged drowned his hands into a kettle of hot water or touched a gluing iron, walked barefoot over burning coals or across a fire or swallowed a poison dose. The person had to swim across a river peopled by crocodiles, was exposed to many a men who threw lances to hit him, or had to face a fatal duel. Some of the ordeals are alike across cultures and continents, some other forms can be found only in certain regions and cultures. Ethnological reports show that the people usually had the fullest confidence in these ordeals, even more than in eyewitnesses and empirical proofs.

The usual practice is that a person charged was obliged to perform the ordeal, which alone determined whether a person was guilty or not. The ordeal decided upon the charges and the fate of the persons accused. According to rational considerations, we have to conclude that millions of innocent people were convicted or even died in these hazard games, whereas millions of guilty people were released, even against all empirical evidence. Still today ordeals exist to some degree in Black Af-

rica. Ethnologists described the vivid, unlimited, credulous, and everyday practice of ordeals as typical for African cultures even during the 20th century. Premodern societies across the continents used them up to the colonial era 100 years ago and later. The first wave of abolishment of ordeals appeared in Europe in consequence of the Lateran congress in 1215, but they survived on a lower rate up to the era of Enlightenment (regarding Europe's history Browe 1932/1933; Erler 1941; Bartlett 1986; Lea 1996; Leitmaier 1953; Morris 1975; Hexter 1975; Hirzel 1966; Holzhauer 1986; Glitsch 1918; Köstler 1912; Radding 1985; regarding ethnological reports Allot 1957; Binet 1963; Evans-Pritchard 1937; Lévy-Bruhl 1959; Oesterdiekhoff 2002 a, b, 2007, 2009a, 2011; Post 1885, 1895; Roberts 1965; Gutmann 1929; Huber 1959; Kahn 1954).

It is obvious that the psychological maturation of humans is the decisive cause to their abolishment and replacement by rational measures. Whenever adult humans surpass the childlike preoperational and concrete operational stages of reasoning in order to attain the adolescent stage of formal operations then they lose their confidence in ordeals and replace them by rational procedures. The decline of animism, of magic, and of the belief into a tight connection between human and cosmos on the one side and the rise of empirical causality, rationality, and intelligence on the other side are parts of the transformation from childlike psychological to adult psychological stages. With reference to Piaget's data it is apparent that a population on psychological stages of children aged six or seven has a full confidence in ordeals and frequently practises them. A population staying on stages of children aged 10 are going to abolish ordeals or have already done it (Hallpike 1979; Rousset 1948; Oesterdiekhoff 2002 a, b, 2007, 2011, 118–126, 2009a, 344–367, 2013a, 169–182).

It is apparent that every nerve in modern brains resists when exposed to a procedure, which promises a fair decision regarding any charge basing on ordeals by duel, fire or poison. It is impossible for modern people to believe in the reliability of such practices. The higher stage of reason and mind is the cause to this inaccessibility and incomparability, not education, socialisation, and brain washing. However, for archaic adults the ordeal delivers the most reliable truth humans on earth can attain because the ordeal is the natural expression of all their childlike mental functions and their stage-bound worldview.

4. Objective Responsibility or Erfolgshaftung

Piaget (1973, 371) described that children and premodern cultures share the same tendency to attribute responsibility to persons for consequences and outcomes, which they neither caused nor could avoid or prevent. According to Piaget, the ancient law believed that objects, plants, animals, actually innocent people only involved in damaging consequences, descendants of delinquents, whole societies, etc. be guilty and responsible for any harmful outcomes. He added that children go and history has gone through the same stages regarding the ability to distinguish between outcomes and intentions, and regarding the capacity to identify and to weigh motives, the very role actors have in occurrences, and the extent of guilt or responsibility. He identified intellectual deficiency as cause to the phenomenon called objective responsibility and determined growing intellectual maturation as motor behind the continuous rise of subjective responsibility. Children aged ten attain levels belonging more to the subjective responsibility, while the younger ones adhere more to the objective responsibility. Piaget himself especially referred to the book "La responsabilité" of Paul Fauconnet (1920, 109), who had extensively described these phenomena in the history of law.

For example, children attribute guilt and responsibility to persons who only are involved in huge damages inflicting other people, and tend to misinterpret their true role, entanglement, and motives. Their intellectual immaturity causes both their focus on considerable consequences and their simultaneous ignorance of the intentions behind. Persons who cause unwillingly huge damages are believed to be more malevolent and guilty than persons who cause deliberately but only harmless damages. Children have much more difficulties than adults in weighing intentions and outcomes regarding any occurrences. Children can identify or weigh the motives only in easily recognizable situations but not in somewhat more complex occurrences. Next to children's cognitive simplicity, affectivity, and egocentrism, it is their magic and animism, which originate the phenomenon of objective responsibility. Children believe that any outcome is directly intended and caused by the person involved whom the children just focus to attribute responsibility. They initially learn to accept excuses with reference to their own actions, and only later with reference to other persons, too (Piaget 1973, 146; Selman 1980). Numerous empirical researches have replicated the phenomenon "objective responsibility" and the theory behind it (see overviews in Oesterdiekhoff 1997, 104, 2009, 372–378, Hallpike 2004, 114–130).

The Piagetian test batteries to identify children's objective responsibility were administered to adults in backward regions. Interestingly, the tests conducted in traditional cultures around the world revealed almost the same prevalence of objective responsibility among adults as among children. There is no ontogenetic decline from objective to subjective responsibility as it takes place among modern adolescents (see overviews in Oesterdiekhoff 2009a, 378f; Hallpike 2004, 141–170). This implies that the same psychological mechanisms, which originate children's objective responsibility, cause the phenomenon "Erfolgshaftung" in the history of law, too. Therefore, it is by no means accidental that countless historians of law in the past 200 years extensively described this strange tendency of ancient law.

Sometimes ancient law and customs deliberately ignore the motives, sometimes they attribute the fitting malevolent motives and fancied guilt to actually innocent people, who are only accidentally involved in disagreeable circumstances but not their makers. For example, numerous historians and ethnologists have described that blood revenge customs regarding the punishment of homicides tend to ignore the motives, demanding the death of a person involved no matter if he or she is guilty or not. Although people sometimes regard and accept true motives and circumstances as children do, too, more often they attribute responsibility and demand revenge even in situations where the persons charged are obviously innocent. Countless historians and ethnologists formulated as E. Schmidt did: "Revenge solely

considers the deed, the damage, and the insult. It is blind with the suspect and does not ask much if he is really responsible and actually intended to cause the outcome. The ancient German criminal law consists of Erfolgshaftung, according to the ruling doctrine in the history of law. Le fait juge l'homme." (Schmidt 1965, 31, translated by G. O.) Numerous scholars drew similar conclusions (Gluckman 1965, 205–213; Moore 1972, 61, 64, 66; Post 1885, 55, His 1964, vol. 1, 80; Schultz-Ewerth 1929, 289, 315; Amira 1960, 127; Brunner 1890, 829; Schmidt 1965, 23; overview in Oesterdiekhoff 2009a, 382–404, 1997, 104–114, 2002b, 2013a, 368–377).

The phenomenon of "typed law" belongs to this complex of "Erfolgshaftung". Ancient law tends to determine responsibility and guilt as automatic ingredient of certain actions and circumstances. According to a law of Groningen from 1425 it was held that whenever a person is sitting on a coach when hitting a person, he or she be guilty, no matter which true motives had actually existed. Whenever he or she accompanies the coach by leading the horses, he or she was believed being innocent (no matter if he or she really intended to damage a person or not) (His, R. 1964, vol. 1, 93). The same forms of typed laws are to find in premodern societies around the world (Gluckman 1965, 213; Moore 1972, 60–70; Planitz 1971, 60; Mitteis 1978, 27). Often persons were treated as true murderers facing the death sentence only because the true assassins had used their weapons without knowledge and help of the owners, in full knowledge of the avengers or accusers regarding this certain circumstance (His 1964, vol. 1, 101; Brunner 1890, 822).

The history of law is full of examples of Erfolgshaftung. Clans in ancient Greece had to pay penalties over several generations for deeds their ancestors had done. The phenomenon of collective responsibility is to find across the whole premodern world. If the punishment cannot easily meet a certain person, it takes some relative or representative. According to a law made by Constantin and confirmed by Justinian, slaves of a woman, who married a forbidden man and broke the parental marriage arrangement, had to be killed, although in fact the slaves had no possibility to act otherwise or to change anything. The population of whole regions in Peru was killed in case somebody coming from there damaged a holy virgin. Written laws sometimes demand that even those people have to be killed when they assassinated an attacking murderer in order to defend their lives. Some laws free from capital punishment only in cases according to them the attacked person waited at least three blows before starting his defence. These laws treat the victim as if he or she be the delinquent (His 1964, vol. 1, 198ff; Oesterdiekhoff 2009a, 372–403, 2002b; Tylor 1871). "The law of the town of Frankenhausen punishs both the unintended manslaughter and the intended murder by an exile of ten years, whereby the person, who killed by mistake, can spend the ten years of exile in the outskirts of Frankenhausen. The law of Brakel close to Dortmund in Westfalia does not differentiate between intended and unintended killing. The person receives the capital punishment no matter, whether the manslaughter happened deliberately or accidentally" (His 1964, vol. 1, 96 f, translated by G. O.)

The ordeal trial is also linked with the phenomenon "Erfolgshaftung". Exposing an accused person to a "hazard game" shows the deficits to identify motives and intentions, the deficits to attribute responsibility and to find the true guilt. Prosecution and punishment of objects, plants, and animals give full evidence to the theory of "Erfolgshaftung". Developmental psychology of the past 100 years has described that children attribute "life" and "soul" to objects and attribute humanlike will and mind to plants and animals. Premodern adults, in consequence of the same animistic tendency and pattern of mind, attribute mind, will, and morals to objects, plants, and animals, too. Moreover, they punish these beings even in judicial trials. This fact evidences both the cognitive difficulty to judge on motives and intentions, and the full existence of "Erfolgshaftung", beyond any doubt possible (see next chapter).

Some historians of law (e.g., H. Brunner) represent the theory of "objective responsibility" according to it premodern humans intend to punish only the guilty person but are unable to do so due to intellectual deficits. The other group (e.g., E. Schmidt, E. Mayer-Homberg, H. Mitteis), representing the theory of "subjective responsibility", maintains that premodern humans are both unwilling and incapable to identify the guilt, at least in comparison to modern humans and modern law (see overview in Kaufmann 1958, 10–20; Oesterdiekhoff 2009a, 380). Both theories cover certain real trends of the traditional law and justice and completely match to the conclusions developmental psychology has drawn regarding children as above outlined. Moreover, historians of law use the same terms to describe both the ancient problems and the emergence of the modern law as developmental psychologists do regarding the corresponding ontogenetic developments. Thus, Piaget was right when in 1932 he identified children's objective responsibility with some kernel patterns of ancient law and the adolescent emergence of subjective responsibility with the rise of modern law.

5. Trials Against Animals

Children need several years of mental development to understand the intellectual and psychological differences between animals and humans. The younger the children are the more do they believe that animals have the same mind and reason, intelligence and morals as humans have. The very young children even assume that animals participate into humans' affairs, understand human language, know what humans are doing, and have willpower and morals. The very young children even do not surmise intellectual differences between insects, frogs, mice, and horses. They also regard plants, stones, rocks, mountains, rivers, clouds, and stars as alive and animated. Children's weakness of intelligence, mind, and sense for reality are the causes to this tendency of personification and anthropomorphism. Both animism and personification decline after the seventh year and vanish with 10 or 12 years of life. The rise of the fourth stage of formal operations annihilates this animistic worldview (Hall 2010; Werner 1948; Zeininger 1929; Ellwanger 1980; Piaget 1959, 1969; Bühler 1930; Russell 1940a, b).

Ethnography has described at length that every archaic society around the world, tribal societies and ancient civilizations as well, have the same tendencies of fetishism, personification and animism. Premodern peoples around the world regard ob-

jects, rivers, rocks, mountains, and plants as alive and animated. Tribal societies attribute willpower and mind even to plants and adore them as gods. Ancient Egyptians, Indians, Native Americans, and others adore animals as gods. Personification of animals is part of the totemic worldview. Premodern humans really believe that animals know what happens in human settlements, know human language and mind, think like humans, have willpower and morals as humans do. They often make no difference between insects, vertebrates, and mammals but attribute more or less the same intelligence to all of them. It may be that some people in ancient civilizations are somewhat reluctant regarding these tendencies but even there the majority of people support those beliefs and institutions, which manifest this childlike view (Lévy-Bruhl 1930, 1935; Frazer 1994; Havighurst & Neugarten 1955; Tylor 1871; Oesterdiekhoff 2011, 96–101, 2009a, 211–224).

They adore many animals as gods or magicians but also use them for work and nutrition. The worldwide spread of slavery and cannibalism shows that this use of animals does not threaten the rightness of the conclusion regarding the personification of animals. Whenever animals damage human settlements, hurt or kill humans, or endanger any human projects, the afflicted humans attribute malevolent intentions to these animals. They tend to regard predators as disgraceful killers and often perform blood revenge against them (Lévy-Bruhl 1930, 31; Oesterdiekhoff 2013a, 139–150, 2011, 102–109, 2009b). In case societies have criminal courts they prosecute them by the same methods they apply referring human delinquents. Africa, Asia, and Europe from ancient times to the era of Enlightenment accused animals in official courtyards. The animals were accused, brought into prison or courtroom, convicted, and punished more or less the same way as human delinquents. Judges, lawyers, eyewitnesses, and servants were involved. The punishment by banning, torture, or killing was often conducted in front of an audience. Servants caught and imprisoned the animals, declared them what to do or what was decided, lawyers defended them in the courtroom, judges took them in their hands or spoke to them, etc. Servants declared on fields that pregnant mice have more time to appear in court or lawyers defended the refusal of summoned animals to appear by some explanations (Evans 1906, 120, 138; Fischer 2005, 38, 103; Oesterdiekhoff 2009b, 2013a, 139–150).

Although animals do not speak, the people firmly believed that they would understand the procedure. "The people recognize animals as moral persons with a free will, free to decide whether they want to act this or another way, able to decide whether to leave fields or not, able to sign and to keep contracts with humans, and apt to carry responsibility for social institutions and moral values." (Fischer 2005, 90, transl. by G. O.). It is out of question that premodern humans did not make carnival but seriously believed in the rationality and legitimacy of their procedures (Fischer 2005, 9; Evans 1906; Oesterdiekhoff 2009b).

Modern society from the era of Enlightenment onwards is the single society in world history that completely abolished trials against animals, plants, and objects. It is the rise of the fourth stage of formal operations, the growth of intelligence and mind, which led to the abolishment of animism and personification on the one side and of trials against animals on the other side. Only child psychology can explain existence and nature of these practices in former times. The internal link to the phenomena objective responsibility and ordeal is obvious. Punishment of animals reveals the weakness of judgment abilities about motives and intentions, that is, the existence of objective responsibility. Further, objects, plants, and animals work as judges in ordeals. Therefore, objects and animals can appear in courts by two ways. Either they work as judges or they are convicted as delinquents, like humans do, too. Thus, the primitive law completely roots in the childlike mentality of the premodern humankind. Trials against animals show that the whole premodern law and justice on the one side and the entire premodern society on the other side manifest psychological roots, which diverge a lot from those characterizing modern societies and humans.

6. The Evolution of the Punishment Law

According to the results of developmental psychology, young children prefer and support severe punishments when considering deeds or faults and their legitimate punishments. They back severe punishments due to their lower psychological stage and primitive mentality, not in consequence and dependence of socialisation and culture. Thus, they use to prefer severe punishments to humane ones across all cultures and milieus. Young children justify revenge punishments and often say that the severest punishment be the most legitimate and most appropriate one. Only in modern societies, the older children and adolescents surmount this law and order mentality and transcend to defend more humane punishments or even to the replacement of punishments at all by other methods, namely those of reconciliation and compensation. Modern teenagers think about a justified correspondence between the quality of deed and the extent of punishment, while the younger ones thoughtlessly prefer a simple and brutal response (Piaget 1973, 238–241; Tapp & Kohlberg 1971; Adelson & Bell 1970).

In a Swiss survey, Piaget and his collaborators found that only 28% of the children aged 6/7 support moderate punishments, but 49% of the children aged 8–10 and 82% of the children aged 11/12 (Piaget 1973, 261ff). Another survey started with a story a sample of 167 Swiss children was requested to judge. A mother, accompanied by her three children, walks along a bank of a lake. She gives one roll to each of her children. The smallest child clumsily loses the roll, which falls into the water. The interviewer then asked the children how the mother ought to react. Three possible reactions were offered to the children questioned. The mother should resist to give another roll to the clumsy child (punishment), she should give another one in order to care for equal supply among the three (equality), or she should give another roll because the breadless child is small and helpless (equity). Half of the children below the age of 9 demanded the child should not receive a new roll in order to punish him or her for negligence, while every child (!) over 13 years of age rejected any kind of punishment and demanded a new roll for the small child (Piaget 1973, 304). Besides, the internal link to the phenomenon objective / subjective responsibility is apparent. Piaget's results regarding children's ideas

about punishment have been repeatedly replicated. Children obviously support a law-and-order justice, according to a related essay title of Kohlberg (Adelson & Bell 1970, 495–504; Medinnus 1957; Mogdil & Mogdil 1976; Selman 1980; Tapp & Kohlberg 1971; Oesterdiekhoff 2011, 162–175, 2013a, 377–379, 2009a, 368–409).

Children manifest lower degrees of empathy, sympathy, perspective-taking, and morals than modern adults do. Further, they tend more to egocentrism, to higher rates of verbal and physical aggression, and to spontaneous and emotional forms of behavior (Selman 1980; Kohlberg & Gilligan 1971; Werner 1948; Oesterdiekhoff 2009a, 293–333, 2011, 162–175; Bühler 1930; Hall 2010). Whether children would apply the archaic punishment law when not raised in modern families, as Golding's "The Lord of the Flies" may suggest, be unanswered here. However, children fighting as soldiers in Africa are said to be more brutal and thoughtless than adult soldiers. In any case it is apparent that adults staying on childlike psychological stages are more stabile and less nervous or insecure than small children are. Henceforth, it is clear that the psychological stages premodern humans occupy are the single cause to the brutal punishment laws to find across the whole premodern world from the earliest times up to its end. The more primitive mentality with its characteristics above-mentioned is the single cause to the horrifying cruelty of the ancient punishment law.

Tribal societies such as the Australian Aborigines, the Papua, the Native Americans, the Black Africans, the ancient Germans and Greeks, etc. used to punish by topmost brutal methods not only murder and robbery but also theft, adultery, forgery, insult, betrayal, etc.. The same punishment procedures prevailed in the great premodern civilizations such as the Roman, Chinese, Ottoman, Russian, Persian, or Indian Empire or in medieval Europe, too. There was no premodern society, which did not regularly use body humiliation, torture, and capital punishment as typical form of punishment as part of the official judicial culture. Even at first glance it is apparent that only developmental psychology can explain this premodern culture of cruelty, culture of brutality and sadism, culture of unbalanced and extreme responses to crime.

For example, in cases of theft of food crops Papua used to kill and eat the thieves. In cases of forbidden sexual contacts, adultery, or escape from the married husband, the Black Australians throw the delinquent in fire or speared him or her to death (Keysser 1911, 21, 95; Strehlow 1913, vol. 2, 10, vol. 1, 58). According to their customary and written laws, the Europeans by the 17th century and the Chinese still later applied drowning, stoning, burning, burying alive, roasting alive, inserting fluid metal into the throat, destroying the eyes, cutting nose or lips, decapitation, etc. Chinese, Indians, and Romans killed children who insulted their parents. Very often even smaller crimes such as theft, lying, or avoiding paying taxes, were punished by cutting arms or hands or other forms of body humiliation, or even by capital punishment (Wrede 2004, 303–414; Schild 2004, 197–208; Oesterdiekhoff 2013a, 380–390, 2011, 162–175, 2009c; Seagle 1946; His 1964; Post 1885, 1895, 1891).

First of all, the punishment systems manifest astonishing commonalities across the whole premodern world from the stone ages, the Australian Aborigines and Papua represent, to the recent and famous agrarian civilizations. This universality especially refers to the spirit of law, that is, to its obvious brutality and sadism. It further refers to the choice of the single practices, too, but to a smaller degree, of course. Secondly, the premodern punishment law reveals a complete disproportion between extent of deed and severity of punishment, like among small children, as mentioned above.

While this primitive punishment law existed in China, Ottoman Empire, Russia, and Africa up to 1900 or later, it vanished in Europe between 1700 and 1850. Many or even most of the cruelties such as burning, drowning, cutting limbs, stoning, burying alive, etc. disappeared shortly after 1700, being nearly completely vanished around 1750/1800 in Europe (Porter 2000; Pinker 2010; Wrede 2004, 414–419, Oesterdiekhoff 2013a, 386–390, 2009c; Hallpike 2004). The era of Enlightenment forbade the punishment of the body, only still allowing the death sentence, but performed without audience and without preceding humiliation and torture. Thus, the annihilation of the sadistic punishment law and the rise of the more humane forms of punishment started in Europe rapidly after 1700, reaching the other parts of the world during the 20th century following colonialism, modernization, and globalization. Only some rests of the barbarian law still exist in some today's backwards regions.

Altogether, the lower psychological stages explain main traits of the premodern punishment law, while the emergence of the adolescent stage of formal operations explain both the annihilation of the cruel practices and the rise of the humane punishment law.

7. The Good, Old Law or the Archaic Customary Law

Already Jean Piaget (1973) discovered the apparent commonalities between children and premodern nations regarding the understanding of rules and law. Radding (1978, 1985, 22–26) hinted at the parallels between the medieval understanding of law and that of children, basing on Piaget's study. From 1987 onwards, I described that the understanding of law and legislation across all premodern nations corresponds to children's mind, while the rise of modern and democratic legislation originates in the evolution of the adolescent stage of formal operations.

Piaget (1973, 7–110) discovered three stages of rule understanding unfolding in the ontogenetic development. The first stage only entails physical exercises with toys, without rules and cooperation. The second stage, lasting by the tenth year of life, consists of an understanding of rules as being eternal, holy, and unchangeable, made by god, parents, or government, and not exposed to democratic choices of children or whomever. The children take the rules given by older children or parents as holy laws, as taboos. They do not differ between natural laws and juridical laws, physical regularities and moral codes as premodern nations don't, too. As premodern nations, children understand both kinds of laws different from corresponding modern understandings. Moral laws, god or the elderly had enacted, rule both society and nature. The physical regularity of behavior of physical objects originates in their obedience to the moral laws

(see the link to the ordeal practices and to animism), not in the laws of mechanical causality, unknown in premodern nations till Europe's 17th century, and initially unknown among modern children, too, due to the same cognitive immaturity both groups share. Correspondingly, cosmos, god, ancestors, or elderly do not change the laws enforced in the beginning of time but care for their eternal status. Therefore, the laws are holy. People have to obey to them but have no right to criticise, modify, or choose them. In fact, children and premodern nations share the same understandings both of physical laws and legal laws (Piaget 1959, 1969; Piaget & Garcia 1989).

Although children understand rules as holy they are bad in performing them and in practising them. They tend to modify them according to their changing wishes and the young players often may change them in any kind of games. However, they do not recognize that they create new rules and that they do not always obey to the rules. In fact, they understand their modifications as resurrections of the true laws. "The child intentionally subdues to the prescribed rules. However, the rules remain external to the consciousness of the child. Therefore, they don't influence and modify the behavior of the child. *The child takes the rules as being holy without applying them in practice.*" (Piaget 1973, 63, transl. by G. O.)

Modern children beyond the tenth year of life develop then a new understanding of laws, in consequence of the beginning rise of formal operations. They develop the consciousness to have the right to discuss and to choose new rules. Rules are right not because they are old and enacted by authorities but because democratic choices and co-operations create and justify them. These children of the third stage of rule understanding develop the idea of the democratic legitimacy of rules, tend to systematize them, and are better in their usage and obedience (Piaget 1973, 66–80). Altogether, younger children combine a scanty practice with a holy ideology, while older children link a secular and democratic ideology to an improved practice.

The Piaget following developmental research has repeatedly replicated his early findings. Thus, the trend described does not depend upon certain research approaches or certain national customs, but solely originates in general laws of psychological respectively ontogenetic developments (Tapp & Kohlberg 1971; Lickona 1976, 221ff; Damon 1983). Moreover, the cross-cultural research found out that both children and adults in premodern milieus remain bound to the second stage of rule understanding and have the same ideas as modern children below 10. "Nowhere among the Indian groups in this study do we see the steady growth from moral heteronomy to moral autonomy that we expect in children of a modern society." (Havighurst & Neugarten 1955, 142) This empirical result basing upon developmental psychology is widely confirmed by historians who did not know and did not rely on developmental approaches.

Karl Popper, in his "Open Society" (1977, vol. 1, 39, 78, 81–107), is one of those authors, who evidenced these understandings of nature, laws, and morals among premodern nations, including their related avoidance of democracy and democratic legislation. Philosophers such as Plato demanded a divine state, ruled by god and his representatives. They govern the people according to the holy laws, and the people have neither the power nor the right to live according to own ideas and wishes. Fritz Kern (1952, 4–40) described the medieval customary law by nearly the same words as Piaget had done with reference to children, although he did not rely on any developmental concepts. The holy law is part of nature, cosmos, and god, something people have to obey but not to make or change. The law is "good" because god made it; it is "old" because it exists since god made the world (Kern 1952, 4, 25; Brunner 1984, 138). "Medieval humans took their belief of the law as unchangeable and eternal (ęwa). They saw all kinds of 'positive' law as part of a permanent order. Thus, they couldn't recognize any kind of opposite between law and justice." (Brunner 1984, 140, transl. by G. O.) Actual legislation was seen as *finding* of the law but not as *creation* of law. Abolishment of a certain law in favor of a new law was interpreted as resurrection of the good, old law. Further, Kern describes a tremendous gap between the holy ideology on the one side and a scanty reality on the other side. Power, violence, and ignorance negatively influenced the preservation of law and justice (Kern 1952, 40; Brunner 1984, 32ff, 136ff). Only the modern constitutional state combines the democratic theory with an improved practice.

Historians and ethnologists of law (Gluckman 1955, 234–254; see overview in Oesterdiekhoff 2009a, 336–344, 2002b, 1997, 88–93) found similar words regarding the customary laws of archaic societies around the world. Everywhere in archaic customary laws do we find the idea of the unchangeable and holy character of law, the non-differentiation between physical and legal law, and the corresponding lack of the constitutional state or any secure system of liberty rights. Today, the ideas of the fundamentalist Moslems regarding law and holy state reflect the survival of these archaic customary laws. According to their ideas, god gave the law, the people or nation is not allowed to set up legislation and democracy, but has to obey to those who govern on behalf of god and his holy laws. The fundamentalist nations (such as Khomeini's Iran) have not only the holy ideology but also the corresponding political praxis. They do neither care for human rights nor for any standards of personal security. Oesterdiekhoff (2013a, 391–493) described the correspondence between their ideas and praxis on the one side and Piaget's second stage of rule understanding on the other side.

The evolution of modern legislation and democracy, prepared by the writings of Montesquieu, Locke, and Rousseau, clearly corresponds to the third stage of rule understanding, that is, to the emergence of the adolescent stage of formal operations in Europe's intellectual elite during the era of Enlightenment. Scholars such as Piaget (1950, vol. 3), Habermas (1989), Hallpike (1979), and others were right who described that the stage of formal operations initially emerged in this period of time and stepwise conquered consciousness and psyche of people as to become a part of the usual human development in modern societies.

8. Conclusions

Main traits of the archaic law across the premodern world correspond to lower stages of the psychological development typical for children. The idea of the nature of law, the immanent

justice, the ideas about punishment, the objective responsibility, and trials against animals strongly originate in those lower stages, which are common among all children of the world. It is apparent that premodern humans did not develop those higher stages that are common among adult humans in modern societies. The evolution from the "good, old" law to the modern democratic law, from the sadistic to the humane punishment law, from objective to subjective responsibility, from ordeals to rational procedures of trial, and the abolishment of trials against animals, and moreover, the evolution from the archaic to the modern spirits of law are manifestations of the psychological maturation of the humankind especially in the past 300 years. Of course, there are many forerunners and latecomers, and moreover, many transitional and in-between structures, but the overall trend is clear and beyond any doubt.

Developmental psychology is obviously necessary to understand human's history and culture. Scholars such as K. Lamprecht, H. Schneider, E. Brunner-Traut, J. Habermas, C. Hallpike, and many others have already maintained and described this (see overview in Oesterdiekhoff 2013a, 1–48, 2011, 25–39, 2012b, 2013b). I have shown in 11 books and many articles so far that the history of population, economics, society, culture, politics, sciences, philosophy, religion, morals, customs, etc. is only recognizable against the background developmental psychology provides. The developmental approach delivers new foundations to understand human's history on the one side and to base humanities and social sciences on the other side. It provides the same breakthrough regarding humanities and social sciences as Darwin's evolutionary theory did with reference to biology.

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Case Studies: German Law and German Society between Third Reich and Post-war Order*

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Abstract

The study explores the sediment of legal conflict management: banal, normal cases from civil and criminal law that were conducted in Germany in late 1944 and early 1945. From a legal point of view, they are uninteresting; but historiographically speaking, they are a remarkable oddity. Downfall, break, zero hour, new beginning? None of these are portrayed in the records. Even total state, total war, and total defeat leave room for a splintering in personal experiences, which can perhaps best be described, according to Reinhart Koselleck, as the 'contemporaneity of the non-contemporaneous'. But if litigation is a way of dealing with societal conflicts, then the cases processed must somehow reflect the state a society finds itself in. The paper discusses where and how such cases connect law and society.

Key words: *Case study; normality; banality; law and society; legal realism; formalism; Kant.*

I. Introduction

Overall, destiny had treated Rudolf Hemminger well. In 1937, he became the owner of a fine piece of real estate in a small city in the German south. His property included a respectable house, which contained a flat for Hemminger and his family, as well as four other apartments which he could let. In addition to his job at the *Reichsbahn* – the national railway – these possessions promised a secure income and, by and large, a comfortable lifestyle. So, all things considered, Herr Hemminger could enjoy a contented present and trust in an even better future.

However, in 1944 the abysmal decisions of the *Weltgeist* put Hemminger's belief in the just course of time to a serious test: some of his tenants stopped respecting his house rules. In particular, Frau Geibel and her three children left him no choice. So, in November 1944, Herr Hemminger was forced to take the ultimate measures that mankind had created for such situations: he hired a lawyer and sued his tenants. And since the list of their misdemeanours was impressively long, his chances to win this battle seemed good. Frau Geibel had neglected her flat, even the existence of bugs seemed plausible, she threw rubbish down the toilet, thereby blocking the outlet pipe. Her 'extremely naughty' children were continuously molesting the neighbours; once the puzzled housemates had to observe the children "stick their buttocks out of the toilet window and defecate so that their excrement trickled down the walls".

When would an action of eviction ever be successful, if not in this case? But even within the orderly confines of a law suit, Frau Geibel proved to be a tough opponent. She also hired professional help, rejected all the allegations, called Herr Hemminger 'belligerent' and his house 'untended'. An irreconcilable struggle. On 22nd December 1944, the parties and their representatives met before the court. Five witnesses were heard. Their testimonies, however, were not totally consistent. One stated that she had only reported rumours which had been spread by her minor daughter; one claimed to have found an apple in the toilets. The others had either not observed anything wrong nor any culprit who could be held responsible. Therefore, the court made use of an instrument that the war had granted it: it deferred the case since it could not be considered 'strategically vital'[1] – a decision hard to disagree with.

For the next four years, the case was forgotten in the basement of the court, until 2nd February 1949 when a diligent Registrar realised that the legal dispute between Herr Hemminger and Frau Geibel was far from settled. Subsequently, the court asked the parties if they wanted to resume the procedure. What a question! Of course they wanted to. Purportedly, Frau Geibel was still reluctant to clean the toilets and her children were still ill-mannered. As if this was not enough, a former German soldier was coming to visit her far too often. Herr Hemminger, who had been a prisoner of war for three years, expressed his utter weariness of the situation: "This struggle has now been going on for 10 years already," he complained to the court. And

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1 Cf. § 1 Kriegsmaßnahmenverordnung ["Decree on wartime measures"] of 12 May 1943, RGBl. I, 290 ff.

his ultimate frustration must have been even worse. Although he received a favourable verdict from the local court, he eventually lost the battle. Frau Geibel appealed and won. In August 1950, it was decided that she and her family could stay on in the apartment.[2]

II. War and Peace

Other than one might think, this case is not an isolated phenomenon from some German pastoral idyll. Even in the last months of the Third Reich, the German judiciary remained accessible for the trivia of daily life, no matter how harsh the practical limitations of its work may have been: staff at the front, buildings destroyed, records burnt. In spite of these adversities, the state invested remarkable resources to prosecute insult,[3] defamation,[4] libelling a public servant,[5] fraud,[6] property damages,[7] public nuisance,[8] driving without a licence,[9] the theft of three bottles of liqueur,[10] showing a cinema film without the required permit,[11] the unauthorised holding of an academic title,[12] public masturbation [13] – demonstrating surprisingly little leniency by a state that was about to lose a world war.

And its citizens? Herr Hemminger and Frau Geibel were far from being alone. Since the greatest enemy always lives next door, there is no reason not to sue your neighbour simply because a foreign army is about to occupy your home. Therefore, in spring 1945, German courts dealt with the intervals in which communal cleaning had to be carried out,[14] the necessity of curtains with rolling hooks,[15] infestation by dry rot,[16] the malicious destruction of a hedge [17]. These manifestations of human civilisation continued to the bitter end – a sinister realisation of the Kantian idea that, even on the brink of self-dissolution, the bourgeois society had to execute its murderers to avenge their bloodshed.[18]

However, after the transfer from philosophy to reality, Kant's categorical jurisprudence assumed a somewhat banal shape. A local chronicle informs us that hedgehopper attacks were chasing the population into the nearest shelters,[19] while at the very same time, the records of the local court impassively witness a brave judge being dragged into his office by a dispute over a rent increase of 5 Reichsmark.[20] Since he was the only one to show up, the case had to be deferred.

Nevertheless, even these dismal materialisations of Prussian conscientiousness could not deny the fact that all the propaganda about wonder weapons and ultimate victory was eventually proved to be false. It appears that the Allied forces were not at all impressed by the doctrine of virtue found in the German judiciary. As soon as the Allied troops set foot on German soil, they closed the courts and subordinated their reconstruction to their strict scrutiny. As was set out in the Potsdam Agreement on 1st August 1945: "The judicial system will be reorganised in accordance with the principles of democracy, of justice under law, and of equal rights for all citizens without distinction of race, nationality or religion."

This renewal was mainly undertaken in the summer of 1945. General observations can hardly be made. When the first German cities were occupied in September 1944, the authorities made desperate attempts to keep the courts functioning by relocating them to safer places. The German court of Bialystok moved to Königsberg, Danzig to Stolpe, Kattowitz to Dresden, Breslau to Görlitz, and so on and so forth.[21] The mobility of the German judiciary had bizarre consequences: an Aachen special court was still dispensing Nazi justice in April 1945, although by that time the city of Aachen – under US-American control for more than half a year – had already reached the post-war order. While the Nazi Aachen court operated in remand centres hundreds of kilometres further east, the democratic Aachen court held its first hearings in the deserted ruins of Aachen itself.[22]

Other institutions, in contrast, were closed for good. Some ceased their work for more than a year, some for only a few months, while a few courts were considered part of an emergency jurisdiction and never stopped their work at all.[23] And in

[2] AG [local court] Esslingen C 115/1944; this and the following cases can be found in Staatsarchiv Ludwigsburg E 341 IV (Ellwangen), F 264 II and FL 300/10 (Esslingen), F 269 III and FL 300/27 I (Schwäbisch Gmünd); F 272 (Heidenheim); F 276 III (Kirchheim/Teck), F 284 II (Bad Mergentheim).
[3] AG Heidenheim Ds 64-65/1944; AG Heidenheim 26/45. AG Kirchheim/Teck Es 3/1944: AG Kirchheim/Teck Ds 17/1944; AG Kirchheim/Teck Ds 19/1944; AG Kirchheim/Teck Ds 21/1944.
[4] AG Heidenheim Ds 64/1944.
[5] AG Bad Mergentheim Ds 17/1945.
[6] AG Bad Mergentheim Ds 15/1945.
[7] AG Bad Mergentheim Ds 9-11/1945.
[8] AG Kirchheim/Teck Es 2/1944; AG Kirchheim/Teck Es 2/1945.
[9] AG Kirchheim/Teck Ds 11/1945 and Ds 26/1944.
[10] AG Kirchheim/Teck Ds 12/1945.
[11] AG Bad Mergentheim Cs 16/1945.
[12] AG Kirchheim/Teck Ds 16/1945.
[13] AG Bad Mergentheim Ds 12/1945.
[14] AG Kirchheim unter Teck C 4-6/1945.
[15] AG Esslingen C 79/1944.
[16] LG Ellwangen O 3/1945.
[17] AG Schwäbisch Gmünd C 11/1945.
[18] KANT, Immanuel, Die Metaphysik der Sitten, Königsberg, 1797, p. 333.
[19] FRASCH, Werner, Kirchheim unter Teck. Kirchheim unter Teck, n.d., p. 424 ff.
[20] AG Kirchheim/Teck C 8/1945.
[21] Attempts to keep an overview on this process can be found in BA [Federal archives] Berlin, R 3001 Nr. 24698.
[22] This information is taken from the adjudication of the Sondergericht [Special Court] Aachen, Hauptstaatsarchiv Düsseldorf, Gerichte Rep. 113, and from a Memorandum the Aachen court produced on 1 October 1962, reference number 321.
[23] e.g. the local court in Heidenheim.

some areas, the Military government even created new institutions ex nihilo. In Berlin, the courts reopened their doors in May 1945, two and a half weeks after the surrender. Since the city had by and large been destroyed, the Soviet authorities established courts in basically every district, which eventually led to a legal density that was unprecedented in Berlin history.[24]

III. Continuities

What happened to all the cases that were bravely negotiated in the midst of the national socialist defence orgy? Since these juristic trifles did not care about the war, they did not care about the surrender either. The cases had been brought to the legal system, and within the concept of lis pendens, they found a safe haven in which to hibernate while the storms of history turned the rest of the world upside down. Societal conceptions of normality were stored in the Law and preserved for the future, where they could be reactivated under any circumstances.

Thus, once daily post-war life had been re-established, the everyday jurisdiction of the Third Reich began creeping back into the light. The interrupted lawsuits were resumed: the rent increase of 5 Reichsmark was further demanded, the rolling hooks were still disputed, the combat against the dry rot continued.[25] The unauthorised projectionist was requested to pay for his wartime misdemeanour in August 1945. One month later, the self-proclaimed academic was imprisoned;[26] the three bottles of liqueur led to 14 days of detention in October, and the public masturbation was punished in November.[27]

Downfall, break, zero hour, new beginning? None of these are portrayed in the records. The grounds of the legal system are covered by a sediment of social conflict management, which is fundamentally unaffected by the rest of the world. The legal threads from the collapsed dictatorship were tied together before the forcefully democratised judiciary, with no regard for the fractures in world history. Stubborn legal formality meets chaos and destruction. The cases are at odds with the regular timeline, they show a world opposite to the great arcs of historiography.

IV. Consequences

And would reading and reporting such cases qualify as case studies? From a juristic point of view, these cases are completely uninteresting. Of course, the records do bear the signs of the times: the courts residing in Adolf-Hitler-Straßen that disappear after 8 May; the swastikas proudly displayed by advocates on their letter-heads, which are blackened out after the surrender, and the paper used often being of the lowest quality. And very rarely, there is even a normative translation of the temporary hardships in which the cases occur: some generosity, for example, is developed when it comes to the obligatory representation by a lawyer. Other than that, these cases could be conducted today just as they were conducted in 1945.

However, if litigation is a method of dealing with societal conflicts, then the cases processed must somehow reflect the state in which a society finds itself. Obviously, none of the aforementioned problems were the prevalent concerns of German society in early 1945. So it would be misleading to take normal cases as evidence of a purportedly normal life. Continuities in legal problems or legal procedures do not necessarily prove continuities in Nazi society, just as breaks do not prove the contrary. The link between law and society is not situated on a level of substance. It is rather the total absence of substance, the denial of anything that is going on outside the courtroom that characterises the way a modern society tackles its legal problems. 'War' does not have any place in administrative records.

A purely formal rationality allows the ruthless operation of modes of normality, even under the most abnormal circumstances. Life and death, destruction and reconstruction, war and peace, victory and loss, undergo a bureaucratic treatment which lasts until even the fundamental concepts of mankind fit into the standard forms of legal administration. "Our typist, Miss Dahlmann has lost her life! Please send us all the documents you have immediately, in particular a copy of our complaint! […] Heil Hitler!" is how a hasty advocate describes the consequences of a recent Allied bombing in January 1945. In small administrative steps, the chasms of the world are being surveyed, measured and finally marginalised – a structural setting that also guarantees the eloquence of the law in those cases where silence would seem more reasonable.

But that is just one side of the coin. The formal restrictions of the legal system are fully compensated for by a substantive abundance that determines the human actors. Court proceedings are a complex interplay of human communication. Therefore, in, behind and sometimes off the record, the individual actors and their driving mentality become visible. In that respect, all the human actors demonstrate a complete incapacity to synchronise their own world with the master narrative. Even total state, total war, and total defeat leave room for a splintering in personal experiences, which can perhaps best be described, according to Reinhart Koselleck, as 'the contemporaneity of the non-contemporaneous'.[28]

Associated with a philosophical tradition, the name of Immanuel Kant would again represent the pertinent mindset. *Fiat justitia, pereat mundus*, "let justice reign though the world perish," or, as Kant puts it in his *Perpetual Peace*, "let justice reign, should all the rascals of the universe perish", "an energetic principle of right", which "courageously cuts asunder the whole tissue of artifice or of force".[29]

So yes, indeed, no craftiness, no violence, no *Gewalt*, only the ideal world of the German *Biedermeier* that had a long time ago been cleansed of anyone that appeared a rascal in Nazi ideology. Jews, gypsies, communists, socialists, democrats, republicans, oppositionists, cosmopolitans, intellectuals. No artifice,

[24] SCHOLZ, Friedrich, Berlin und seine Justiz. Geschichte des Kammergerichtsbezirks 1945–1980, 1982 p. 9 f.
[25] Cf. notes 15, 16, 19.
[26] This harsh punishment results from the fact the he had also falsely promised two medical treatments, for which he had also been paid.
[27] Cf. notes 11–14.
[28] KOSELLECK, Reinhart, Vergangene Zukunft. Zur Semantik geschichtlicher Zeiten. Frankfurt am Main, 1989.
[29] KANT, Emanuel (sic), Project for a Perpetual Peace. A Philosophical Essay, London, 1796, p. 61.

no force, instead two equal *Volksgenossen* engaging in an equitable dispute about right and wrong: the rest of the world may be drowning in blood, individual empathy does not go further than the hedge next door.

V. Epilogue

So what are we studying when we study such cases? It is trite to identify the rigour in Kant's conception of the law and ask for a utilitarian safety net. But this is not about justice at any cost. It is about law under any circumstances. The law cushions the caesura of the unconditional surrender and transfers the normality of the old order into both succeeding German states. The world *is* actually perishing, and yet the longing for judicial services is almost untarnished. Instead of lambasting the insulting neighbour, he is being entrusted to the patient serenity of a court proceeding – an anxious respect of the rule of law that could be called, depending on the point of view, the peak of civilisation, or its ultimate perversion.

Reality is much more rigorous than any philosophical theorem. And these cases offer a small window through which to study that troubling part of reality. We look into the wells of the past and see – ourselves.

Prosecuting Indirect Perpetrators of Crimes against Humanity in Western Germany*

*Andrew Szanajda***

Abstract

This work is an examination of the practices and experiences of administering correctional and transitional justice in postwar Germany after 1945, examining the adjudication of informers as indirect perpetrators of crimes against humanity. Allied occupation law allowed for the prosecution of informers retroactively in the German courts through legislation specifically enacted for the purpose of prosecuting crimes against humanity. The implementation of the law and the prosecution of informers in the American, French, British occupation zones under the auspices of the military government administrations, and then later in the Federal Republic of Germany is examined. This work also addresses the theoretical and practical problems associated with the implementation of the law in this attempt to call individuals to account for their crimes against humanity through the use of retroactive legislation.

Key words: *Transitional justice; crimes against humanity; Allied occupation law; occupation zones; retroactive legislation.*

Bringing the perpetrators of National Socialist crimes to justice was one of the aspects of dealing with the past in Germany after the end of the Second World War. The Allied occupation powers enabled the retroactive prosecution of these crimes through the enactment of Allied Control Council Law No. 10 on "Punishment of Persons Guilty of War Crimes," which could be transferred to a German court, if so authorized by the respective occupation power.[1] German courts in the British, French, and Soviet zones were empowered with adjudicating denunciation cases according to the terms of their respective military government ordinances, and courts in Berlin were empowered to hear such cases under the terms of Control Council Law No. 10 and German law. Although such cases could not be prosecuted in the US occupation zone, they could be tried upon special application in exceptional cases if they also constituted a violation of German law.[2] Article II section c of this law provided the legal basis for the prosecution of all types of crimes against humanity perpetrated during the National Socialist regime. This law thereby allowed for the prosecution of informers who had as having committed a crime against humanity, having established the legal basis for the prosecution of all types of such crimes. This included actions committed by third parties. Regardless of whether they had intended to support the National Socialist regime or serve personal interests, their conscious intentions to set the machinery of political persecution into motion while having been conscious of the potential gravity of the consequences of their actions made them subject to prosecution for crimes against humanity at a time when the rule of law was suspended. Being aware of the regime's methods of suppressing dissent meant these informers could be accused of acting on political grounds, and could therefore be subject to prosecution for having caused the commission of a criminal act, which in itself constituted a form of political persecution since they had been conscious of the inhumane consequences of their actions. The purpose of this work is to determine how postwar Allied and then German legislation opened the way for the prosecution of denunciation cases in western Germany as the instrument by which one type of crime against humanity was redressed in the interest of dealing with crimes committed during the National Socialist regime.

The adjudication of these types of cases initially followed the implementation of separate legislation promulgated by the Allied occupation powers. The major obstacle was that these cases could only be adjudicated retroactively, which constituted a contravention of the principle of *nulla poene sine lege*.[3] There were also serious reservations among postwar German jurists about administering the law retroactively.[4] Some of them argued that the prosecution of cases of crimes against human-

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1 Art. 3 (1d), „Law No.10: Punishment of Persons guilty of War Crimes, Crimes against Peace and against Humanity," *Official Gazette of the Control Council for Germany* No.3 (31 January 1946), pp. 52–53.

2 Richard Lange, „Zum Denunziantenproblem," *Süddeutsche Juristenzeitung* 3 (1948) 3: 302.

3 Bundesarchiv. Koblenz. Legal/CLO/108. Central Legal Office. Liason Officer, Legal Division. Control Commission for Germany (BE). 23rd October, 1946. Subject: Crimes against Humanity. Appendix A. Nulla Poene Sine Lege.

4 "Zum Kontrollgesetz Nr. 10," *Neue Justiz* 1947 (1): 138.

ity would inevitably lead to crises of conscience among them, whose training and oath of office bound them to the principles of the rule of law. This could potentially be undermined by them being expected to comply with military government legislation[5] that they would consider to be contravening these principles. Another major problem was that the experience of the National Socialist regime had greatly shaken the authority of the German administration of justice, and as a result, the judiciary did not want to be mistrusted once again by being expected to adjudicate cases of a political nature.[6]

There was some degree of risk for the occupation powers in empowering German jurists with the authority to apply the law retroactively, and the successful prosecution of denunciation cases as crimes against humanity would ultimately depend on several factors. It required the willingness of the German state prosecutors to initiate the investigation and prosecution of these cases, and the willingness of judges to adjudicate them, and then pass the appropriate sentences. It was equally dependent on the support and willingness of local governments and the general public to prosecute these crimes, in terms of people filing charges with the authorities, the availability of witnesses, and evidence to support their charges.

The French military government decided to authorize the German courts in the French zone to prosecute crimes perpetrated during the National Socialist regime[7] soon after Control Council Law No.10 was enacted, and these courts were then formally empowered with administering its provisions on 2 May 1946.[8] This left the application of this law open to interpretation, with violations of German law serving as a basis for determining how such cases could be prosecuted, until further instructions from either the military government or actual practice could provide the courts with clearer interpretations. Although there proved to be a widespread reluctance to prosecute crimes of a political nature, the German jurists in the French occupation zone soon thereafter formulated arguments for putting Control Council Law No. 10 into practice in prosecuting cases of denunciations as cases of crimes against humanity.

The military government gave its approval for public prosecutors to bring such cases to trial using German criminal law as a basis for the charges.[9] Informers would be subject to prosecution in accordance with the consequences of their actions as instigators or accomplices in such crimes, and would be called to account for their actions as they could be defined under the provisions of German criminal law. Whether the proceedings against those who were denounced resulted from false or truthful accusations would be considered irrelevant in view of the consequences that were incurred, such as death, false imprisonment, dismissal from office or bodily injury. These consequences would be taken into consideration and the judgments to be passed on them accordingly. The wide range of sentencing cited in Article II section 3 of this law also allowed the possibility for the appropriate sentencing to be imposed in each individual case.[10] More general provisions of Control Council Law No. 10 could also form the basis for the prosecution of such cases, as in any types of crimes against humanity that emanated from political, racial or religious grounds.[11]

The most important case concerning denunciation as a crime against humanity was the trial of Helene Schwärzel, who had denounced Karl Gördeler, the former mayor of Leipzig and a leading member of the German resistance to National Socialism who would have been appointed the President of Germany had the 20 July 1944 conspiracy succeeded in killing Hitler and instituting a regime change. She had received a one million Reichsmark reward for having identified him on 12 August 1944 while he was in her workplace at the Elbing air base and then notifying the local military authority, who in turn had him immediately placed under arrest. He was sentenced to death for high treason by the People's Court and was subsequently executed on 2 February 1945.[12] This case became one of the highlights of the postwar German administration of justice, not only because of the significance of the victim, but it also was a landmark precedent for other cases of denunciations that had inhumane consequences for those who had been denounced by contributing to lifting doubts about Control Council Law No. 10 violating the *ex post facto* principle in practice.[13]

On 14 November 1946, the Berlin regional court sentenced to fifteen years' imprisonment for committing a crime against humanity due to her indirect involvement, which was considered to have constituted an act of political persecution that led to his execution. This case opened the way for the prosecution of other such denunciation cases that were hereafter considered a specific type of case that could be adjudicated retroactively as

[5] Gisela Diewald-Kerkman, *Politische Denunziation im NS-Regime oder Kleine Mach der "Volkogenosse,"* (Bonn: Dietz Nachfolger, 1995): 155–156.

[6] Diewald-Kerkmann, *Politische Denunziation im NS-Regime*, 156–157.

[7] Archives de L'Occupation Française en Allemagne et en Autriche. Colmar. AJ c.3678, p. 8. Ergebnis der mündliche Aussprache am 25. Februar 1946 mit Herrn Oberleutnant S. bei der französischen Abteilung der Justiz. 2. Zuständigkeit der deutschen Gerichte für die Aburteilungen von Kriegsverbrechen.

[8] Zuständigkeit für Aburteilung der Kriegsverbrechen im Sinne des Kontrollratsgesetzes Nr. 10. Anweisung der Militärregierung Baden vom 2. Mai 1946, *Amtsblatt der Landesverwaltung Baden. Französisches Besatzungsgebiet* (1946): p. 49.

[9] Archives de L'Occupation. Colmar. AJ 3674/17. Le Directeur Régional du Contrôle et de la Justice ŕ Monsieur le Procureur Générale prčs la Cour d'appel ŕ Neustadt. 20 Mai 1946. Répression des faits de denunciation politique.

[10] Archives de L'Occupation. Colmar. AJ 3674/17. Oberregierungspräsidium Hessen-Pfalz. Abteilung Justiz. 18. Juni 1946. An den Herrn Directeur Régional de la Justice. Neustadt a.d.Hdt. Betrifft: Bestrafung politischer Denunzianten aus der nat. soz. Zeit.

[11] Archives de L'Occupation. Colmar. AJ 3674/17. Gouvernement Militaire de la Zone Française d'Occupation. Le Directeur Régional du Contrôle et de la Justice ŕ Monsieur le Generalstaatsanwalt prčs l'Oberlandesgericht de Neustadt. 26 Juin 1946. Object: Repression des faits de dénoncations politiques.

[12] Rüter, Adelheid L. and C.F. Rüter, eds. *Justiz und NS-Verbrechen: Sammlung deutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen 1945–1966*, Vol. 1 (Amsterdam: University Press Amsterdam, 1968): 710–711.

[13] 17/201-3/2 Legal Division, RG 260 OMGUS, Institut für Zeitgeschichte, Munich. Subject: Crimes against Humanity – Ex Post Facto Legislation. 19 May 1947.

crimes against humanity, when the intentions of the defendants could demonstrate that they had prior knowledge of the potentially grave consequences of their actions, as defined in Control Council Law No. 10, and acted on of what were construed as political motives. Subsequent judgments in the German criminal courts clarified how these cases could be adjudicated.

Cases of denunciations were hereafter considered a specific type of case that could be adjudicated retroactively as crimes against humanity. The enactment of Control Council Law No.10 was based on moral considerations in view of the crimes that had been committed in the National Socialist regime, which overrode the judicial principle in the rule of law that justice must not be administered retroactively. Those individuals who had taken action in denouncing others to the authorities who would in turn take cruel actions against them were therefore subject to prosecution as indirect perpetrators of crimes against humanity. Subsequent experiences and judgments in the German criminal courts clarified how these cases could be adjudicated

There had been an element of risk in charging the German judicial organization with the task of adjudicating political cases, but the French military government had considered it to be sufficiently stable after the implementation of its denazification policies. Supervision of the German administration of justice indicated that the German judges executed their duties conscientiously and effectively[14] and that they were administering German law efficiently without being disposed toward National Socialist ideology,[15] and without any considerations for political, racial or religious grounds.[16] However, there remained the tendency to administer the law according to a strict application of legal positivism, which was reinforced by their anxiety over making unpopular judgments in cases of a political nature. This resulted in unquestionably lenient sentences that were not commensurate with the offences that were tried.[17] Nevertheless, the military government concluded that the functioning of the German administration of justice was generally satisfactory.[18] On the other hand, they were concerned that judicial independence appeared to have been undermined in political cases, in which jurists seemed to give priority to reconciling their judgments with public opinion. This had a negative influence on the discharge of their duties.[19]

The number of trials and judgments in cases concerning crimes against humanity later declined from late 1947 to 1949, when the public prosecutors and the courts demonstrated a marked reluctance in applying Control Council Law No. 10, and this trend was accompanied by judges imposing lenient sentences in cases they heard.[20] Public prosecutors stated that they would only take responsibility for prosecuting cases that resulted in ill-treatment or grave or inhumane consequences for the victims, such as incarceration in a concentration camp or death. The number of such cases coming before the courts decreased, and the sentences that were passed became more lenient, with prison sentences being replaced with monetary penalties, and the German courts continuing to demonstrate hesitation in adjudicating these types of crimes.[21]

The German courts in the British occupation zone were also granted jurisdiction over adjudicating crimes against humanity on 30 August 1946.[22] Since political denunciation was not specifically mentioned in Control Council Law No. 10, this type of case was to be included through a broader interpretation of the concept of political persecution.[23] A British military government decree on 10 September 1946 empowered the German courts with applying this law, and imposing the penalties cited in this law when the charges were not applicable under German law. They could also apply this law to prosecute offences against German law, provided that the appropriate charges could be imposed. However, the extent of sentencing was not to be limited by what was prescribed under German law for particular offences if it was considered inadequate to fulfill the requirements of justice.[24] This would particularly apply to the prosecution of criminal actions that were committed on political grounds.[25] German courts could also draw further

[14] Archives de L'Occupation. Colmar. 3679/13/1. Wurtemberg. Contrôle Justice 3e Partie. Justice Allemande. Période de Rapport du 20 Mai au 20 Juin 1946. Appreciation sur l'État d'Esprit des Juges Allemands.

[15] Archives de L'Occupation. Colmar. 3679/13/3. Gouvernement Militaire de la Zône Française d'Occupation. Délégation supérieure pour le Gouvernement Militaire de Rhénomie-Hesse-Nassau. Direction Régionale de la Justice. Rapport Trimestriel. Sur la période du 20 Mai au 20 Juillet 1946. E. Appréciation sur l'état des Juges Allemands et leur manière d'appliquer la Loi Allemande.

[16] Archives de L'Occupation. Colmar. 3679/13/4. Wurtemberg. Controle Justice. 3e Partie. Justice Allemande. Période du Rapport du 20 Juin au 20 Juillet 1946. E. Appréciation sur l'État des Juges Allemands et leur Manière d'Appliquer la Loi Allemande.

[17] Adolf Arndt, "Das Strafmaß," *Süddeutsche Juristenzeitung* (1946) 1: 30.

[18] Archives de L'Occupation. Colmar. AJ 806 p.616. Wurtemberg. Contrôle Justice. 3e Partie. Justice Allemande. Période de Rapport du 10 Novembre au 9 Décembre 1946. Observations générales sur le fonctionnement de la Justice Allemande.

[19] Archives de L'Occupation. Colmar. AJ 806 p.616. Wurtemberg. Contrôle Justice. 3e Partie. Justice Allemande. Période de Rapport du 10 Novembre au 9 Décembre 1946. Appréciation sur l'État d'Esprit des Juges et leur Manière d'Appliquer la Loi.

[20] Archives de L'Occupation. Colmar. AJ 3679 p.20 d.2. Gouvernement Militaire en Allemagne. Délégation Supérieure pour le Gouvernement Militaire de Bade. Direction Régionale de la Justice. Rapport jurisdique. L'activité des tribunaux allemands du pays Bade Durant le mois de Octobre 1947. I. Repression des Crimes contre L'Humanité.

[21] Archives de L'Occupation. Colmar. AJ 806/p.617. Rapport Mensuel. Rapport du Décembre 1947. Justice/Activité Pénal 1947.

[22] Ordinance No. 47. "Crimes against Humanity (Control Council Law No. 10), *Military Government Gazette: British Zone of Control* No. 13: 306.

[23] Kerstin Freudiger, *Die juristische Aufarbeitung von NS-Verbrechen: Beiträge zur Rechtsgeschichte des 20. Jahrhunderts 33* (Tübingen: Mohr Siebeck, 2002): 317.

[24] Bundesarchiv. Koblenz. Z21/396. Legal/MOJ/52343/1. Legal Division. 10 September 1946. Subject: Control Council Law No. 10 – Crimes against Humanity; Erlass der Mil.-Reg., Legal Division – Legal/MOJ/52 343/1 – vom 10. September 1946; *Justizministerialblatt Zentraljustizamt für das Land Nordrhein-Westfalen* 1947 (1): 50.

[25] Bundesarchiv. Koblenz. Z21/784. Der Präsident des Hanseatischen Oberlandesgerichts an Controller Legal Branch. 4. Oktober 1946.

guidance in adjudicating these types of cases from Allied denazification legislation, and also follow the example of the precedent set by the conviction of Helene Schwärzel.[26]

Although some jurists in the British occupation zone officially supported the military government's legislation on crimes against humanity and recognized that it necessarily had to be applied retroactively,[27] other jurists had expressed their views to the British military government legal division about the difficulties that could be encountered with obtaining convictions in certain cases, in which the facts of the case were not offences against German law. In their view, this meant the prosecution of these cases would be in conflict with the concept of *nulla poene sine lege*. Despite these potential difficulties, the legal division remained undeterred from granting the German courts jurisdiction over these cases.[28] These cases of crimes against humanity were thus to be adjudicated by German courts whenever possible[29] while supplementing German law with military government legislation. The British military government later specifically addressed the matter of adjudicating denunciation cases on 21 November 1946, when it decided that the ordinary German courts would adjudicate such cases when the facts of these cases could be considered as falling under the jurisdiction of Allied and British occupation law regarding the prosecution of crimes against humanity. This decree circumvented the shortcomings in the German criminal code, which only contained regulations and sanctions for false accusations in Articles 164 and 165, and specifically addressed those denunciation cases that were brought about by truthful accusations.[30]

As in the French zone, the British military government also believed that the German judicial organization in its zone could be entrusted with jurisdiction over the prosecution of National Socialist crimes after the implementation of its denazification program.[31] They also believed that extending the jurisdiction to adjudicate denunciation cases to the German courts would also serve to placate the public demand that had been expressed in the press for such cases to be prosecuted,[32] and put an end to the criticisms of the German administration of justice by both the public and the political parties for its reservations about prosecuting cases of a political nature,[33] as well as their insufficient political cleansing.[34] The military government also wanted to allay suspicions about the shortcomings of the administration of justice while it operated under its supervision, but the problem facing them was that this first required the cooperation of the German judiciary in contributing to achieving the political aims of the military occupation, which included prosecuting crimes against humanity in the German courts. However, the main problem that they would face for the duration of the occupation was the enduring reluctance among the German judiciary to apply the law retroactively.[35] Theoretical considerations about jurisprudence and concerns about Control Council Law No. 10, and doubts about its retroactive application caused delays in prosecuting crimes against humanity in the British zone for the duration of the military occupation.

The initial progress in dealing with cases of crimes against humanity was slow, and the accumulation of such cases on the court dockets remained a serious problem. The British military government legal division came to the conclusion that apart from the delays that could be attributed to difficulties in reaching some of the accused, and witnesses were being held in custody in civil internment camps, or there were witnesses who were residing in the other occupation zones, or whose whereabouts were unknown,[36] this tardiness was either a deliberate policy of delaying the hearing of these cases due to reservations among German jurists to handle cases that violated the principle of *nulla poene sine lege*,[37] or just a willful neglect of duty by German jurists in dealing with such cases.[38]

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[26] Bundesarchiv. Koblenz. Z21/1334. Legal Division. Zonal Executive Office. Control Commission for Germany (British Element). 21 November 1946. Subject: Control Council Law No. 10. Crimes against Humanity – Trial of Informers.

[27] Bundesarchiv. Koblenz. Z21/784. Der Präsident der Rechtsanwaltskammer in Hamburg an das Zentral Justizamt, Hamburg. 4. Februar 1947; Z21/784 Stellungnahme des Hanseatischen Rechtsanwaltskammer zur Frage der rückwirken Kraft des Gesetzes Nr. 10 des Kontrollrates.

[28] Erdsiek, "Das Zentral-Justizamt für die britische Zone," *Deutsche Rechtszeitschrift* 1946 (4): 121.

[29] Bundesarchiv. Koblenz. Z21/1334. Legal Division. Zonal Executive Office. Control Commission for Germany (British Element). 21 November 1946. Subject: Control Council Law No. 10. Crimes against Humanity – Trial of Informers.

[30] Bundesarchiv. Koblenz. Z21/784. Der Präsident des Hanseatischen Oberlandesgerichts. 401/1c/1/. 17. Januar 1947. Betrifft: Kontrollratsgesetz Nr. 10. Verbrechen gegen die Menschlichkeit: 1.

[31] Martin Broszat, "Siegerjustiz oder strafrechtlicher 'selbtsreinigung'? Aspekete der Vergangenheitsbewältigung der deutschen Justiz während der Besatzungszeit 1945–1949," *Vierteljahrshefte für Zeitgeschichte* 1981(4): 516.

[32] Bundesarchiv. Koblenz. Z21/784. Der Präsident des Hanseatischen Oberlandesgerichts an das Zentral-Justizamt für die britische Zone. 20. Dezember 1946. Betrifft: Kontrollratsgesetz 10.

[33] Bundesarchiv. Koblenz. Z21/784. Der Generalstaatsanwalt be idem Hanseatischen Oberlandesgericht an Legal Division, Zonal Executive Offices. 4053-1-. 8. Oktober 1946. Betr.: Kontrollratsgesetz No. 10. – Verbrechen gegen die Menschlichkeit; Bundesarchiv. Koblenz. Z21/1352. Legal/MOJ/52316. 17. November 1946. Betrifft: Hamburger Besuch vom 12.–15. November 1946; Z21/784. Der Präsident des Hanseatischen Oberlandesgerichts. 20. Dezember 1946. Betrifft: Kontrollratsgesetz 10.

[34] Bundesarchiv. Koblenz. Z21/784. Der Generalstaatsanwalt be idem Hanseatischen Oberlandesgericht. 4053-1-. 8. Oktober 1946. Betr.: Kontrollratsgesetz No. 10 – Verbrechen gegen die Menschlichkeit.

[35] Bundesarchiv. Koblenz. Z21/424. Legal/MOJ/52316. Legal Division. Zonal Executive Offices. Control Commission for Germany (British Element). 15 January 1947. Subject: Visit to Hamburg 13–14 January 1947. Control Council Law No. 10 – Crimes against Humanity. Tillson [sic] Case.

[36] Bundesarchiv. Koblenz. Z21/1354. Legal/MOJ/52343/1. Legal Division. Zonal Executive Offices. 7. Mai 1947. Betrifft: Verbrechen gegen die Menschlichkeit.

[37] Bundesarchiv. Koblenz. Z21/1355. Legal/MOJ/52316. Legal Division. Zonal Executive Office. 18. Juni 1947. Betrifft: Besuch beim Hauptquartier des Landes Nordrhein-Westfalen am 16. und 17. Juni 1947.

[38] Bundesarchiv. Koblenz. Z21/1354. Legal/MOJ/52343/1. Legal Division. 14. Mai. 1947. Betrifft: Verbrechen gegen die Menschlichkeit; Z21/784. Legal Division, Zonal Executive Offices, Control Commission for Germany (British Element). 14 May 1947. Subject: Crimes against Humanity.

In spite of the delays, the prosecution of denunciation cases as a crime against humanity got underway in late 1947. While precedents were set in the initial judgments, there remained disputes within the German judiciary about how Control Council Law No. 10 was to be applied. There also remained problems reconciling the inherently abstract concept of what constituted a crime against humanity with the actual types of cases in which it was to be applied. There were also differences of opinion concerning whether occupation law was to take precedence over German law, and debates about the compatibility of the application of occupation law, and the provisions of the German code of criminal procedure in such cases. It remained unclear whether the German courts were to apply occupation law independently of German law, or whether the facts of the case were to apply under both, and thereby allow for the provisions of German law to be applied retroactively when indictments were submitted as crimes against humanity.[39] This raised the particular problem of prosecuting denunciation cases as indirect perpetrations of crimes against humanity, since the consequences of the informers' actions could not be theoretically considered violations of German law.

Many German jurists remained reluctant to apply Control Council Law No. 10, and instead favored adjudicating these crimes against humanity under German law. There were also acute differences of opinion between some judges and public prosecutors, since the sentences imposed by the courts were far more lenient that those that the prosecutors had recommended. In some cases, this law was not cited in indictments against defendants who were subject to prosecution under both this law and German criminal law. These cases, which should have been prosecuted as crimes against humanity, instead resulted in acquittals. Although certain judges were averse to applying this law, public prosecutors dealt with such cases conscientiously.[40]

The progress in prosecuting these types of cases was considered relatively good in spite of the many legal and administrative difficulties, while the prohibition against retroactive legislation remained the main stumbling block. The general hesitation in adjudicating these cases was partly alleviated by the adjudication of cases of crimes against humanity through jury courts, and judgments passed at the Highest Court for the British Zone brought about the necessary clarity and uniformity in the administration of justice that resulted in further and more satisfactory progress.[41] The German judiciary had also slowly become reconciled with the idea of applying retroactive legislation in these cases involving crimes against humanity, and this trend continued in the British zone until the end of the military occupation.

From the beginning of the occupation, the American military government decided not to grant the German courts in their occupation zone the authority to use Control Council Law No. 10 to prosecute denunciation cases as crimes against humanity. The American military government legal division authorities argued that these types of cases could not be adjudicated by German courts since there was no German law dealing with such cases, and they were also reluctant to allow the German courts in their zone the authority to apply Control Council Law No. 10 due to the retroactive nature of this law,[42] and the expected difficulties they would face in persuading the German judiciary to uphold its provisions in practice. They were also concerned judicial resources would be overwhelmed by the volume of litigation,[43] and that the potential problem of jurists' reactions to a retroactive application of the law would have increased the problem of supervising German courts by the American military government. They also expressed to the German authorities that they would not look favorably upon any retroactive laws enacted by them to make such actions subject to prosecution.[44] As a result of this decision, the courts in the American zone would apply German law to deal with all types of cases involving crimes against humanity, as defined in the provisions of Control Council Law No. 10, except for those dealing with denunciations.[45]

The refusal of the US military government to give the German courts the jurisdiction for administering Control Council Law No. 10, along with the failure to secure convictions in several court proceedings concerning acts of political persecution in Hesse in early 1946, led to the Ministers of Justice of Baden-Württemberg, Hesse and Bavaria deciding to create their own legislation[46] to prosecute crimes against humanity committed during the National Socialist regime. They came to the conclusion that it was necessary to enact a special retroactive criminal law for the purpose of prosecuting informers, since they thought imposing sanctions against the indirect perpetration of criminal actions was not possible under existing German law. They drafted the Law for the Prosecution of National Socialist Crimes,[47] which substantially restated the provisions of Article II, sections 1(c), 4 and 5 of Control Council Law No. 10,

[39] Bundesarchiv. Koblenz. Z21/799. Der Generalstaatsanwalt bei dem Oberlandesgericht. 401a. 24. Oktober 1947.
[40] Bundesarchiv. Koblenz. Z21/1355. Legal/MOJ/52318/1. Legal Division. 16. Oktober 1947. Betrifft: Inspektionsreise der Aufsichtskommission für deutsche Gerichte vom 23. September bis 8. Oktober 1947.
[41] Bundesarchiv. Koblenz. Z21/799. 1. Schreiben Herrn Generalstaatsanwalt Dr. S. Braunschweig. 13. Nov. 1947.
[42] Broszat, "Siegerjustiz oder strafrechtlicher 'selbtsreinigung'? 496.
[43] Karl Loewenstein, „Reconstruction of the Administration of Justice in American-Occupied Germany," *Harvard Law Review*, 61 (1947–1948): pp. 436–437.
[44] Hessisches Hauptstaatsarchiv. Wiesbaden. RG 260 OMGUS, 17/210-2/6. APO 633, Subject: Denouncements," 20 January 1946.
[45] Friedrich Hoffmann, *Die Verfolgung der nationalsozialistischen Gewaltverbrechen in Hessen*, (Baden-Baden: Nomos Verlagsgesellschaft, 2001): 143.
[46] Loewenstein, "Reconstruction of the Administration of Justice," 437.
[47] "Gesetz zur Ahndung nationalsozialistischer Straftaten vom 29. Mai 1946," *Gesetz- und Verordnungsblatt für Groß-Hessen* 1946: 136; Hans Neidhard, "Die Rechtspflege in der Gesetzgebung der amerikanischen Zone II. Die gemeinsame Gesetzgebung der drei Länder Bayern, Württemberg-Baden und Großhessen. B. Strafrechtspflege," *Deutsche Rechtszeitschrift* 1946 4: 119.

insofar as the offences were subject to prosecution under the provisions of the German criminal code.[48] This proposal was then presented at a conference of the Ministers of Justice in Stuttgart on 17 April 1946.

The Ministers of Justice agreed that the provisions of this law would be encompassed in a draft of the Law for the Prosecution of National Socialist Crimes that was also under discussion at this time, and would supplement the terms of the earlier Law for the Liberation of National Socialism and Militarism of 5 March 1946 by granting German courts jurisdiction over such cases. They proposed that whoever had directly or indirectly subjected another individual to political persecution as a result of a denunciation, whether deliberately or through negligence, and had caused severe consequences, particularly imprisonment in a concentration camp or death, would be sentenced to prison. Perpetrators who had acted out of self-interest, vengeance, or other reprehensible motives would be sentenced to imprisonment in a penitentiary and be deprived of their civil rights.[49] This proposal was rejected, as all German legislation had to be approved by the military government, which opposed the introduction of retroactive legislation to be applied by the German courts in denunciation cases in their zone.

The American military government and the reconstituted German political authorities then arrived at a compromise solution. Upon special application, exceptional cases of denunciation committed by Germans against Germans or individuals who were not United Nations nationals could be prosecuted, subject to the appropriate provisions of German law if the case revealed *prima facie* malicious intent by the informer, and if the person against whom it was directed had incurred grave consequences. In practice, individuals guilty of such actions would be subject to denazification sanctions under the Law for Liberation, which was reproduced in Control Council Directive No. 38 in Part II, Article II, section 9, paragraph 7. This Directive defined a major offender as someone who had been an activist if they had acted as a provocateur, agent or informer who had actively cooperated with the Gestapo, the SD, the SS or a similar organization, and who had brought about or tried to bring about the institution of proceedings to the disadvantage of another because of their race, religion, or political opposition against National Socialism, or contraventions against National Socialist regulation, or who had contributed to their persecution out of self-interest or profit-seeking. However, the military government authorities disapproved of overburdening the courts with minor cases, and therefore ruled that the German courts would not be authorized to adjudicate denunciation cases under any circumstances until the appropriate legislation had been enacted.[50] As a result, denunciation cases would have to be adjudicated by denazification tribunals that were established under the Law for Liberation.

This became the standard policy for denunciation cases in the American zone. The denazification tribunals were a means for imposing sanctions in denunciation cases that spared the ordinary courts from being concerned with what could be considered a political matter.[51] However, the sanctions that could be imposed could not be defined as criminal sentences in comparison to the sanctions that could be passed by a criminal court.[52] There was still a public demand for denunciation cases to be dealt with as criminal actions, in view of the consequences that had been incurred by those who had been denounced. The Minister of Justice of Hesse also continued to express an interest in drafting a law to prosecute informers, citing the shortcomings of this law for serving this purpose. However, it was not possible to use German criminal law to adjudicate cases of truthful denunciations, and therefore a new criminal law that would have to be retroactive was needed to prosecute the indirect perpetrators,[53] but this was contrary to the policy of the American military government.

The American military government was again asked in early 1947 to consider granting the ordinary German courts in the American zone the power to prosecute informers according to the provisions of Control Council Law No.10 in the interest of legal uniformity, since the German courts in the French, British and Soviet occupation zones had been granted this authorization. Although Article 5 section 9 and Article 7 part II section 8 of the Law for Liberation provided the possibility of classifying informers as major offenders or offenders and being sentenced accordingly,[54] there were no definitive guidelines or justification for the imposing of appropriate sentences for the purpose of lustration. Sentencing was thus at the discretion of the denazification tribunals. Meanwhile, German legal authorities deplored the fact that they could not comply with requests from the British, French and Soviet zones to prosecute informers, and they were concerned about the fact that they appeared to lack the ardor to redress National Socialist crimes. They also noted that the German population could not understand why authorization had not been granted for prosecuting informers.[55]

The Legal Division of the Office of Military Government for Hesse was also in favor of the local German courts being granted this authorization. They also argued that these tribu-

[48] Institut für Zeitgeschichte, Munich. 17/201-3/2 Legal Division, RG 260 OMGUS. Subject: Authorizations granted to Wuerttemberg-Baden Courts for trying offenses pursuant to Control Council Law No. 10. 5 August 1947.

[49] Bundesarchiv. Koblenz. Z1/1235A. Niederschrift über die Sitzung der Justizminister am 17. April 1946 in Stuttgart. Besprechungsgegenstand: Gesetz zur Ahndung nationalsozialistischer Straftaten. Stuttgart. 17 April 1946.

[50] Lange, "Zum Denunziantenproblem," 302.

[51] Albert Eberhardt, "Die Denunziation im Spiegel des Kontrollratgesetzes Nr. 10 als Verbrechen gegen die Menschlichkeit," (Munich: Ludwig-Maximilian Universität zu München, 1950): 148.

[52] Adolf Arndt, "Das Recht der politischen Säuberung," *Süddeutsche Juristenzeitung* 1948: 110.

[53] Institut für Zeitgeschichte, Munich. 17/262-3/15 Legal Division, RG 260 OMGUS, Subject: Punishment of Informers. 17 January 1947.

[54] Institut für Zeitgeschichte, Munich. 17/262-3/15 Legal Division, RG 260 OMGUS, Subject: Punishment of Informers. 17 January 1947.

[55] Institut für Zeitgeschichte, Munich. 17/262-2/15 Legal Division, RG 260 OMGUS, Subject: Trial by German Courts of Crimes against Humanity. 16 September 1947.

nals were not instruments of the criminal justice system, and therefore they could not fulfill the same functions of ordinary criminal law courts. It was further added that the population did not consider these tribunals to be adequate for administering criminal justice, and that they were not satisfied with the sentences passed by denazification tribunals on individuals they had considered to be "obedient and willing tools of nazi terrorism."[56] The policy of the Legal Division for the Office of Military Government for Germany remained that the denazification tribunals were to deal with such cases, so the legal division of the *Land* military government remained obliged to withhold any authorization from the courts in Hesse to adjudicate cases under the provisions of Control Council Law No. 10.[57]

Further deliberations on extending the jurisdiction of the German courts in the American zone to adjudicate cases under Control Council Law No. 10 continued into 1948. The Justice Ministers of the American zone met on 13 February 1948 at the request of their respective *Land* governments to further deliberate on the question of German courts applying this law. In contrast to their earlier requests, it was decided that the *Land* governments should recommend to the military government that the German courts be granted the authority to apply this law within certain limitations, especially in denunciation cases that resulted in the death of the denounced, and that the Justice Minister should have the power to decide which individual cases would be brought to trial.[58] Nothing came of this proposal, as the military government still refused to modify its policies regarding denunciation cases.

A series of discussions about the possible economic and administrative fusion of the American and British occupation zones led to a series of meetings to resolve the differences in the two zones regarding the application of Control Council Law No. 10. The British military government remained committed to maintaining the principles set forth in this law and British Military Government Ordinance No. 47, and asked the American military government to either assume the guidelines that had been set forth in this Ordinance in their zone to empower the German courts in the American zone to prosecute denunciation cases, or at least find a compromise solution, in order to overcome the prevailing contrasting legal situation in the two zones. Despite these proposals by the British military government, there was no change in American military government policy in their zone.

Despite all the discussions and entreaties by the German authorities and the British occupation authorities, jurisdiction over denunciation cases was withheld from the German law courts in the American zone. Cases of indirect perpetration of crimes resulting from truthful denunciation that related to the aiding and abetting of murder, manslaughter or unlawful imprisonment, as defined in article 239 of German criminal code, could only be prosecuted in the German courts when it could be established that the conduct of the defendant had demonstrated their hostile intentions by filing a report against another, and then adjudicated under German criminal law.

One such case was heard on 27 July 1949, concerning a woman who wanted to be separated from her husband. She filed a report against him in October 1944 with the local *Ortsgruppenleiter*, stating that he had made disparaging remarks about Hitler and other NSDAP leaders, and that he had expressed his regret that they had not "gone to the devil on 20 July 1944."[59] This report later led to military court proceedings, in which she appeared as the leading witness for the prosecution while she acted out of personal enmity, and took advantage of the law of the time to act against another on political grounds. He was sentenced to death, but this sentence was not carried out since he was returned to the front after a week's imprisonment. The court ruled that the defendant's intention was to cause the unlawful imprisonment of her husband.[60] She had indirectly fulfilled the first condition for his arrest and imprisonment, and had initiated his prosecution on the basis of National Socialist legislation. Like other such cases that were prosecuted under Control Council Law No. 10, she was conscious of the consequences of her actions. Her actions were therefore interpreted as having caused unlawful imprisonment in accordance with Article 239 of the German criminal code.[61] This case was later reviewed, and the conviction was upheld at the Bamberg supreme regional court,[62] thus demonstrating that a denunciation case could be adjudicated within the scope of the German criminal code, without citing the consequences of their actions as a crime against humanity, as had been constituted in the new sphere of retroactive criminal law through the promulgation of Allied occupation legislation.

Informers in the American zone were not subject to prosecution in the criminal courts, but they did face retribution for their actions through the denazification tribunals set up under the Law for Liberation,[63] which had the power to sentence them to terms of imprisonment in labor camps. The use of these tribunals was ultimately a compromise solution in the American occupation zone chosen to avert the potential legal difficulties with extending the jurisdiction of Control

[56] Institut für Zeitgeschichte, Munich. 17/262-2/15 Legal Division, RG 260 OMGUS, Institut für Zeitgeschichte, Munich. Subject: Trial by German Courts of Crimes against Humanity. 16 September 1947.

[57] Institut für Zeitgeschichte, Munich. 17/262-2/15 Legal Division, RG 260 OMGUS, Subject: Trial by German Courts of Crimes against Humanity. 16 September 1947.

[58] Bundesarchiv. Koblenz. Z21/2213. Legal/MOJ/52340. Ministry of Justice. Legal Division. 11. März 1948. Betrifft: Aburteilung von Verbrechen gegen die Menschlichkeit durch deutsche Gerichte; "A. Anweisung des Zonal Office of the Legal Adviser. Verbrechen gegen die Menschlichkeit – Kontrollratsgesetz Nr. 10"; *Zentraljustizverwaltungsblatt* 1948: 250–251.

[59] "OLG Bamberg, Beschluß vom 27. 7. 1949, Ws 152/49," *Monatsschrift für deutsches Recht* 4 1950: 55.

[60] OLGrat Dr. Sauer, "OLG Bamberg, Beschl. v. 27. 7. 1949, Ws. 152/49," *Neue Juristische Wochenschrift* 1950 (1): 35–36.

[61] "OLG Bamberg, Beschluß vom 27. 7. 1949, Ws 152/49," *Monatsschrift für deutsches Recht* 4 1950: 56; "OLG Bamberg. § 239 StGB," *Süddeutsche Juristenzeitung* 1950: 208–209.

[62] "OLG Bamberg, Beschluß vom 27. 7. 1949, Ws 152/49," *Monatsschrift für deutsches Recht* 4 1950: 55.

[63] Friedrich Hoffmann, *Die Verfolgung der nationalsozialistischen Gewaltverbrechen in Hessen*, Baden-Baden: Nomos Verlagsgesellschaft, 2001: 145–146.

Council Law No. 10 to the German judicial organization in their zone, and they remained in place until the end of the military occupation with the establishment of the Federal Republic of Germany, which led to the lifting of this limitation on the legal jurisdiction of the German courts. Denunciation cases could then be subject to prosecution when legislation concerning the prosecution of crimes against humanity became uniform in the Federal Republic of Germany.

The creation of the Federal Republic of Germany led to new legal developments in western Germany concerning the adjudication of denunciation cases. Legal issues under the jurisdiction of the new Federal Republic of Germany were defined in the Occupation Statute. The Allied High Commission that had superseded the military government had also issued Law No. 13 of 25 November 1949 on "Judicial Powers in the Reserved Fields," which abrogated the occupation powers' right to withdraw cases from the jurisdiction of the German courts that had been imposed under military government legislation enacted by the western occupation powers. The issuing of this law also defined the new delineation between Allied and German judicial responsibilities.[64]

The adjudication of denunciation cases in the Federal Republic of Germany continued where there was evidence and a willingness to take these cases to trial using Control Council Law No. 10. The problem was that there was a general unwillingness among jurists to prosecute these cases, which undermined the prosecution of such cases. One contributing factor was the fact that the consensus among jurists that denunciation cases ought to be prosecuted had begun to weaken in 1948 and 1949. There was also a renewed focus on the new priorities of addressing the necessities of the reconstruction and restoring the economy in view of the advent of the Cold War, as well as a diminished interest among the German population in addressing the National Socialist past.[65] These trends led to a decline of the number of cases involving informers being brought to court, and the only cases that were eventually prosecuted were those that had involved the Gestapo,[66] or had led to inhumane treatment for the person denounced.

The major contributing factors in the decline of the number of cases involving informers came from two initiatives of the government of the Federal Republic of Germany, which contributed to the decline of the adjudication of denunciation cases that had already begun during the Allied military occupation. The Immunity from Prosecution Law of 31 December 1949 had the effect of reducing the number of convictions for denunciation cases[67] that were considered minor. The decision of the German government to approach the Allied High Commission for the elimination of the *obligation* of the German administration of justice to apply Control Council Law No. 10 in these cases also resulted in fewer of these cases being prosecuted. As a result, the Allied legislation that had governed the application of this law was abrogated through new legislation enacted by the Allied High Commission. These conditions went into force in the French occupation zone through Ordinance 171 of the French High Commission of 31 August 1951[68] and in the British zone through Ordinance No. 234 of the British High Commission on 31 August 1951.[69] This change now meant cases of crimes against humanity would thereafter be judged according to the provisions found in German law.[70] The application of the German criminal code in proceedings against informers would be based on a consideration of the consequences of the act of denunciation, as cited in Article 239 of the criminal code concerning unlawful imprisonment and death related to murder.[71]

German jurists were therefore alleviated of the burden of applying the law retroactively, and could instead adjudicate National Socialist injustices in accordance with German criminal law. However, the number of prosecutions dropped rapidly, with prosecutors palpably diminishing their investigative proceedings[72] in such cases, including the prosecution of denunciation cases. Cases that had previously been adjudicated under Control Council Law No. 10 were also to be quashed and re-examined for adjudication under German criminal law, in accordance with Article 264 of the code of criminal procedure.[73]

In practice, the prosecution of these types of cases became much more narrowly defined than before, as it became more problematical to interpret cases of denunciation as crimes against humanity under German law than under the provisions of Control Council Law No. 10. As a result, many informers who were guilty of crimes against humanity under this law could no longer be convicted under the provisions of German law.[74] Passing sentences in such cases thus became much more difficult after this law was abrogated, since the typical circum-

[64] "Law No. 13: Judicial Powers in the Reserved Fields," *Official Gazette of the Allied High Commission for Germany* No. 6, 9 December 1949: 54–58.

[65] Diewald-Kerkmann, *Politische Denunziation im NS-Regime*, 164; Broszat, "Siegerjustiz oder strafrechtlicher 'selbtsreinigung'? 518.

[66] Claudia Bade, "'Das Verfahren wird eingestellt.' Die Strafrechtliche Verfolgung von Denunziation aus dem Nationalsozialismus nach 1945 in den Westzonen und in der frühen BRD." *Historical Social Research*, Vol. 26 2001 No.2/3: 74.

[67] Inge, Marβolek, *Die Denunziantin: Die Geschichte der Helene Schwärzel, 1944–1947* (Bremen: Edition Temmen, 1993): 102.

[68] "Arręté No 171: Abrogeant Certaines Dispositions de l'Arręté No 154 en Date du 1er Juin 1950." *Official Gazette of the Allied High Commission for Germany* No. 65, 19 September 1951: 1137.

[69] "Ordinance No. 234: Repeal of Military Government Ordinance No. 47". *Official Gazette of the Allied High Commission for Germany* No. 65, 19 September 1951: 1138.

[70] Archives de L'Occupation. Colmar. AJ 3655/p.326/12053. Haute Commission de la Republique en Allemagne. Le Conseiller pour les Affaires Judiciaires. Chef des Service de la Justice. Baden-Baden. 1 Octobre 1951. Object: Retrait, aux Tribunaux Allemands, de l'obligation d'applique la Loi No. 10 du Conseil de Contrôle dans les jugements de crimes contre l'humanité.

[71] Freudiger, *Die juristische Aufarbeitung von NS-Verfahren*, 317.

[72] Bernhard Diestelkamp and Susanne Jung, "Die Justiz in den Westzonen und der frühen Bundesrepublik," *Aus Politik und Zeitgeschichte* 13 (24 March 1989): 25.

[73] Claus Seibert, "Abschied vom KRG 10," *Neue Juristische Wochenschrift* 1952: 251–252.

[74] Diewald-Kerkmann, *Politische Denunziation im NS-Regime*, 164.

stances of a denunciation case did not conform to the provisions of the German criminal code. Denunciation cases would only be subject to prosecution when it could be proven that an informer had been conscious of the serious consequences that would incur as a result of their denunciation, such as imprisonment in a concentration camp or execution, and that they had acted with intent and premeditated approval. As a result, increasingly fewer cases of denunciation were prosecuted than theoretically could have been anticipated.[75] There were 7674 cases of suspected denunciation in western Germany by December 1964, with 603 convictions. Out of this number, there was one was sentence of life imprisonment, 566 prison sentences of varying lengths, 36 fines, and 18 pending cases. Proceedings were temporarily suspended in another 61 cases, and 6992 proceedings ended without convictions.[76]

The rule of law had been nullified by the National Socialist regime that had established a politicized administration of justice that was to uphold its interests. Consequently, this opened the way for individuals to use the law for the promotion of political as well personal interests to the detriment of others at a time when the law did not serve that purposes that it is meant to serve – to uphold individual interests by protecting them from abuses directed against them by others, in addition to upholding the state and its institutions. The effectiveness of the law also collapsed following the National Socialist takeover of the state, when the regime sought to exploit the law as a means of primarily upholding the interests of the NSDAP and quell any opposition to the regime. The law was restored after the postwar collapse of the National Socialist regime, and the administration of justice applied retroactive legislation as an extraordinary measure to compensate for the injustices that had been perpetrated. There was also the willingness to make this possible among the occupation powers and German jurists by implementing the broadly defined provisions of Control Council Law No. 10.

Those who had indirectly taken part in these past injustices by making political denunciations against others were prosecuted by a restored administration of justice governed by the restored rule of law. The Allied occupation powers as the highest legislative authority in postwar Germany legislation enacted retroactive application of the administration of justice on the basis of criminal law that could not have been administered at the time of the perpetrators' actions. Whereas the authorization for the German courts to prosecute cases of denunciations as crimes against humanity was not granted in the American occupation zone, these types of cases were nevertheless adjudicated by lay jurors in denazification tribunals. This type of case was prosecuted in the criminal law courts of the French and British occupation zones in order to bring the offending parties to justice for *all* forms of crimes against humanity in the reconstituted German courts. The courts and their staffs and the juries all demonstrated the objective applications of the law in the ways that it was meant to serve, when it became possible for them to administer justice.

There had been objective reservations against the retroactive application of the administrative of justice among many members of the judiciary which needed to be overcome. Those who denounced others to the National Socialist regime while being conscious of the consequences of their actions for those they had denounced to the authorities faced the consequences of those actions. Those who had undoubtedly taken premeditated action against their victims received the heaviest sentences. Meanwhile it could be argued that many other sentences may have been too lenient.[77] This could have been partly symptomatic of the psychological reaction to the excessively harsh sentencing during the National Socialist regime that led to insufficiently severe sentencing thereafter,[78] as well as certain cases in which the applying of the letter of the law tended to outweigh considerations of the guiding principles of justice and humanity.

The range of sentences that were imposed in these cases did not necessarily recognize the consequences of denunciations. While being afforded the flexibility of judicial independence in passing sentences, the jurists primarily took what the law prescribed into consideration and, apart from a few exceptions, passed largely lenient sentences, while hesitating to risk passing judgments in cases of a political nature. Control Council Law No. 10 was insufficiently detailed with regard to reconciling the provisions of existing law and the principles of humanity in determining how a crime against humanity could be judged in view of the consequences that indirect perpetrators of crimes against humanity had caused. As a result, such cases could be judged on the basis of different precedents, while it was also necessary for jurists to demonstrate the willingness to sufficiently take the consequences of the informers' actions into consideration in the interest of redressing past injustices that emanated from political circumstances. The question as to whether the law and morality as defined by the principles of humanity could be reconciled would only be decided through the individual court judgments.

The inconclusiveness of the postwar denazification program led to suspicions there had been jurists whose objectivity about past political injustices that had been perpetrated, such as through denunciations, may have been compromised if they had themselves contributed to crimes against humanity during the National Socialist regime.[79] The Highest Court of the British Zone had always maintained that those who denounced others and caused them to appear before a Special Court were to be judged for committing crimes against humanity, but the jurists of the courts that adjudicated political offences in the National Socialist regime were not similarly judged

[75] Mandy Jakobczyk, "Das Verfahren ist einzustellen," *Demokratische Justiz* (2003) 15: 277, 281.

[76] *Verhandlung des Deutschen Bundestages. 4. Wahlperiode. Anlage zu den stenographischen Berichten.* Band 96. Drucksachen IV/3124. Bonn: Der Bundesminister der Justiz, 1965: 33.

[77] Diewald-Kerkmann, *Politische Denunziation im NS-Regime*, 166.

[78] Adolf Arndt, "Das Strafmaß", *Süddeutsche Juristenzeitung* (1946) 1: 30.

[79] Diewald-Kerkmann, *Politische Denunziation im NS-Regime*, 173.

for their accountability in these cases.[80] On the other hand, the reconstructed administration of justice demonstrated in individual cases how the law could be applied to those who stood accused of crimes against humanity. While there were errors made in judgments, these were thereafter reviewed by the appellate courts at higher levels of jurisdiction that continued serving justice.

The willingness to continue prosecuting cases of denunciations as crimes against humanity continued throughout the newly-established Federal Republic of Germany, following the initiative for doing so that had been set out during the military occupation in keeping with the necessity for doing so while evidence for prosecuting such cases could be marshaled to convict those who remained guilty. The original spirit of administering the widely encompassing definition of crimes against humanity under the provisions of Control Council Law No. 10 later had less significance after this law was abolished. Jurisdiction was no longer extended to interpreting the inhumane consequences when such cases came under the jurisdiction of German law. Due to the more narrowly defined scope of interpretation that could be made due to the provisions found in the German criminal code, the prosecution of informers became subject to much more narrowly defined circumstances that made convictions less likely than cases heard under the broad interpretations that had been allowed under the concept of political persecution cited in occupation law.

It remained for the administration of justice to set precedents for judgments in such cases, and the political will of legislators to set standards of justice in bringing the direct or indirect perpetrators of crimes against humanity to account for their actions outside the rule of law that serves to protect the human rights of every individual. As with all who live under the rule of law to this day, the principles of humanity are maintained to preserve its values regardless of any statute of limitations after the time that offences against these principles were committed. Maintaining the precepts of natural law in the form of upholding the rights and dignity of humanity will thus afford all individuals the protection of the law against those who would disregard these rights, whether it would be by other individuals or by the state.

[80] Bundesarchiv. Koblenz. Z21/1334. 14 Js. 133/46. 11.6.48. Der Oberstaatsanwalt bei dem Landgericht Hamburg: 3.

Der Schutz des Kaisers im StG 1803
(The Protection of the Austrian Emperor in the Criminal Code of 1803)

Christoph Schmetterer *

Abstract

The emperor of Austria had a very privileged position in criminal law: Due to his immunity the emperor himself could not commit any crime. On the other hand he was protected in a special way by criminal law. Attacks on him were prosecuted as high treason and insults as breaches of the peace. This article analyses these two crimes according to the Austrian criminal code of 1803.

Key words: *Kaiser; Strafrecht StG 1803; Hochverrat; Ruhestörung; Majestätsbeleidigung; Lästerung des Landesfürsten.*

I. Einleitung

Im Strafrecht hatte der Kaiser von Österreich eine grundlegend andere Position als alle anderen Bewohner seines Reiches, weil er sich einerseits aufgrund seiner Unverantwortlichkeit nicht strafbar machen konnte und andererseits durch das Strafrecht ganz besonders geschützt war.

Bis 1848 war die Unverantwortlichkeit des Kaisers nicht ausdrücklich schriftlich niedergelegt. Dennoch war sie ein allgemein anerkannter und selbstverständlicher Grundsatz der (absoluten) Monarchie (für die es insgesamt typisch war, dass die Stellung des Monarchen kaum durch schriftliche Rechtsnormen fixiert war). Springer etwa schrieb: „Der Kaiser ist heilig und unverletzlich und außer aller Verantwortung vor den Menschen.“ [1]

Die Unverantwortlichkeit des Kaisers bedeutete, dass er in keiner Weise für seine Handlungen zur Verantwortung gezogen werden konnte. Das bezog sich insbesondere, aber nicht nur auf das Strafrecht. Der Kaiser konnte sich nicht strafbar machen – weder im gerichtlichen noch im verwaltungsbehördlichen Strafverfahren. Zivilrechtlich konnte der Kaiser grundsätzlich geklagt werden, allerdings war es auch in diesem Zusammenhang ausgeschlossen, irgendeine Art von Verschulden des Monarchen geltend zu machen oder festzustellen.[2]

Interessanterweise war die (strafrechtliche) Unverantwortlichkeit des Kaisers weder im materiellen noch im formellen Strafrecht in irgendeiner Weise ausdrücklich normiert. Dieser Grundsatz war offenbar so selbstverständlich, dass er nicht eigens erwähnt werden musste.

II. Das StG 1803

Als Franz I./II. 1804 den neuen Titel des Kaisers von Österreich annahm, erklärte er mit Patent vom 11. August 1804[3] ausdrücklich, dass sich die staatsrechtlichen Verhältnisse dadurch nicht ändern sollten. Auch der besondere strafrechtliche Schutz des Herrschers änderte sich durch diesen neuen Titel nicht. Schon vor der Annahme des Kaisertitels war er im StG 1803 durch § 52 (Hochverrat) und § 58 (Lästerung des Landesfürsten) geschützt, wobei in § 52 vom „Oberhaupt des Staates“ die Rede war und in § 58 vom „Landesfürsten“.[4] Diese Formulierungen bezogen sich auf Franz‘ Position als Landesherr der einzelnen habsburgischen Besitzungen, nicht auf seine Funktion als Kaiser des Heiligen Römischen Reichs. Seine Stellung als Staatsoberhaupt und Landesfürst der habsburgischen Erbländer änderte sich weder durch die Annahme des österreichischen Kaisertitels noch durch die Beendigung des Heiligen Römischen Reichs. Somit blieben Bestimmungen des StG 1803 über den Schutz des Staatsoberhaupts auch nach 1804 bzw. 1806 unverändert anwendbar.

1. Hochverrat

Die Regelung des Hochverrats in § 52 des StG 1803 entsprach wörtlich jener des Patents vom 2. Jänner 1795.[5] Diese Vorschrift enthielt zwei alternative Begehungsformen, von denen sich nur die erste auf die Person des Herrschers bezog:

„Das Verbrechen des Hochverrats begeht:

a) Der die persönliche Sicherheit des Oberhauptes des Staates verletzet.“

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1 SPRINGER, Johann, Statistik des österreichischen Kaiserstaates, Bd. 1, Wien, 1840, S. 220; Interessanterweise spricht Springer hier nur von der Unverantwortlichkeit des Kaisers vor den Menschen; vor Gott sollte auch der Kaiser verantwortlich sein.

2 TEZNER, Friedrich, Der Kaiser, Wien, 1909, S. 101–110; die Ausführungen Tezners beziehen sich an sich auf konstitutionelle System, gelten aber ebenso für den Vormärz.

3 PGS 20/1804.

4 Vgl. auch die §§ 20 und 289 ABGB.

5 JGS 209/1795.

Bei der Interpretation dieser Vorschrift stellte sich natürlich die Frage, was genau unter „persönlicher Sicherheit“ des Herrschers zu verstehen war. Nach Jenull waren seine Freiheit, sein Leben und seine Gesundheit die von diesem Begriff umfassten Schutzgüter.[6]

Der Hochverrat war (entsprechend der allgemeinen Vorschrift des § 1 StG)[7] ein Vorsatzdelikt. Daraus ergab sich, dass kein Hochverrat vorlag, wenn jemand die persönliche Sicherheit des Kaisers angriff, dabei aber über die Person des Angegriffenen irrte, indem er glaubte, es handle sich nicht um den Kaiser.[8]

Die Strafe für Hochverrat war in § 53 normiert:

„Auf dieses Verbrechen, wäre es auch ohne allen Erfolg, nur bey dem Versuche geblieben, wird die Todesstrafe verhängt.“

Die Todesstrafe (in Form des Erhängens)[9] war erst kurz vor dem StG 1803 wieder eingeführt worden, nachdem Joseph II. sie weitestgehend abgeschafft hatte.[10] An der Strafdrohung für Hochverrat ist es nicht sonderlich erstaunlich, dass der Hochverrat auch mit dem Tod bestraft werden konnte, bemerkenswert ist aber, dass dieses Delikt mit dem Tod bestraft werden musste. Im Gegensatz zu den meisten anderen Delikten war hier kein Strafrahmen vorgesehen, der eine gewisse Flexibilität für den konkreten Einzelfall bot, sondern nur eine einzige, unveränderliche Strafdrohung für alle Fälle.

Besonders auffällig an § 53 ist die ausdrückliche Anordnung, dass auch der Versuch strafbar und mit dem Tod zu bestrafen ist. Diese Anordnung scheint überflüssig zu sein, weil in § 7 StG ohnehin eine generelle Versuchsstrafbarkeit festgelegt war.[11] Es stellt sich daher die Frage nach dem Sinn dieser Bestimmung. Der ist wohl im Zusammenhang mit § 40 lit. a StG zu sehen, wonach es ein Milderungsgrund war, wenn die Tat nur versucht und nicht vollendet wurde. Da aber für den Hochverrat nur eine einzige, fixe Strafdrohung vorgesehen war, konnte es bei diesem Delikt auch keine (ordentliche) Strafmilderung geben. Vor diesem Hintergrund wurde durch den zweiten Satz des § 52 noch einmal klargestellt, dass der Tod auch für den versuchten Hochverrat die einzige Strafe war.

§ 54 enthielte eine besondere Regelung über die Verhinderung des Hochverrats:

„Wer eine in den Hochverrath einschlagende Unternehmung, die er leicht, und ohne eigene Gefahr in ihrer weiteren Fortschreitung verhindern konnte, zu hindern vorsetzlich unterläßt, macht sich des Verbrechens mitschuldig, und soll lebenslang mit schwerestem Kerker bestrafet werden.“

Schon in § 1 des StG war grundsätzlich festgehalten, dass Verbrechen nicht nur durch aktive Handlungen, sondern auch durch Unterlassungen begangen werden konnten. Handlung und Unterlassung waren als Begehungsformen eines Verbrechens also grundsätzlich gleichwertig. Somit konnten die Verbrechen im ersten Teil des StG auch dann durch Unterlassung begangen werden, wenn im konkreten Tatbestand die Unterlassung nicht ausdrücklich genannt war. Neben diesen uneigentlichen Unterlassungsdelikten enthielt das StG auch eigentliche Unterlassungsdelikte. Bei diesen war die Unterlassung ausdrücklich im Tatbestand des jeweiligen Delikts genannt.

Der Hochverrat in § 52 StG konnte auch ein uneigentliches Unterlassungsdelikt sein. Ein durch Unterlassung begangener Hochverrat gegen den Kaiser war zwar eher unwahrscheinlich, aber immerhin denkbar.[12]

Im Gegensatz dazu enthielten die §§ 54–55 eigentliche Unterlassungsdelikte, bei denen es um ganz besondere Unterlassungen ging, die von § 52 auch in der Begehungsform der Unterlassung nicht erfasst waren. § 52 konnte auch verwirklicht werden, wenn die Tathandlung statt aus einem positiven Tun aus einem Unterlassen bestand. § 54 pönalisierte hingegen die Unterlassung, das positive Tun eines anderen zu verhindern. Der entscheidende Unterschied war also, dass im Fall des § 54 das positive Tun eines anderen den Hochverrat verwirklichte. Die Unterlassung war hier nicht unmittelbar die (negative) Ursache des verpönten Erfolges und konnte daher in diesem Fall nicht nach § 52 strafbar sein.[13]

An sich war die unterlassene Verhinderung eines Verbrechens ein eigenes, in § 191[14] normiertes Delikt. Diese allgemeine Vorschrift war auf den Hochverrat allerdings nicht anwendbar, weil

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[6] JENULL, Sebastian, Das österreichische Criminal-Recht nach seinen Gründen und seinem Geiste dargestellt, 2. Teil, Grätz, 1809, S. 13; Im StG 1852 wurden dann ausdrücklich die körperliche Unversehrtheit, die Gesundheit und die Freiheit des Kaisers als Schutzgüter genannt. Die nähere Beschäftigung mit diesen Begriffen erfolgt daher bei der Behandlung des StG 1852; vgl. auch FINGER, August, Das Strafrecht systematisch dargestellt, Bd. 2, Berlin, ¸1910, S. 502, Anm. 752.

[7] „Zu einem Verbrechen wird böser Vorsatz erfordert. Böser Vorsatz fällt aber nicht nur dann zur Schuld, wann vor, oder bey der Unternehmung oder Unterlassung, welches mit dem Verbrechen verbunden ist, geradezu bedacht und beschlossen; sondern auch, wann aus einer anderen bösen Absicht etwas unternommen, oder unterlassen worden, woraus das Uebel, welches dadurch entstanden ist, gemeiniglich erfolget, oder doch leicht erfolgen kann.“

[8] Ein derartiger Angriff wäre nicht einmal tatbildlich und daher auch kein Versuch gewesen.

[9] § 10.

[10] Zur Abschaffung und Wiedereinführung der Todesstrafe siehe AMMERER, Martin, Das Ende für Schwert und Galgen? Legislativer Prozess und öffentlicher Diskurs zur Reduzierung der Todesstrafe im Ordentlichen Verfahren unter Joseph II. (1781–1787), Wien, 2010.

[11] Dazu auch WAHLBERG, Wilhelm Emil, Grundriss zu Vorlesungen über österreichisches Strafrecht. Besonderer Teil, Wien, 1888, S. 11–12.

[12] Ein Beispiel wäre etwa ein Leibwächter des Kaisers gewesen, der den Kaiser vorsätzlich nicht vor einem herabfallenden Stein warnt, durch den der Kaiser dann verletzt oder getötet wird.

[13] Zur dogmatischen Erfassung der Begehung durch Unterlassung siehe: MOOS. Der Verbrechensbegriff in Österreich im 18. und 19. Jahrhundert. Sinn- und Strukturwandel, Bonn, 1968, S. 408–411.

[14] § 190: „Daß durch Zuthun eben die Gattung von Verbrechen begangen werde, deren sich der unmittelbare Thäter schuldig macht, ist schon in dem §. 5 erkläret Aber auch derjenige, der einem Verbrechen Vorschub leistet, wird in nachstehenden Fällen selbst eines Verbrechens schuldig.“; § 191: „Erster Fall: Wenn, jemand, ein Verbrechen zu hindern, aus Bosheit unterläßt, da er es doch leicht, ohne sich einer Gefahr auszusetzen, hätte verhindern können.“

es für die unterlassene Verhinderung des Hochverrats mit dem § 54 eine *lex specialis* gab.[15] Im Detail unterschied sich die Konstruktion des § 54 von jener des § 191. Während nämlich § 191 ein eigenständiges Delikt normierte, ergab sich aus § 54, dass die unterlassene Verhinderung des Hochverrats eine Form der Mitschuld am Hochverrat selbst darstellte.[16] Die unterschiedlichen Konstruktionen hatten aber wenig praktische Auswirkungen. Wichtig war hingegen, dass die Strafdrohung des § 54 (lebenslanger schwerster Kerker) wesentlich höher war als die für sonstige Unterlassungen, ein Verbrechen zu verhindern (Kerker von sechs Monaten bis zu einem Jahr[17]).

Im System des StG wog die unterlassene Verhinderung des Hochverrats also wesentlich schwerer als die unterlassene Verhinderung anderer Verbrechen. Gleichzeitig wog die unterlassene Verhinderung des Hochverrats weniger schwer als der unmittelbare Hochverrat. Das wird an zwei Aspekten des § 54 deutlich: Erstens war diese spezifische Form der Unterlassung nicht immer strafbar, sondern nur dann, wenn der Täter die hochverräterische Handlung leicht und ohne Gefahr für sich selbst hätte verhindern können;[18] zweitens war die Strafdrohung des § 54 nicht ganz so drastisch wie jene des § 53 – lebenslanger schwerster Kerker statt der Todesstrafe.

Ebenso wie § 54 stellte auch § 55 StG eine Unterlassung im Zusammenhang mit dem Hochverrat unter Strafe, nämlich die Unterlassung der Anzeige eines Hochverrats:

„Auch derjenige macht sich mitschuldig, der einen ihm bekannten, des Hochverrats schuldigen Verbrecher der Obrigkeit anzuzeigen bedächtlich unterläßt, wofern nicht aus den Umständen erhellet, daß der unterbleibenden Anzeige ungeachtet, eine schädliche Folge nicht mehr zu besorgen ist. Ein solcher Mitschuldiger soll lebenslang mit schwerem Kerker bestrafet werden."

Der Wortlaut des § 55 bezog sich auch nicht nur auf die Anzeige künftiger hochverräterischer Handlungen. Von der Anzeigepflicht ausgeschlossen waren nur jene Fälle, in denen keine Gefahr mehr drohte. Das bedeutete praktisch wohl, dass die Anzeigepflicht nur dann entfiel, wenn der/die potentielle(n) Hochverräter bereits von den Behörden gefasst war(en). Jenull meinte diesbezüglich, dass eine gesetzliche Vermutung der Gefährlichkeit bestand, ohne diese Meinung speziell aus dem Gesetzeswortlaut abzuleiten. Seiner Meinung nach war von der Gefährlichkeit auszugehen; solange die Ungefährlichkeit nicht eindeutig erwiesen war, solange bestand auch die Anzeigeverpflichtung.[19]

Die Formulierung des § 55 unterschied sich insofern von jener des § 54, als in § 54 war die Rede von „vorsetzlichem" Unterlassen, in § 55 hingegen von „bedächtlichem" Unterlassen. Hier handelte es sich eindeutig um Synonyme.[20]

Außerdem war in § 54 ausdrücklich normiert, dass die unterlassene Verhinderung eines Hochverrats nur dann strafbar sein sollte, wenn sie leicht und ohne Gefahr möglich gewesen wäre. In § 55 fand sich über die unterlassene Anzeige keine vergleichbare Regelung. Jenull meinte aber, dass die besonderen Voraussetzungen für die Strafbarkeit des § 54 auch auf § 55 anwendbar sein sollten.[21]

Bei der Interpretation des § 55 stellte sich weiters die Frage, wann genau die Verpflichtung zur Anzeige erfüllt war. Aus der Formulierung „der Obrigkeit anzuzeigen" ergab sich eindeutig, dass eine Mitteilung an eine Privatperson nicht ausreichte. Hingegen meinte Jenull, dass jede Mitteilung an obrigkeitliche Personen ausreichend sei – unabhängig davon, ob sie in dienstlichem Zusammenhang erfolgte oder nicht. Er begründete das, „weil sie [die obrigkeitlichen Personen] die Verpflichtung hierüber von Amts wegen zu handeln, nicht in der Amtsstube zurück lassen können."[22] Jenull führte aber nicht aus, wer überhaupt obrigkeitliche Personen waren, an die eine Anzeige ausreichend sein sollte.[23]

Nach der Wertung des StG wurde die unterlassene Anzeige ein etwas weniger schwerwiegend beurteilt als die unterlassene Verhinderung eines Hochverrats. Auch die Unterlassung einer Anzeige war mit lebenslangem Kerker bedroht, aber es war „nur" schwerer Kerker, nicht schwerster Kerker wie im Fall des § 54.

In § 56 war ein besonderer Strafaufhebungsgrund für Hochverrat vorgesehen, nämlich die Anzeige an die Behörden durch einen Mitverschwörer.[24] Dieser Strafaufhebungsgrund bezog sich aber nur auf den zweiten Fall des Hochverrats, also die gewaltsame Änderung der Staatsverfassung etc. Im Zusammen-

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15 Daher verwies der zweite Satz des § 192 auch ausdrücklich auf § 54: „Bey dem Verbrechen des Hochverrathes ist eine so beschaffene Unterlassung für Mitschuld zu beachten, und auf die in dem §. 54 bestimmte Art zu bestrafen."

16 Im System des StG 1803 bezeichnete Mitschuld die nicht-unmittelbare Täterschaft. (§ 5)

17 § 192 StG.

18 Bezüglich des Leichten-Verhindern-Könnens meinte Jenull, dass ein subjektiver Maßstab anzulegen war; er beschäftigte sich hingegen nicht damit, welche Art von Gefahr vorliegen musste, damit die Unterlassung nicht strafbar war. Genau dieselben Voraussetzungen galten nach § 191 auch für die unterlassene Verhinderung sonstiger Verbrechen. Zu § 191 siehe JENULL. Criminalrecht 2, S. 392–394.

19 JENULL, Criminalrecht 2, S. 28.

20 JENULL, Criminalrecht 2, S. 25 schreibt in Bezug auf beide Vorschriften von vorsätzlichem Unterlassen; vgl. auch: HYE, Anton, Freiherr von Glunek, Das österreichische Strafgesetz über Verbrechen, Vergehen und Uebertretungen und die Pressordnung vom 27. Mai 1852, 1. [und einziger] Bd., Wien, 1855, S. 724, Anm. **. Im StG 1852 wurde dann in beiden Nachfolgebestimmungen (§§ 60 und 61) die Formulierung „vorsätzlich" verwendet.

21 JENULL, Criminalrecht 2, S. 28.

22 JENULL, Criminalrecht 2, s. 29.

23 HYE, Strafgesetz, S. 726 meinte dann zur Parallelbestimmung des StG 1852 (§ 61), dass die Anzeigepflicht durch eine Meldung an jede öffentliche Behörde erfüllt wurde.

24 Das StG nannte dies „Tätige Reue". Es entsprach insofern nicht der modernen Terminologie des StGB, nach dem Tätige Reue die Vollendung des Delikts voraussetzt. (vgl. § 167 StGB).

hang mit Angriffen auf die Sicherheit des Kaisers war eine derartige Möglichkeit der Straflosigkeit nicht vorgesehen.[25]

2. Schmähungen des Landesfürsten

Während Angriffe auf die Sicherheit des Kaisers im Delikt des Hochverrats pönalisiert waren, waren Angriffe auf die Ehre des Kaisers nach § 58 strafbar. Im System des StG 1803 handelte es sich dabei nicht um ein selbständiges Delikt, sondern um eine Sonderform der „Störung der innerlichen Ruhe des Staates". Dieses Grunddelikt war in § 57 geregelt:[26]

„Wer boshafter Weise andern Mitbürgern durch Reden, schriftliche oder bildliche Darstellungen solche Gesinnungen einzuflößen suchet, woraus Abneigung gegen die Regierungsform, Staatsverwaltung oder Landesverfassung entstehen kann, begeht das Verbrechen der Störung der öffentlichen Ruhe."

Dieser Tatbestand wurde in § 58 folgendermaßen ergänzt:

„Unter dieses Verbrechen werden auch Lästerungen auf die Person des Landesfürsten, aus welchen unverkennbare Abneigung gegen denselben entstehen kann, wenn sie in Gesellschaft, oder öffentlich vorgebracht werden, wie auch dergleichen Schriften, oder spöttische Vorstellungen, wenn sie jemandem mitgetheilt worden, gerechnet."

Für eine Strafbarkeit nach dieser Bestimmung mussten drei Elemente gegeben sein: Erstens eine Lästerung des Landesfürsten, die zweitens geeignet war, unverkennbare Abneigung gegen diesen entstehen zu lassen; das dritte Element war eine gewisse Öffentlichkeitswirksamkeit. Hier nannte das Gesetz vier Möglichkeiten: Lästerungen in der Öffentlichkeit, in Gesellschaft, in Schriften und in spöttischen Bildern („Vorstellungen").

Jenull definierte Lästerungen folgendermaßen:

„Wer über vollkommen sittlich gute Handlungen und Eigenschaften eines Anderen bey dessen anerkannten innern und äußern Vorzügen ein im hohen Grade entehrendes Urtheil fällt; oder demselben grobe oder schändliche Unvollkommenheiten andichtet und aussagt, der lästert ihn."[27]

Er ergänzte diese Definition noch mit dem Hinweis, dass Lästerungen in einem weiteren Sinn zu verstehen seien, der auch Verleumdungen des Landesfürsten einschließt. Dies begründete er mit systematischen Überlegungen. Da der Landesfürst im Tatbestand der Verleumdung (§ 188) nicht eigens genannt war, ging er davon aus, dass eine Verleumdung des Landesfürsten nach § 188 nicht strafbar war.[28] Die Straflosigkeit der Verleumdung des Landesfürsten konnte seiner Meinung nach aber nicht gewünscht sein. Daher meinte Jenull, dass auch Verleumdungen des Landesfürsten unter Lästerungen im Sinne des § 58 zu subsumieren seien. In den praktischen Auswirkungen war es freilich unerheblich, ob eine Verleumdung des Landesfürsten unter § 58 oder unter § 188 zu subsumieren war. Die Strafdrohung (ein bis fünf Jahre schwerer Kerker) war nämlich in beiden Fällen dieselbe.

Bei bildlichen Darstellungen nannte das Gesetz nicht Lästerungen des Landesfürsten als Tatbestand, sondern Spott über ihn. Damit waren Bilder gemeint, die zum Lachen über den Kaiser anregten.[29]

Sowohl Lästerungen als auch Verspottungen des Kaisers waren aber nicht in jedem Fall strafbar, sondern eben nur, wenn sie mit einer gewissen Breitenwirkung geschahen und unverkennbar geeignet waren, Abneigung gegen den Kaiser zu erzeugen. Jenull meinte dazu, dass es sich dabei um jene Lästerungen oder Verspottungen handelte, die darauf angelegt waren „den guten Willen eines Regenten verdächtig zu machen", und begründete das folgendermaßen:

„Denn weil das Wohl Aller und jedes Einzelnen von seinem abhängt, so müssen solche Lästerungen Abneigung erzeugen."[30]

Besonders ausführlich und durchaus differenziert setzte er sich mit dieser Frage in Bezug auf spöttische Darstellungen auseinander. Er unterschied diesbezüglich zwischen Belachen und Verlachen. Das erste geschehe ohne Verachtung, das zweite schließe hingegen die Verachtung des Verlachten mit ein. Seiner Meinung nach sollte in der Regel nur das Verlachen strafbar sein. Bezüglich des Belachens schrieb er:

„Denn wenn nicht besondere Gründe die Abstrafung nöthig machen, so wird die Lästerung sowohl, als spöttische Darstellung durch Verachtung am sichersten und schnellsten ihrem verdienten Lose, der Vergessenheit überliefert."[31]

Was besondere Gründe sein konnten, die auch beim bloßen Belachen eine Bestrafung notwendig machen sollten, führte er allerdings nicht aus.

Über des Verlachen meinte er, es liege dann vor, „wenn sittliche oder geistige Unvollkommenheit in einem Bilde versinnlichet werden, welches wegen der natürlich unanständigen oder eckelhaften Lage, in der es erscheint, oder wegen der, das Natürliche übersteigenden, Auszeichnung eines oder des anderen Körpertheiles Mißfallen, und weil sich das (der) Dargestellte diese Lage gefallen lassen muß, Lachen erwecket."[32]

Jedenfalls musste sich der Vorsatz des Täters auch darauf erstrecken, dass durch seine Tat Abneigung gegen den Regenten entstehen konnte.[33]

Die dritte und letzte Voraussetzung für eine strafbare Lästerung des Landesfürsten war eine gewisse Breitenwirksamkeit.

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[25] Der Grund dafür war, dass der Hochverrat gegen den Kaiser im StG 1803 im Gegensatz zu den anderen Formen des Hochverrats (noch) nicht als Angriffsdelikt konstruiert war. Daher konnte beim Hochverrat gegen den Kaiser der Rücktritt vom Versuch nach den allgemeinen Regeln zur Straffreiheit führen. Die Sonderregel des § 56 war in diesem Zusammenhang nicht erforderlich.

[26] Zur Ruhestörung siehe JENULL, Über die in § 57 des 1. Theils des Strafgesetzbuches bestimmte Art des Verbrechens der Störung der öffentlichen inneren Ruhe des Staates, in: Zeitschrift für österreichische Rechtsgelehrsamkeit 1, 1825, S. 31–51.

[27] JENULL, Criminalrecht 1, S. 44–45.

[28] Ganz überzeugend ist diese Überlegung nicht. Immerhin war auch das Bestehlen des Landesfürsten als Diebstahl strafbar, obwohl der Landesfürst bzw. sein Vermögen in den Tatbeständen des Diebstahls nicht ausdrücklich genannt war.

[29] JENULL, Criminalrecht 1, S. 45.

[30] JENULL, Criminalrecht 1, S. 47.

[31] JENULL, Criminalrecht 1, S. 46.

[32] JENULL, Criminalrecht 1, S. 46–47.

[33] JENULL, Criminalrecht 1, S. 48–49.

Jenull verstand unter einer Äußerung in Gesellschaft eine Aussage, die im Umgang mit anderen gemacht wurde.[34] Er nahm aber Äußerungen gegenüber Freunden und Gatten aus und meinte, dabei handle es sich nicht um Äußerungen in Gesellschaft. Das begründete er mit folgender Überlegung: Eine (mündliche) Lästerung bestehe notwendigerweise in einer Mitteilung an jemanden anderen. Wenn aber jede Mitteilung an jemanden anderen schon eine Äußerung in Gesellschaft war, hätte die Einschränkung des § 58 auf Äußerungen in Gesellschaft und in der Öffentlichkeit keinen eigenständigen Sinn mehr gehabt.[35] Jenulls nachvollziehbare Überlegung führt dazu, dass wirklich private Lästerungen des Kaisers nicht strafbar waren. Seine Abgrenzung scheint aber etwas willkürlich zu sein, da seiner Meinung nach Lästerungen zu Gatten und Freunden nicht strafbar sein sollten, solche zu Kindern oder anderen Verwandten aber offenbar schon.

Öffentliche Äußerungen waren nach Jenull solche, die „vor Mehreren, mit denen man nicht in Gesellschaft ist", gemacht wurden.[36] Eine Lästerung in Gesellschaft konnte nach seiner Auffassung schon bei nur einem Zuhörer vorliegen, eine öffentliche Lästerung musste vor mehreren, also zumindest zwei Zuhörern geschehen. Im ersten Fall musste irgendein bewusster Kontakt zwischen dem Lästerer und seinem Zuhörer bestehen, im zweiten Fall genügten auch zufällige Zuhörer.[37]

Auch bei Lästerungen in Schriften oder Bildern entstand die Strafbarkeit erst durch deren Verbreitung. Nicht das Niederschreiben oder das Malen oder Zeichnen war schon strafbar, sondern erst die Mitteilung (hier wohl im Sinne von Übermittlung gemeint)[38] begründete die Strafbarkeit. Das StG 1803 enthielt keine besonderen Vorschriften für Schmähungen des Monarchen in Druckwerken. Aufgrund der damals bestehenden Zensur bestand dafür keine Notwendigkeit. Wegen der umfassenden (Vor)Zensur war es praktisch nicht möglich, Straftaten wie etwa Schmähungen des Landesfürsten durch die Veröffentlichung in Druckschriften zu begehen.[39]

Nach § 59 betrug die Strafe für die Störung der innerlichen Ruhe des Staates nach den §§ 57 und 58 ein bis fünf Jahre schweren Kerker.

3. Anwendungsbereich und Auslandsbezüge

Im Zusammenhang mit Straftaten gegen den Kaiser stellte sich auch die Frage nach dem räumlichen und personellen Anwendungsbereich des StG. Das Gesetz galt (ebenso wie wenige Jahre später das ABGB) für die „deutschen Erblande" der Habsburgermonarchie, also nicht für Ungarn und seine Nebenländer. Im Sinne des Gesetzes waren die Bewohner Ungarns und seiner Nebenländer daher Ausländer, die anderen Bewohner der Monarchie hingegen Inländer.[40]

Selbstverständlich war das Gesetz auf Verbrechen anwendbar, die von Inländern im Inland begangen wurden. Zusätzlich ordnete § 30 an, dass auch Verbrechen von Inländern in Ausland nach dem österreichischen StG zu bestrafen waren. § 31 bestimmte weiters, dass auch Ausländer, wenn sie in Österreich ein Verbrechen begingen, nach dem StG zu bestrafen waren. Gemäß § 32 waren gewisse Delikte sogar dann nach österreichischem Recht strafbar, wenn sie von einem Ausländer im Ausland begangen wurden. (Dies wurde freilich nur dann relevant, wenn der ausländische Täter nach seiner Tat irgendwann einmal österreichisches Gebiet betrat.) Diese besonders umfassende Anwendbarkeit des österreichischen Strafrechts war aber nur auf einige wenige Delikte beschränkt, nämlich solche, die Einfluss „auf die Verfassung, die öffentlichen Creditspapiere, oder auf das Münzwesen dieses Staates" hatten.[41]

Es war unbestritten, dass das eigentliche Delikt des Hochverrats diese Kriterien erfüllte. Für die Sonderformen der unterlassenen Verhinderung und der unterlassenen Anzeige verneinte Jenull aber die Anwendbarkeit des § 32 und meinte, dass diesbezügliche Unterlassungen von Ausländern nicht strafbar waren. Er begründete das mit dem Wortlaut des § 32, der besagte, dass ein Verbrechen eines Ausländers nur strafbar war, wenn es Einfluss auf die genannten Rechtsgüter hatte, also eine bestimmte Wirkung ausübte. Jenull meinte nun, dass eine Unterlassung als solche nie eine Wirkung ausüben könne.[42] Aus heutiger Sicht scheint diese Überlegung nicht sehr überzeugend. Immerhin legte das StG 1803 schon in den §§ 1 und 2 grundsätzlich fest, dass Verbrechen grundsätzlich auch durch Unterlassungen begangen werden konnten.[43] Die dogmatische Einordnung der Unterlassung war damals freilich noch eher unklar und umstritten.[44] Im Ergebnis erscheint Jenulls Überlegung außerdem durchaus sachgerecht. Dass sich Ausländer im Ausland schon dadurch strafbar machen sollten, dass sie eine hochverräterische Handlung gegen ein fremdes Land nicht verhindern oder anzeigen, wäre schon eine extreme Ausdehnung der Strafbarkeit gewesen – dies umso mehr angesichts der drakoni-

[34] JENULL, Criminalrecht 1, S. 48.
[35] JENULL, Criminalrecht 1, S. 48, Anm. f.
[36] JENULL, Criminalrecht 1, S. 48.
[37] Zumindest die spätere Judikatur zum StG 1852 folgte dieser Auffassung Jenulls nicht. Sie verstand unter „öffentlich" die Begehung „an einem öffentlichen Ort". Nach dieser Judikatur kam es nur auf den Ort an und nicht darauf, wie viele Leute die Schmähung hören konnten; vgl. HYE, Strafgesetz, S. 744–746, Anm.
[38] Vgl. HYE, Strafgesetz, S. 752, Anm.
[39] OLECHOWSKI, Thomas, Die Entwicklung des Preßrechts in Österreich bis 1918, Wien, 2004, S. 289.
[40] MAUCHER, Ignaz, Sistematisches Handbuch des österreichischen Strafgesetzes über Verbrechen und der auf dasselbe sich unmittelbar beziehenden Gesetze und Verordnungen, Bd. 1, Wien, 1844, S. 219 (Nr. 222); Der Begriff des Inländers richtete sich ab 1812 nach den einschlägigen Bestimmungen des ABGB (§§ 28–32); vgl. MAUCHER, Handbuch, S. 213.
[41] Dazu auch WAHLBERG, Emil Wilhelm, Zu Geschichte und Classification der politischen und socialen Verbrechen, in: DERS., Gesammelte kleinerer Schriften, Bd. 3, Wien, 1882, S. 18–54, hier S. 18–19.
[42] JENULL, Criminalrecht 1, S. 27.
[43] Vgl. auch Art. II und IV des Kundmachungspatents.
[44] MOOS, Verbrechensbegriff, S. 408–411.

schen Strafdrohungen mit lebenslangen Kerkerstrafen. Bei der unterlassenen Anzeige hätte sich außerdem die Frage gestellt, ob eine Anzeige einer/jeder ausländischen Behörde ausreichend gewesen wäre oder nicht. Eine Anzeige bei österreichischen Behörden wäre in den meisten Fällen wohl unmöglich, jedenfalls aber unzumutbar gewesen.

Auch die Lästerung des Monarchen nach § 58 erfüllte die Voraussetzungen des § 32 nicht und war somit nicht strafbar, wenn sie von einem Ausländer im Ausland begangen wurde.[45]

Ausländische Staatsoberhäupter waren durch das österreichische Strafrecht in keiner besonderen Weise geschützt. Wenn sie in Österreich beleidigt wurden, war das allerdings ein Anwendungsfall der allgemeinen Delikte gegen Ehre.[46]

4. Andere Mitglieder des Kaiserhauses

Das StG 1803 stellte den Kaiser als Staatsoberhaupt unter ganz besonderen Schutz. Diese Bestimmungen des 7. Hauptstücks bezogen sich ausschließlich auf den Kaiser und waren auf sonstige Mitglieder des Kaiserhauses nicht anwendbar. Aus der Formulierungen „Oberhaupt des Staates“ und „Landesfürst“ ergab sich auch eindeutig, dass ein abgedankter Kaiser nicht mehr unter dem besonderen Schutz des Strafgesetzes stand, denn dieser war ab dem Moment der Abdankung nicht mehr Staatsoberhaupt und auch nicht mehr Landesfürst. Besondere strafrechtliche Vorschriften in Bezug auf die anderen Mitglieder des Kaiserhauses gab es nicht. Diese waren also in genau derselben Weise geschützt wie andere auch.

III. Ausblick

Das StG 1803 wurde 1852 durch ein neues Strafgesetz ersetzt. Dabei handelte es sich aber nicht um völlig neues Gesetzbuch, sondern eher um eine Art Wiederverlautbarung. Jene Veränderungen und Ergänzungen, die es seit 1803 an verschiedenen Stellen und in verschiedenen Formen gegeben hatte, wurden in den Gesetzestext selbst aufgenommen.[47] Gerade das siebente Hauptstück über Hochverrat, Majestätsbeleidigung etc. wurde aber im neuen Gesetz grundlegend neu gestaltet: Strafdrohungen wurden teilweise geändert, und Formulierungen präzisiert. Die Majestätsbeleidigung wurde nunmehr als eigenes Delikt konstruiert und nicht mehr als Unterfall der Störung der innerlichen Ruhe des Staates. Außerdem wurde mit dem Delikt der Beleidigung der Mitglieder des kaiserlichen Hauses ein völlig neuer Tatbestand eingeführt. Schließlich brachte das StG 1852 eine terminologische Neuerung, die mehr aus staatsrechtlicher als aus strafrechtlicher Hinsicht interessant ist: Das neue Gesetz sprach konsequent vom Kaiser und nicht mehr vom Landesfürsten oder vom Staatsoberhaupt. Insgesamt brachte das StG 1852 eine deutliche Erweiterung der Strafbarkeit von Hochverrat den gegen Kaiser und Majestätsbeleidigung. Schon bald wurden gerade diese Bestimmungen des StG 1852 als zu weitgehend empfunden. In den 1860er-Jahren setzte eine Reformdiskussion zum gesamten Strafrecht ein, die aber bis zum Ende der Monarchie nicht mehr zu einem konkreten Ergebnis führte.[48] Somit blieben die Bestimmungen von 1852 bis 1918 in Kraft.

[45] JENULL, Criminalrecht 1, S. 43.

[46] Die Verfassung etc. des Deutschen Bund hingegen war seit 1837 ebenso geschützt wie jene des Kaisertums Österreich; MAUCHER, Handbuch 1, Nr. 228.

[47] HOEGEL, Hugo, Geschichte des Österreichischen Strafrechts mit einer Erläuterung seiner grundsätzlichen Bestimmungen, 2 Hefte, Wien, 1904–1905, S. 96–97; OLECHOWSKI, Thomas, Zur Entstehung des österreichischen Strafgesetzes 1852, in: DERS., Christian NESCHWARA, Alina LENGAUER (Hgg.), Grundlagen der österreichischen Rechtskultur. Festschrift für Werner Ogris zum 75. Geburtstag (Wien–Köln–Weimar 2010) 319–342.

[48] CZECH, Philip, Der Kaiser ist ein Lump und Spitzbube. Majestätsbeleidigung unter Kaiser Franz Joseph, Wien, 2010, S. 87–116.

The Origin of Legitim in English Law – a Reappraisal

Brian Dowrick, Meryl Thomas***

Abstract

The ability of a testator to dispose of chattels by means of a will seems to have been restricted from an early time in England. This paper re-examines the possible origins of such a concept; it considers ideas from Roman law, Anglo-Saxon law, Canon law and Anglo-Norman law in an attempt to trace the genesis of the so-called legitim. It highlights the intrinsic problems that are faced when embarking on such a task, and concludes that legitim most likely has its roots in customary law, and is likely to pre-date the Norman Conquest.

Key words: *Succession-legal history; legitim or reasonable parts; Roman law; canon law; Anglo-Saxon wills; Norman law; wills.*

Introduction

Freedom of testation over chattels existed in England for but a short period of time, namely, from 1724 to 1938. After 1938 the Inheritance (Provision for Family and Dependants) Act, while permitting freedom of testation at a theoretical level, introduced a system whereby a dependant could apply to the court for provision from a deceased's estate if the will (or the intestacy) did not make reasonable financial provision for him. Hence, although a testator may make a will reflecting his wishes, testamentary freedom may be more illusory than real, since the deceased's actions may be challenged after his death. Before 1724 there was, to a greater or lesser extent, a measure of control over the testator's ability to dispose of personalty by means of a will. The degree and nature of this control depended on where the testator lived (since the rules applied to certain parts or regions of the country) and by whom he was survived. Generally, in the case of a testator who was survived by a widow and child(ren) one-third of his personalty devolved to the child(ren) and one-third to his wife (this being their legitimate part, *legitim* or reasonable part), with the remaining one-third being the 'free' estate over which he had full testamentary power; where the testator was survived by a widow or child(ren) then one half of his personalty devolved to the widow or child(ren), with one half of the estate being the 'free' part. A series of Acts of Parliament, namely 4 Will & Mary (1692) cii section 3,[1] 7 & 8 Will III (1696),[2] 2 & 3 Anne (1704),[3] and 11 Geo I (1725) c 18, sections 17 and 18,[4] abolished *legitim* from English law.

Legitim was enforced "at an early date in medieval history",[5] but its origin has remained obscure. Glanvill, when writing his treatise of the laws on England around 1187, describes the division of a person's chattels into thirds (where a wife and heir survive, with one-third devolving to the wife, one-third to the heir and one-third being the free part over which a seriously ill testator had power of disposition), or halves (where only the heir survives, with one-half devolving to the heir and one-half being the free part).[6] Magna Carta some twenty-eight years later endorses the rule, and talks of the *rationabilibus partibus*.[7] Sheenan suggests that there may be evidence of a division of chattels before this in the Coronation Charter of Henry I, c.7:[8] the evidence is equivocal, however, because of the uncertainty of the meaning of the term *'pecuniam suam'* in c.7 which can

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1 This statute permitted the inhabitants of the Province of York (which extended to York, Nottingham, Cumberland, Northumberland, Westmoreland, Durham and a large part of Lancaster) to dispose of their personal estate notwithstanding the custom of *legitim*, although the statute did not extend to freemen of the cities of York and Chester.

2 This statute removed the restrictions on a man disposing of his personal estate within the principality of Wales and parts of the Marches.

3 This Act gave the same rights of testamentary freedom over the personal estate to freemen of York.

4 This Act placed London on the same footing as the rest of the country and abolished the custom relating to the distribution of a freeman's personal estate.

5 R.H. Helmholz, Canon Law and the Law of England, (Hambledon Press, 1987), 247.

6 Glanvill, The treatise on the laws and customs of the realm of England, ed G.D.G. Hall, (Nelson, 1965), VII 5.

7 W. Stubbs, Select Charters, (Oxford, 1913) 296, c. 26.

8 ibid, 118. *"Et si quis baronum vel hominum meorum infirmabitur, sicut ipse dabit vel dare disponet pecuniam suam, ita datam esse concedo. Quod si ipse, praeventus vel armis vel infirmitate, pecuniam suam non dederit vel dare disposuerit, uxor sua sive liberi aut parentes, aut legitimi homines ejus, eam pro anima ejus dividant, sicut eis melius visum fuerit."*

either refer to the chattels available for distribution at the testator's death (since there is no express reference as such, presumably after the wife and heir had taken their chattles), or be used to describe all of a person's wealth (and it is used in this context in c.8). It is only when the deeds from the reign of Henry I are examined that Sheehan's argument becomes more plausible, since a number of deeds from the reign of Henry I suggest some form of division of chattels operated throughout England.[9]

The aim of this paper is to re-examine and reappraise the evidence concerning the early origins of *legitim*. If *legitim* existed as early as 1100, then what is its origin? There are conceivably a number of possibilities, including the following:

(a) It descended from Roman law, either by means of a direct and unbroken chain from the time of Roman Britain, or Roman law principles were reintroduced at a later date.
(b) It was practised by the Anglo-Saxons and was either introduced by them, or they continued an earlier practise of the Romans.
(c) It was introduced into England and Wales by the Normans.
(d) It is a construct of the church and became a feature of a post-Christian England.

(a) Roman Origins?

The principle which underpinned Roman law from the time of the Twelve Tables to the fall of the Republic was that of testatmentary freedom. A testator was free to make legacies, and could give away much of his property by means of these legacies, so that little or nothing remained for the heir. A series of statutes was passed to remedy this, and to guarantee the heir a certain part of the testator's property, thus restricting the testator's freedom of disposition,[10] but it was not until the *lex Falcidia* was enacted in 40 B.C. that forced heirship operated effectively, although this may have been an unintended consequence since the *Lex Falcidia* was primarily "a revenue collection device" according to Reid.[11] By the *lex Falcidia* the amount of the legacies which the testator could make should not exceed three-quarters of the estate, thus guaranteeing a portion for the heir, who was often the testator's son.

Later the Institutes of Justinian set out the rules of how the *lex Falcidia* interacted with testamentary freedom, both of which were inextricably linked to the notion of *pietas* within the Roman family, which Saller says was "[a]t the center of the Romans' ideal view of familial relations."[12] This 'piety' had a reciprocal quality, with children owing duties to parents and *vice versa*. If a will failed in its duty of piety a legal fiction operated whereby the testator was presumed to be insane: this fiction served to reconcile the inherent tension and contradiction between the Roman notion of testamentary freedom and the duty to transmit wealth to the next generation. In cases where the obligation owed to the child was breached Justinian said that the action of the *querela* (inofficious will) was available. A connection was thus established between 'natural affection' and the inofficious will,[13] and where children demonstrated a regard for their parents, obedience and a sense of deference they had a claim against the estate. The *lex Falcidia* became the *legitima portio* or the 'legitimate portion' in the Codex of Justinian:[14] the Novels of Justinian (from around A.D. 538),[15] changed the amount of the *legitima portio,* and the testator was obliged to leave one-third of his property to the children if there were not more than four, and one-half if there were more than four children.[16]

Despite the superficial similarity between the *legitim* of Roman law and that of medieval England, the latter is extremely unlikely to be a direct descendant of the former for a number of reasons:

(i) It is with the rules of testamentary succession of Justinian where we see the greatest similarity between *legitim* and the curtailment of testamentary freedom, but these did not become law in the Western Empire until after the reconquest of Italy in 554 A.D.,[17] almost one hundred and fifty years after the Romans had retreated from Britain. Restraints on testamentary freedom existed before the Novels of Justinian – the *lex Falcidia* – and we can assume that this was known of in Roman Britain, but little evidence of the law and legal institutions of late antique Britain have survived.[18] The problem was neatly summed up by C.E. Stevens, when he said, quoting A. L. F. Rivet, "You can dig up a villa but you cannot dig up its land-tenure."[19] The

[9] ibid, 290–291. See, for example, Gloucester Cart., I 326 (W.H. Hart ed, Historia et Cartularium Monasterii Sancti Petri Gloucestrić, R.S. 33 (1863–7); Ramsey Cart II 259 (W.H. Hart and P. A Lyons eds., Cartularium Monasterii de Rameseia, R.S. 79 (1884–94)) and the Cartulary of St Werburgh, (J. Tait ed, The Chartulary or Register of the Abbey of St Werburgh Chester, (Chetham Soc 1920-1-3), I, 17, 31–32). In the last of these we see one of the clearest examples of the 'thirds' system in operation in the 'foundation charter' of St Werburgh's Abbey Chester; Earl Hugh and his men arranged that on the death of the barons, knights, burgesses and other free men, the body of the deceased and one-third of his substance be given to the abbey.

[10] Gai II §§ 224–227 in Friedrich Karl von Savigny, Private International Law and the Retrospective Operation of Statutes (Lawbook Exchange, 2003), 392–3. For example, the *lex Furia* and the *lex Voconia.*

[11] Charles J. Reid Jr., Power over the Body, Equality in the Family, (William B. Eerdmans: Cambridge, 2004), 165.

[12] Richard P. Saller, 'Pietas, Obligation, and Authority in the Roman Family' in P. Kneissel and Volker Losemann, eds, Alte Geschichte und Wissenschaftsgeschichte. Festschrift für Karl Christ zum 65. Gebertstag, (Darmstadt: Wissenschaftliche Buchgesellschaft, 1988).

[13] See Codex 3.28.36.2; Novella 1.1.2. The references to Roman law are taken from the three-volume edition, Corpus Iuris Civilis, P. Krueger, T. Mommsen, R. Schoell and W. Kroll, eds., (Hildesheim: Weidmannsche Verlagsbuchhandlung, 2000).

[14] Codex 3.28.30 and Codex 3.28.31, ibid.

[15] Justinian wanted to strengthen the rights of heirs, and may have been influenced by both Christian and Hellenistic ideals.

[16] Novella 18.1, op cit footnote 13.

[17] Hunter, Roman Law, (London: Sweet and Maxwell, 1897), 3rd ed, 93, 98.

[18] John Frederick Winkler, 'Roman Law in Anglo-Saxon England', 13 J. Legal History (1992) 101. See also E. Birley, Roman Britain and the Roman Army, (T. Wilson, 1953) 48ff and J. Liversidge, Britain in the Roman Empire, (Routledge & Keegan Paul, 1968) 303ff, for evidence of Roman law in the first and second centuries in Britain.

[19] C.E. Stevens, 'The social and economic aspects of rural settlement' in Rural Settlement in Roman Britain, C.Thomas (ed), (London:CBA, 1966).

Romano-British must have been familiar with the institutions of Roman law and Roman law itself, which "consisted of local customs,[20] customs common to the western Roman world, and such written *leges* and *iura* as reached them from the centres of government and legal scholarship".[21] The Roman occupation of Britain lasted from 43 A.D. to 410 A.D., and Roman ideas of inheritance would have been known, but the extent to which they were practised (outside the Roman population) is unclear, suffice it to say it was not Roman practice to force its laws on its citizens.[22] Nevertheless in 212 A.D. the *constitutio Antoniana* extended Roman citizenship to almost all of the free inhabitants of the Empire and large numbers of the provincials were required to live under Roman law.[23] But in 224 A.D. a law was passed by which a governor could try cases at his own discretion under 'local law', and he should be prudent in tampering with customary law.[24]

(ii) The Germanic races who settled in Britain were a people beyond the reach of the Roman Empire.[25] At the time of their settlement of England the *municipia* of Roman Britain were ceasing to function as centres of political and economic activity,[26] and thus it has been generally assumed that the institutions in which Roman law was practised and studied disappeared. The Greek historian, Zosimus, said that the Britons, in ejecting Roman administrators in 410 A.D., ejected Roman law with them.[27] In the areas where the Anglo-Saxons did not settle Roman practices were abandoned by the Romano-British people,[28] and moreover in the areas where the Anglo-Saxons settled all elements of Roman law seem to have disappeared, and the Romanisation of Britain 'evaporated'.[29] From the fifth to the mid-seventh century the Anglo-Saxons occupied most of Britain and displaced, assimilated or enslaved the Romano-British:[30] in so doing there is no evidence that they were influenced by the ideas and legal concepts of Roman Britain.

(iii) Finally the *legitim* of Roman law referred only to the child's right to a share of the parent's estate, and no provision was made for the widow, who was taken to be sufficiently provided for if she received back her dowry. The *legitim* of medieval Ebgland extended not merely to the child, but also to the widow.

(b) Evidence of Legitim in Anglo-Saxon England

The sources of Anglo-Saxon law are sparse compared with the wealth of documentary evidence of later eras, and the customs regulating inheritance among the early Germans is unknown.[31] Tacitus tells us that the early Germanic peoples were ignorant of the will,[32] and preferred to transmit property by means of intestate succession, favouring inheritances to devolve according to a set of rules, rather than choice. Undoubedly the rules of succession in this early Anglo-Saxon era must have been governed by custom, but the details are obscure,[33] although such rules are likely to have reflected the "intimate relationship that Germanic society saw between the possession of family property and personal identity."[34]

Legal documentary evidence for the devolution of property on death in the Anglo-Saxon age can be found in the laws of the kings and the extant corpus of wills.[35] The vernacular wills number sixty-eight, in addition to a handful of wills and bequests recorded in Latin,[36] although they would better be described as *post obit* dispositions,[37] since they lack the features of a modern day will,[38] and there are a number of references to will-making or wills in the Latin chronicles, *Liber Eliensis* and *Chronicon Abbatiæ Rameseinsis.*[39] Only two wills can be traced to

[20] There is no doubt local customary law operated within the Empire. This was recognised by Bishop Theodoret of Cyrrha in the fifth century, when he said that in parts of the (albeit Eastern) Empire 'Fisherman's Law' had penetrated and Roman law had not (Theodoret, Graec. Affect. Car., 9ed, Raeder, 223). Wales, when under Roman rule, had provisions (for example, tir gwelywg and tir cyfrif) which, as C.E. Stevens (ibid, footnote 19 108), says have a primitive look which invite suspicion that they were part of Welsh law.

[21] op cit, footnote 18, 101.

[22] ibid, 108. See also Velleius Paterculus, ii, 117, 4.

[23] See H. Jolowicz, Historical Introduction to the study of Roman Law, (Cambridge, 1954) 2nd ed., 357.

[24] Cod Just VII, 53, 1, op cit, footnote 13.

[25] op cit, footnote 18, 101.

[26] ibid.

[27] vi, 5, 2.

[28] Justinian's Novellae 154, op cit, footnote 13.

[29] C.J. Arnold, Roman Britain to Saxon England, (Croom-Helm, 1984) 9. See also W. Senior, 'Roman Law in England before Vacarius', xlvi LQR 191.

[30] F. Calasso, Medio evo del diritto, (le fonti, 1954) and P. Koschaker, Europa und das römische Recht, (Munich-Berlin: C.H. Beck, 1953), 2nd ed.

[31] M.M. Sheenan, The Will in Medieval England, (Toronto: Pontifical Institutue of Medieval Studies, 1963) 5.

[32] Tacitus, Germanica, edited and translated by H. Goelzer, Collection des Universités de France (Paris, 1922), c. 20.

[33] Sheenan footnote 31, 5.

[34] James A. Brundage, Medieval Canon Law, (Routledge, 1995) 88.

[35] There are also religious and literary sources.

[36] S1182/EHDI 72, S146/EHDI 78, S157, S1187/EHDI 81, S1414, S1652 and S1502. www.trin.cam.ac.uk/chartwww/.

[37] Sheenan identifies another type of will, the *cwiðe*, which is a development of the *post obit* gift, but distinguishable from it. (Op cit, footnote 31, 20) In the *post obit* gift there is one donee and one gift made to that person, whereas in the *cwiðe* there are several gifts made to several persons.

[38] This has been discussed by several writers, including Hazeltine (in D. Whitelock, Anglo-Saxon Wills, (Cambridge, 2011), xi n2) and Sheehan (ibid, 45–46) who agree to a greater or lesser extent that that these wills lacked being hereditative, ambulatory and revocable in nature. Moreover, there is a bilateral quality to many of them which is missing from the modern day will. They seem to be evidentiary in nature, supplying proof of oral arrangements.

[39] These Latin chronicles are a useful source of information concerning bequests of land, although the *Liber Eliensis* gives lengthy detailed lists of movable property donated to the monastery at Ely, which cannot be found elsewhere. (References to *Chronicon Abbatić Rameseinsis* (*C.R.)* are to *Chronicon Abbatić Rameseinsis,* W.D. Macray, ed., RS, 83 (1886), and references to *Liber Eliensis* (*Lib. El.*) are to *Liber Eliensis*, D. J. Stewart, Anglia Christiana Soc, (London, 1848)). For example, *Lib.El.* ii 114, ii 135, ii 139 and iii 50.

the eight century,[40] eleven to the ninth century,[41] and although there is an incremental increase in the number surviving in the tenth and eleventh centuries, their number still remains small. The reason for the paucity of surviving documents is impossible to know, but several cogent hypotheses may be advanced. Will-making may not have been frequent in the eight and ninth centuries, with intestacy being the standard method of devolution of property on death. By the time of Cnut[42] however it is explicit in the law that it is 'neglectful' not to make a will, thus suggesting that wills are employed more frequently than the survival rate indicates. From the mid 860's the Anglo-Saxons faced a wave of attacks from the Danes (in East Anglia) and the Norwegians (in the north-west): both "consigned the land to waste and desolation"[43] and it is probable that many written wills may have been destroyed, at the time of these raids.[44] Nevertheless this argument does not account for the scarcity of wills in the old territories of Wessex and Mercia, which were not overrun by the Viking invaders.[45] A better explanation may be the disintegration of the actual fabric of the will itself which would have caused many to have been lost,[46] and, perhaps more importantly, the fact that early Anglo-Saxon wills were largely oral in nature, following the Germanic traditions and practices:[47] the death-bed disposition, which is one form of Anglo-Saxon will, was usually oral, and thus left little trace.[48] Between the fifth and eleventh centuries English society was largely an oral society,[49] and it was not until the end of the Anglo-Saxon period that access to the written word became important.[50] Evidence from the seventh and eighth centuries show that the oral will, in the form of the *verba novissima,* was used soon after the conversion of the country to Christianity,[51] and Sheehan has said it was the most commonly used type of will among the Anglo-Saxons,[52] and if this is correct it presents a problem when trying to determine the origins of *legitim.* Some have contended that there is a reference to *legitim* in Bede's work of the seventh century, *The Ecclesiastical History of the English People,*[53] where Drythelm, before entering a monasary at Melrose, divided everything he possessed into three parts, one for his wife, one for his sons and the third was to be distributed to the poor. Several writers have remarked on the similarity of the division of property into thirds in Bede's story and the *legitim* later found in England, and have argued that it is evidence for the existence of a 'thirds system' operating in the customary law in the northern part of England,[54] but there is scant evidence to support this other than the reference in Bede's work.[55] Moreover, it is unclear from the story itself whether there was in fact a will in this case.

Of the sixty-eight vernacular wills[56] forty contain bequests of chattels, with there being chronicle evidence of a further ten wills of chattels.[57] No evidence of *legitim* or a quota system can be detected in them,[58] but the donees in most are family mem-

[40] Dunwal's will, S1182/EHDI 72 and that of King Offa S146/EHDI 78, both of which are recorded in Latin.

[41] S1500/R3, S1482/H2, S1510/R6, R1200/H7, S1508/H10, S1507/H11S1514/R9, S1202/H8 (all of which are recorded in the vernacular), S157, S1414 and S1187/EHDI 81 (which are recorded in Latin).

[42] Cnut §71 "And if any one depart this life intestate, be it through his neglect, be it through sudden death; then let not the lord draw more from his property than his lawful heriot. And, according to his direction, let the property be distributed very justly to the wife and children, and relations; to every one, according to the degree that belongs to him."

[43] Lib. El. op cit footnote 39, 105.

[44] P. Wormald, 'The ninth century', in The Anglo-Saxons, ed. J. Campbell (Oxford, 1982), pp 132–59. See also L. Tollerton, Wills and Will-Making in Anglo-Saxon England, (York Medieval Press, 2011) who also proposes this as a possible reason for the paucity of written wills.

[45] John Blair, The Church in Anglo-Saxon Society, (Oxford, 2005) 306.

[46] For example, see the compiler's references to the deteriorating charters in the *Chronicon Abbatić Rameseiensis. Op cit footnote 39, C.R.* 1, 39.

[47] See A. Heusler, Institutionen des deutschen Privatrechts, (Leipzig, 1885) I §§11–19; R. Schröder, Lehrbuch der deutschen Rechtsgeschichte, (Leipzig, 1932), 7th ed. §§ 11, 35, 61 and K. von Amira, Grundriss des germanischen Rechts, (Strassburg: Verlag von Karl J Trübner, 1913) 3rd ed. §§ 69–71. Hazeltine, op cit footnote 38, ix says, "spoken words and manual acts … dominated the law…".

[48] See the death bed disposition in *Lib El*, op cit footnote 39, II 59.

[49] B. Danet and B. Bogoch, 'From Oral Ceremony to Written Document: The Transitional Language of Anglo-Saxon Wills', (1992) 12 Language and Communication 96.

[50] F.H. Baüml, 'Varieties and consequences of medieval literacy and illiteracy', (1980) 55 Speculum 237.

[51] op cit, footnote 31, Sheehan 31. See also Lib. El., op cit footnote 39, Bk II chpts 59, 61 and the *Chronicon Rameseiensisnos*, op cit footnote 39, 67, 79 and 80.

[52] ibid, 33.

[53] J. McClure and R. Collins, Bede The Ecclesiastical History of the English People, (Oxford, 1999), Chapter 12.

[54] See, for example, E.F. Bruck, Kirchenväter und Soziales Erbrecht, (Berlin, 1956), 196–200 in which it is suggested that this practice was common in Northumbria at the time of Bede, although there is no direct evidence of this. Also see R.H. Helmholz, The Oxford History of the Laws of England, (Oxford, 2004), Vol 1, 425.

[55] Bruck (ibid) in his work shows that the one-third 'free part' or dead's part' of the estate which was used by the testator to make ecclesiastical gifts developed profoundly in Ireland and this is reflected in both the Brehon Laws and the Irish canonical collections. He suggested that this one-thirds part can be found in areas of Europe where the influence of Irish missionaries is found. Sheehan (op cit, footnote 31, 77) tenatively supports this view.

[56] Namely, S1507/H11, S1515/H21, S1503/W20; S1508/H10, S1504/H20, S1483/W2, S1485/W9, S1498/W10, S1482/H2, S1505/W12, S1487/W13, S1501/W16, S1536/W17, S1534/W19, S1527/W24, S1528/W25, S1537/W27, S1490/W28 S1531/W31, S1516/W33, S1519/W34, S1532/ St Albans 13, S1517/ St Albans 15, S1539/W3, S1484/W8, S1494/W14, S1486/W15, S1538/W21, S1521/W29, S1535/W32, S1525/W37,38, S1497/ St Albans 7, W39/Peterb 27, S1511/W11, S1526/W1, S1491/W4, S1488/W18, S1492/N+S10, S1489/W26, S1499/W35.

[57] *Lib. El.,* op cit footnote *39,* Byrhtsige II, 11; Byrhtnoth II, 62; Æthelgifu II, 59, Ælfwaru II, 61. *C.R.,* op cit footnote 39, Æthelstan 33, Æthelgifu 32, Ælfwaru 54, Ærnketel & Wulfrun 37, 38, Godric 63, Eadnoth and wife 107.

[58] See Tollerton (op cit, footnote 44, 108 et seq) for a detailed analysis of the bequest of movables in Anglo-Saxon times.

bers (including collaterals, wives, children, mothers and sometimes kinsmen and kinswomen), the lord (the heriot clauses),[59] or the gift of an ecclesiastical nature: it is in the ecclesiastical gift made by lay persons that we see the true bilateral nature of the Anglo-Saxon will, for the donors expected a 'spiritual return' for their gifts. In these ecclesiatical gifts the donees varied, with the recipients being, *inter alia,* religious houses, monastic foundations or local churches, but the purpose of the gift was usually to allow the donor to make "a good death"[60] and ensure that the church mediate between the living and the dead.[61] Gifts 'for my soul' frequently appear in Anglo-Saxon wills, and there are two aspects to such donations. The first is the redemptive nature of gift-giving which would carry with it a celestial reward,[62] and the second is that such gifts could warrant spiritual intercession by the community of prayer immediately after the donor's death and in perpetuity.[63] Special masses would be said for the deceased and their kin, and by the ninth century prayers for the dead were being incorporated into daily office, a practice reflected in the *Regularis Concordia.*[64] Moreover burial dues in the form of soul-scot had to be paid to the church for funerary obsequies.[65] There is no doubt that one of the important aspects of will-making at this time (and throughout the middle ages)[66] was the ecclesiastical bequest, and while gifts of land to the church had to be counter-balanced with the needs of the surviving kindred, this was less important in relation to bequests of chattels, which were far less likely to upset the economic dynamics within the family.

From the sixth century, first in Kent, and then elsewhere, the Anglo-Saxon kings caused their laws to be reduced to writing. These laws are laconic in style and do not give us a comprehensive picture of the law that operated within society at the time,[67] but they do provide us with a fragmented picture of the devolution of property on the death of the deceased. Klinck, in her work on Anglo-Saxon women and the law, quite rightly points out that the surviving wills are limited in one respect, namely, they relate exclusively to the disposition of property by the upper classes.[68] The laws are therefore especially valuable since they represent a 'repository of customary law',[69] and, chiefly had "the peasant class … in mind", a deduction that can be drawn from the language used in some (but not all) of these laws.[70]

There is little or no evidence in these early laws of any pattern of testamentary devolution, although in the laws of Ine, from the early eight century, we see the wife's 'third part' mentioned for the first time[71] in a law dealing with the wife of a *ceorl* who has stolen goods: she could succeed to one-third of her husband's chattels if she were innocent of the crime. And in the tenth century the laws of Æthelstan, namely VI Æthelstan, 1, §1, in a similar context speaks of the division of a thief's possessions into parts, one-part to go to an innocent wife, the remainder being divided into two, the king taking one half and the slain man's associates taking the other. It is difficult to conclude however, that these laws are referring to *legitim.* Moreover if these laws were referring to legitim we might expect to see mention of a child's right to *legitim* in Ine §38,[72] a law which dealt specifically with the property rights of a child on the death of the *ceorl.* There is none. It is not until the tenth century in the laws of Edmund 'Of Betrothing a Woman' that we once again have a reference to a wife's property rights on the death of her husband. But the interaction of laws §3 and §4 is difficult to interpret. Law § 3 states, "let the bridegroom declare what he will grant… if she live longer than he", and §4 states "If it be so agreed, then it is right that she be entitled to one half the property, and to all, if they children in common, except she again choose a husband." Thorpe[73] has suggested that these laws "indicate that the legal endowment of a woman was one-third of the chattels, as in Ine, c. 57" and this amount may be increased to one half if the husband so wishes. While this interpretation may be correct, there is no explicit reference to one-third being the legal endowment of the wife in the laws of Edmund, and the interpretation of the two clauses does not naturally lead to this conclusion. A more logical interpretation

[59] See N.P. Brooks, 'Arms, Status and Warfare in late-Saxon England', in Ethelred the Unready: Papers to the Millennium Conference, ed D. Hill, BAR Bri. Ser 69 (Oxford, 1978), 81–103, reprinted in N.P. Brooks Communities and Warfare 700–1400, (London, 2000) 138–61.

[60] P. Binski, Medieval Death, (London, 1996) 36.

[61] See P.J. Geary, 'Exchange and Interaction between the Living and the Dead in Early Medieval Society' in Geary Living with the Dead in the Middle Ages (Ithaca: London, 1994) 12.

[62] B.H. Rosenwein, To Be the Neighbor of Saint Peter: The Social Meaning of Cluny's Property, 909–1089 (Ithaca: London, 1989).

[63] ibid, footnote 61.

[64] M. McLaughlin, Consorting with Saints: Prayer for the Dead in Early Medieval France, (Cornell, 1994), 67–79.

[65] See Blaire (ibid, footnote 45). Both Stenton (F.M. Stenton, Anglo-Saxon England, Oxford History of England, II 2nd ed, (Oxford, 1947)) and Bruck (E.. Bruck, Kirchenväter und soziales Erbrecht, (Berlin, 1956) vi, n3) suggest the heathen custom of the burial of grave goods turned into a Christian use, thus making the custom more easily accepted.

[66] ibid, footnote 60, 34.

[67] Theodore F. T. Plunknett, A Concise History of the Common Law, (Liberty Fund, 2010), 712.

[68] Anne L. Klinck, 'Anglo-Saxon women and the law', 8 (1982) Journal of Medieval History, 108. In the sixty-eight vernacular wills which form the corpus of Anglo-Saxon wills and the corpus of wills written in Latin the donors are kings, ealdormen, thegns, bishops, abbots and reeves.

[69] ibid.

[70] For example, Ine §58, deals with the case of a *ceorl* stealing a chattel; II Cnut 77 speaks of a man's *cot*; and Ine §38 deals with the case of the death of a *ceorl.*

[71] Sheehan (op cit, footnore 31) suggests that this law is evidence of the Irish missionary influence, although it is difficult to see the logic to the argument in this context.

[72] §38 "If a ceorl and his wife have a child between them, and the ceorl die, let the mother have her child and feed it: let VI shillings be given to her for its fostering; a cow in summer, an ox in winter. Let the kindred take care of the 'frum-stol' until it be of age."

[73] B. Thorpe, Ancient Laws and Institute of England, (Lawbook Exchange, 2004) 108.

is that if the parties so agree the widow receive one half or the whole of the chattels (§4), *or some other agreed amount* (§3), which may or may not be one-third. What does seem clear from the laws of the Anglo-Saxon kings is that there is scant evidence of the *legitim* of later times.

The codes were supplemented by a mass of customary law which had local variations,[74] but little direct evidence remains of the customs simply because they were customs. The surviving wills are limited in that they represent a particular social class in a particular geographical area, and we are largely left in ignorance about the manner in which property passed between the generations of the lower social classes. Since the laws that have survived are incomplete and fragmented it is not inconceivable that some type of quota system operated in relation to the devolution of property on death, but they contain little proof of such a system.

(c) A Norman Introduction?

We have already seen that from 1100 there is evidence of a quota system operating in England in relation to the disposition of chattels. Earlier writers, such as Pollock and Maitland, have said that there is no proof that the division of property into thirds ever existed in Normandy,[75] and thus cannot be a Norman import. Part of the problem in trying to establish whether there is a link between the quota system of England and the duchy of Normandy stems from the lack of documents in Normandy from the time of the conquest in 911 A.D., and later charters recognise that transfers in earlier generations were not written down in such documents.[76] It was only after 965 A.D. when the Neustrian monasteries were refounded and re-established[77] and the ecclesiatical revival was in full swing,[78] that charter evidence began to appear,[79] and by the reign of Duke Richard II (996–1026) the writing of charters became more common place.[80]

Unsurprisingly transfers of movables are rarely mentioned in the early charters, and, as Génestal says, this is likely to be due to the relative unimportance of movables *vis-à-vis* immovables.[81] They are rarely used to command spiritual benefits, rarely pawned or granted and never given conditionally or rented.[82] Nevertheless there is one type of gift of movables about which evidence from early Norman times survives, and that is the gift a person's *pars, portio* or *substantia* of movables made to a convent after a person's death:[83] it was used in conjunction, although not exclusively, with several types of gifts, namely the grant of life estates, *post-obit* gifts of immovables, grants of the right to become a monk at a future date and grants of the right to be buried at the convent, when there is no expectation that the latter right will be exercised in the near future.[84] Thus the extant charters show that a 'portion' was a recognised feature of *post-obit* gifts to convents in eleventh century Normandy.[85] It is not clear however what amount of property comprised of a 'portion'. Some charters suggest it may have been limited to one-third of the donor's movables, for example, where a gift was stated to be *"tercia parte tocium substantie mee";*[86] and in another where it was said that "the same Richard's part, that is, the third portion of his grain and wine".[87] Thus the term 'portion' or 'part' may have been used and understood to mean one-third, but as Tabuteau correctly points out, "It would be stretching meagre evidence too far to conclude that most donors knew they could dispose freely of only one-third of their goods…",[88] although it is likely from the words such as proper part or proper portion that donors were aware that some limit had to be observed.[89] Nevertheless from the charter evidence that is available from the early Norman period it would be fallacious to conclude that any guaranteed rights of inheritance over movables existed for either a child or a widow: the evidence merely demonstrates that there is a some sort of limit over the portion of movables which can be left to a convent after a person's death.

Moreover, there is no trace of *legitim* in the *pays de droit coutumier* of northern France until towards the middle of the thirteenth century. Undoubtedly it was in use amongst the Gallo-

74 D. Whitelock, D.C. Douglas, C.H. Lemmon and F. Barlow, The Norman Conquest: its Setting and Impact, (Eyre and Spottiswoode, 1966) 26.
75 E. Pollock and F.W. Maitland The History of English Law, (Cambridge, 1968), Vol II, 349.
76 E.Z. Tabuteau, Transfers of Property in Eleventh-Century Norman Law, (London: Chapel Hill, 1988) 7.
77 While Christianity was preached at a very early time in parts of Normandy, for example, in Bayeux as early as 400A.D.; and the bishops of Avranches, Evreux and Coutances all took part in the Council of Orleans in 511 A.D., during the first half of the tenth century the ecclesiastical life of the region was disrupted by the Viking invasion, with some parts of the region lapsing into paganism. The monastic collapse reaching its zenith by the third quarter of the tenth century.
78 op cit, footnote 76, 23.
79 For example, those drawn up by the Abbey of Saint-Pčre de Chartes see Tabuteau, footnote 76, 7 n3.
80 Eighteen charters covering the period 1006–1026 are extant and in print, one in favour of Richard's wife, Judith; ten charters to churches in Normandy and seven to churces outside the province – D. C. Douglas, Time and the Hour, (Eyre Metheun, 1977), 96.
81 R. Génestal, Les formes du testament dans le droit normand, (Olivier, M. Caron, 1928).
82 op cit, footnote 76, 88.
83 idib. For example, in the charters from Saint-Martin de Sées, Saint-Evroul, La Trinité du Mort and also in charters from Fécamp.
84 op cit, footnote 76, 25–26.
85 Most of the charter evidence from Normandy dates from the 1080's and 1090's, but there are a few charters which pre-date this (ibid). The earliest evidence in England dates from 1091 (in Bishop Osmund's charter of Salisbury cathedral) with most dating from 1100 onwards – op cit, footnote 31, 290.
86 op cit, footnote 76, 89.
87 ibid.
88 ibid.
89 ibid.

Romans in the *pays de droit écrit,* and was firmly entrenched in most districts of southern France by the year 1100.[90] The influence of Roman ideas on the law of the *pays de droit écrit* is much stronger than on the laws of the *pays de droit coutumier,* and the *legitim* in the former region is acknowledged to be a direct descendant of that of Justinian's time.[91] In the north the combination of Germanic with Roman and Canon laws as well as local usage led to the development of numerous customs which reflected the Germanic tradition. In the south however the Germanic invaders permitted Roman law to continue under their doctrine of personal laws. The *Lex Romana Visigothorum* and the *Lex Romana Burgundonium* of about 506 A.D. and 517 A.D. respectively both contain laws whose source was Roman law and they were formulated to apply to the Hispano-Roman, Gallo-Roman and Burgundian-Gallo-Roman peoples who lived within the Visigothic and Burgundian kingdoms. By the Edict of Theodoric the *Lex Romana Burgundonium* could apply not only to Roman subjects but also those of Germanic descent.[92] Both the Edict of Theodoric and the Breviary of Alaric say that a will is '*nuls*' if the children or grandchildren do not receive their *lex falcidie (legitim).*[93] In the *Lex Visigothurum, Lois Lamb*arde of Luitprand and in *Lois Burgunde* we see curtailment of testamentary freedom and a guaranteed portion for the issue.[94] In cases of unjust disinherison the will fell, and in cases where a claimant received less than he was entitled he could obtain the shortfall.[95] The introduction of *legitim* into the *pays de droit coutumier* was likely to be an attempt to foster a moral duty to provide for one's children.[96] The amount was not at first fixed in the Roman manner, but decided upon by a judge, at least during the period of Phillipe de Beaumanoir,[97] and would be determined so that the "heirs could live reasonably and have their maintenance according to their condition in life."[98] The amount of legitim finally became fixed in the fourteenth century[99] and by the sixteenth century the Parlement de Paris declared that it was part of local custom,[100] and it was included in a revised text of the Custom of Paris in the late sixteenth century. A combination of court decisions and revision of the published customs resulted it being adopted throughout the *pays de droit coutumier.*[101] The *Ancienne Coutume de Normandie* did not grant children either a right of *legitim* nor a right of the *réserve,*[102] the latter being its Germanic cousin which operated throughout much of the *pays de droit coutumier* and represented a portion of the intestate succession which could not be disposed of by will to the prejudice of the heirs, and was 'reserved' for them. The redacted *coutumier,* from around 1583 however, sets out the increased children's rights to the property of their parents, where they were given a right to a '*tiers*' of the movables of the father and of the mother.[103] This right was in a way an analogue of the '*douaire des enfants*' practiced in other regions of northern France, particularly Paris, where in cases where the mother predeceased the father the children were given the right of dower which the widow would have taken had she survived: it was in effect a '*propre héritage aux enfants*'.[104] Terrien, some ten years earlier in his commentaries on the law of Normandy, had written of the child's '*part légitime*' (in the context of *avancements de succession*), and this is one of the first examples of legitim being referred to as such in Normandy:[105] by the time Godefroy was writing in the 1620's the term had slipped more into common usage.[106]

Sheehan acknowledges that there is no written evidence for the existence of *legitim* in Normandy, but argues that the Normans came into contact with a legal system which 'embodied the teaching of the Fathers on the share of the soul'[107] in their settlement of southern Italy, and that during these escapades they would have encountered Byzantine law which required a third of a testator's property be left as a bequest in alms. He

[90] E. Chénon, Histoire générale du droit français public et privé des origines à 1815, (Paris, 1926) Tome II, 286–287; J.B. Brissaud, Histoire générale, (Paris: Fontemoing 1904), Tome II 1634–1637. This *legitim* applied to both movables and immovables.

[91] J. Dainow, 'Forced Heirship in French Law', 2 (1940) La. L. Rev. 670.

[92] Ed Theod., c. xxviii and c. xxxii.

[93] Pap. Resp., tit I and Ed Theod, ibid, tit x, §§ 5–7.

[94] Lex Vis, lib IV, tit II § 20 (in K. Zeumer ed, Leges Visigothorum in Monumenta Germaniae Historica, Leges Nationum Germanicarum, vol 1 (Hanover: Hahn, 1902)), where the portion for the child(ren) is called the *meliorare filium*; See also Luitprand I. VI, CXLVIII and L Bur t. II. See also Brissaud, op cit, footnote 90 514.

[95] E. Vallier, Le fondement de droit successoral en droit français, (Larose, 1903), 124.

[96] J. Engelman, Testaments Coutumiers, (Paris: Macon, 1903), 258–9. Most of the customs established *legitim* for children, but a few did so for ascendants too.

[97] F.R.P. Akehurst trans., The 'Coutumes de Beauvaisis of Philippe de Beaumanoir', (Philadelphia: University of Pennsylvania Press, 1992), 12,37: 70,5.

[98] Ibid.

[99] J. Brissaud, A History of French Private Law, vol II, (Little, Brown and Co., 1912) 743.

[100] J.P. Dawson, Gifts and Promises, (New Haven: Yale University Press, 1980), 41.

[101] ibid 41.

[102] G. Boissonade, *Histoire de la réserve héréditaire et de son influence morale et économique*, (Paris, 1873), 275. The *réserve,* which is superficially similar to *legitim*, is the part of a person's property (usually the *propres*) which the law assured to the heirs, and of which they could not be deprived by gifts made to others – see M. Planiol, Traité élémentaire de droit ivil, T 3 (Paris, 1937), 11th ed, 860.

[103] See Berault, La coustume reformée du pays et duche de Normandy, (Rouen, 1620), …. www.jerseylaw.je/Publications/Library/customary/berault1620/Berault-01.pdf, Article CCXCII.

[104] J. Yver, 'La rédaction officielle de la coutume de Normandie (Rouen 1583):Son, éspirit', (1986) 36 Annales de Normandie, 3, 18.

[105] Terrien, Commentaires du droict civil, 1574 ed, livre VI accessed at www.jerseylaw.je/Publications/Library/customary/terrien/default.aspx.

[106] See Godefroy, *Coustume de Normandie, Commentaries sur la Coustume Reformée du Pays et Duché de Normandie*, 1ére ed, 1626, see 477pt and 502 pt accessed at www.jersey.je/Publications/Library/customary/Godefroy/default.aspx.

[107] op cit, footnote 31, 293.

argues that credence is added to this theory by the fact that most of the early English examples suggest that the practice was well-known in Normandy and was introduced by the new aristocracy.[108] Two points need to made. The first is that while the Norman crusaders would have encountered Byzantine law in southern Europe they would have needed to 'import' it back to Normandy, and there is no evidence of this.[109] Secondly, as Sheehan himself points out, the laws which they encountered were laws that embodied ideas of gifts for the soul, not necessarily guaranteed testamentary rights over chattels for the widow and child, although the two do seem to be linked.

(d) The Influence of the Church and Roman-Canon Law

Early Christian theologians made a connection between the death-bed confession and atonement and the making of the final will and testament. Examples of this can be seen in the sermon of Caesarius of Arles[110] and St Augustine[111] and Salvian,[112] and while not all the early Christian writers were as extreme in their views as Salvian, there is no doubt that they believed there was a connection between testamentary freedom and the exercise of that freedom in favour of pious causes, and that the act of charitable giving on one's death-bed was an important spiritual act. Moreover the Irish canonical collections from the early middle ages demonstrate that testators should divide their partimony into three parts, one part for 'Caesar', one part for one's sons and one part for the church.[113]

In 1140 John Gratian of Bologna completed his compilation of ancient canons and disciplinary regulations of the church (the concordia discordantium canonum), and the classical period of canon law came of age. Even though the church never formally adopted Gratian's work[114] the Decretum became the fundamental and universally consulted canonistic collection upon which the development of canon law depended, and included a number of canons concerning succession, although Helmholz states that "no Causa or Distincto was devoted particularly to the subject."[115] Gratian, while endorsing Gregory the Great's statement that "the final will of the dead should … be conserved",[116] nevertheless questioned just how free individuals were to dispose of their property on death following the admonition of St. Augustine who said that the Lord should be added to the list of one's heirs.[117] Gratian saw this, not as *allowing* a testator to direct at least part of his family property to charitable causes, but rather as a constraint on testamentary freedom.[118] The importance of Gratian's work was discussed by Henri Auffroy,[119] who said that the questions that Gratian posed in relation to testamentary capacity and the need for testamentary choice would dominate future work in the area. Moreover, Gratian raised these questions at a time when the role of the church and the power of the eccesiastical courts in testatmentary matters was increasing. It was with the work of Rufinus, a generation later, that a body of law emerged which would see the protection of freedom of testation as a right of a testator. Rufinus impliedly challenged Gratian's treatment of St. Augustine, the latter of whom, Rufinus said, was fundamentally opposed to testatmentary freedom.[120] Rufinus interpreted St. Augustine's work not as prohibiting the giving of a son's share to the church, but rather *dissuading* the giving of a share in excess of that of a son's to the church in ordinary family circumstances. He said that the only limitation on testamentary freedom was the *pars legitima* of Roman law.[121] The *Summa Stephani*[122] a year later said that the *pars legitima* that had once been a quarter was now a third, and the *Summa Lipsiensis*[123] some twenty eight years later endorsed this.

Later canonists, such as Bernard of Parma, Hostiensis[124] and Goffredus of Trani[125] all primarily defended the notion of testamentary freedom, and as Reid says, "In [their] body of writing one saw the emergence of a sophisicated defense of the idea of testamentary freedom premised on the capacity of the human person to know and judge how his affairs should be ordered. This freedom was conceptualized as a right."[126] But he continued, "[A person] should not only be concerned merely with dynastic affairs… but also with matters of the spirit",[127]

[108] See Sheehan ibid, 292–3 and also H. Brunner, 'Der Totenteil in germanischen Rechten', ZRG Germ. Abt., XIX (1898) 107, 111, the latter of whom related the practice to the Germanic custom of grave endowment.
[109] Sheehan argues that 'it is probable' that the laws of Sicily and southern Itlay effected the Normans in some way. Ibid, 293.
[110] Caesarius of Arles, Sermon 60, in G. Mortin, ed., Sancti Caesarii eposcopi Arleatensis Sermones, Part I, (Turnholt: Brepols, 1953).
[111] Sermo de Disciplina Christiana, PL 40: 673.
[112] Timothei ad Ecclesiam libri IV, book III 17–19, in Georges La Garringue, ed., Sources chrétiennes no 176, (Paris, Les Editions du Cerf, 1971), 250–53.
[113] See Lotte Kéry, Canonical Collections of the Early Middle Ages (ca 400–1140): A Bibliographical Guide to the Manuscripts and Litterature, (Catholic University of America Press, 1999), 73.
[114] William W. Bassett, Canon Law and the Common Law, 29 (1978) The Hastings Law Journal, 1383, 1388.
[115] op cit footnote 54, 389.
[116] Gratian, Decretvm Gratiani Emendatvm et Annotationibvs: Illvstratum Vna Cum Glossis: Gregorii XIII. Pont. Max. ivssv editvm: Ad Exemplar Romanvm Diligenter Recognitum, (Johannes Teutonicus, Glossa Ordinaria) Canon law 35. (Parisiis, 1601), C.13, q.2, c. 4.
[117] ibid, C.13, q.2, d.p.c.7.
[118] See Sheehan, op cit, footnote 31, 123.
[119] Henri Auffroy, Evolution du testament en France des origines au XIIIe siĉcle, (Paris:Arthur Rousseau, 1899), 388–389.
[120] Rufinus, Summa decretorum, Heinrich Singer ed. (Aalen: Scientia Verlag, 1963), C.13, q. 2, d.a.c. 8, pp 335–36.
[121] ibid, C. 13, q. 2, d.a.c. 9.
[122] Stephen of Tournai, Die Summa über das Decretum Gratiani, (Aalen: Scientia Verlag, 1965), C, 13, q. 2 d.a.c. 7.
[123] Summa Lipiensis ad C 19, q. 3, c. 9. Referred to in Sheehen, op cit footnote 31.
[124] See Hostiensis, Summa, bk. III, De Testamentis et Ultimis Voluntatibus, sec 7.
[125] See Goffredus Tranensis, Summa super Titulis Dectrealium, bk III, De Testamentis.
[126] C. J. Reid, Power over the Body, Equality in the Family, (Eerdmans, 2004), 164–5.
[127] ibid.

and thus the idea of freedom of testation for the individual must be viewed against the backdrop of the protection of a person's soul. The early medieval canonists took their ideas and doctrines about succession and testaments from Roman law. They connected the doctrine of natural rights with the share a child was entitled to receive from his or her parent's estate.[128] Hostiensis, in the early thirteenth century, discussed the duty of piety (or *pietas* as he termed it) which had been developed by the Romans, and upon which they had based the right of a child to inherit from its parents,[129] and said that it now referred not only to the respect and deference attributable to earthly relationships, but also to the respect and obiesance owed to God.[130] He linked the transcendant familial duty of parent to child with the order that God had established for his creation: part of this duty was the right of a child to inherit from its parent. Thus the child's right became one that was owing 'by nature'. The Roman law origins of this concept can clearly be seen in the remedy that was available to those children who were disinherited without good cause – the *querelae inofficiosi testamenti,* and Antonio de Butrio, at the end of the fourteenth century in his work, *Super prima primi… Decretalium Commentarii*[131] commented on the interaction of canon law with the secular systems of Europe on the right of the *Falcidium* share. But Antonio took matters a step further and said that it was not only the canon law that said that a child should have a share in his father's property, but "the law of nations [and] the civil laws mandate a father to leave a legitime [share] to his son…".[132]

From the thirteenth century jurisdiction over the dispositions of chattels at death rested with the ecclesiastical courts.[133] Thus we would expect to see the influence of the philosophy of the Romano-canon theologians on the *legitim* in England and Wales, and it is not inconceivable that such ideas would strengthen and consolidate a widow's and child's claim to *legitim.* This is not the case however. In fact in a writ from the early fourteenth century in which a son brings an action in detinue against his father's executors for his share of his father's chattels, Stanton J., who said that the matter must be heard by a Court Christian, was told that the son had been prohibited from so doing.[134] A series of further writs from the first part of the fourteenth century by which a son or a widow claiming their reasonable parts all demonstrate that the action is based not canon law but on custom.[135]

Conclusion

There is no doubt that ideas of testamentary freedom and inroads into that freedom can be found in Roman law. We have seen that the Romans were concerned with balancing ideas of freedom with notions such as piety and natural affection, and accorded testamentary rights to children, but it is extremely unlikely as we have seen, that these ideas survived the fall of the empire and influenced the Anglo-Saxons. Furthermore, *legitim* was unknown in Normandy until the sixteenth century, by which time it had all but disappeared from England and Wales, and thus cannot be a Norman construct. As we have seen there was much discussion amongst the canonists about testamentary freedom and jurisdiction over the devolution of chattels was ultimately transferred to the ecclesiastical courts during the reign of King John yet rights to *legitim* do not seem to originate in the canon law nor do the ecclesiastical courts seem to have fostered and promoted the tripartite division of chattels.

The references to *legitim* in Glanvill and in Magna Carta reflect a pre-existing earlier customary practice, rather than create the practice itself. The wills of the Anglo-Saxon era are of limited use since there are only forty-six wills written in the venacular which dispose of chattels and they are representative of the upper classes of Anglo-Saxon society. There is a vague bequest pattern but they do not contain equivocal proof that the *legitim* of the latter middle ages operated. Bede makes, what may possibly be one of the earliest references to *legitim* in his tale of the husband who entered Melrose Abbey,[136] but the evidence is not equivocal; moreover the fact that the early canonical collections of Ireland refer to the division of movables into thirds again does not indicate that they necessarily influenced English law. Holdsworth points out that, "Though, possibly, these rules were always the rules observed, we cannot say that there is any definite connecting link in the Anglo-Saxon laws between Bede's date and the twelfth century."[137] There is evidence in Anglo-Saxon documents which suggests that from the earliest period the boundaries of testamentary freedom were unclear.[138] In the post-Christian Anglo-Saxon world the ecclesiastical gift was common and gifts for the soul, gifts to religious houses and monastic foundations and gifts to churches all appearing in the wills of the Anglo-Saxon times: making a 'good death' was important. It was however only the wealthy members of society who could make generous gifts of land for this purpose. Poorer members of society would still want to make a 'good death', and the gifts of chattels and the concomitant division into thirds would permit this by guaranteeing rights for a widow and child and yet allowing part to be given to the church etc: this may have been encouraged by the early church. The problem that we face however is that Anglo-Saxon society was largely an oral

[128] See the papal decretal, Raynatius, of Pope Innocent II and that of Raynaldus of Pope Gregory IX.
[129] Op cit, footnote 124, sec 11.
[130] The ideas of pietas and obseqium had been linked in the second decree of Constantine found in the Codex Theodosianus.(See Codex Theodosianus, (Hildesheim:Wiedmann, 2000–2002).
[131] (Venice, Iuntas, 1578).
[132] ibid X.3.26.16, sec. 2.
[133] W. S. Holdsworth, A History of English Law, Vol I, (London:Methuen, 1927) 625.
[134] Y.B. 1 & 2 E.2, 39.
[135] Y.B. 17 E. 3, 536: Y.B. H 17 E. 3 17 pl 55 and Y. B. M 30 E 3 25.
[136] (Infra).
[137] W.S. Holdsworth, A History of English Law, Vol II, (London: Methuen, 1923), 94.
[138] See, for example Thorpe, op cit, footnote 73, 466.

one, and although there are some tantilising glimpses of a tripartite division of chattels at death direct evidence is lacking. The customs of Wessex, Mercia and Danelaw did survive the conquest [139] and, as Richardson and Sayles point out, the Normans "continued the system of administration they found in the conquered land and with it, inevitably, the English system of law..." [140] with some additions of their own. Thus any laws and customs concerning inheritance of chattels could theoretically have survived into the Norman era and this may be the origin of the division of chattels of later times.

What does clearly emerge from the body of research that has been carried out in this area, is that *legitim* is not a right of the ecclesiastical court nor a right of the common law. In fact Sir Edward Coke, when commenting on chapter 18 of Magna Carta makes it clear that *legitim* is neither a creature of the common law nor is it a right as such. He says that it is merely a 'saving' and does not purport to confer a right to any particular portion.[141] Professor Helmholz's study confirms that it was a customary right,[142] and as such its origin is obscure and shrouded in mystery.

[139] op cit, footnote 67, 48.
[140] H.G. Richardson and G.O. Sayles, Law and Legislation from Æthelberht to Magna Carta, (Edinburgh, 1966) 30.
[141] Sir Edward Coke, The Second Part of the Institutes of the Laws of London, 2 vols, (London 1797), 2 Inst. 32.
[142] R.H. Helmholz, '*Legitim* in English Legal History', [1984] University of Illinois Law Review, 659, 667.

The Birth of the Russian Science of Civil Law in the mid-19th Century: towards the Unity of the European Legal Tradition

Dmitry Poldnikov *

Abstract

This paper examines Russia's accession to the (Western) European legal tradition in the mid-19th century. It reviews the key elements of traditional Russian legal culture of the 1820s and 1830s and examins Professor Dmitry Meyer's (1819–1856) contribution to the establishment of westernized Russian science of civil law, reforming legal education, and formation of professional legal consciousness. To illustrate this process this study analyses Meyer's treatment of sale and purchase contracts.

Key words: *European legal tradition; traditional Russian legal culture; Russian science of civil law; legal education; legal consciousness; sale and purchase contracts.*

Introduction

19th century legal nationalism is deplored by many influential legal historians as the end of the European legal unity of the *jus commune.* The main complaint is that nationalization of the sources of law and of the legal scholarship and language of jurisprudence destroyed the unity of the early modern learned law (*jus commune*) and resulted in the mutual isolation of national legal systems.

This criticism seems to be well grounded and, consequently, is widely shared among legal historians [1], as well as in textbooks and lectures for law students [2]. Yet there are rare dissenting voices. One of them is Tomasz Giaro who perceives a new unity in Europe in the 19th century because of the developments of legal scholarship. On the contrary, in his view, this legal unity of the "Western legal tradition" (as defined by Berman) was reinforced in the countries of the *jus commune,* it exercised a substantial influence on Anglo-American common law, and it made the particular legal traditions of Eastern Europe extinct [3].

Such a new perspective may gain new ground in the face of the current debate about the meaning of "Europe" itself. For some contemporary scholars, the concept of "Europe" experiences transformation from a mere historical "reality" into an open space with flexible borders which cannot (and should not) be reduced to the West only. In the words of director of the Institute for European legal history, Thomas Duve, "a closed concept of Europe as a physical space cannot be maintained as a fruitful analytical category", as a "largely intelligible (reality) in and out of itself". He suggests moving from "European legal history" to a "Legal history of Europe [from] a global perspective" which means giving up regarding other parts of Europe as the "not-yet" Europe [4].

In our view, Russia's experience of the mid-19th century could offer more evidence in support of the thesis of the new unity of the European legal tradition, if examined from the suggested global perspective. Indeed, mid-19th century Russian legal history underwent a dramatic turn from a particular to a more westernised (or modernised) legal system, legal procedure, judiciary, legal scholarship, education, and ideology. The process is well studied both in Russian and in western literature [5]. However, the place of the Russian legal system within the European legal tradition had been largely contested both in Western and Russian legal scholarship [6], not least, because of

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1 See the comprehensive overview in: Coing H., *Europäisches Privatrecht*, Bd. 2, (19. Jahrhundert), München, 1989.

2 Bellomo M., *Common legal past of Europe (1000–1800)*, Washington, 1995, p. 1–33; Van Caenegem R., *European Law in the Past and the Future: Unity and Diversity over Two Millennia*, Cambridge, 2002, chapter 2. speaking about the "closure" of national legal systems in the 19th century.

3 Giaro T., *Legal tradition of Eastern Europe. An Epitaph*, in: The Civilistical Researches, ed. by B.L. Haskelberg, D.O. Tuzov. Vol. 2. Moscow: Statut, 2005. p. 143. (in Russian).

4 See Duve Th., *European Legal History – Global Perspectives*, in: Working Paper for the Colloquium "European Normativity – Global Historical Perspectives" (Max-Planck-Institute for European Legal History, September, 2nd-4th, 2013) (August 5, 2013). Max Planck Institute for European Legal History Research Paper Series, No. 2013-06, p. 6. Available at SSRN: http://ssrn.com/abstract=2292666.

5 For a comprehensive list of publications in English, German, and Russian see: Hamza G. *Entstehung und Entwicklung der modernen Privatrechtsordnungen und die romischrechtliche Tradition*. Budapest, 2009, p. 520–534.

6 In Russia the advocates of its the special place (way) could be found in the 19th century (see the ideology of the Official nationality), in the 20th century (denying the affiliation of the Soviet civil law to the bourgeois legal systems of Western Europe; or even the eurasian concept евразийство of the émigré intelligentsia), and even in the early 21st century (see a recent publication by Alexander Baunov entitled 'The new concept of the Fatherland: Russia is not Europe now, URL: http://slon.ru/world/kontseptsiya_otechestva-1091580.xhtml).

political, ideological, and religious motives. In Western scholarship Wieacker and Berman were the first to bring Russia back to the sphere of the (Western) European legal tradition at least from the 19th century[7].

Obviously, the ongoing debates about Russia's legal past cannot be resolved on the basis of the limited study of legislation or the will of the single rulers. Contrary to F. Wieacker's phrase, even Peter I could not single-handedly "drag [Russia] directly from late medieval Byzantinism into the Enlightenment of western Europe"[8]. A debate like this calls for evaluating law in a broader (cultural) context.

This paper aims to shed more light on the evaluation of the Russian legal system in the mid-19th century. To do this, we will, *first,* discuss the appropriate (methodological) approach and conceptual categories of legal culture and legal tradition; *second,* outline major elements of Russian legal culture (aroung 1840s); *third,* examine the changes of each major element taking as an example Meyer's legacy.

1. Approaches to the Study of Legal Cultures or Legal Traditions

Shedding new light on a well-researched topic in legal history requires an updated methodological toolkit. Since the early 1990s both Western and Russian legal scholarship have widely recognized that law should be treated as embedded in a broader cultural context. Hence, legal history cannot be regarded as an autonomous discipline and must seek connections with social and cultural studies.

To get to grips with "an enormous amount of expertise on analytical tools in this field"[9] legal history have to update its conceptual vocabulary. *Legal culture* and *legal tradition* are the key concepts. Although, their usage entails further difficulties in Western and Russian legal scholarship.

In contemporary Russia the interest in a social and cultural approach to the legal past follows from dismissing the monopoly of the Marxist view of the world history as a progressive evolution of social orders from prehistory to communism. The most popular alternative to this universalistic methodology is the acceptance of cultural diversity of the world, best expressed in the concept of civilization (in the sense of Toynbee)[10], intertwined with the notion of culture or cultural tradition. It should be noted, however, that this search for alternatives has so far produced methodological eclecticism rather than the coexistence of several well-established scientific approaches[11].

The sympathy of Russian academics with social and cultural studies follows the dominant trend abroad. In the world of post-modern science the leading legal historians and comparatists in civil law and common law countries alike share the same conviction that "legal rules alone can never tell us all we need to know" and "much more than legal rules needs to be subjected to comparison", that using data of social and anthropological studies[12].

This consensus as to the general approach does not, however, extend even to the meaning of its basic concepts. Thus, the notions of legal culture and legal tradition are still subject to intense debates.

"Legal culture" is generally understood either as:

a) *a major cause of legal change* (Watson, Friedman), embracing the outlook, traditions, values, and interests; or
b) *ways of thinking* about, practising, and experiencing law (Legrand, Cotterrell).

According to Legrand, legal culture is a matter of *mentalité,* an entire distinctive way of thinking about law and legal experience, "a particular *epistemological framework*"[13]. Cotterrell defines it as a kind of lens through which all aspects of law must be perceived (by comparatists)[14].

Critics point out that in any sense legal culture "appears to be a <vague>, ill-defined, all-inclusive system, which... appears as a particularly western construction"[15]. Instead, they propose "legal tradition" as a better-definable alternative. The leading advocate of this concept, H. Patrick Glenn, conceives tradition as "normative information that has been passed on over time through an iterative process of capture, application and recapture"[16]. However, in the English-speaking scholarship "tradition" is also used as synonym for law itself[17], or even of legal

[7] Wieacker F., *A history of private law in Europe with particular reference to Germany*. Transl. by Tony Weir. Oxford, 1995, p. 219; Idem, *Foundations of European legal culture*, in: AJCL 1990 No. 39, p. 8; Berman H., *Law and revolution: the formation of the Western legal tradition*, Cambridge, Mass., 1983, p. 539.

[8] Wieacker F., op. cit. p. 219.

[9] Quoting Duve T. op. cit. p. 7.

[10] For recent methodological debates on this approach see: Krasheninnikova N.A., *Issue of methodology in studying history of law*, in: Moscow University Law Bulletin, 2007, No. 6, p. 3–27 (in Russian) (published together with the proceedings of the discussion that followed).

[11] See the critical overview in: Lapteva L.E., *Some issues of methodology of research in history of law*, in: Moscow University Law Bulletin, 2007, No. 6, p. 33–37.

[12] Cotterrell R., *Comparative law and legal culture*, in: Oxford handbook of comparative law, Oxford, 2007, p. 710, 712. Similar opinions in favour of studying law in context could be found in German-speaking scholarship: Senn M. *The methodological debates in German-speaking Europe (1960–1990)*, in: Making legal history: approaches and methodologies /Ed. by A. Musson. N.Y., 2012. P. 108–117; in France: Halpérin J.-L., *De la méthode historique en jurisprudence et de son avenir*, Paris: Dalloz, 2013, p. 2–33; in Italiy: Bellomo M., *Societŕ e diritto nell'Italia medievale e moderna,* Roma, 2002; Padoa-Schioppa A. *Il diritto nella storia europea*. Bologna, 2007; Grossi P., *A History of European Law*, Wiley, 2010; in England: Ibbetson D., *Comparative Legal History: a methodology*, in: Making legal history. P. 131–145. in the USA: Donahue Ch. Jr. *Whither Legal History*, in: Transformations in American Legal History: Essays in Honor of Professor Morton J. Horwitz. Cambr., 2009. P. 327–343; Horwitz M.J., *Legal History*, in: Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory, ed. by J. Hackney. N.Y., 2012. P. 63–85.

[13] Legrand P., *What legal transplants*, in: Adapting legal cultures, ed. by Nelken and Feest, Oxford, 2001, p. 55, 65.

[14] Oxford handbook of comparative law, p. 711.

[15] Glenn P. op. cit., p. 154; also Cotterrell R., *The concept of legal culture*, in: Law in Culture, in: Ratio juris, 2004 No. 17, p. 9.

[16] Glenn P., *Concept of Legal Tradition*, in: Queen's L.J. No. 34, 2008–2009 p. 427.

[17] "Law is essentially a tradition, that is to say something that has come down to us from the past.", A.W.B. Simpson quoted by Glenn P., op. cit. p. 431.

culture (Berman)[18]. Moreover, it seems that in western legal scholarship most scholars focus on examining particular legal cultures or traditions without giving a general definition to the respective concepts[19].

In the face of such a debate, similar confusion can be observed in contemporary *Russian legal scholarship*[20]. The terms "legal culture" and "legal tradition" have drawn more attention recently. They are discussed at conferences and round tables[21], become key-words in some papers and monographs (quoted below). All this to indicate the ongoing search for the appropriate conceptual framework for comparative research in legal history in a wider social and cultural context.

Despite a noticeable interest, these categories have not yet become well-defined among Russian legal historians. Their meaning is still debatable and uncertain because of their conceptual complexity and the diversity of the denoted reality of various societies and periods in history[22].

Hence, some scholars conceive *legal tradition* as a part (or manifestation) of legal culture indicating its continuity[23]. Others deliberately refuse to give a one- or two-sentence definition[24]. Quite often the categories of legal culture and legal tradition are used interchangeably as self-evident, without further clarification. Or even merged together into one term[25].

Since the analytical potential of "legal culture" or "legal tradition" depends on its exact meaning, this vagueness greatly reduces its epistemological value[26]. The advocates of studying law in context, however, do their best to reduce the vagueness of these categories by breaking them down into distinct components[27]. In Russian this attempt was made by Medushevsky and Tomsinov. Medushevsky distinguishes in "legal tradition" key legal concepts, causes of its development, sources of law, phases of its evolution, unchanging and changing factors, and salient legal institutes[28]. Tomsinov envisages at least three indispensable components of legal culture, namely: legal science, legal education, legal consciousness[29].

In our view, the notions of legal culture and legal tradition can still be used interchangeably. Despite some inherent vagueness, one of these concepts is indispensable to embrace the broad social context in which legal rules were and still are imbedded. This vagueness can and should be reduced by identifying the key elements of legal culture or tradition. However, an exact list of such elements is hardly plausible, since they may differ from society to society and from one historical period to another.

For the purpose of studying Russian legal tradition of the mid-19th century we hold the following components to be indispensable: 1) sources of law; 2) legal science; 3) legal education; 4) legal consciousness.

In the paragraphs that follow we will offer a brief characteristic of Russian legal culture before and after the birth of the Russian science of civil law facilitated by Meyer.

2. The Outline of the Major Elements of Russian Legal Culture (up to the 1830s)

Similar to other parts of Eastern Europe (and in contrast to Western Europe) the Russian legal "landscape" was a composition of feudal laws (statutes and customs, written and oral) for various estates. Laws were applied by dependent judicial administration mostly recruited from the military service[30]. Generally, this legal culture was very different from the Western European one, as defined by Wieacker[31]. It was marked by collectivism, not personalism. It bore signs of legal nihilism downplaying, if not rejecting altogether legalism. It lacked a systematic theoretical organization, while the contemporary Western European culture was marked by intellectualism.

The differences are clarified by examining each major component of Russian legal culture:

2.1 Sources of Law

As one of the leading pre-revolutionary textbooks on the history of Russian law put it, *de jure* the only source of law in the Imperial Russia was the statute (in various forms: *zakon, ustav, reglement, ukaz*) enacted by the Tsar[32]. Contrary to the progres-

[18] Indeed, it is hard to distinguish culture and tradition in the usage of Berman as he comprehensively described the most fundamental features of the Western legal tradition (=culture). See: Berman H., Law and revolution: The Formation of the Western Legal Tradition. Cambridge, 1983.

[19] See for example, Wieacker F., *Foundations of European legal culture*, in: AJCL 1990 No. 39, p. 1–29.

[20] This paper is concerned with legal cutlure in the context of legal history. For a dicsuccion on legal culture among Russian legal theoretitians see: Marchenko M.N., Legal culture as sociological category, in: Moscow University Law Bulletin, 2013, No. 2, p. 45–61.

[21] For example, at Moscow State University M.V. Lomonosov in 2007, at The Peoples' Friendship University of Russia in 2013.

[22] See: Muromcev G.I. *Traditions in Law: historical and theoretical considerations*, in: Legal Traditions. Collected papers of the International academic conference. Moscow, 29–30 March 2013, ed. G.I. Muromcev, M.V. Nemytina. Moscow, 2014, p. 5 (in Russian).

[23] Legal culture as continuously upheld body of legal concepts and phenomena, which makes life in society more certain through its normative content; it serves as a framework for legal system. See: Nemytina M.V., *Traditions in legal cultures, legal systems*, in: Legal Traditions. Collected papers of the International academic conference. (n. 22), p. 20–21 (in Russian).

[24] Tomsinov V.A. *Meaning of category "legal culture" for studies of history of law*, in: Moscow University Law Bulletin, 2007, No. 6, p. 27–30 (in Russian).

[25] See for example, Maltsev G.V. *Cultural traditions of law*, Moscow, 2013, p. 5 (in Russian).

[26] "[T]oo weak a concept to act as an epistemological model", in: Samuel G., *Epistemology and Method in Law*, Aldershot, 2003, p. 50.

[27] Cotterell R., op. cit., p. 9.

[28] Medushevsky A.N., *Russian legal tradition: system, structure, dynamics in comparative perspective* (2014), available at: http://www.liberal.ru/anons/6484 (in Russian), earlier in: The Civilistical Researches, ed. by B.L. Haskelberg, D.O. Tuzov. Vol. 2. Moscow, 2005.

[29] Tomsinov V.A., op. cit.

[30] See: Wortman R.S., *The Development of a Russian Legal Consciousness,* Chicago, 1976, p. 34–50. On the Eastern European legal tradition see: Giaro T., op. cit. p. 138.

[31] Wieacker F., *Foundations of European legal culture*, in: AJCL 1990 No. 39, 1, 20–25.

[32] Latkin V.N., *Textbook of the history of Russian law in the period of the Empire (18th and 19th centuries),* 2d ed., 1909, reprinted Moscow, 2004, p. 3 (in Russian).

sive enlightened vision of the law as the outcome of the *volonté generale*, a statute was considered to be the will of the Tsar.

Another difference lies in the significant role of customs. If not *de jure, de facto* in the sphere of private law, local and regional customs were widely used[33]. This customary law was influential enough to resist all attempts by the statute (written, rational) law to squeeze it out. Hence, the dualism of these two systems is one of the hallmarks of Russian legal tradition after the harsh pro-western reforms of Peter I (1672–1727)[34].

The Russian codification of the early 19th century also differ from the European codes of the age of the Enlightenment. After several failed codification projects of the 18th and early 19th centuries, all laws in force were grouped together in the Digest of the Laws of the Russian Empire (hereinafter *Svod Zakonov,* 1st ed. 1832, 2nd ed. 1842). It replaced the previous medieval Russian codification *Sobornoye Ulozhenije* of 1649 but introduced few progressive concepts and institutes.

The *Svod Zakonov* was conceived as a "concise" version of all laws in action drawn from the massive chronological collection of the legislation of the Empire (completed in 1830). Still it ran to impressive fifteen volumes, very roughly systematised, and dedicated to the form of the government of the Empire, the status of its subjects, multiple administrative provisions, tax laws, civil and criminal procedure[35]. The tenth book contained the Civil Laws. Unlike modern European civil codes, this massive volume did not introduce liberal values, nor reject feudal institutions (such as estates or serfdom), nor offer a clear system of private law[36].

The *Svod Zakonov* thus conserved the existent Russian legal culture rather than facilitated its change.

2.2 Legal Science

Legal science, defined by Berman, as "a coherent, systematic body of knowledge, combining particular facts with general principles", is believed to be the staple of the Western legal tradition, both in the times of the *jus commune* and today[37]. In this sense, Russian legal science did not exist either in the 18th or in the early 19th centuries. The attempts to import the knowledge of the natural law of the Enlightenment failed. The invited professors of natural law from German-speaking universities did not kindle the movement of natural law in the Russian empire[38]. In the late 1820s and 1830s the closest match for legal science was the so-called "knowledge of statutes" (*zakonovedenije*). It represented a verbatim knowledge of the *Svod Zakonov* which expressly prohibited judicial administration to interpret and comment this legislation in cases of (frequently discovered) ambiguity or lacunas.

2.3 Legal Education

In the absence of legal science and given the dominant role of the statute law, legal education in Russia also differed from that of Western European one.

In the beginning of Nicholas I's reign (1825–55) no university course in Russian law was offered. Legal education was entrusted to the administrative body (the Second Section of His Imperial Majesty's Own Chancery which compiled the *Svod Zakonov*). It resembled craft apprenticeship in terms of its practice-oriented goals (training high administrative officials in Roman law, Russian public law, and political economy) and in small number of apprentices (only six outstanding students per year, since 1828).

What Wieacker labelled the "intellectualism" of (western) European legal culture, was lacking in the educational version of *zakonovedenije* altogether. It was focused exclusively on reading, learning by heart, and the scholastic exegesis of legal statutes. This emphasis was best illustrated by the literature for the students of law which essentially paraphrased the laws (*zakony*) without giving any systematized overview or outlining general principles. Only the University Statute of 1835 made the teaching of law a major function of the universities and created separate law faculties with seven chairs[39].

2.4 Legal Consciousness

The Russian legal consciousness in the first half of the 19th century was marked by a communitarian character, a growing dualism between customary law and official law[40], and a distrust to the official law. More than ninety per cent of the population of the Russian empire before World War I lived in rural communities. Most peasants distinguished a fair "law" (Russian "*pravo*") and an unfair "statute" (Russian "*zakon*"). Unlike the

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[33] It was best shown in a unique comprehensive study of Pakhman S.V., *Customary private law in Russia,* 1st ed., 1877–79, reprinted in Moscow, 2003 (in Russian).

[34] On the feature of dualism see Medushevsky A.N., *Legal dualism in Russia and an attempt to overcome it*, in: Comparative constitutional review, 2005, No. 1 (50), p. 183–193 (in Russian).

[35] See: Butler W., *Russian Law,* 3d ed. Oxford, 2009, p. 30–31.

[36] On the emergence of the Digest and its appraisal, see: Borisova T., *The Digest of Laws of the Russian Empire: The Phenomenon of Autocratic Legality*, in: Law and History Review, August 2012, p. 904–915.

[37] Berman H., Reid Ch., *Transformation of English Legal Science: From Hale to Blackstone*, in: Emory L.J., 1996 No. 45 p. 440, obviously bears on his "*Law and Revolution I: The Formation of the Western Legal Tradition*". About legal science as the precondition for the new *jus commune* of Europe see: Zimmermann R., *Civil Code and Civil Law. The Europeanization of Private Law within the European Community and the Re-emergence of a European Legal Science*, in: Columbia Journal of European Law, 1994–1995, No. 1, p. 63–105.

[38] After the break of the French revolution all the offsprings of jusnaturalism were uprooted from the universities in Russia; the chairs for natural law were closed). On foreign legal scholars in Russia see: Tomsinov V.A., *Foreign legal scholars in the service of Russia* (articles 1–2), in: Zakonodatelstvo (1999), No. 3–4 (in Russian).

[39] See, for example, Kranihfeld A., *An Essay on Russian civil law*, 1843; Proskuryakov F., *Textbook for study of Russian state, civil, criminal, and administrative laws*, 1854. For critical review of the education in the first three decades of the 19th century see Tomsinov V.A., *Legal education and legal science in Russia in the second third of the 19th century*. Moscow, 2010 (also published in a series of ten articles in "Zakonodatelstvo" in 2008 and 2009). For general overview see: Wortman R.S. op. cit., p. 45 f.

[40] See: Medushevsky A.N., *Russian legal tradition: system, structure, dynamics in comparative perspective* (2014), at http://www.liberal.ru/anons/6484.

Germans or the French, most Russian people were skeptical and suspicious of the positive law even at the end of the 19th century. This attitude is best confirmed by the following Russian proverb: "A statute is like a weathercock: you can turn it anyway you like." It alludes to the different application of statues in the interests of the rich and the poor.

A fair law in the Russian legal consciousness was perceived as a customary one based on justice. Statutes in action were viewed as limitations on this customary law and, by consequence, on justice, as a means to push forward the state ideology. Statutes, thus, were often perceived as unjust. It was a matter of pride for most Russian peasants not to deal with the state judicial administration, in capacity as plaintiff, or defendant, or witness[41].

3. Dmitry Meyer and the Transformation of Russian Legal Culture

If we are to choose only one personality to illustrate the transformation of Russian legal culture, it would be Professor Dmitry Meyer (1819–1856). He was and still is praised by many academics as one of the leading figures responsible for westernising the ways of studying and teaching Russian civil law from the 1840s on. He was not the first to embrace a good deal of European legal culture. Russians travelled abroad to learn in German-speaking universities as early as the mid-eighteenth century. In the late 1830s this situation began to change, mainly due to the influence of German legal science. The first historical commentaries on the *Svod Zakonov* followed (e.g. Konstantin Nevolin's "*History of Russian Civil Laws*", 1851).

Yet, Meyer turned out to be more consistent and original in building a new foundation of Russian legal scholarship and education.

His publications and the memoirs of his students and colleagues give sufficient data as to his personality and his academic views[42]. Meyer published few works during his life. Most notable are "*The ancient Russian law of pledges*" (1855, his doctoral thesis of 1848), "*On Legal Fictions and Presumptions in Roman and Russian law*" (1853), and "*Legal Studies on the Trade Customs in Odessa*" (1853).

It was the posthumously published "*Russian Civil Law*" that won Meyer fame as the founder of the Russian science of civil law[43]. "*Russian Civil Law*" is, in fact, the lecture notes more or less accurately taken from Meyer by his students in Kazan University in the late 1840s and early 1850s. Following his sudden death in 1856, one of his students carefully compiled and edited these notes to publish them in 1858. The nine subsequent editions published in St. Petersburg between 1861 and 1915 offer the best evidence of the popularity of this textbook. According to one trusted testimony from 1893, hardly any textbook could compete with the popularity of Meyer's course of lectures[44].

"*Russian Civil Law*" is arranged into two parts, similarly to the dogmatic textbooks of the Pandectists. The general part comprises basic concepts of civil law, its sources, and an outline of the system of legal institutes. The specific part deals with property rights, obligations, family laws, and succession law.

1) Meyer's View of Legal Science

Meyer as a Scholar and Georg Puchta's Programme

Meyer's biographers still dispute which of Meyer's instructors at Berlin University exercised the most profound influence on this young Russian professor. It is but logical to take into consideration Friedrich von Savigny (d. 1861), the leading German academic jurist of that time, who was giving his last lectures in Berlin just as Meyer arrived there. He might have been one of his numerous pupils at the same institution. However, it is more likely that Meyer fell under the particular influence of Georg Puchta (d. 1846) given some undeniable similarities in their academic creeds.

As far as Puchta's major works allow us to see his academic programme[45], as Savigny's pupil, he shared the idea of "scientification" of people's law through the joint efforts of jurists. However, unlike Savigny, he put emphasis not on the empirical studies of the old legal sources, but rather on system-building of the modern Roman law.

As Olivia Robinson rightly put it, Puchta believed that legal science should become a source of law, alongside custom and legislation, and that it was jurists' duty to reveal the systematic coherence of the law by placing legal rules in their relations to each other and to its underlying principles (the famous method of *Begriffsjurisprudenz,* or jurisprudence of concepts)[46].

Puchta's academic contribution in the 1830s and early 1840s initiated the transition of many German jurists from the camp of the Historical School to that of the Pandectists. It was Pandectists who eventually transformed Roman law into the general theory of private law filled with the coherent system of abstract legal definitions and other legal material, arranged under obligations, property law, family law, and succession, with further sub-headings. The hallmark of this systematisation was to include the "general part" (*allgemeiner Teil*) in courses with certain basic concepts used throughout the system (e.g. legal capacity, juristic personality, legal facts, transactions, etc.). The generally applicable concepts were to be explained before dealing with particular fields and their rules.

This system of legal concepts became known after the monumental work of Savigny in his later years, "*System of Modern Roman Law*" (8 vols., 1840–1849) which epitomised the Pandectist legal science (before being surpassed by the "*Textbook of the Pandects*" (1st ed. 1862) by Bernhard Windscheid (d. 1892)).

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41 See: Shapovalov I.A., *Soviet legal consciousness: origins and formation in 1917–1920*. Armavir, 2005 (in Russian).

42 For references to the memoirs see: Holmsten A., *Dmitry Ivanovich Meyer, his life and work*, in: Meyer D.I., Russian civil law (n. 43), p. 16–35.

43 In this paper the following edition is being cited: Meyer D.I., *Russian civil law*, edited by A. Holmsten, Moscow, 2003 [= reprint of the 8th ed., St. Petersburg, 1902[(in Russian).

44 See: Šeršenevič G.F., *The Science of Civil Law in Russia,* 1st. ed. 1893, reprinted Moscow, 2003 (in Russian).

45 Above all, "*The Customary Law*" in 2 vols. (1828 to 1837), "*Lectures on the Modern Roman Law*" (1847), and most notably, "*Textbook of the Pandects*" (1838, and nine later editions until 1863.

46 See: Robinson O.F., European legal history: sources and institutions. 3. ed., London, 2000, p. 274.

Actually, this abstractness and (alleged) political neutrality of the Pandectists allowed the new teaching, in the words of Wieacker[47], to "travel apace", even across the territories previously unaffected by Western legal institutions. And it was from this abstract legal science that Meyer took these ideas with him to Russia.

Meyer on Civil Law as a Science vs Old "Zakonovedenije"

In his course of lectures at Kazan University Meyer offered a new vision of the science of civil law, by redefining its relation to the positive laws and to legal education. In his own words, "the ultimate aim of legal science was not to study the positive statutes [as old Russian *zakonovedenije* did] but to understand the laws of real life [i.e. people's customs and beliefs]" with the help of dogmatical exegesis, historical and comparative study, and to state the doctrine in clear and elegant style[48]. It is for legal science to define the scope of civil laws, put them in order and, if necessary, amend them even *praeter legem* or *contra legem* according to supra-legal principles (national spirit, justice, rationality, etc.). According to Meyer, civil laws were there only to "define the measure of freedom each individual had to enjoy the things and the actions of other individuals in order to satisfy one's own needs". Thus, the scope of civil law and of its science should be limited to proprietary rights on things and actions, excluding all family relations (as part of canon law) and parents' authority (as part of public law).

Yet, in his lectures he dealt with both institutes as a matter of positive civil law in Russia. The disorder of civil law in the *Svod Zakonov* prompted Meyer to arrange its institutes into general and specific parts. Although such a division had been introduced earlier in the lectures (but published only in 1861) by a professor of Moscow University, Fyodor Moroshkin (d. 1857), Meyer excelled him in coherence and the elegance of his systematic exposition.

2) Meyer's View of Legal Education

Despite his academic ambitions, Meyer attributed a great value to legal education. Partly, it was because of his personal preferences: "I feel a strong calling to instruct young men, not to become statesman", as he wrote. According to the memoires of his former students, Meyer was friendly with students, his study was open for them almost every day of the week[49]. Partly, this was because of the objective connection between legal science and legal education, which he learned to recognise in the teachings of the Pandectists at Berlin University. Modern Roman law became for Meyer the principal source of legal education. He was one of the would-be professors returning from abroad who, after the mid-1830s, were expected to change legal teaching, a branch of the traditional *zakonovedenije,* at all faculties of law in the Russian Empire[50].

Meyer's views on legal education can be deduced from his textbook (originally his lectures at Kazan University), as well as from special publications[51]. He believed in the strong link between legal science, legal education, and legal practice. Legal science as the leading force predetermined the goals, the methods, and the desired results of legal education. In that sense, Meyer's vision of the reformed legal education can also be called the "scientification"[52]. Hence, the best part of his scientific programme (as reviewed above) was to be implemented in the educational sphere.

According to this programme, the ultimate *goal* of legal education was to develop in law students ability to think critically and systematically about the positive laws. In other words, law students should be capable of interpreting the laws literally, *praeter legem* or *contra legem,* if necessary to eliminate ambiguities and contradictions, or to fill in gaps in the text of the statutes. Such a competence hinged on the *methods* of examining legal concepts and institutions historically and comparatively. Finally, the *result* of the reformed legal education was the practical application of the theoretically coherent knowledge.

And Meyer lived by this programme. His textbook attests that he always strived for clarity and systematic consistency in his lectures, drew his arguments carefully from a historical and comparative perspective (although limited mostly to Roman, German, and French laws). In the memoires of his students, he encouraged them to examine the statutes as if they were conducting a scientific investigation, but without forgetting the practical perspective. Indeed, Meyer is credited with organizing the first practical classes and establishing a legal clinic at Kazan University (in this accomplishment, second only to Moscow University). This pioneering accomplishment in Russia enabled law students to put their dogmatic knowledge of laws to a proper use and proved to be profoundly influential on the ways of their thinking about law.

3) Meyer's View of Legal Consciousness

Certainly, Meyer's academic activities contributed greatly to "the emergence of a legal ethos" (to quote Wortman), or the professional legal consciousness in Russia in the 1840s and 1850s[53]. Before that the ethos of the military service dominated the judicial administration and the bureaucracy in the absence of a proper legal education and an idea of the discipline of law.

Meyer is said to instruct his students with a phrase "... Spare no effort to labour for the rightful cause until your last breath!"[54] This concise summary of his professional credo, in

[47] See: Wieacker F., op. cit. p. 350–351.
[48] See: Meyer D.I., op. cit., p. 48.
[49] See: Holmsten A., op. cit., p. 29–30 (in Russian).
[50] See: Ščeršenevič G.F., op. cit., quoting the prediction of professor Moroshkin in 1835.
[51] See, for example, his last publication in Kazan: *On the importance of practice in legal curriculum* (1855), outlining a project of practical classes on civil law, criminal law, and legal procedure.
[52] Avenarius M., *Rezeption des römischen Rechts in Rußland*. Göttingen, 2004, S. 33.
[53] See Wortman R.S., op. cit., p. 198 f.; Tomsinov V.A., Legal culture, in: Essays on Russian Culture, vol. 2 (Government and Culture), Moscow, 2000, p. 102–166. (in Russian).
[54] Quote from: Belov V. A. "*... Dlya dela dobra i pravdy trudites do samoj smerti vashej...*", in: Meyer D.I., Selected papers on Civil Law, Moscow, 2003, p. 5.

our view, refers to the following components of the emerging professional legal consciousness: 1) the supra-positive standard of moral values, and 2) active citizenship of jurists.

The standards of goodness and justice, combined with the scientific view of the law, provided a solid foundation for a critical attitude towards the positive law. The statutes in force could not be legitimated only by the will of the Tsar. They must be just, highly moral, and reasonable to be called "law" (*pravo*). This viewpoint could prevent the growing popular disbelief in the positive law and bridge the widening gap between the positive law and the customary law.

Such a high legal standard motivated Meyer to denounce the defects of the Russian legal order, namely: religious discrimination, privileges of the estates (including judicial immunity), bribery and embezzlement of the public property, and, most notably, feudal servitude[55]. This critique anticipated the Great Reforms of the 1860s. Undoubtedly, it hinged on the liberal values of equal rights under the law and a free market economy. The appropriate rules for this new civil society should be developed by the legal science and put into practice by the learned lawyers.

Meyer's lifestyle in Kazan was all about archiving his great goal. According to the memoires of his students, Meyer devoted all his time to academic studies and education. His personal study was open for student visits most time of the week. It was the place where the young professor and his students could engage in conversations varying from professional issues to modern literature, even to private classes, as it was the case with a young Leo Tolstoy[56].

4. Meyer's Interpretation of the Sale and Purchase Contract

Meyer's treatment of specific legal institutes should be explained as the outcome of his academic programme. Let us take one example of interpreting Russian statutory laws against their literal meaning (*contra legem*): the sale and purchase contract.

As a matter of positive law, the provisions of the *Svod Zakonov* on buying and selling turned out to be inconsistent, even contradictory, and did not resemble the models of major European legislations of that day. That models were definitely not unfamiliar to Russian lawmakers. The head of the codification works Count Speransky (d. 1839) was very knowledgable about the civil law in France, Germany and Ancient Rome. And yet, when presiding the compilation of the *Svod Zakonov,* he opted for consistency with the old Russian statues mainly because of the conservative mood of government under Nicolas I.

In the Tenth Volume of the *Svod Zakonov* (containing the civil laws) the provisions on the sale of goods were quite numerous spanning from art. 1381 to art. 1527. It was not by chance that they were placed in the third devision dealing with various means of acquiring property rights (such as an exchange of goods), and not into the fourth division on the contractual obligations (book 4, division 1, art. 1528–1553). This placement went in line with the previously established regime of transferring a property title which could be put into effect either by drafting and delivering a document, or a deed of purchase (*kupchaya,* art. 1417) for immovables, or by actual delivery of movables (art. 1510).

Although the statute did not define the sale and purchase contract — definitions in the *Svod Zakonov* were notably scarce — one could deduce from its content that the lawgiver understood sale of goods not as a contract but as delivery of a piece of property. Such a delivery was either purely factual (for movables), or was effectuated by drafting a formal document, a deed of purchase.

Since a property title was considered to be transferred as soon as the correspondent deed of purchase was delivered, a sale and purchase in the sense of the *Svod Zakonov* could be compared with a symbolic tradition (*traditio symbolica*) in Roman law. Actually, Speransky alluded to this similarity when he explained why the legislative committee preserved this typically Russian distinction between a transfer of a property title and an agreement to do so. In other words, the provisions on buying and selling in the *Svod Zakonov* were centred around the transfer of a property title, not an agreement to sell. The reason for such regulations was to secure property and possession. Just like the laws of Romans, the *Svod Zakonov* protected any possessor *bona fide* who could not be deprived of his possession on the grounds of a deed previously delivered to another non-possessing person. With a notable exception of the deeds of purchase over immovables (art. 1416).

Consequently, if buying and selling was a deed or a fact of actual delivery, its regulation fell outside (!) the scope of the provisions in the *Svod Zakonov* on the conclusion, interpretation, validity, termination of contractual obligations (book 4, art. 1528–1678).

As for the agreements to buy and sell, according to the statute, any deed of purchase or actual delivery presupposed such an agreement, either oral or in writing. Yet, the provisions on an agreement to buy and sell (*zaprodazha*) were placed in a different division of the fourth book of the *Svod Zakonov* (art. 1679–1690). Again, the definition of this agreement was missing. But the content of the articles made it clear that it was a consensual contract to enter an obligation to deliver a property title — to draft a deed of purchase, in case of immovables, and to accept this delivery.

The role of such an agreement was, indeed, quite limited. It could neither result in transfer of property, nor serve as a pretext to compel a nonperforming seller (usually the owner) to convey the property title under the contract. Non-performance of a buyer's duty to pay for the delivered thing must have led to annulling of the transfer of the property title and to its auction sale (art. 1522).

The Pandectists of the 19th century treated a sale and purchase contract differently. In his "*Textbook of the Pandects*" (1838), the leading Pandectist of the 1830s and early 1840s Georg Puchta drew a clear distinction between property rights (rights *in rem*) and rights under obligations (rights *in personam*). Under

[55] Šeršenevič G.F., op. cit., quoting Meyer's Russian Civil Law in edition of 1873, p. 79, 80, 83, 369, 623.
[56] See quotations and comments on Tolstoy's memoires in: Avenarius M., op. cit., S. 25–27.

such a distinction a sale of goods was qualified as a binding contract, or a means to conclude a legally enforceable obligation between a buyer and a seller. A property title was transferred through the act of delivery (*traditio*) of the thing sold.

More importantly, a sale and purchase contract was fit into the coherent system of concepts of private law. Building on the idea of *Begriffsjurisprudenz* (jurisprudence of concepts), Puchta expected a jurist to proceed from the concept of rights on actions (book 6) to the general provisions on all obligations (chapter 1), and finally, to find a sale and purchase contract among specific provisions on various obligations (chapter 2).

Despite Puchta's references to the sources of Roman law (Inst. III,23; D. 18,1; C. 4,38, etc.), it seems appropriate to label his model a "neo-Roman" one. It differed substantially from the way Roman jurists must have been thinking about the obligations to buy and to sell. Because of their casuistic and practice-oriented mentality, Romans focused on the issues of civil procedure and cases from their experience[57]. Instead of speculating about property rights or obligations, Paul, Ulpian, and even Gaius wrote about the distinctions between *actiones in rem* and *actiones in personam.* They were busy with arranging actions from various *countractus* instead of classifying the contracts themselves. Moreover, Roman jurists never strived for placing it into a complete system of civil law. General part of obligations was totally missing as incompatible with the casuistic spirit of its jurists. It was not by chance that Javolenus famously warned against formulating definitions in the civil law because those could be universally sustained (D. 50,17,202).

Now, if we turn our attention to Meyer's "*Russian Civil Law*", it will not be hard to prove that he closely followed the "neo-Roman" model of the sale and purchase contract instead of sticking with that of the *Svod Zakonov.* Here are five main points of the relevant part of his teaching:

1) a sale and purchase contract under Russian law is (should be?) equal to *emptio et venditio* under Roman law;
2) as such, it is a means to conclude an obligation and not to perform it by actual conveying a thing sold;
3) it wholly belongs to the domain of the law of obligations;
4) it is a single contract, not two separate contracts of selling and buying (therefore, it cannot be partially valid, e.g. selling without buying);
5) it must be labelled with a single term, and all the relevant provisions should be grouped together in one part of a statute[58].

Meyer's concept of the sale contract was well integrated into the system of Russian civil law he devised in his textbook. The provisions on a sale and purchase contract can be found in Chapter 2. Law of Obligations, § 4. Sources of Obligation, section a. General Theory of Contracts, section b. Specific Contracts, point 1) Sale of goods.

Hence, in order to understand Meyer's conception of a specific contract thoroughly, one must take into account the general provisions of the law of obligations and, eventually, the general part of the civil law. This is another striking similarity with Puchta's teaching.

A discrepancy between the provisions of the *Svod Zakonov* and Meyer's teaching were striking. Hence, his critiical attitude towards the law in force. Basically, all the above points on the sale of goods were either implied or open disapproval of the statute:

1) Meyer openly refused to recognise a sale and purchase contract as a mere conveyance of a thing sold;

2) He denounced the inconsistent or ambiguous terminology of the *Svod Zakonov.* For example, the scholar warned his readers that the wording in the statute might give them an erroneous impression of regulating two separate contracts – one of buying and another of selling (art. 1381–1401 and art. 1402–1405). Of course, it could lead both to theoretical absurdity and to practical difficulties, such as a valid purchase and a voidable sale of the same piece of property. Moreover, the working of the provisions was such that it was not clear right away that the subdivision 1, "General provisions" (art. 1381–1416) envisaged only immovables. One should read first up to the section of the sale of movables to discover this;

3) Additionally, Meyer deplored lacking of systematical arrangement of the sale and purchase provisions in the *Svod Zakonov.* Rules on the sale of immovables and movables, on the private sale and auction sale were placed in different books, divisions and chapters;

4) The scholar also expressed regret about the casuistic style of the *Svod Zakonov.* Indeed, it contained few definitions and general rules (including the general part itself).

On several occasions Meyer tried to "amend" the defects of the statute by extending the literal meaning of the black-letter rules. For example, he cited article 1510 as the basis for buyer's right to demand the sold piece of property. Yet, this article stated only what "conveyance" of a thing meant.

5. Meyer's Legacy

Meyer's treatment of the sale of goods is just a single illustration of how his programme of the "scientification" of Russian civil law was being carried out. There are many more. For example, Meyer drew a clear distinction between the concepts of the right of property and that of possession as a factual relationship. This amended the confusion of the two in the *Svod Zakonov* which resulted, *inter alia,* in a possessor being protected by the same lawsuit the proprietor was. All this is to convince us that Meyer's ultimate goal was to introduce the (neo-)Roman models of contracts or real rights into Russian law[59].

Such an outspoken pro-western viewpoint on Russian civil law provoked some criticism among later scholars. Professor Gabriel Šeršenevič reproached Meyer for ignoring legal institutes, which were unique to the Russian way of life, and which should therefore be especially interesting for judicial practice[60].

[57] On "casuism" of the Roman jurisprudence see: Garcia Garrido M.J., *Derecho privado romano: casos, acciones, instituciones*. 7 ed., Madrid, 1998 (used in Russian translation, Moscow, 2005), p. 101–116.
[58] Meyer D.I., op. cit., p. 575–590.
[59] Avenarius M., op. cit. S. 39.
[60] Šeršenevič G.F. op. cit. p. 104.

Ilja Oršanskij (d. 1875) was even more skeptical about Meyer's methods, accusing him of "the *violent submission of Russian civil law to foreign jurisprudence* and to Roman law followed a habit of theorists to apply the usual methods of European jurisprudence to Russian legal problems without any serious study of our juridical mode of life"[61].

And yet Meyer's contribution to changing Russian legal culture proved to be extremely influential and long-lasting. The first dogmatic treatment of Russian civil law by Meyer turned out to be ground breaking. Its most important outcome was the birth of *Russian legal science* as a distinct discipline capable of systematizing, evaluating and, if necessary, correcting the positive law on the basis of higher standards of reasonableness and inner logic. From that moment on, the Russian professorship embarked on a new course of becoming another power close to the legislative power.

Meyer's legacy decisively shaped the *legal education.* And it came as no surprise. After all, the "*Russian civil law*" was a collection of lectures at Kazan University. According to Šeršenevič, this was the most popular textbook in Russia before 1917 which proved to be indispensable for those willing to learn to 'think like lawyers'. Its popularity resonated with the changes in the curriculum of law faculties and the reinforced a dogmatic approach to legal studies. All this was undertaken with the aim to prepare jurists capable of finding their way in the reformed courts of law.

Meyer's dogmatical approach to studying and teaching Russian civil law was undoubtedly "a product of Western science, mainly of Roman law"[62]. However, the subsequent development of Russian law and the Russian legal science justified his choice for borrowing ideas and conceptions from Western Europe. In the second half of the nineteenth century Russia felt the need to update its legal practices because of various new developments: the abolition of serfdom in 1861, the beginning of industrialisation, the expansion of a free-market economy. Last but not least, there were purely legal factors. The Judicial Reform of 1864 and the new rules of civil procedure created the need for a dogmatical interpretation of the statutes by judges and practicing lawyers.

Not by coincidence, from the 1860s on the *Russian judiciary* found it appropriate to lean on the developing dogmatical legal science. The courts of the Russian Empire started to quote, from time to time, academic treaties when adjudicating on complicated cases. It did not lead to establishing the expert committees at the law faculties (as it had been the case in the early modern German principalities). But still, by the late nineteenth century the Civil Cassation Department did not hesitate to hand down a decision with these words: "it was necessary for civilian authors to fill up the lacunae in law."[63] (Rudokvas, 2010) Occasionally, the high court (the Senate) and the lower ones specifically referred to Meyer's "*Russian civil law*".

As the westernisation of Russian law made progress, Meyer's legacy affected another important domain of legal culture – that of *lawmaking.* The first draft of the Civil Code of the Russian Empire was unmistakably influenced by the Pandectist legal theory. It was no surprise to find there the 'neo-Roman' model of the contract of the sale of goods, together with a more consistent terminology and the General Part of the law of obligations.

If we group together all these trends, the overall picture would not be that different from other major continental jurisdictions. To use the metaphor of Stephan Vogenauer, Dmitry Meyer could claim credit for "igniting the light" of rational legal science[64] which illuminated the whole legal culture in the late imperial Russia and contributed to the unity of the European legal tradition.

[61] Quoted by Rudokvas A., Kartsov A., *The Development of Civil Law Doctrine in Imperial Russia Under the Aspect of Legal Transplants (1800–1917)*, in: Rechtwissenschaft in Osteuropa. Studien zum 19. und frühen 20. Jahrhundert. Sonderdruck. Frankfurt am Main, 2010, vol. 5, p. 291–333.

[62] Šeršenevič G.F. op. cit.

[63] Rudokvas A., Kartsov A. op. cit.

[64] Vogenauer S., *An Empire of Light*. in: Oxford Journal of Legal Studies, 2006, vol. 26, No. 4, p. 627–663.

Platz der munera sordida im Abgabensystem der Spätantike
(Munera sordida in the later Roman System of Taxation)

Miklós Kelemen *

Abstract

The levy which is the subject of our study (munera sordida), particularly combined the conceptual characteristics of the munus and the direct services as well. It is specific to the roman administration and organization that it evolved efficient and practical institutional and organizational solutions by reacting on emergent situations and problems. Although it is described accidental and under-organized by the literature. The ordinary tax burdens were consisted of the taxes based on imperial assessment (canonica) and the annually completions (consuetudine, ex more) determinated by different territorial customs. These burdens were distinguished from extraordinary taxes (extraordinaria onera/munera). The 'menial service' (munera sordida) were prescribed for the tax payers as extraordinary charges which could have been fulfilled in different forms (work, animal/equipment service). These burdens particularly combined the conceptual characteristics of the munus and direct services. From a certain perspective they formed a transitional group between the 'annona'-like and public burdens, and even between ordinary and extraordinary taxpayer services. Due to their characteristics, the munera sodida refer to organizational tasks, which are considered to be menial and ad hoc not like the annual tasks of the civilia munera. The tasks covered by the munera sordida were not provided by the subject of the burden but the tax payers living on the subject's estate. Therefore the burden was connected to the owner of the estate but considering its completion it was bound to estate itself. The burden which is the subject of our study, the munera sordida illustrates the purpose and character of the late roman levies well. The scope of its duties indicate the disproportion between the expectations of the imperial government and the performance of the population which has already reached its limits.

Key words: *Munera sordida; annona; capitatio-iugatio; munera extraordinaria; Diocletianus; dominates; curialis; Later Roman Empire; History of public administration; Taxation in the later Roman Empire.*

Einleitung

Im Rahmen der vorliegenden Arbeit kann weder eine vollständige Darstellung noch die Verschaffung eines Überblicks über das Abgabensystem der Spätantike unternommen werden. Nuancenreichtum und Kompliziertheit des Themas werden auch in der fachliterarischen Bearbeitung regelmäßig betont. Die Studie von Bott (1928) hebt einerseits den Quellenmangel und die daraus resultierenden Schwierigkeiten der Theorieschaffung hervor,[1] andererseits weist sie in Bezug auf die maßgebliche Institution des Steuersystems, die „Kopfsteuer" *(capitatio)* darauf hin, dass einige Fragen derer „sehr im Dunklen liegen".[2] Den gleichen Inhalt hat die Aussage von Karayannopulos, in der er einen der wichtigsten Wesenszüge des neuen Systems behandelt, und zwar das sich gegenseitig ergänzende System der „Bodensteuer" *(iugatio)* und der *capitatio*.[3] Várady beschreibt Arbeiten, die sich um die Mitte des Jahrhunderts eine Analyse des Systems *capitatio-iugatio* zum Ziel setzten, geradewegs als solche, die „die Unlösbarkeit des Grundsatzes offen oder stillschweigend hinnehmen."[4]

Die meistzitierten Repräsentanten des Themas stellen das Steuersystem im heutigen Sinne, d. h. die gemäß den Grundsätzen der *capitatio-iugatio* der „Agrarbevölkerung" auferlegten öffentlich-rechtlichen Lasten in den Mittelpunkt der Untersuchungen. In ihren Analysen unternehmen sie vor allem den Versuch, den selbst fachliterarisch äußerst nuancierten Inhalt der Grundbegriffe des Steuerwesens („Kataster", *capitatio*, *iugatio*, *indictio*, *delegatio* usw.) zu klären.[5] Neben der Analyse der Steuerpflicht, der Steuereintreibung und der Verwaltungsfinanzierung werden die anderen maßgeblichen Gebiete der „öffentlichen

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1 H. Bott: *Die Grundzüge der diokletianischen Steuerverfassung*, Darmstadt 1928, S. 11.

2 A. a. O., S. 23.

3 J. Karayannopulos: *Das Finanzwesen des frühbyzantinischen Staates*, München 1958, S. 29 ff.

4 Várady, L.: *Későrómai hadügyek és társadalmi alapjaik – A Római Birodalom utolsó évszázada (376–476)*[Spätrömisches Kriegswesen und seine gesellschaftlichen Grundlagen – Letztes Jahrhundert des Römischen Reichs], Budapest 1961, S. 313.

5 Aus der weiteren Literatur zum Thema, nur Beispiele: H. Dazert: *Ergänzungsabgaben und außerordentliche Lasten im römischen Reich im 4. und 5. Jahrhundert nach Christus*, Freiburg 1985; Hahn, I.: *A kései császárkori patrocinium viszonyok kialakulásának kérdéséhez* [Zur Frage der Entstehung des patrociniums in der späten Kaiserzeit], Antik Tanulmányok II. (1955), S. 239–253; A.H.M Jones: *Census, Records of the Later Roman Empire*, Journal of the Roman Studies 43 (1953) S. 49–64; L. Várady: *Contributions to the Late Roman Military Economy and Agrarian Taxation*, Acta Arcaelogica 14 (1962) S. 403–438.

Gelder" und der „öffentlich-rechtlichen Lasten" (z. B. Zusammenhänge zwischen den öffentlichen Belastungen, den sog. *munus* und dem Steuersystem, oder Verwaltung der unter staatlicher Nutzung stehenden Grundbesitze) eher nur tangiert.

Eine besonders gründliche Behandlung der Grundbegriffe des spätrömischen Steuersystems ist dadurch unbedingt gerechtfertigt, dass die hier verwendeten Methoden und Prinzipien für die ganze Verwaltung der öffentlichen Gelder ausschlaggebend waren. Dabei ist jedoch zu berücksichtigen, dass aus den uns zur Verfügung stehenden Quellen kein eindeutig und konsequent angewendetes Begriffssystem hervorgeht. Auf eine mangelnde Einheit der Begriffsverwendung und der Terminologie und auf die daraus resultierenden Schwierigkeiten der systematischen Analyse weist Dazert in seiner Arbeit hin, in der er die wichtigsten kaiserlichen Verordnungen der Steuerwirtschaft behandelt.[6]

Wegen der besonderen Bedeutung der sog. *annona*-Steuer, die der Versorgung und Besoldung sowohl der Reichsbürokratie als auch des Militärs diente, beschränkte sich die Untersuchung der spätrömischen öffentlich-rechtlichen Lasten und der Staatsfinanzierung in erster Linie auf die Pflichten der Agrarbevölkerung.[7] Die im Mittelpunkt der "Staatsfinanzierungsreform" während der Herrschaft von Kaiser Diocletian stehende *annona* wurde von der Agrarbevölkerung hergestellt und als Steuer an die staatlichen Institutionen abgeführt. Neben den „Agrarsteuern", die die Einnahmen sicherten, spielten die „öffentlichen Bürgerpflichten" *(civilia munera),* die die Eintreibung ermöglichten, eine grundlegende Rolle in der spätrömischen Staatsfinanzierung, sie bildeten – mit treffenden Worten von Kolb – wirklich die „zweite Säule der römischen Steuerwirtschaft".[8]

Mit Rücksicht auf die obigen Ausführungen scheint es genauer formuliert zu sein, wenn wir die Praxis der spätrömischen Verwaltung von öffentlichen Geldern als ein System von Steuern und öffentlichen Pflichten (*annona-munera*-System) auslegen. Es ist dabei auch zu betonen, dass zum Kreis der öffentlichen Pflichten nicht nur die unter dem Begriff *civilia munera* zusammengefassten Aufgaben gehörten, sondern auch Arbeitsleistungen von Körperschaften *(collegia, corpora)* solcher Berufe, die für die Staatsorganisation wichtig waren (Waffenschmiede, Schneider, Lieferanten auf Wasser und zu Land, Bäcker, Lebensmittelhändler usw.) (ihren Namen nach sind sie ebenfalls *munera),* sowie die den Steuerpflichtigen außerordentlich *(extraordinaria)* aufzuerlegenden körperlichen öffentlichen Arbeiten und die sog. „schmutzigen Frondienste" *(munera sordida).*

Der Gegenstand der vorliegenden Arbeit, die *munera sordida* vereinten in sich auf eine besondere Art und Weise die begrifflichen Besonderheiten der unmittelbaren Leistungen und der *munera.* In gewisser Hinsicht bildeten sie eine Übergangsgruppe zwischen den als *annona* bzw. als öffentlich-rechtliche Pflicht geleisteten Lasten, sowie zwischen den regelmäßigen bzw. den außerordentlichen Lasten. Diese Mannigfaltigkeit der Merkmale der *munera sordida* rechtfertigt eine kurze Darstellung der Begriffselemente des spätrömischen Steuerwesens, bevor der Inhalt der „schmutzigen Frondienste" näher erläutert wird. Anschließend werden die zum Kreis der *munera sordida* gehörenden öffentlich-rechtlichen Lasten kurz dargestellt.[9]

Grundelemente der spätrömischen Steuerwirtschaft

Auch für die Verwaltungsgebietsreform von Diocletian gilt, was Ausbüttel bezüglich der Neuerungen in der römischen Verwaltungsgeschichte feststellt: „Den verschiedenen administrativen Änderungen lag niemals irgendein staatspolitisches Konzept zugrunde, vielmehr reagierten die Kaiser auf Erfordernisse und Probleme, die sich im Laufe der Zeit ergaben".[10] Für die in der Fachliteratur als unterorganisiert oder als zufallsbestimmt[11] dargestellte Verwaltungsorganisation ist im Allgemeinen kennzeichnend, dass sie Institutionen zur Erhöhung der Effizienz und des Praktikums in erster Linie als Reaktion auf Situationen und Probleme schuf.

Auch mit dieser Anschauungsweise ist zu erklären, dass die in der severischen Zeit als außerordentlich geltende Versorgungsleistung in Natura, die *annona,* zum 3. Jh. schon zu „Hauptsteuer" der Bevölkerung wurde. Die vom Annonaaufkommen verteilte, vor Allem in Produkten geleistete *annona militaris* wurde zum ordentlichen Entgelt des Militärs und der Beamten, eine Art „Produktensold", die allmählich die immer unregelmäßiger geleistete Geldzahlung, das *stipendium* ablöste.[12] Mit Durchsetzung der *annona* wurde der kaiserliche Befehl über die außerordentliche „Getreideabgabe", die *indictio,* zur Institution der allgemeinen Steuererhebung.[13]

Die Umwandlung der Praxis der gelegentlichen Getreideabgabe für das Militär – im Wesentlichen ein außerordentliches Requirieren auf Befehl des Kaisers – in ein Staatsfinanzierungssystem für das ganze Reich, war vielleicht das wichtigste Element

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[6] H. Dazert: a. a. O., S. 2.

[7] S. Hahn, I.: a. a. O., S. 241. Alföldy betont, dass das spätrömische Staatsfinanzierungssystem für alle unteren Gesellschaftsschichten eine große Last, sogar Unterdrückung bedeutete. (*Römische Sozialgeschichte*, Wiesbaden 1984[3]) S. 145–146.

[8] A. Kolb: *Transport und Nachrichtentransfer im Römischen Reich*, Berlin 2000, S. 167.

[9] Mit der Institution der *munera sordida* befassen sich selbst Monografien (E. Kuhn: *Die städtische und bürgerliche Verfassung des Römischen Reichs bis auf die Zeiten Justinians*, Leipzig 1864, C. Drecoll: *Die Liturgien im römischen Kaiserreich des 3. und 4. Jh. n. Chr.*, Stuttgart 1997), in denen das spätrömische System der *munera* eingehend und umfassend dargestellt sind, erstaunlicherweise nur kurz, fast nur tangential.

[10] F. M. Ausbüttel: *Die Verwaltung des Römischen Kaiserreiches. Von der Herrschaft des Augustus bis zum Niedergang des Weströmischen Reiches*, Darmstadt 1998, S. 194. Zu einem ähnlichen Schluss kommt Schmidt-Hofner in seiner Arbeit, die die Herrschaft von Valentinian I. (364–372) untersucht: „Der Großteil der Regierungstätigkeit hatte demnach affirmativen und reagierenden Charakter". S. Schmidt-Hofner: *Reagieren und Gestalten: der Regierungsstil des spätrömischen Kaisers am Beispiel der Gesetzgebung Valentinians I.*, München 2008, S. 337 ff.

[11] Németh, Gy. (Red.): *Római történelem* [Römische Geschichte], Budapest 2007, S. 723.; P. Garnsey – R. Saller: *The Roman Empire (Economy, Society and Culture)*, University of California Press 1987, S. 20.

[12] Várady: a. a. O., S. 85–86.

[13] Dazert: a. a. O., S. 3–4.

der Reformen von Diocletian. Im Mittelpunkt des „verhältnismäßigen örtlichen Versorgungssystems" stand die Zielsetzung, dass die Bevölkerung einer Provinz in Form von Abgaben für Versorgung, Entgelt und sonstige Bedürfnisse des auf ihrem Gebiet stationierten Militärs und der Bürokratie aufkommen soll. Die Vorgesetzten der Truppen sandten der *praefectura,* die für Sachen der *annona* auf höchster Ebene zuständig war, die Bestandslisten *(quadrimenstrui breves)* der Militäreinheiten regelmäßig zu, wo auf Grund der Truppenlisten der Betrag des den Einheiten zustehenden Solds festgelegt wurde.[14]

Die Festsetzung der dem Staat zu leistenden Abgaben war ein Privileg des Herrschers, und enthielt neben der Festlegung des Steuerbetrags auch Art und Weise seiner Verwendung. Der Befehl des Herrschers bezüglich der Steuererhebung wurde von Beamten des Reichs, in erster Linie von Provinzstatthaltern, die auf diesem Gebiet eine besonders wichtige Rolle spielten, vollzogen. Sie hatten aber kein Recht, mehr einzutreiben, als vom Kaiser vorgeschrieben *(Omnes pensitare debebunt, quae manus nostrae delegationibus adscribuntur, nihil amplius exigendi)*,[15] und sie durften nicht selbstständig, ohne besondere kaiserliche Anweisung *(sine sacra forma)* über die nicht verwendeten, übrig gebliebenen Einnahmen der Schatzkammer verfügen.[16] Eine eigenwillige Nacheintreibung *(superexactio),* welche die oben genannte Regelung aufs Schwerste verletzte, galt als mit Todesstrafe geahndete schwere Straftat *(superexactionis crimen).*[17]

Die wichtigste Form der Steuererhebung war die allgemeine, jährliche Steuerfeststellung durch den Kaiser (*delegatio sacra*, *theia diatyposis*), und sie konnte durch andere kaiserliche Befehle über Steuererhebung ergänzt werden. Gegen Ende des 4. Jh. war eine „Nacherhebung" *(superindictum)* durch die *praefectus praetorio* oder andere Statthalter schon eindeutig verboten. Früher war es möglich, der Bevölkerung über die ordentliche, von der kaiserlichen *delegatio* ihnen durch die Steuerveranlagung *(indictio)* auferlegten Steueranteil hinaus eigenmächtig *(arbitrio suo)* weitere Lasten aufzuerlegen, um den in der Provinz entstandenen dringenden Bedarf (*inexcusabilis necessitas*) zu decken.[18] Auch die in der *delegatio* vorgeschriebenen, also vom Kaiser erhobenen, *superindictum* genannten Abgaben mussten als ordentliche Steuern *(velut canonem)* ausgelegt und geleistet werden.[19] Eine eigenartige Form der Pflichten bildeten die auf einem Gebiet ohne kaiserlichen Befehl „auf herkömmliche Art und Weise" zu leistenden Abgaben, denen der „ordentliche" Charakter dadurch verliehen wurde, dass sie „nach langjähriger Übung jedes Jahr erbracht" wurden *(anniversaria consuetudine antiquitus postulantur)*.[20]

Die auf kaiserlicher Vorschrift beruhenden „allgemeinen und ordentlichen" *(canonica)* Steuern, sowie die territorial unterschiedlichen, auf Gewohnheit beruhenden (*consuetudine*, *ex more*) jährlichen Leistungen zusammen machten die ordentlichen Pflichten aus, die von den außerordentlichen Pflichten *(extraordinaria onera/munera)* zu unterscheiden waren.[21] Im 5. Jh. beinhalteten die an eine kaiserliche Genehmigung gebundenen *Extraordinarien* im technischen Sinne die außerordentliche Steuervorschrift *(superindictum)* und die außerordentliche Beitreibung *(collatio extraordinaria).*

Als außerordentliche Lasten *(extraordinaria onera/munera)* wurden alle Pflichten bezeichnet, die nicht zu den auf kaiserlicher Vorschrift beruhenden *(canonica)* und auf Grund der örtlichen Gewohnheiten auferlegten, regelmäßig *(sollemniter)* zu leistenden Abgaben gehörten,[22] und auch nicht zu den jährlich zu leistenden öffentlich-rechtlichen Pflichten, zu den *munera* gehörten. Ihre Leistung erfolgte nicht regelmäßig im Jahrestakt, sondern außerordentlich und nach Bedarf. Den „unregelmäßigen" Charakter der Pflicht hebt auch die einschlägige Verordnung des *Codex Iustinianus* hervor, indem sie festhält, dass die „von dienstbereiten Einwohnern regelmäßig zu erfüllenden Pflichten nicht als außerordentliche [Lasten] auszulegen" seien *(nec esse extraordinaria nec vocari, quae sollemniter a provincialibus devotissimis conferenda sunt)*.[23]

Die Aufteilung der außerordentlichen Lasten unter den Steuerpflichtigen wies Constantin – statt der Stadtvorsteher *(principales)* – in die unmittelbare Zuständigkeit der Statthalter. Im Sinne der diesbezüglichen Anordnung hatten die Statthalter bei den in der kaiserlichen Steuerveranlagung angegebenen Namen die persönliche Steuerpflicht eigenhändig *(manu propria)* einzutragen.[24] Die *Extraordinarien* galten auch deshalb als „außerordentlich", weil sie nicht nach den allgemeinen Bemes-

[14] C. 1, 42, 2.
[15] CTh. 11, 1, 1 (315) = C. 10, 16, 4.
[16] C. 10, 16, 1.
[17] Der angerufene Erlass (C. 10, 20, 1 [400]) unterscheidet die Beitreibung ohne Rechtstitel *(superexactio)* von der rechtmäßigen, aber überhöhten Mehreintreibung *(ultra debitum elicitum),* und ahndet diese Letztere mit einer Geldstrafe.
[18] CTh. 11, 6, 1 (382) = C. 10, 18, 1. Der von Kaiser Constantius II. und *caesar* Iulianus 356 erlassene, einschlägige Dekret (CTh. 11, 16, 7) beschränkte das Steuererhebungsrecht der Statthalter auf die besonders begründeten Fälle, wenn eine neue Last „wegen eines dringenden Bedürfnisses aufzuerlegen ist und das öffentliche Interesse keinen Aufschub duldet" (*si inexcusabilis necessitas quiddam novum exigat nec dilationem publica utilitas patiatur*). Aber auch so ein Fall bedurfte der Bewilligung des vorgesetzten *praefectus praetorio.* Den Missbrauchsmöglichkeiten, die in der vom Provinzstatthalter angeordneten, aber in Wirklichkeit von der Entscheidung des *praefectus praetorio* abhängenden, „wegen eines dringenden Bedürfnisses" angeordneten Steuererhebung enthalten waren, stand Iulianus schon als caesar von Gallien gegenüber. Die Erfahrungen aus dem Steuererhebungsstreit zwischen ihm und seinem *praefectus praetorio* widerspiegeln sich in der ein Jahr später erlassenen *constitutio* (CTh. 11, 16, 8 = C. 10, 48, 8), die bei einer Steuererhebung eine – jedoch nur nachträgliche – Benachrichtigung des Herrschers vorschreibt.
[19] CTh. 11, 5, 2 (416) = C. 10, 17, 1.
[20] CTh. 11, 16, 7 (356).
[21] Ein Beispiel dafür, wenn die „regelmäßigen Steuern" an der gleichen Stelle genannt werden: erster Satz des Erlasses CTh. 11, 16, 7 (356): *„Sola iubemus exigi, quae factis a nobis indictionibus aliisve praeceptis continentur et quae anniversaria consuetudine antiquitus postulantur"*.
[22] Gemäß Auslegung des CTh. 11, 16, 2 [323]: *quae praeter „canonica et consueta dependant"*.
[23] CTh. 11, 1, 5 (339) = C. 10, 16, 5.
[24] CTh. 11, 16, 4 (328).

sungsgrundlagen: Grundbesitzeinheit *(iugum)* und Prokopfeinheit *(caput)* auferlegt wurden,[25] sondern auf eine von den Statthaltern festgelegte, den Vermögensverhältnissen der Einzelnen angepasste, theoretisch gerechte Art und Weise. Die Genehmigung der *Extraordinarien* war auch ein kaiserliches Privileg, die in unserer Verordnung erwähnte „Steuerzusammenschreibung" *(iudices describunt)* bedeutete also kein selbstständiges Steuererhebungsrecht. Sie berechtigte lediglich dazu, die vom Herrscher vorgeschriebenen Steuern den persönlichen Verhältnissen der Steuerpflichtigen anzupassen und unter ihnen aufzuteilen, nach Maßgabe der Bedürfnisse und Möglichkeiten der Region.

Begriffselemente der munera sordida

Die „schmutzigen Frondienste" *(munera sordida)* sind den Steuerpflichtigen außerordentlich *(extraordinaria)* aufzuerlegende Lasten, die in mehreren Formen erfüllt werden konnten (Arbeitsverrichtung, Überlassen von Mitteln und Tieren zu öffentlichen Zwecken usw.). Ihre Bezeichnung kann in der Hinsicht vielleicht irreführend sein, dass sie nicht zu den *munera* (im engeren Sinne) gehören, und nicht mit den öffentlich-rechtlichen Pflichten der Stadtbürger, mit den *munera civilia* verwandt sind. Sie vereinigten in sich auf eine eigentümliche Art und Weise die Begriffselemente der unmittelbaren Abgaben und der *munera,* in gewisser Hinsicht bildeten sie eine Übergangsgruppe zwischen den als *annona* und als öffentlich-rechtliche Pflichten zu erbringenden, und den regelmäßigen und außerordentlichen Leistungen. Nachstehend wird der Versuch unternommen, die wichtigsten Begriffselemente der Institution zu erfassen.

a) Die zu den *munera sordida* gehörenden Lasten als „schmutzige" *(sordida)* Pflichten können den „bürgerlichen" öffentlich-rechtlichen Pflichten *(munera civilia)* gegenübergestellt werden, die in Verwaltungs- und Organisationsaufgaben bestanden, und vornehmlich von zu den *honestiores* gehörenden Stadtvorstehern *(decuriones, curiales)* zu erfüllen waren. Die zu den *civilia munera* gehörenden Pflichten galten nämlich – ihrer Bezeichnung nach – als „ehrenvolle" *(honesta)* Aufgaben, die ihren Besitzern nicht nur eine Last *(onus)*, sondern auch Ehre und Rang *(honor)* bedeuteten.[26]

Bezüglich ihrer Wesenszüge deckten auch die *munera sordida* Organisationsaufgaben, die aber ihrer Beurteilung nach schmutzig *(sordida)*,[27] und – im Gegensatz zu den Aufgaben der jährlich regelmäßig zu leistenden *civilia munera* – gelegentlich waren. Der niedrige Wert der Organisationsaufgabe kann auf den niedrigeren Wert der zu organisierenden Sachen (gemeinnützige Arbeiten, körperliche Arbeiten) zurückgeführt werden. Die niedrigere Anerkennung dieser „schmutzigen" öffentlich-rechtlichen Pflichten ging nicht mit einer Befreiung der zu den *honestiores* gehörenden höheren Gesellschaftsschichten, insbesondere der städtischen Beamten, von diesen Aufgaben einher.[28] Die einschlägigen kaiserlichen Erlasse gewährten nur den besonders hervorgehobenen gesellschaftlichen Gruppen und Oberbeamten, sowie den Klerikalen eine Befreiung.[29] Von den *munera sordida* konnten demgegenüber Personen aus den niedrigen Schichten, die zu den *humiliores* gehörten, befreit werden, und zwar mit Rücksicht auf die Wichtigkeit ihres Berufs.[30] Personen des Rangs *illustris* (CTh. 11, 16, 23 [409?412?]=C. 10, 48, 16) und die Senatoren wurden von dieser Pflicht außerordentlich und kollektiv befreit.[31]

b) Die Aufgaben der *munera sordida* wurden in der Tat nicht von dem Subjekt der Verpflichtung erledigt, sondern von den Steuerpflichtigen, die auf seinem Grundbesitz lebten. Die tatsächliche Arbeit der Steuerzahler (z. B. Bau- und Reparaturarbeiten) galt als öffentliche Arbeit *(opera)*, und ihre sonstigen Leistungen (z. B. Kohleabgabe) als gelegentliche Zahlung *(collatio)*. Es ist jedoch zu betonen, dass sich die im Rahmen der *munera sordida* organisierten Leistungen und der Kreis der *operae* nur teilweise decken. Bau und Reparatur von öffentlichen Gebäuden und Kirchen (*sollicitudo publicarum aedium vel sacrarum constituendarum reparandarum*) sind *opera*, deren Organisierung dem Subjekt der *munera sordida* obliegt. Der Bau von Festungsmauern *(constructio murorum)* ist demgegenüber eine öffentliche Arbeit, die nicht im Rahmen der *munera sordida* zu organisieren ist. Die Stellung von Tieren und Fuhrwerken (*praebitio paraveredorum et parangariarum*), die über den Bedarf der staatlichen Post *(cursus publicus)* hinausgeht, ist keine öffentliche Arbeit, aber sie ist von den Verpflichteten der *munera sordida* zu leisten.

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[25] Dies kommt im Erlass (CTh. 11, 16, 6 [346]) eindeutig zum Ausdruck, der die Bürger von Konstantinopel von den *extraordianria munera* befreit, indem er vorschreibt, dass sie nur zur Erfüllung von Zahlungen und Leistungen nach *caput* und *iugum* verpflichtet sind *(pro capitibus seu iugis suis tantum pensitationem atque obsequia)*.

[26] Auf den Zusammenhang zwischen Aufgabenbereich und gesellschaftlichem Rang weist folgendes Zitat hin: *„honor municipalis est administratio rei publicae cum dignitatis gradu…"* (Call. Dig. 50, 4, 14, pr.). Auf den Zusammenhang zwischen Stadtbevölkerung und *munera civilia*: *„…municipes dici, quod munera civilia capiant"* (Paul. D. 50, 16, 18).

[27] Ein kaiserlicher Erlass von 441 (Nov. Val. X. 3.) verwendet bezüglich der *munera sordida* auch das Attribut *contumeliosa* (schändlich, beleidigend).

[28] Die im Zusammenhang mit der Frage so häufig zitierte Stelle (Pap. D. 50, 1, 17, 7) schließt nur die Aufgabe der Steuerbeitreibung vom Kreis der *munera sordida* kategorisch aus *(„exigendi tributi munus inter sordida munera non habetur et ideo decurionibus quoque mandatur")*.

[29] Die *constitution*en zur Regelung der persönlichen Befreiungen (CTh. 11, 16, 15; 18), sowie andere *constitution*en, in denen teilweise auch diesbezügliche Regeln zu finden sind, erteilen folgenden Personen die Befreiung:
a) bürgerliche und militärische Würdenträger höchsten Ranges (*maximarum culmina dignitatum* bzw. *amplissimarum fastigium*);
b) *comes* des Kaiserlichen Rates *(comites consistoriani)*;
c) gewisse Gruppen des öffentlichen Dienstes (*notarii*, *cubicularii*, *ex-cubicularii*, *palatini*, *decuriones*, *silentiarii*);
d) Personen der Kirche *(ecclesii)*;
e) Lehrende an den Universitäten (*rhetores*, *grammatici*).

[30] Dieses Vorrecht genossen die Schweinehändler (ganz genau: die Schweinefleischbeschaffer) der Stadt Rom, die *porcinarii* oder *suarii* (CTh. 14, 4, 6 [389]).

[31] Nach Zeugnis der *Nov. Val.* X. (441) wurde der größte Teil der Befreiungen (auch wenn nur provisorisch) später durch die kaiserliche Rechtsetzung zurückgenommen *(Neque domum divinam neque ecclesiam aut aliquam personam a quolibet munere publico excusandam)*.

Das Subjekt der *munera sordida* ist – ähnlich wie die mit Steuerbeitreibung beauftragte Person – eine Art „sekundär Verpflichteter", der als quasi Bürge die materielle Verantwortung für die Erbringung der seinem Grundbesitz auferlegten Verpflichtungen übernimmt, und im Fall der erfolglosen „Beitreibung" oder Leistung die Erfüllung der Aufgabe mit eigenen Mitteln zu bewirken hat.

c) Aus den oben ausgeführten Besonderheiten der *munera sordida* folgt, dass sie an die Person des Grundbesitzers geknüpft sind, was aber die Leistung betrifft, haften sie am Grundbesitz. Der *persönliche* Charakter zeigt sich daran, dass eine Befreiung davon für ein ganzes Leben gilt und nicht mit Ablauf der Beamtenzeit endet. Die Befreiung ist jedoch nicht erblich, kann auf das Vermögen der Frau nicht übertragen werden, und bezieht sich nur auf den Grundbesitz, der dem Begünstigten unter seinem eigenen Namen gehört.[32] In den genannten Fällen sind sinngemäß nicht nur die genannten Subjekte der *munera sordida* befreit, sondern auch die zum Grundbesitz gehörende Bevölkerung, die die Leistung als Steuer tatsächlich erbringt.

d) Die *munera sordida* als öffentlich-rechtliche Last gehören nicht zu den ordentlichen Pflichten, sie sind von der Kategorie der außerordentlichen Lasten, der *Extraordinarien* – die in den Quellen mit ihnen zusammen genannt sind – jedoch abzugrenzen. Im Gegensatz zu den oben beschriebenen Besonderheiten der *Extraordinarien* bedeuten die *munera sordida* jeweils Einzelleistungen, die mit der kaiserlichen Steuervorgabe nicht verbunden sind, weil sie die gelegentlichen Bedürfnisse der Administration (überwiegend des Militärs) befriedigen. Ein gemeinsames Element ist jedoch, dass auch die Lasten der *munera sordida* von den Statthaltern für die Grundbesitzer und für die Bevölkerung auf ihren Besitztümern auf die Person zugeschnitten und konkretisiert werden.

Umfang der munera sordida (CTh. 11, 16, 15; 18)

Die zwei Erlasse zur Regelung der Befreiung von den *munera sordida* (CTh. 11, 16, 15 [382]; 18 [390]),[33] legen auch die zu den Verpflichtungen gehörenden Leistungen sowohl in der westlichen als auch in der östlichen Hälfte des Reiches fest.[34]

a) Mehlbereitung *(cura conficiendi pollinis)*, Brotbacken *(panis excoctio)*, sowie Bäckereidienste (*obsequium pistrini* bzw. *pistrinis obsequia*) bedeuteten die Verarbeitung des Getreides zu an die Soldaten zu verteilendem Brot *(panis)* oder zu Kommissbrot *(buccellatum)* zur Befriedigung der Bedürfnisse des Militärs. Dementsprechend sind sie von den im Titel CTh. 14, 3 *(De pistoribus et catabolensibus)* geregelten ähnlichen Tätigkeiten scharf abzugrenzen, denn diese dienten einerseits zur Versorgung der Hauptstadtbewohner mit Getreide und Brot, andererseits regelte dieser Titel die Art und Weise der von den Körperschaften *(collegii)* der örtlichen Bäcker und Getreidelieferanten *(catabolenses)* als ordentlicher *munus* (im Hinblick auf die Besonderheiten der Aufgabe und ihrer Pflichtigen als eine Art *munus speciale)* erbrachten Leistungen. Der im Bereich der *munera sordida* organisierte Dienst dieser Art bedeutete die Bäckerdienste der ländlichen Bevölkerung zur Befriedigung der gelegentlich entstandenen Bedürfnisse des Militärs und der Administration.

b) Die Teilnahme an den öffentlichen Bauarbeiten und den Handwerksarbeiten (*obsequia operarum atque artificum diversorum* bzw. *praebere operas atque artifices),* Herstellung des als Bindematerial notwendigen Kalks *(obsequium excoquendae calcis* bzw. *sollicitudo excoquendae calcis*), bzw. die Leistung des als Grundmaterial dienenden Rohholzes, Latten- und Scheitholzes (*materiam, lignum atque tabulata praebere* bzw. *obnoxia tabulatis conferendis et lignis quoque materies indulta*) dienten ebenfalls überwiegend militärischen Zwecken. Die Aufgabe des Kalklöschens ist gemäß der oben genannten begrifflichen Grundlage von den ähnlichen Tätigkeiten abzugrenzen, die die Bedürfnisse der Hauptstädte zu befriedigen bestimmt waren (siehe: CTh. 14, 6 *De calcis coctoribus urbis Romae et Constantinopolitanae*). Die *materia* konnte die zu militärischen Zwecken *(in usus militares)* benutzten Holzwaren (zu denen auch die *tabulata* und das *lignum* gehörten) auch zusammenfassend, wie auch eine Unterart von ihnen, das zum Bau von Schiffen und Fuhrwerken verwendete „Blockholz" bedeuten. *Lignum* und *tabulata* bezeichneten kleinere, speziellere Holzwaren, die ausgesprochen zur Waffenherstellung verwendet wurden.

c) Eine besondere Kategorie der Verpflichtungen stellte die Kohleabgabe *(carbonis praebitio* bzw. *carbonis illatio)* dar, welche zur Befriedigung der Bedürfnisse der Verwaltung bestimmt war. Wurden die geleisteten Kohlen der damaligen Praxis entsprechend (*secundum veterem morem* bzw. *antiquo more*) von Münzprägen oder Waffenfabriken verwendet, zählte die *carbonis illatio* als ordentliche Leistung und gehörte nicht zu den gelegentlichen *munera sordida.* Dementsprechend genossen die von den *munera sordida* Befreiten keine Freiheit von der Kohleabgabe zwecks Münzprägung *(monetalis cusio)* und Waffenherstellung *(fabricatio).* Zu diesem letzten Kreis gehört nur die Kohleabgabe, die nicht der Münzprägung oder der Waffenherstellung dient. In diesem Fall ist die Verpflichtung die gleiche, aber die abweichende Verwendung *(usus multiplex)* ergibt eine andere steuerliche Einteilung *(collatio diversis).*

d) Die Stellung von Postpferden und Zugtieren für Nebenstraßen *(praebitio paraveredorum aut/et parangariarum)* kann nach ihrer Natur mit den öffentlich-rechtlichen Lasten bezüglich der staatlichen Post *(cursus publicus)* verglichen werden. Die zur Betätigung des *cursus publicus* notwendigen, zusammenfassend *angaria* genannten Leistungen (Stellung von Zugtieren und Gespannen, Erhaltung von Gebäuden usw.) *(angariarum praebitio),* gehörten zu den *munera civilia,* und waren von den Grundbesitzern entlang der Postlinien zu erbringen.[35] Die *praebitio paraveredorum et parangariarum* bedeutete ihrer Natur nach die gleichen Leistungen, unterschied sich von ihnen jedoch dadurch, dass sie die Bedürfnisse der Straßen außerhalb des Postnetzes befriedigte und gelegentlich zu erbringen war. Eine Einordnung

[32] S. die grundlegenden Erlasse bzgl. der Befreiungen (CTh. 11, 16, 15; 18; 19), und ihre in den *Codex* übernommenen Varianten (C. 10, 48, 12—14).

[33] Den Erlass analysiert Dazert: a. a. O., S. 65–73, 95–99.

[34] Von den in Klammern angegebenen verschiedenen lateinischen Bezeichnungen bezieht sich die erste auf die Variante in CTh. 11, 16, 15; die zweite auf die in CTh. 11, 16, 18.

[35] Herm. D. 50, 4, 18, 4.

zu den *munera sordida* ist also nicht durch die Qualität oder die niedrige Natur der Leistung, sondern durch den gelegentlichen Charakter der Leistung gerechtfertigt.

Beide Erlasse betonen jedoch, dass die *praebitio paraveredorum et parangariarum* als ordentliche Leistung gelte und nicht zu den *munera sordida* gehöre, wenn sie am rätischen Limes *(raeticus limes)* bzw. in der Provinz Illyricum zur Befriedigung von militärischen Bedürfnissen *(expeditiones Illyricae)* erbracht werden. Sie zählt ebenfalls als ordentliche Leistung, wenn die Gespanne und Zugtiere zum Transport *(translatio)* von Versorgungsgütern *(pastus militaris)* an kämpfendes Militär in Anspruch genommen werden.[36] Laut einer späteren, im Jahre 445 erlassenen *constitutio* (C. 10, 49, 2) ist Jedermann verpflichtet (selbst die von den „ordentlichen" Leistungen Befreiten), Leistungen der Stellung von Transportmitteln und Zugtieren zur Befriedigung der persönlichen Bedürfnisse des Kaisers zu erbringen, also die Verpflichtung der *parangaria, angaria* und Wagenstellung *(plaustrum)* zu erfüllen. Die Bezeichnung *„expeditio felicissima"* im Text des Erlasses konnte nicht nur ausschließlich eine vom Kaiser geführte militärische Aktion bedeuten, sondern auch die Erscheinung und den Durchmarsch des Kaisers mit seinem Gefolge auf dem betreffenden Gebiet. Die Verpflichtung berücksichtigt die Befreiungen nicht, und sie gilt ausdrücklich für Gebiete, wo der Weg des Kaisers führt *(„per loca, qua iter adripimus")*.[37]

e) Bau und Reparatur von öffentlichen Gebäuden und Kirchen (*publicis vel sacris aedibus construendis atque reparandis* bzw. *sollicitudo publicarum aedium vel sacrarum constituendarum reparandarumve*), der Bau von öffentlichen Straßen und Brücken (*sollicitudo viarum et pontium* ill. *constructio pontium vel viarum*), ähnlich wie die oben genannte Verpflichtung der *obsequia operarum atque artificum diversorum* bezeichnete diejenige Gruppe der öffentlichen Arbeiten *(operae)*, die nicht zu den öffentlichen Arbeiten in Städten *(opera publica)* gehörten, und deren Kosten von der Bevölkerung, genauer gesagt von den Verpflichteten der *munera sordida* zu tragen waren. Der Bau von öffentlichen Straßen und Brücken wurde im Jahre 423 aus der Liste der *munera sordida* gestrichen (CTh. 15, 3, 6).

f) Die mit Stellung von Rekruten und deren Ablösung zusammenhängenden Lasten (*capituli atque temonis necessitas* bzw. *temonis sive capituli onera*) bedeuteten die tatsächliche Stellung von Rekruten *(tironum praebitio)* bzw. die Zahlung der Ablöse dafür (*temo),* die unter den Eigentümern der zur Rekrutenstellung verpflichteten Steuereinheiten *(capitulum)* aufgeteilt wurde. Das Einsammeln der Rekruten bzw. die Beitreibung der dafür gezahlten Ablösungsbeträge war schon eine andere Organisations- und Verwaltungsaufgabe. Sie wurde – nach der Bezeichnung *capitularius* oder *turmarius,* der die Rekrutierung verrichtete – als *capitularia (turmaria) functio*, bzw. *temonaria functio* bezeichnet.

g) Versorgung der kaiserlichen Gesandten und Gäste (*legatis atque allectis sumptus* bzw. *collatio sumptuum allectis atque legatis*) und Erhaltung der Gästehäuser *(cura hospitalium domorum)*[38] bedeuteten die Organisierung der genannten Aufgaben, einschließlich Kostentragung bzw. Kosteneintreibung. Die zweitgenannte Verpflichtung bezog sich ausgesprochen auf Gebäude in ländlichen Gebieten, denn die Erhaltung von Gästehäusern in den Städten war getrennt genannt *(munus xeroparochi),* und ihrer Natur nach ein *munus civile*. Diese Last ist von der persönlichen Unterbringungspflicht *(metata)* gänzlich abzugrenzen, weil sie für den Verpflichteten die Zurverfügungstellung seines eigenen Hauses zu Zwecken der Unterbringung von Mitgliedern des Militärs und der Administration bedeutete.[39] Sie ist aber auch von der Last der „Unterbringung in der Stadt" *(munus hospitis in domo recipiendi)* abzugrenzen, denn diese gehörte zu den *civilia munera*.[40]

Zusammenfassung

Die „diocletianisches System" genannte Verwaltungsreform machte eine in einer Krise verwendete Staatsfinanzierungspraxis zum Alltag, sie überführte außerordentliche Mittel in einen Dauerzustand, und ging damit das ernsthafte Risiko ein, das System langfristig nicht betätigen zu können. Die in der vorliegenden Studie dargestellte Verpflichtung, die *munera sordida* veranschaulicht sehr gut Natur und Zweck der spätrömischen öffentlich-rechtlichen Lasten. Die Institutionen und immer ärmeren finanziellen Quellen des Reichs allein waren nicht mehr im Stande, das stark angeschwollene Heer und den Staatsapparat zu betätigen, so mussten die Verwaltungsaufgaben durch Arbeit und vom Vermögen der Bevölkerung gelöst oder unmittelbar durch sie erledigt werden. Die nennenswerten Ergebnisse der Reform, die zunehmende Macht des Kaisers, die Verwaltung auf breiterer Basis und die bessere Effizienz der staatlichen Administration gingen aber mit einer zunehmenden Verarmung der Bevölkerung, mit allmählicher Verkümmerung der gesellschaftlichen Organisationseinheiten, und letztendlich mit Abbau des „Reichs" im inhaltlichen Sinne einher.[41]

Wie auch Alföldy darauf hinweist, betraf diese Betätigung der Reichsorganisation um jeden Preis alle unteren Schichten der Gesellschaft als offene und brutale Unterdrückung („… die offene, oft brutale Unterdrückung, die für die Sicherung der erforderlichen Arbeits- und Abgabenleistungen notwendig war und ebenfalls wahllos, die meisten sozialen Gruppen innerhalb der niederen Bevölkerung betraf…").[42] Die Aufgaben und Lasten der *munera sordida* zeigen plastisch auch die Unverhältnismäßig-

[36] Zur Aufgabe des Transports der militärischen Versorgung an den notwendigen Ort siehe Titel 12, 38 *(De excoctione et translatione militarium annonarum)*.

[37] Siehe noch den Erlass C. 12, 50, 21 (440–441?) mit dem ähnlichen Inhalt, der die ähnlichen Befreiungen ohne einen besonderen Hinweis auf den Kaiser für die Zeit der Feldzüge *(tempore expeditionis)* aussetzt.

[38] Steht nur in CTh. 11, 16, 15.

[39] Zur Unterbringungspflicht siehe *Codex Iustinianus,* Titel 12, 40 *(De metatis et epidemeticis)*.

[40] Ulp. Dig. 50, 4, 3, 13, in dem die Verpflichtung ausdrücklich steht, betont besonders, dass diese Aufgabe die Unterbringung innerhalb der Stadt *(in civitate)* bedeutet.

[41] G. Ostrogorsky: *Geschichte des byzantinischen Staates*, München 1963, S. 33–34.

[42] G. Alföldy: a. a. O., S. 145.

keit, die zwischen den Erwartungen der kaiserlichen Regierung und den Möglichkeiten der Bevölkerung bestand, die die Grenzen ihrer Leistungsfähigkeit erreicht hat. Die Aufteilung der Verantwortung für die öffentlich-rechtlichen Lasten zwischen den Subjekten und den tatsächlich Leistenden erkennt eigentlich die Zweifelhaftigkeit der Erfüllung und der Eintreibbarkeit an.

Die dargestellte Besteuerungsmethode veränderte die politischen und gesellschaftlichen Verhältnisse des Reichs in ihren Grundlagen. Das System war „für das Reich unheilvoll, aber für den Kaisern sehr bequem"[43], es belastete gleichermaßen die Agrarbevölkerung und die Bevölkerung der Städte, stellte sie jedoch einander gegenüber, und es erwies sich später als fatal. Die Stadtvorsteher, die die Aufgaben der Steuerfestlegung und -eintreibung erfüllten, wurden letztendlich genauso zu Opfern der kurzsichtigen Staatsfinanzierungsmethoden, wie die unmittelbaren Steuerzahler. Der eigentümliche „Schachzug" der kaiserlichen Politik, der nur kurzfristige Interessen vor Augen hielt[44], stellte auf eine tragische Weise gerade die zwei Gesellschaftsgruppen in einen Interessenkonflikt mit den Einrichtungen des Reichs, die ihre Funktion sicherstellten.

[43] O. SEECK: *Geschichte des Untergangs der antiken Welt*, II., Berlin 1901, S. 276.
[44] G. ALFÖLDY: a. a. O., S. 169.

Academic Degrees and Titles, Classifications in Jurisprudence in Hungary from the 18th Century to the Present Day

Tamás Nótári *

Abstract

In this paper we survey the system of academic degrees and important academic titles used in Hungary in the mirror of their historical development – as appropriate from the aspect of jurisprudence, omitting scientific titles that fall outside this field. First, we examine the requirements and statutory conditions of becoming a university professor (ordinary and extraordinary university professor) and university private professor (Privatdozent) in the period from Maria Theresa's Ratio educationis, i.e., 1777 to 1950. After that, we present the introduction, regulations of the academic degrees introduced in 1950 and 1951 following Soviet patterns: the candidate of sciences and doctor of sciences degrees and the rules of obtaining them as well as the system of scientific and researcher classification still used today. After the historical survey, we analyse the regulation of academic degrees and titles after the change of regime on the basis of statutory and institutional regulations. As part of that, we survey the system of requirements of obtaining the doctoral (PhD) degree, the requirements of habilitation as scientific qualification, the rules of winning the doctor of the Magyar Tudományos Akadémia (MTA) [Hungarian Academy of Sciences (HAS)] title replacing the doctor of sciences degree and the conditions of becoming an ordinary and corresponding member of the Academy. Finally, in the mirror of these degrees and titles we present the current changes in the classification system of lecturers and researchers.

Key words: *academic degrees; Hungarian jurisprudence; CSc; DSc; PhD; habilitation; Hungarian Academy of Sciences.*

1. From Ratio Educationis to 1950

1.1 University Professorship

Regarding the appointment of university professors and the requirements they are to meet, Article 21 of the 1777 *Ratio educationis* issued by Maria Theresa reveal the following. Becoming a university professor is conditional upon having documented scientific activity. The council of the university can put three nominees forward for the given department through the Governor's Council to the ruler; this wording makes it clear that (using later terminology) it applies to public ordinary university professors. The nominees were invited from academies and grammar schools on the basis of their scientific activity or could be men "living anywhere and known of their excellent erudition". The nominees' curriculum vitae and description of their scientific activity and personality, character were attached to the recommendation, and the ruler selecting from them appointed the given person university professor. The fact that the decree speaks about "providing university lectures" makes it clear that in those days – as we shall see, up to the second half of the 19th c. – only so-called ordinary university professors were allowed to teach at the university.[1] Consequently, public ordinary university professors obtained their chair through application, their order of priority at the faculty was determined by the date of their appointment, and by public extraordinary university professors they meant professors who did not have their own independent department, in other words, in rank they were placed by all means behind ordinary university professors.[2]

Among the criteria of selecting the above-mentioned nominees for professor Article 102. § of the Decree underlines the importance of professional knowledge and lecturer's competence, their certification by public opinion and published works and, as a criteria outside science, engaging an irreproachable religious and moral conduct. The decree obligatorily stipulates that – in order to decrease "the risk of error" – the professors of the given faculty have the right to express an opinion on the nominees. The need to prove and document lecturer's and teaching competence is determined also as a requirement by the decree.[3] The option of open invitation was provided by Article 116. § of the *Ratio educationis;* to use a modern term, it made it possible for foreign citizens to be employed as university professors, by referring to the point that it is unlawful to consider

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1 Friml, Aladár: *Az 1777-iki Ratio educationis [Ratio educationis from 1777],* Kath. Középiskolai Tanáregyesület, Budapest, 1913, p. 54–55.

2 Mezey, Barna: *Nagyszombattól Budapestig. Az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kara (1667–2002) [From Nagyszombat to Budapest. Faculty of State and Law of Eötvös Loránd University (1667–2002)],* in Takács, Péter (ed.): *A jogászképzés múltja, jelene és jövője [Past, Present and Future of Legal Education],* ELTE ÁJK, Budapest, 2003, p. 148.

3 Friml: *op. cit.* p. 199.

that "only natives should arrange for studies without damage to public education". Therefore, the possibility to invite persons to a chair must extend not only to the citizens of Hungary and the hereditary provinces but also to "foreign persons famous for their education and scientific lectures".[4]

Act 19 of 1848 on Hungarian University determines the principle with respect to university professors that students can freely elect "what subject from what professor they intend to study" and that other "excellent individuals" could teach at the university in addition to ordinary university professors.[5] On the one hand, the Act subordinated the university to the authority of the Minister of Public Education,[6] thereby creating and statutorily guaranteeing the autonomy of the university. On the other hand, during the Revolution and War of Independence no further reforms affecting universities and scientific sphere in a wider sense were adopted: the university organisational regulation based on academic freedom was enacted by the *Imperial and Royal Ministerial Decree No. 6798 of 1849,* which can be linked with the name of Leo von Thun-Hohenstein Minister of Religion and Public Education.[7]

1.2 University Private Professorship

It was the quoted 1848 Act that introduced the institution of private professors – or, using the term applied in the Act: "other excellent individuals" – in addition to ordinary and extraordinary university professors, which existed up to 1952. In ranking university private professors were placed between professional university professors and the university support staff.[8] University private professors were not full-time employees of the university; in other words, they were not paid salaries but shared the tuition fee according to the classes held by them.[9] They obtained their private professor's qualification through habilitation, which vested them – on the grounds of the decision of the public ordinary and extraordinary university professors of the given faculty – with the right to teach the given subject, *venia legendi.* This qualification procedure was regulated, after numerous former proposals and legal sources – such as, for example, the 1848 draft university regulations made by Baron József Eötvös, the private professors' regulations no. 412 issued by the *Studien Hof-Commission* of Vienna on 19 December 1848, promulgated at the university of Pest in 1853 and entered into effect in 1858 and the Bill of 1870 made also by Eötvös *"On the Repeated Organisation of the Royal Hungarian University of Pest"*[10] – by the private professors' qualification regulation of 1871 made by Tivadar Pauler[11] and then by the *Ministerial Decree No. 45. 520/1892 of the Hungarian Royal Minister of Religion and Public Education* made by Count Albin Csáky.[12]

It is worth noting why the term private professor became generally accepted in Hungarian university terminology. The phrase is the translation of the German *Privatdozent,* which remained unchanged during the more than one hundred years of the existence of the institution, however, it drew fierce criticism and numerous unsuccessful attempts at modifications. Due to failure of the motions for modification, the term 'docens' */associate professor/* was generally used in common talk only, and in 1923 a decree officially prohibited the use of the term;[13] accordingly, the professor's title was not "enacted" either.[14]

Private professor's habilitation could be carried out the earliest three years after obtaining doctorate,[15] and the procedure could be commenced if the body consisting of ordinary and extraordinary professors deemed the applicant eligible by secret ballot on the basis of his "personal qualification".[16] The latter criterion, i.e., personal qualification, allowed several extra-scientific – religious, origin related, political, etc. – aspects to play a part in commencing the habilitation procedure, which might have been all the more injurious since no legal remedy lay against the result of the secret ballot on this subject, requiring simple majority of the votes cast (but dismissing the applicant in case of equality of votes).[17] In the further phases of the procedure, the applicant's "independent, strictly scientific" habilitation paper "published in printing"[18] was reviewed by two experts, within six months' deadline set by the regulations.[19] If the two opinions were unanimously positive – in case of difference of opinion a third evaluator was appointed[20] – the faculty council decided whether the applicant could be admitted to oral exam[21] and trial lecture[22]. When these were successfully per-

4 Friml: *op. cit.* p. 208.
5 Section 2 of Act 19 of 1848.
6 Section 1 of Act 19 of 1848.
7 Bíró, Judit: *Magántanárok a pesti tudományegyetemen 1848–1952 [Private Professor at the University of Pest from 1848 to 1952],* ELTE, Budapest, 1990, p. 7.
8 Bíró: *op. cit.* p. 12.
9 Mezey: *op. cit.* p. 148.
10 Eötvös, Károly: *A pesti királyi magyar egyetem újbóli szervezése tárgyában [On the Repeated Organisation of the Royal Hungarian University of Pest],* in: *Képviselőházi Irományok, IV.,* Pest, 1869–1871, p. 262–268.
11 Pauler, Tivadar: *Magántanári képesítő szabályzat [Regulation of the Qualification of Private Professors],* Budapesti Közlöny 1871/6, p. 157–158.
12 Bíró: *op. cit.* p. 14.
13 Ministerial Decree No. 77.893/1923.
14 Bíró: *op. cit.* p. 16.
15 Section 6 of Ministerial Decree No. 45. 520/1892.
16 Section 8 of Ministerial Decree No. 45. 520/1892.
17 Bíró: *op. cit.* p. 22.
18 Section 4 of Ministerial Decree No. 45. 520/1892.
19 Sections 8–10 of Ministerial Decree No. 45. 520/1892.
20 Section 11 of Ministerial Decree No. 45. 520/1892.
21 Section 13 of Ministerial Decree No. 45. 520/1892.
22 Sections 14–16 of Ministerial Decree No. 45. 520/1892.

formed, the applicant was appointed private professor by the Minister of Religion and Public Education – contrary to public ordinary and extraordinary professors who were installed into their office by the king, later on by the governor or the president of the republic.[23] After that, private professors were granted the *decretum habilitationis* signed by the rector.[24] If the applicant was refused in any short listing – except for a resolution to dismiss adopted with regard to "personal qualification" – he could lodge an appeal to the Minister,[25] however, if this failed to bring any result, he could try again to obtain private professor's title the earliest two years later.[26]

Some of private professors could become titular public extraordinary university professors pursuant to *Decree No. 20.162/1891 of the Minister of Religion and Public Education.* The difference between holders of this title – granted by the university on the basis of literary works, but almost entirely not being under the control of the ministry – and private professors was merely that the former could use their title outside the university as well, while they belonged to the same category as private professors within the university system.[27] The title of titular public extraordinary professor was granted in the following process: two experts expressed an opinion on the documentation analysing the scientific activity of the nominee having worked as a private professor for at least three years, on the basis thereof a body consisting of three persons set up by the faculty made a proposal, which formed the basis of the decision to be usually approved by the Minister of Religion and Public Education.[28] It should be noted that this rise in title did not make the holder expectant of becoming a public ordinary or extraordinary university professor;[29] therefore, persons belonging to this category were placed between private professors and ordinary or extraordinary university professors in the "order of protocol".[30]

The title of titular ordinary university professor introduced in 1910 could be given (i) to retired public ordinary university professors and (ii) to private professors vested with public extraordinary title who had outstanding academic achievement.[31] This category did not mean any extra right compared to titular extraordinary university professorship, in other words, its introduction served only a kind of seeming rise in title.[32]

2. The System of Academic Degrees Introduced Following the Soviet Pattern

By 1952 the former scientific qualification system was definitively terminated pursuant to the provisions of *Law-decrees 44 of 1950 and 26 of 1951* and was replaced by the centralised pattern adopted from the Soviet Union, where it was introduced in 1934[33], which contained the candidate of sciences and doctor of sciences degrees conferred by the HAS and the university doctor title and later degree conferred by universities.

2.1 The Candidate's Degree

The *candidate of sciences (Candidatus Scientiarum, C.Sc.)* degree was introduced by *Law-decree 44 of 1950* on "the introduction of a new academic degree and regulations of obtaining it" promulgated on 26 November 1950 – as the Preamble of the Law-decree puts it – "…in order to ensure planned scientific and professional recruitment, following the example of the Soviet Union's leading scientific cadre training program …".[34]

The Law-decree entrusted the Hungarian Academy of Sciences with controlling the training that served the basis of the candidate's degree, which exercised this duty through the National Scientific Qualification Committee, from 1951 through the Scientific Classification Committee[35] replacing the former[36]. Obtaining the degree was conditional upon aspirantship, i.e., candidate training, a dissertation proving capability of independent scientific research and defending it before the committee designated by the National Scientific Qualification Committee.[37] The maximum duration of aspirantship was three years as stipulated by law, however, in certain cases this duration was determined by the National Scientific Qualification Committee, taking account of the character of the branch of science and the preparedness of the aspirant.[38] For the period of training, i.e., aspirantship, the nominee had to be assigned to the scientific institute determined by the National Scientific Qualification Committee[39] and his professional activity was controlled by the aspirant supervisor.[40] During the period of candidate training the aspirant obtained a state scholarship and the aspirant supervisor was paid a fee depending on the number of aspirants controlled by him[41] to the debit of the

[23] Bíró: *op. cit.* p. 34.
[24] Section 18 of Ministerial Decree No. 45. 520/1892.
[25] Section 19 of Ministerial Decree No. 45. 520/1892.
[26] Section 21 of Ministerial Decree No. 45. 520/1892.
[27] Bíró: *op. cit.* p. 48.
[28] Ministerial Decree No. 11.041/1868.
[29] Ministerial Decree No. 24/114/1876.
[30] Bíró: *op. cit.* p. 49.
[31] Ministerial Decree No. 85.107/1910.
[32] Bíró: *op. cit.* p. 50.
[33] Волков, М. Н.: *Кандидат наук,* in: *Большая советская энциклопедия XX.,* Государствзнное Научное Издательство, Москва, 1953, p. 3.
[34] Preamble of Law-decree 44 of 1950.
[35] Section 4 of Law-decree 26 of 1951.
[36] Section 1 (1) of Law-decree 44 of 1950.
[37] Section 2 (1) of Law-decree 44 of 1950.
[38] Section 3 (1) of Law-decree 44 of 1950.
[39] Section 5 (1) of Law-decree 44 of 1950.
[40] Section 5 (2) of Law-decree 44 of 1950.
[41] Section 6 (1) of Law-decree 44 of 1950.

budget of the HAS.[42] The latest until the end of the first academic year, the aspirant took a preliminary examination in the subjects of the candidate's exam before the designated board of examiners[43] and at the end of the training period he took the candidate's exam, where he gave account of his professional and ideological (as the law puts it "Marxist-Leninist") expertise and foreign language skills.[44] It was possible to obtain the candidate's degree also without completing the aspirant training, on condition that the nominee had taken his candidate's exam, made his dissertation and defended it with the special authorisation of the National Scientific Qualification Committee,[45] in other words, "individual preparation" was an option in case of the candidate's degree as well. The candidate's degree could be obtained also when it was conferred by the National Scientific Qualification Committee "on the basis of formerly achieved scientific merits serving the benefit of the people" without taking any aspirant's exam, writing any dissertation or defending it[46] – this solution was used in several cases regarding scientists who were appointed university professors earlier.

With respect to the persons holding a candidate's degree in all branches of science, it is worth mentioning three records: while in 1961 2266 persons holding a candidate's degree were registered, this number rose to 9885 in 1990; in the period of the existence of the candidate's degree a total of 17434 candidate's certificates were issued.[47] For the last time applications for obtaining a candidate's degree could be submitted in 1997, the matters in progress were concluded in the following one or two years. Contrary to PhD, as we shall see, it was usually rare for a scientist to obtain the candidate's degree under the age of forty.[48]

2.2 The Doctor of Sciences Degree

In the year following the introduction of the candidate's degree *Law-decree 26 of 1951 on the introduction of the academic degree doctor of sciences and regulation of university lecturer's and research institute positions and degrees arranged for setting up the degree doctor of sciences (Doctor Scientiarum, D.Sc.).* The Preamble of the Law-decree referred to the earlier Law-decree 44 of 1950 and pointed out that "on the basis of the experience of the Soviet Union it is necessary to introduce […] the academic degree doctor of sciences" as the former (old system doctoral and private professor's) "degrees do not sufficiently help enhancement of the general standard of our scientific life" and "do not sufficiently urge our researchers to carry out increased scientific work and to widen their knowledge".[49] The Preamble of the legal rule also underlined that it is necessary to regulate the system of university lecturer's and research institute positions as well, noting that for the time being filling these positions is not conditional upon holding either the candidate of sciences or the doctor of sciences degree, however, for the future "persons who fill the highest positions are expected to be possibly candidates or doctors as soon and in as many number as possible".[50]

The doctor of sciences degree – i.e., emphatically not a title but the highest grade of the scientific qualification system – "is the sign of acknowledgement of high-level scientific achievement",[51] which can be won by those who have already obtained the candidate of sciences degree, have in-depth and overall knowledge in the given field of their branch of science, have showed new results based on their independent researches and defended their doctor's thesis".[52] The Law-decree made it possible to win the doctor of sciences degree exceptionally without holding a candidate's degree and writing a dissertation for those who deserved it by their scientific achievements of especially great significance.[53] According to this regulation, the ordinary and corresponding members of the HAS were entitled to the doctor of sciences degree,[54] which was obviously aimed at conferring a degree upon scientists who were elected academicians earlier before introduction of the new type of degrees. The legal rule ordered that both candidates and doctors of sciences should use the specification of their branch of science with their name[55] and should be provided with emolument supplement.[56] With respect to conferring both the candidate's and the doctor of sciences degree – in order to replace the National Scientific Qualification Committee set up earlier regarding the candidate's degree – the above cited Law-decree ordered to set up the Scientific Classification Committee within the HAS, whose members were to be appointed upon the proposal of the HAS by the Council of Ministers.[57]

With regard to winning the doctor of sciences degree, the Law-decree set the following order of procedure. Applications for obtaining the degree could be submitted the earliest three years after winning the candidate's degree – the Scientific Clas-

42 Section 6 (2) of Law-decree 44 of 1950.
43 Section 7 of Law-decree 44 of 1950.
44 Section 8 (1) of Law-decree 44 of 1950.
45 Section 9 (1) of Law-decree 44 of 1950.
46 Section 9 (2) of Law-decree 44 of 1950.
47 Nagy, Péter Tibor: *A tudományos továbbképzés Kádár-korszakbeli társadalomtörténetéhez [Postgraduate Education in the Kádár-Era],* Kultúra és közösség 2011/2., p. 26.
48 Pálinkó, Éva: *Fiatal kutatók életútja és szakmai identitása [Course of Life and Professional Identity of Young Researchers], PhD-Thesis,* BCE, Budapest, 2009, p. 22.
49 Preamble of Law-decree 26 of 1951.
50 Preamble of Law-decree 26 of 1951.
51 Section 1 (1) of Law-decree 26 of 1951.
52 Section 1 (2) of Law-decree 26 of 1951.
53 Section 1 (3) of Law-decree 26 of 1951.
54 Section 2 of Law-decree 26 of 1951.
55 Section 3 (1) of Law-decree 26 of 1951.
56 Section 3 (2) of Law-decree 26 of 1951.
57 Section 4 of Law-decree 26 of 1951.

sification Committee could exempt applicants from compliance with this period exceptionally –[58] the application had to be lodged with the dean of the given university faculty addressed to the Scientific Classification Committee.[59] The applicant marked one of his dissertations and monographs as doctor's thesis and attached it to his application – as an exception the legal rule made it possible for nominees presenting exceptional scientific achievement who had only one dissertation to win the doctor of sciences degree.[60] The submitted dissertation was delivered by the dean of the university faculty to the scientists of the given field for review and the so developed opinion was submitted by him to the Scientific Classification Committee.[61] In view of the fact that the candidate's dissertation and the application for winning the degree had to be forwarded to the Scientific Classification Committee through the dean of the faculty and that the preliminary opinion expressed on the dissertation was made by two experts designated by the dean, it was unavoidable that the evaluation should be influenced by ideological, political and personal criteria outside academic considerations as well.[62]

The Scientific Classification Committee designated three evaluators to review the dissertation and when the opinion of two of them was favourable, the dissertation was put to public debate before the designated special committee of the Academy.[63] On the basis of the judgements, the debate and the special committee's proposal, the Scientific Classification Committee adopted decision on conferring the doctor of sciences degree by secret ballot; in case of favourable decision, the certificate was issued, which was delivered by the council of the university the application was submitted to.[64] The regulations do not contain any reference to whether the decision of the Scientific Classification Committee had to be adopted by a simple or qualified majority of the votes cast, which allows to presume that conferring the degree was decided by simple majority.

With respect to formerly issued titles, the Law-decree made the following decision. The holders of these titles could submit an application based on which the Scientific Classification Committee examined until 30 September 1952 whether they could get the doctor of sciences or candidate of sciences degree.[65] In this interim period the Scientific Classification Committee (i) could confer any of the new degrees upon the applicant without submitting any dissertation or (ii) could dismiss the application or (iii) could set the conditions that the applicant had to satisfy in order to win the appropriate degree.[66] By entering into effect, the Law-decree cancelled the option of conferring the doctoral title (dr. jur.) as part of granting the diploma – similarly, as from 1 January 1952 it terminated issuance of doctoral titles in such a form at medical universities – instead of it, it ordered to use the specification 'qualified' (qualified jurist),[67] however, it made it possible for "old system doctors" to continue to use this title.[68] (This regulation was in effect only for a short period; from 1953 lawyers and physicians were given doctoral title again together with their diploma.)

3. The System of Academic Degrees and Titles after the Change of Regime

The need for transforming the scientific qualification system developed in 1950/51, primarily the necessity to return the right to confer the doctoral degree to universities became apparent shortly after the change of regime. This was made emphatically necessary by two circumstances: on the one hand, the Conference of European Universities (CRE) admitted as its members only universities that – in accordance with ancient university privileges – had the right to confer doctoral degrees; on the other hand, the candidate of sciences degree did not appear to be compatible in the international scene; it was a subject of dispute, for example, whether, taking the West German system as basis, the candidate's degree could be considered equal to promotion or habilitation.[69]

Below we shall discuss the doctoral, i.e., PhD degree, now the only degree in Hungary's scientific life, habilitation that represents a prerequisite for taking certain positions in the scientific qualification system (associate professor, university professor, senior research fellow, research advisor) and the doctor of the HAS title replacing D.Sc. After that we shall dwell on the rules of becoming a member of the Academy.

3.1 The Doctoral Degree (PhD)

As a result of the above outlined attempt, by *Act LXXX of 1993* on Higher Education the currently effective scientific qualification system was developed that now defines only a single uniform academic degree, PhD and under which the doctor of the HAS title replacing the doctor of sciences degree is now considered a title rather than a degree. (It should be noted that the titles *dr. jur.* of jurists and *dr. med.* of physicians – just as the titles *dr. med. dent.* of dentists, *dr. pharm.* of pharmacists and *dr. vet.* of veterinarians – are not academic degrees but titles, part of their diploma.[70]) PhD is nothing else then the abbreviation of the Latin *philosophiae doctor.* The official abbreviations of the term in Anglo-Saxon countries is also PhD – sometimes

[58] Section 5 (1) of Law-decree 26 of 1951.
[59] Section 5 (2) of Law-decree 26 of 1951.
[60] Section 5 (3) of Law-decree 26 of 1951.
[61] Section 6 (1) of Law-decree 26 of 1951.
[62] Nagy: *op. cit.* p. 23.
[63] Section 6 (2) of Law-decree 26 of 1951.
[64] Section 6 (2) of Law-decree 26 of 1951.
[65] Section 7 (1) of Law-decree 26 of 1951.
[66] Section 7 (2) of Law-decree 26 of 1951.
[67] Section 8 (1) of Law-decree 26 of 1951.
[68] Section 8 (3) of Law-decree 26 of 1951.
[69] Róna-Tas, András: *A magyar doktori iskolák helyzete és jövője [Status and Future of Postgradual Schools in Hungary],* Magyar Tudomány 2003, p. 1298.
[70] Section 52 (7) of Act CCIV of 2011.

Dphil; in German language areas dr. phil. *(Promotion, Doktor der Wissenschaften);* the equivalent of PhD in the science of the arts is DLA *(Doctor of Liberal Arts, Doctor Liberalium Artium).*[71]

Act LXXX of 1993 on Higher Education already refers to the PhD degree and habilitation and mentions the relation of the candidate's degree to PhD. As a condition of founding and operating universities the Act, among others, defines doctoral training and suitability for conferring the doctoral (PhD) and master's (DLA) degree and conducting the habilitation procedure as a required condition.[72] Regarding the doctoral degree, in 1993 the Act formulated as follows: "Whenever this Act refers to doctoral degree as requirement for employment, engagement, qualification or other legal rule refers to academic degree as requirement for employment, engagement, qualification, then it shall be interpreted as the doctoral degree as set out in this Act, the candidate of sciences, doctor of sciences degree or an academic degree obtained abroad and registered or acknowledged inland. As from entry into force of this Act, the persons who hold the candidate of sciences degree can use the specification 'doctoral degree'."[73] The latter sentence makes it clear that candidate's degrees were automatically re-qualified as PhD. In spite of this formal identity, András Róna-Tas declared with regard to degrees that PhD, i.e., the doctoral degree conferred by the university "…did not replace the candidate's degree but indicated transfer to a new system simultaneously with termination of the latter."[74]

Act CCIV of 2011 on National Higher Education formulates the following with regard to the doctoral degree. After obtaining the master's degree – regarding jurists, as appropriate, in view of undivided lawyer's training, after obtaining the diploma – doctoral training prepares PhD students for the doctoral degree. The Act declares that the university obtains the right to perform doctoral training and confer doctoral degree in the field of science – more specifically within the branch of science – to which its operation licence extends; the doctor's certificate is signed by the rector and the chairman of the council of doctors. Furthermore, the Act determines that it is the right of the council of doctors of the university to organise the doctoral training and confer the doctoral degree and that the council of doctors of the university can set up a council of doctors for each field of science and that each member of the council of doctors, except for would-be doctor representatives, must have an academic degree.[75]

Furthermore, the Act defines doctoral training, which can be individual or group training, research and reporting activity in line with its peculiarities and the would-be doctor's needs. After the doctoral training, the procedure of obtaining doctoral degree begins; the name of the former PhD student applying for degree is: candidate for doctor; the legal relation of the candidate for doctor is established through application for the procedure of obtaining a degree and its acceptance – the university cannot dismiss the application of those who have successfully completed the doctoral training at the given university. However, it is possible to obtain doctoral degree, subject to satisfying certain conditions, even without participating in the doctoral training preceding it as a so-called individual preparer. The legal relation of the candidate for doctor can terminate, as appropriate, by conclusion of the procedure of obtaining a degree and in the event that the candidate for doctor failed to submit his doctor's thesis within two years from establishing the legal relation. The Act determines the conditions of obtaining a degree in highly great details as follows: in addition to fulfilling the requirements set out in the doctoral regulations, completing the doctoral examination before (at least) a three-member board of examiners; certifying knowledge of two foreign languages at a level defined in the doctoral regulations; documenting independent scientific activity by articles and studies (or "otherwise", which is difficult to interpret within the frameworks of obtaining a degree in jurisprudence); presenting the dissertation and defending it in a public debate.[76] According to the interpretation of the Act, the dissertation "is a piece of writing, creation or work made by the candidate for doctor, by which the candidate for doctor proves during the procedure of obtaining doctoral degree that he is able to solve scientific tasks set in accordance with the requirements of the decree independently".[77] The Act requires maintenance of a central register of doctoral degrees accessible for anybody and that it should be made public electronically[78] – this is served currently by the web site www.doktori.hu. As appropriate the Act entrusts the doctoral regulations of the given university with regulating several issues.[79] Pursuant to the Act, holders of PhD degree can use the abbreviation PhD or Dr. with their names.[80]

The Act regulates publicity of doctor's dissertations and the theses of doctor's dissertations as well. It is the university that shall arrange for registering them electronically and in printed form and making them public in their full volume; in other words, for placing a printed copy and a copy recorded on electronic data carrier of the dissertations and the theses at the central library of the university. Also, publicity is to be ensured by the provision that requires that the doctor's dissertation and its theses in electronic form shall be made accessible to anybody in the Database of Hungarian Scientific Publications (MTMT)[81] with a DOI identity code attached to them.[82]

[71] Section 87/F (4) of Act LXXX of 1993 and Section 16 (4) of Act CCIV of 2011.
[72] Section 3 (1) of Act LXXX of 1993.
[73] Section 119 (1)–(2) of Act LXXX of 1993.
[74] Róna-Tas: *op. cit.* p. 1298.
[75] Section 16 (1)–(5) of Act CCIV of 2011.
[76] Section 53 (1)–(5) of Act CCIV of 2011.
[77] Section 108 (1) of Act CCIV of 2011.
[78] Section 53 (6) of Act CCIV of 2011.
[79] Section 53 (6) of Act CCIV of 2011.
[80] Section 53 (7) of Act CCIV of 2011.
[81] www.mtmt.hu.
[82] Section 53/A (1)–(2) of Act CCIV of 2011.

Government Decree No. 387/2012. (XII. 19.) on Doctoral Schools, the Order of Doctoral Procedures and Habilitation sets forth, among others, the following with regard to the procedure of obtaining a degree. The board of examiners for the doctoral examination (whose chairman can be only a university professor, professor emeritus or habilitated professor) must consist of at least three members, where one of them – if the number of the board members does not amount to five persons – shall not maintain any legal relation aimed at employment with the given university.[83] Regarding the thesis booklet the Decree determines that it shall present the results of independent scientific activity in a summary form.[84] The doctor's dissertation shall be submitted simultaneously with submitting the application for commencing the procedure of obtaining a degree or within two years from accepting the application.[85] With regard to deadlines, the Decree sets forth that the procedure of obtaining a degree shall be concluded within one year from submitting the dissertation,[86] and as an incompatibility rule it declares that next of kin of the person concerned and any person who cannot be expected to judge the matter objectively shall not act as evaluator or a board member in the procedure.[87]

3.2 Habilitation

According to the definition of the effective Higher Education Act, habilitation "is judging academic's and lecturer's competence and scientific achievement by the institution".[88] The term itself comes from the Latin word *habilis,* meaning *suitable* and accordingly in time it denoted suitability for independently announcing, registering main courses of lectures, university subjects. However, this meaning developed as the result of a longer process. It was at the end of the 18th century, in the world of German universities that they formulated the need for the first time that lecturers should prove their academic and lecturer's competence as *Privatdozent* at the university. At regulations level, the requirement of habilitation was recorded for the first time at the Reformuniversität of Berlin founded in 1810 in the statute adopted in 1812 and entered into effect in 1816 – at the same time, it should be noted that in those days habilitation was not to mean some kind of second doctoral degree *(Promotion)* and did not contain any habilitation paper *(Habilitationsschrift)* as requirement for creating some kind of great summary work.[89] No uniform regulation was developed on this matter in the 19th century, however, customary law set that usually two years must pass between promotion, i.e., doctoral degree and habilitation, although this depended on the age and university and was highly changing. The requirement of writing a habilitation paper, which definitely exceeded the doctor's dissertation in terms of both its volume and standard, became a general requirement at the beginning of the 20th century.[90]

As we have seen, habilitation was defined in the Hungarian university system before the changes that occurred in 1950/51 since it was a prerequisite for private professor's qualification. The two analysed law-decrees (*Law-decree 44 of 1950 and Law-decree 26 of 1951*) terminated habilitation as a scientific qualification procedure since conducting them and conferring the degree fell within the powers of universities and as such did not fit in with the centralised system of academic degrees developed following the Soviet pattern.

Habilitation was brought back into the Hungarian university system by *Act LXXX of 1993,* which set the following provisions in this respect. The prerequisite for habilitation is that the applicant should have a doctor's degree and should prove his scientific, professional results and the achievements attained by him as lecturer, research fellow in practical and creative activities after obtaining the doctor's degree, in the form determined in adherence to the habilitation regulations of the university. The applicant had to give account of his lecturer's competence in public, free lectures in Hungarian and a foreign language.[91] Development of the detailed rules of the habilitation procedure was assigned by the Act to the powers of universities.[92] Furthermore, the Act stipulated that university professors appointed before the Act entered into effect shall be considered habilitated;[93] in other words, it did not instruct universities to conduct the habilitation procedure with regard to university professors holding the doctor of sciences degree or, in certain cases, the candidate of sciences degree since university professors were appointed on the basis of the candidate's degree as well.

The effective law, i.e., *Act CCIV of 2011 on National Higher Education* assigns regulation of the rules of habilitation to the level of Government Decree,[94] which authorisation was performed – just as in the case of the doctoral procedure – also by *Government Decree No. 387/2012. (XII. 19.)* on Doctoral Schools, the Order of Doctoral Procedures and Habilitation. Pursuant to it – considering only provisions applying to jurisprudence and omitting provisions regarding technical and arts activities – commencement of the habilitation procedure can be applied for when the nominee has pursued high level, independent scientific activity since obtaining his doctoral (PhD) degree (for at least five years); has delivered lectures at some higher education institution either in Hungary or abroad for at least eight semes-

[83] Section 12 (3) of Government Decree No. 387/2012.
[84] Section 14 (1) of Government Decree No. 387/2012.
[85] Section 14 (2) of Government Decree No. 387/2012.
[86] Section 16 (9) of Government Decree No. 387/2012.
[87] Section 17 of Government Decree No. 387/2012.
[88] Section 108 (7) of Act CCIV of 2011.
[89] vom Bruch, Rüdiger: *Qualifikation und Spezialisierung. Zur Geschichte der Habilitation,* Forschung und Lehre 2000, p. 69.
[90] Schubert, Ernst: *Die Geschichte der Habilitation,* in: Koessler, Henning (Hrsg.): *250 Jahre Friedrich-Alexander-Universität Erlangen Nürnberg,* Universitätsbund Erlangen, Erlangen, 1993, p. 125., 134., 151.
[91] Section 25 (1)–(4) of Act LXXX of 1993.
[92] Section 26 (5) of Act LXXX of 1993.
[93] Section 123 (1) of Act LXXX of 1993.
[94] Section 110 (25) of Act CCIV of 2011.

ters; his scientific works have been published in noted international, authoritative periodicals edited by consultant editors and references to his works were made in such periodicals (as certified by the MTMT database); and has regularly attended international and inland scientific conferences as a lecturer.[95] The nominee sums up the results of his scientific activities performed since obtaining the doctor's degree in theses; yet, the habilitation committee or regulations of the given university can require submission of a habilitation dissertation as well.[96]

As part of the habilitation procedure, a so-called habitus investigation is carried out to establish how the nominee has satisfied the set conditions; this is followed by the evaluation of the habilitation theses. If both evaluations are positive, the nominee will hold a habilitation lecture in Hungarian and a foreign language, which is followed by public debate.[97] The theses and the dissertation as well as the lecture and the public debate are evaluated by the jury – with respect to its composition the criteria determined in the procedure of obtaining doctor's degree shall be applied appropriately.[98] As the closing act of the procedure – in the case that the lecture and the public debate is evaluated positively – on the basis of the report of the jury, the habilitation committee of the university confers the habilitated doctor's degree upon the nominee and issues a habilitation certificate thereon *(decretum habilitationis),*[99] which entitles its holder to bear the title habilitated doctor (in abbreviated form: dr. habil.).[100]

3.3 The Doctor of the HAS (MTA) Title

As we have referred to it already, in 1994 *Act XL of 1994 on the Hungarian Academy of Sciences* "changed" the doctor of sciences (D.Sc.) degree introduced in 1951 into the doctor of the HAS title, thereby the degree became a title – a title not lower at all in prestige, although not precisely defined in the system of scientific qualification and professional progress. At present the HAS has 55 doctors (except for the ordinary and corresponding members of the Academy) in legal and political sciences, including those who had obtained the doctor of sciences degree earlier.

The Act sets forth that the doctor of the HAS degree can be conferred by the Council of Doctors of the Academy upon persons "who have attained outstanding scientific achievements" – which is, as a matter of fact, conditional upon holding an academic degree and complying with other conditions of obtaining the degree set by the doctoral regulations of the Academy.[101] The Act reasonably declares that the formerly obtained doctor of sciences degree is equal to the doctor of the HAS title.[102] Also, the Act on the HAS sets forth that the doctors of the HAS who live in Hungary can be provided with monthly honorarium by the Academy until the end of their life and that the annual amount of the honorarium of all the doctors of the HAS cannot exceed 1.8 times the annual honorarium of all the academicians.[103]

Pursuant to the *Statutes of the Hungarian Academy of Sciences* the doctor of the HAS title can be conferred upon persons holding an academic degree who have enriched their science subject with original results after obtaining the degree, pursue outstanding scientific activity known to and acknowledged by the authoritative inland and international circles of the relevant field and sum up their findings in a doctor's dissertation.[104] The Statutes empowered the Council of Doctors of the Academy to work out the *Doctoral Regulations of the HAS* and the *Rules of Procedure of the Council of Doctors,* which can stipulate further requirements in addition to the above.[105] The special procedural and requirement system of Section IX of the Academy, i.e., Section of Economics and Law, applicable to doctoral matters entered into effect in September 2013.[106]

The rules of procedure of Section IX and the special requirements set by the Committee on Legal and Political Sciences distinguish three forms of the doctor's dissertation: a dissertation made in order to obtain the title, based on scientific results attained after obtaining the previous degree, in the volume of minimum 12, maximum 16 author's sheets without appendices and bibliography; a monograph published maximum three years earlier, based mostly on the results attained in the period after obtaining the previous degree; and a so-called short dissertation, in which the applicant sums up his independent scientific theorems.[107] Summary theses must be attached to the doctor's dissertation, which (i) can follow the usual structure of dissertations (objective, method, results, utilisation, bibliography), or (ii) can contain only the main points of thesis, including an introduction and a list of publications certifying originality of the theses.[108]

The *Statutes* separate seven phases of the doctoral procedure: submission of the application; habitus investigation (i.e., qualification of the applicant's scientific activity, personal suitability, where the scientific committee expresses an opinion on the applicant and in case of positive opinion the scientific section drafts a proposal towards the Council of Doctors, which makes

[95] Section 21 (2) of Government Decree No. 387/2012.
[96] Section 21 (3) of Government Decree No. 387/2012.
[97] Section 22 (5) of Government Decree No. 387/2012.
[98] Section 23 (3) of Government Decree No. 387/2012.
[99] Section 24 (1) of Government Decree No. 387/2012.
[100] Section 21 (1) of Government Decree No. 387/2012.
[101] Section 8 (1) of Act XL of 1994.
[102] Section 8 (5) of Act XL of 1994.
[103] Section 8 (3) of Act XL of 1994.
[104] Section 24 (1) of Statutes of the Hungarian Academy of Sciences http://mta.hu/cikkek/akademiai-szabalyozasok-119791.
[105] Section 24 (2)–(3) of Statutes of the Hungarian Academy of Sciences.
[106] http://mta.hu/ix_osztaly_cikkei/doktori-ugyek-121451.
[107] Section (1) of Doctoral Regulations of the HAS, Rules of Procedure of the Council of Doctors.
[108] Section (3)–(4) of Doctoral Regulations of the HAS, Rules of Procedure of the Council of Doctors.

the decision); putting up for judgement and defending procedure, carried out on the basis of the decision of the Council of Doctors; review of the doctor's dissertation by three external examiners; putting to debate by the Council of Doctors on the basis of the proposal of the three adjudicators; public debate (as a result of which, on the basis of the three external examiners' opinion, the jury makes a proposal to the scientific section on conferring the title); and conferring the title on the basis of the proposal of the scientific section by the Council of Doctors.[109]

3.4 Membership in the Academy

Act XL of 1994 amended in 2011 provides that the Hungarian Academy of Sciences is made up by (inland) ordinary and corresponding and (foreign) external and honorary members. With regard to being elected an academician, the Act sets forth no more than that academicians are elected by inland members and that the number of inland academicians younger than 70 cannot be more than two hundred, and the total number of inland academicians can be maximum 365 persons; also it stipulates that inland academicians living in Hungary are provided with monthly honorarium.[110] At present Section IX of the Academy has 30 (25 ordinary and 5 corresponding) members, including 11 (9 ordinary and 2 corresponding) members in the field of legal and political sciences.

By its Resolution No. 5/2012 the HAS's General Assembly regulated the detailed procedural rules of electing academicians.[111] Academicians are elected in every three years in May, when members are elected by the Assembly of Academicians.[112] Recommendations for membership in the Academy can be submitted by members of the Academy to the competent section, evaluating therein the scientific activity of the proposed person, his outstanding scientific results and their acknowledgement at home and abroad. The recommendations examined and forwarded by the Presidium are published in the periodical Hungarian Science.[113]

Being a candidate for membership, no matter whether being nominated as an ordinary, corresponding, external or honorary member, requires at least three recommendations. Minimum three ordinary members' recommendation is required for ordinary membership; minimum three inland members' recommendation is required for corresponding membership; at least three inland or two inland and one external members' recommendation is required for external membership; at least three inland members' recommendation is required for honorary membership. The Resolution regulates the number of recommendations that one member can put forward: each ordinary, corresponding and external member can recommend two persons, ordinary members can make two recommendations in each of the four categories; corresponding and external members can make two recommendations in each of the three categories (reasonably they cannot make recommendations on ordinary members); honorary members cannot make recommendations.[114]

The earliest four weeks after the recommendations are published in the Hungarian Science, the scientific section holds a so-called member nomination section meeting, attended by inland academicians with right to vote – as a matter of fact, external and honorary members have right of consultation only. The member nomination section meeting adopts resolution on the nomination of the proposed persons by secret ballot and simple majority of the votes cast, and those who have won this share of the votes will be put on the common list of nominees for academicians. The result of the voting of the member nomination section meeting ranks the voted nominees as well. The order is determined by the decreasing number of "yes" votes or, in case of identical number of "yes" votes, by the increasing number of "no" votes. The president of the section informs the Presidium on the result of voting, and the Presidium unites the lists of nominees into a common list of nominees where it is bound by the order set by the section. The number of eligible new members and their distribution among sections are determined by the member election meeting of the Assembly of Academicians.[115]

Summary

The prime aim of this study was to survey the system of academic degrees and titles used in Hungary and the related university lecturer and research fellow classing – as appropriate, setting out primarily from the field of legal and political sciences. However, in view of the fact that currently used degrees and titles can be traced back to longer or shorter historical precedents, a historical analysis seemed to be necessary as well. For example, habilitation as a condition of private professor's qualification appeared in Hungarian scientific life as early as in the 19th century, and although the candidate of sciences and doctor of sciences degrees introduced following Soviet patterns are no longer conferred, it is possible to continue to hold them and they have been included in the scientific qualification system.

We set out from the year 1777 when *Ratio educationis* was issued by Maria Theresa, which marks the starting point of a long period of development up to 1950. It was in this period when the system of qualification and required conditions of ordinary and extraordinary university professorship and, from the second half of the 19th century, of university private professorship evolved. This organic system complying with Western European patterns was ended by two law-decrees issued in 1950 and 1951. This step, on the one hand, terminated the former scientific qualification and classification system and introduced the Soviet type candidate of sciences and doctor of sciences degrees as well as the university classification system that is used up to this day (which defines assistant lecturer's, senior

[109] Section 24 (4) of Statutes of the Hungarian Academy of Sciences.
[110] Section 6 (1)–(4) of Act XL of 1994.
[111] http://mta.hu/data/cikk/13/10/17/cikk_131017/2013_evi_akademikusvalasztas_eljarasi_szabalyzata.pdf.
[112] Section 2 (1)–(4) of Procedural Rules of Electing Academicians of the HAS.
[113] Section 3 (1)–(5) of Procedural Rules of Electing Academicians of the HAS.
[114] Section 4 (1)–(3) of Procedural Rules of Electing Academicians of the HAS.
[115] Section 5 (3)–(7) of Procedural Rules of Electing Academicians of the HAS.

lecturer's, associate professor's and university professor's scopes of work); and, on the other hand, centralised Hungarian scientific life by depriving universities of their powers of scientific qualification.

The bases of effective regulations were created in 1993 when the transformation of the scientific qualification system introduced following Soviet patterns began. It was at that time when the PhD, i.e, doctor's degree was introduced following western examples, which has now become the only conferable academic degree in Hungary – all other qualifications are considered "merely" a title. Regarding the PhD degree, we have analysed not only statutory provisions and requirements but also the possibilities of institutional regulations. Partly according to former Hungarian traditions, partly following Western European (primarily German) patterns, habilitation as a step of scientific career following PhD has been reinstated among academic titles. The issuance and conferment of both the PhD (doctor's) degree and dr. habil. title have been assigned to the powers of universities. The doctor of sciences degree has been replaced by the doctor of the HAS title; as a matter of fact, conferring this title has stayed within the powers of the Hungarian Academy of Sciences, however, the conditions of obtaining it have become stricter. As the highest academic title, membership (primarily corresponding and ordinary membership) in the Academy has been preserved – at present Section IX of the HAS (Section of Economics and Law) enumerates 11 legal scientist members.

Remedy and Legal Force in the Procedural Law of Hungarian Public Administration (1869 to 1901)

Anita Paulovics[*]

Abstract

I chose the assessment of the development of remedies between 1869 and 1901 as my topic, because that was the time when initiatives characteristically determining the regulations of general public administration procedural law for the past one hundred years took place. I primarily processed the special literature and legislative practices of the era.

Key words: *administrative procedural law; legal remedy; administrative jurisdiction; legal force.*

The legislative process of a law on the general rules of public administration procedures was also much later initiated in Central Europe – compared to other procedural law acts. One of the reasons is that the principal conception in that era (not only in Hungary) was that "given the variety of public administration issues, procedures similar to judicial or court procedure in uniformity cannot be accomplished"[1]. Another – less explicit – reason was that the general regulation of public administration procedures limited public administration proceeding on behalf of the government; accordingly, the legislative authority tended to delay the regulation of the issue despite propagating the principle of rule of law. At the same time, it needs to be emphasized that initiatives striving to unify (primarily) remedies can be found as early as from the 1870's onwards in special literary works of public law and from the beginning of the 20th century in codified law.

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1. Separating Public Administration and Justice

In Hungary, it was Article 1 of *Act 4 of 1869* that declared processing justice and public administration to be handled separately, i.e. that public administration and judicial authorities were not allowed to intervene with each other's authority.

At the time when the separation of justice and public administration was regulated on a legislative level – i.e. in 1869 – only civil law and criminal law courts were in operation, thus such courts were considered as judicial authorities by the law[2]. Later, when administrative courts were established, the law application activities of these courts were considered by the contemporary special literary works – including German literary works – as public administration activity.[3]

The primary goal of separating the two government affairs was to ensure that public administration authorities should no longer carry out judicial activities at court.

Nevertheless, shortly after the adoption of the law – especially in the 1870's – new laws deviating from the above stated principle appeared,[4] in which public administration authorities are granted judicial entitlements with respect to certain cases. The government and the legislative authority tried to blame overloaded courts and extensive lagging in the administration of legal cases as explanations for this tendency. Other laws assigned several public administration cases to legislative bodies without regulating the means of exercising authorities or procedural issues. In such cases, the proceeding authority (person) had extensive – or, actually, full – discretion. In general, laws including more specific regulations on public administration authority proceedings were related to the economic, property or financial interests of citizens, such as the Industrial Law[5], the law on the Management of Public Taxes, the Law on Water Rights and the legislations on guardianship or wardship.[6]

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[1] *Kmety Károly*: A magyar közigazgatási jog kézikönyve. Harmadik javított kiadás, Budapest, Politzer, 1902. pp. 294.

[2] The parliament debate on the bill of Act 4 of 1869 is detailed in the following work: *Máthé Gábor*: A magyar burzsoá igazságszolgáltatási szervezet kialakulása. Akadémia kiadó, Budapest, 1982. pp. 47–50.

[3] *Jászi Viktor*: A magyar közigazgatási jog alapvonalai. I. kötet, Debrecen, Hegedűs és Sándor, 1907. pp. 23.

[4] Such laws included Act 13 of 1876 on Regulating the relationship between servants and masters, agricultural workers and day-labourers, which set out no specific regulations on proceeding methods applicable for legislative bodies. In lack of procedural rules, „the legality of such procedures could not be checked" *Sarlós Béla*: Közigazgatás és hatalompolitika a dualizmus rendszerében. Akadémiai Kiadó, Budapest, 1976. pp. 164.

[5] see: István Turkovics: The Regulation of Commerce in the 19th Century in Hungary, Journal on European History of Law,Vol.4/2013, No.2, pp. 135.

[6] *Sarlós*: cited work pp. 163.

2. Academic Initiatives in the 1870's

2.1 A Right to Petition and the Right to Complain

In his work on public law, *Imre Korbuly* briefly mentions *the right to petition and the right to report injuries*.[7] Right to petition is a basic right for citizens both individually and in groups, in the framework of which they can submit their petitions – among others – to the authorities as well as to the government. The basis for the right to petition could exclusively be the promotion of public or individual interests; however, this right could not be exercised against infringements. Regarding infringements, if related to private law, one had to go to court for remedy; if civil or constitutional laws were infringed, affected persons were entitled to submit constitutional law complaints.

Based on the above, *the right to petition cannot be considered as a remedy from today's perspective,* as one could not actually exercise it in cases of infringements. Its significance lies in the fact that it did provide a basis for the establishment of public administration remedies set out in later periods, due to the fact that the right to appeal set out in general public administration procedural laws as a regular form of remedy could be exercised in cases of rightful infringement as well.

The *right to complain* made it possible for the affected persons to turn to the competent superior authority, and, if being unsuccessful, to the parliament in case they wished to complain about the infringement of their civil or political rights *due to the unlawful acts or default of an authority*.

The *right to petition and right to complain* are also briefly assessed by *Gyula Kautz*,[8] primarily on the basis of German authors.[9] According to Kautz, the essence of the right to petition and the right to complain is that individuals or groups of individuals have the right to submit complaints to the government or the legislative authority even in political cases, with reference to the need for their alleged problems to be remedied. *These rights,* Kautz says, *can be derived from* the individuality of people as well as from the freedom of opinion and freedom of speech, because through these means, the state authority is able to acquire the wishes and demands of common people, authority abuses, as well as the (primarily negative) effects of certain governmental or legislative measures. Nevertheless, *exercising such rights* – according to the author – needs to be *restricted by certain boundaries.*[10]

In Chapter IV of his work on Hungarian public law, *István Kiss* mentions the right to petition as well as the right to complain[11] among the political and civil rights of citizens. Kiss – unlike Kautz – *did not place the emphasis on the sources of and restrictions on rights* with respect to the right to petition and the right to complain*, but rather on the forms of their enforcement.*

Regarding the right to petition, Kiss emphasizes the fact that the citizens or their groups are entitled to submit petitions to the king, the Parliament, a ministry or other authorities in case they find it necessary to do so in order to promote public or private interest.[12] Kiss – similarly to Kautz – points out that the right to petition cannot be exercised with respect to remedying infringements. In cases of private law infringements, people could go to court, and in cases of infringements with respect to civil and political rights, the right to complain could be applied. The rules for exercising the right to petition are presented by Kiss in details. Such petitions were sent by the King to the Minister of the respective department for opining.[13] *Accordingly, the rudiments of involving skilled experts at different administrative areas in the course of evaluating petitions occurred, even if the final decision was made personally by the king, and the opining provided by the minister did not have any binding force with respect to the decision.*

Private individuals and bodies could submit petitions only through Members of Parliament, and the Chamber of Representatives made a respective decision through adopting a resolution.[14]

The right to petition that could be exercised on the basis of the infringement of interests – as mentioned above – cannot be considered as a remedy according to modern terminology; its significance rather lied in the fact that former decisions could be reviewed based on claiming the infringement of interests, and new decisions could eventually be made. *From the perspective of assessing legal force,* it is important that there were no other forms of remedy in relation to decisions made by the King and the (Upper) Chamber of Representatives, *the persons in question could not do anything but accept the contents of the decision, as it was final and immutable.*

Citizens and their bodies could exercise the constitutional rights to petition or to complain in case their civil and political rights were violated; they could turn to the legislative authorities, and settlements could seek remedy at the upper authorities, the Parliament or even the King.[15]

2.2 The Role of Administrative Committees in the Remedying System

In his public administration manual, *György Fésüs* discusses the issue of remedies against the public administration proceedings and authority decisions. In his work – beside the organisa-

[7] *Korbuly Imre*: Magyarország közjoga illetőleg magyar államjog rendszere kapcsolatban az ország közigazgatási szervezetével. Harmadik újra átdolgozott kiadás. Budapest, 1877. Eggenberger, pp. 191–193.

[8] *Kautz Gyula*: A politika tudomány kézikönyve. Harmadik, újólag átnézett és javított kiadás. Budapest, 1877. Franklin-Társulat, pp. 140.

[9] Kautz refers to the works of the following German authors: *Bluntschli*: Allgemeines Staatsrecht 648. sk. 1; *Röder*: Politik 177. 1; *Mohl*: Staatsrecht, Völkerrecht und Politik I. k. 222. sk. 1; *Kautz*: cited work pp. 140. Please note that the effects of German legal literature could be witnessed throughout the whole Hungarian legal system, e.g. private law and property law, see: Katalin Ibolya Koncz. Community Property as one of the Special Institutions of Hungarian Matrimonial Property Law of the 19th Century; Journal on European History of Law,Vol.4/2013, No.2, pp. 129–133.

[10] *Kautz*: cited work pp. 140.

[11] *Kiss István*: Magyar Közjog (Magyar Államjog). Negyedik kiadás. Budapest, Eggenberger, 1888.

[12] *Kiss*: cited work pp. 238.

[13] *Kiss*: cited work pp. 238–239.

[14] *Kiss*: cited work pp. 239.

[15] *Kiss*: cited work pp. 239–241.

tional system of public administration – he placed the emphasis on the assessment of the special administration areas he found most significant.[16] In the chapter on the organisation of internal affairs administration, he mentions *administrative committees* operating within the framework of the public legislative authorities. The committees were established in 1876[17], with the primary goal of decreasing the jurisdiction of public legislative authorities. Consequently, the formerly very clearly set dividing line between government and legislative administration became vaguer. The law did not actually state the nationalisation of legislative public administration, but regarding its practical effects, it was very nearly so.[18] According to Fésüs, *the jurisdiction of committees was divided into three groups*:

- taking measures in public administration authority cases that laws prescribe to fall under their jurisdiction,
- acting as a disciplinary authority in legally stipulated cases,
- making decisions in the cases of appeal set out by law to fall under their sphere of authority.

This latter issue fulfils the function of legal remedy.[19] *The scope of resolutions that could be appealed* at a committee *was generally stipulated by law,* but – if using modern terminology – *in an illustrative manner,* i.e. leaving opportunities for the judgment of appeals in other cases to be ordered under the jurisdiction of administrative committees by other laws. Other laws took this opportunity, for example in cases of legal disputes between masters and servants or between agricultural workers or day-labourers[20], or in guardianship cases.[21] This tendency increased even further later on, multiplying the number of administrative cases in which the proceeding authority of appeal was the administrative committee. Moreover, regarding cases that were stipulated by other laws to be handled by the administrative committees for appealing, this special legislation also determined what authority decisions can be appealed and what procedural rules are to be kept. In essence, *special laws determined all the details of submitting appeals to the administration committees,* in a relatively modern way in many cases.

Fésüs *did not consider administrative jurisdiction to be really significant; he found the remedying system related to authority cases within public administration fairly operable. Although Fésüs did not explicitly state so, he considered authority decisions as effective, which were not appealed, or regarding which a final material decision had been made by the highest body in the procedure of appeal.*

The incorporation of administrative committees into the authority forum system of public administration resulted in an increased number of remedying degrees. A potentially positive aspect of such increase is that in a multi-degree forum system, multiple authorities review the given decisions, and thus the remedying of an actual infringement has higher chances. Nevertheless, the negative aspect is that the remedying system becomes more complicated, which is an unfavourable issue with respect to the requirements of the rule of law.

3. Administrative Jurisdiction

3.1 The Appearance of the Notion of Administrative Jurisdiction

Shortly after the separation of jurisdiction and public administration, special literary works started bringing up more and more frequently (based on foreign examples) the urgent issue of establishing the court control of public administration legality. However, there were extensively different views expressed regarding the scope of court control, the sphere of authority of administrative jurisdiction bodies and their structural elements.

In general, *Korbuly* determined the tasks of court authority to protect the rights of individuals and to eliminate infringements through the application of laws, thus ensuring the effective application of law. According to *Korbuly*, jurisdiction does not actually entail the practicing of real powers; it is rather limited to the protection of recognised rights. *Court verdicts are the sentences, the execution of which is the task of public administration* in specific cases, pursuant to the governing law.[22] An important requirement is that jurisdiction and public administration should operate separately from each other, and judicial tasks should be executed by separate bodies independent of any influence, proceeding solely according to law and respective legislations: courts. Regarding the topic of this work, it is particularly important that the *guarantee* for this was not only defined in the organisational independence of courts, but primarily in the requirement that *neither the government nor the legislative authority should be allowed to amend final court decisions and public administration should be obligated to execute such decisions.*

Actually, the essence of this issue is that *according to Korbuly, court decisions are not to be changed, i.e. they have material legal force,* and the author considers the material effectiveness of court decisions as the key proof of the independence of courts from public administration.

Kautz uses the collective term *„public law courts"* for courts of non-civil jurisdiction, and determines *three types of them*: state court, national political court and *administrative court.*[23] According to his basic principle, a key requirement of the rule of law is that individuals could go to *independent courts* in case their rights set out by laws are infringed by a public authority or a government body. An administrative court should only proceed *in case an individual complains that an authority decision infringes their*

[16] *Fésüs György*: A magyar közigazgatási jog kézikönyve. Harmadik átdolgozott és bővített kiadás. Budapest, Eggenberger, 1887.
[17] Act 6 of 1876 on Administrative Committees.
[18] *Sarlós*: cited work pp. 117.
[19] Regarding administrative committees, a detailed description can be found at *Fésüs*: cited work pp. 50–63.
[20] According to Act 13 of 1876, regarding the violation of the legislation, the administration committee acted as the second degree body in Budapest and as the third degree body in counties as well as in municipal boroughs with legislative entitlements.
[21] According to Act 20 of 1877, the committee was allowed to make decisions in guardianship cases as the second degree body regarding decisions made by legislative authorities and the ward council, and as a third degree body with respect to the same type of decisions made by settlements.
[22] *Korbuly*: cited work pp. 488–489.
[23] *Kautz*: cited work Chapter seven, pp. 398–409.

rights. The sphere of authority of administrative courts does not cover cases regarding infringements; in such cases, adversely affected parties could appeal to public administration authorities. Kautz attaches great importance to administrative jurisdiction by stating that the operation of this legal institution is a main support of constitutionality. He agrees with the German legal scholars according to whom *everyone needs to be granted the opportunity to protect their rights at court against any despotism or infringement of authorities.* In lack of such opportunity – especially in countries with parliamentary governments – even the most accomplished constitution and the broadest extent of civil freedom cannot provide enough security against the arbitrary powers of authorities.

Kautz refers to several different solutions for the structural arrangement of administrative courts. One possibility is that disputed public administration cases should be judged *by a body related to the government authorities*, i.e. not to regular or special courts. We agree with the opinion of the author according to which this solution does not meet the requirements of the rules of law, as an independent legal body – separate from the executive authorities – is not ensured for the final judgment of administrative cases. The essence of the other solution is that public law disputes, including administrative jurisdiction, is to fall under the competence of *common national courts of justice*. He argues against this solution that certain administrative disputes require such special knowledge that is not available at civil or criminal courts. Kautz finds the third solution to be most appropriate, according to which judicial activities related to authority cases should be processed by *independently organised administrative courts*. In this case, administrative jurisdiction would be implemented by courts with appropriate skills and independent of executive authorities, which are not only entitled to annul unlawful authority measures and order a new procedure in the given case, but also to make material decisions on the actual facts. At the same time, Kautz also points out that no matter how bodies of administrative jurisdiction are specified, *their activities can only be successful in case the legislative authority establishes the system of administrative legislations providing a firm basis for such court proceedings.*[24]

The first volume of the complex work of *Győző Concha* titled *"Politika"* (Politics) was published in *1885*.[25] In this work, significance lies in the assumptions of the author with respect to the executive powers.[26] He points out that judicial powers must be independent of executive powers, but, nevertheless, such independence of authority does not place courts above the executive powers, and jurisdiction remains to be a supplementary aspect of executing procedures.[27] Within the executive organisational structure, Concha separated the executive powers and the administrative authorities. According to him the former was responsible for establishing rules or organising tasks, whereas he defined two subgroups within the so-called administrative authorities: public administration and judicial authorities. The task of public administration authorities is to act on the basis of the given laws, and to accomplish certain results, and the administrative courts are to compare the acts of public administration authorities with the respective laws.

According to Concha, a judicial body independent of the executive powers is necessary because the decision made by the highest level of such organisation cannot be changed by any other government powers.[28]

The author does not mention the institution of legal force; nevertheless, he considers the court decisions on the legality of resolutions made by public administration authorities to be immutable. This is basically a certain concept of material legal force, which became much more refined – affected by German language, more particularly Austrian legal literary works – later.

In his monography on state services[29], *Ferenc Keleti* brought up the necessity to separate public administration authorities and administrative courts, and stated that rules of law definitely required the institutionalisation of administrative jurisdiction. According to his starting point, the authority system is based upon certain agencies restricted to manage only particular types of cases within a particular geographical area.[30] *The basic notion of the author later appears in the regulation of public administration procedural law in a way that the legal institution of sphere of responsibilities and of authority was established on the basis of the notion of division based on types of cases, and the notion and definition of legal competence served the basis for the legal terminology of geographical borders.*

Based on the variety of cases to be addressed, the author defines *two different types of state agencies*, namely *public administration (or government) agencies and judicial agencies.* Public administration state agencies are grated powers to act in their competence; their responsibilities are to order or assign issues being necessary and required for public interests, and, in given cases, to execute such orders. On the other hand, Keleti says, public administration state agencies are to follow the orders of superior bodies, and they are independent from such bodies. At the same time, judicial agencies can only apply the effective laws for particular cases.[31]

The author points out that an important requirement of a "law-abiding state" is that *judicial protection needs to be ensured against infringements committed by public administration authorities.* The requirement led to the establishment of administrative courts.

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[24] *Kautz*: cited work pp. 408.

[25] *Concha Győző*: Politika. I. kötet Alkotmánytan. Budapest, 1885.

[26] Part III of Volume I of *Concha's* Politics is titled „The Constitution of the State". In this part, the author discusses in details the legislative powers, the executive powers, the regal, i.e. head of state powers as well as the relations between the main government bodies.

[27] *Concha*: cited work pp. 502.

[28] *Concha*: cited work pp. 505.

[29] *Keleti Ferenc*: Az államszolgálat jogi természete és a rendszeres államszolgálati pragmatika elvei különös tekintettel hazánk viszonyaira és a nevezetesebb európai államok e tárgyra vonatkozó intézkedései. Második kiadás. Budapest, Singer és Wolfner, 1886.

[30] *Keleti Ferenc*: cited work pp. 10.

[31] See more details in *Keleti*: cited work pp. 12–14.

Regarding the powers of courts, *István Kiss specifically discuses financial administrative courts.*[32] He considers this type of court to be one of the courts serving to protect constitutional rights, which makes decision on the supreme degree. He also points out the absence of any actual administrative court operating at that time, thus citizens had no effective and lawful protection against the authorities in most of the different public administration branches except for financial public administration, where the financial administrative court guarded the legality of public administration.[33]

3.2 The Financial Administrative Court

In the 1870's, it became apparent that the establishment of administrative jurisdiction is an essential requirement for a modern state under the rule of law.

This was partly the reason why the government submitted the bill on financial administrative courts to the Chamber of Representatives in January 1881. However, the bill did not meet the academic and practical requirements, therefore it was not adopted.[34]

The law on financial administrative courts was eventually adopted by the Parliament *in 1883*.[35]

The chairman and the judges of the financial administrative court were appointed by the King, based on the recommendations made by the Minister of Finance. Appeals were submitted by public administration authorities to the financial administrative court. The court processed the appealed cases in the form of trials open for the public, and decisions were made by boards consisting of three members. Appeals could be submitted to the court in the subject of resolutions made by public administration authorities with respect to cases related to certain taxes and duties.[36] In disputable cases, the financial administrative court was intended to serve the protection of taxpayers against the fiscal interests of the state.[37] The court made final decisions in cases under its sphere of authority.[38]

This means that the decisions made by the financial administrative court could not be appealed, i.e. are formally effective and immutable, therefore it was also materially effective, and the contents of the decision was binding for both the affected persons and the government bodies. In 1896, the financial administrative court was merged into administrative court established in that year.[39]

3.3 The Hungarian Royal Administrative Court

According to *Act 26 of 1896* the *Administrative Court* was established, which acted as an independent, single-degree body separated from public administration and common courts. The court operated in two departments – financial and general public administration – and in several boards within the departments.[40] According to its function, the court was responsible for remedying the infringements suffered by citizens and, to a smaller extent, by regional legislative authorities. The operating principles of the Administrative Court were characterised by limited liberalism. Regarding the stability of their statuses and disciplinary aspects, the members of the Administrative Court were as independent as the judges of ordinary courts and their assignment followed the same procedure as well. The Administrative Court was organised by the law to be an institution of high authority.[41]

The law exhaustively specifies cases that can be submitted to this court, therefore court protection was predestined to be restricted. Furthermore, it expressly excluded *the application of 'analogia legis' and 'analogia iuris', thus it failed to meed the academic and practical relevant requirements.*

Resolutions with respect to the Administrative Court – particularly in relation to its jurisdiction – were often amended. *In 1907,* a specific legislation was adopted on the expansion of the jurisdiction of the Administrative Court.[42] As a result, *the number of cases falling in the jurisdiction of Administrative Courts increased, but even this law listed the appealable case types with positive exhaustion – thus establishing a tradition – therefore, ultimately guaranteed legal protection was not ensured against all decisions made by public administration authorities. According to the above stated reasons, the established administrative jurisdiction was neither modern nor efficient.*

A novelty *of the law* was that it had a *separate section* – its third section – for the *detailed rules of proceedings at administrative courts. This was particularly significant due to the fact that the regulations contained several procedural law institutions that also appeared later in the course of codifying the law on the general rules of administrative proceedings.* The law allowed retrials with regards to administrative court decisions. Requests for retrials could be submitted to the Administrative Court by private parties in case they had acquired substantial evidence (after the effective decision on the main case) materially affecting the case, and

[32] *Kiss*: cited work pp. 490–491.
[33] *Kiss*: cited work pp 490.
[34] Further details on the bill can be found in *Keleti Ferenc*: cited work pp. 14–16.
[35] Act 43 of 1883 on the Financial Court of Public Administration.
[36] See more details in *Stipta István*: Adalékok a pénzügyi közigazgatási bíróság működésének történetéhez (1884–85) Acta Juridica et Politica, Szeged, Tomus LVII. Fasciculus 9. Szeged, 1999.
[37] *Takács Imre*: Magyarország földművelésügyi közigazgatása az osztrák-magyar monarchia korában 1867–1918 Mezőgazdasági kiadó, Budapest, 1989. pp. 57.
[38] *Kiss István*: cited work pp. 490–491.
[39] Act 26 of 1896 on the Hungarian Royal Administrative Court.
[40] Article 11 of Act 26 of 1896.
[41] *Sarlós*: cited work pp. 176.
[42] Act 60 of 1907 on Expanding the Jurisdiction of the Hungarian Royal Administrative Court.

which could not be used during the main proceeding for no fault of their own.[43]

The significance of the law on Administrative Court – despite the above mentioned deficiencies – *can be summarised as the following: it established the legal institution of administrative jurisdiction, i.e. legal control over public administration resolutions exercised by an independent, special court, and thus laid the foundations for the further development of administrative jurisdiction, which by now has become fully complete. On the other hand, through stating general applicability on public administration authority decisions by other procedural law institutions – even if rather remotely – it contributed to the forming of the notion on the general regulations of public administration authority procedures.*

4. The Significance of the Law Simplifying Public Administration Procedures

In 1901, the law on simplifying public administration procedures was adopted.[44] This law provided detailed stipulations on the remedying system of public administration authority procedures (in a separate section). *This had great significance from the aspect of the development of the remedying system, as the application of remedies became simple after the adoption of the new rules, on one hand, and on the other hand, due to the fact that the rules on the remedying system – except for some specified types of cases – became applicable in any public administration authority cases. Consequently, legal regulations set the bases for establishing the general rules of remedy procedures, projecting the notion of the need for a general procedural law.*

Section I of the Act is titled "Remedies". However, the wording of the Act rather uses "appeal" instead of "remedy". Specifically, appeal was the collective name for devolutively effective remedies that could be applied through a public administration procedure, i.e. the legislative authority included the terms of appeal, the request for review and appeal to a higher degree body in it.

As a general rule, the law stipulated that third degree decisions (measures) could not be appealed, i.e. challenged for remedy by public administration procedural means. This, however, did not exclude the right of applying a petition to the Administrative Court.[45]

In order to unify and decrease the number of degrees of remedies, a rule was established according to which second degree decisions (measures) materially concordant with the first degree decisions could not be appealed – according to the main rule –, which meant that appeals as ordinary tools of remedy became used in two degrees. Nevertheless, the law itself sets out an extensive list of exceptions, therefore this limitation does not apply to second degree decisions made by administrative committees in water rights permitting cases[46], or second degree decisions made in industrial or commercial cases.

A generally enforceable tool for remedy against second degree decisions concordant to first degree ones was the request for revision, which could be submitted to the competent Minister. In case the given Minister found the request substantial and well-grounded, the Minister may have annulled the appealed decision and ordered a new procedure to be carried out. Court revision could be enforced against the decision.

The law stipulated common rules applicable for both above mentioned remedy types. Both remedies could be requested against final decisions. According to modern terminology, "final decision" meant the resolution made on the given level with respect to the case, deciding on the material legal issue. Remedies could only be requested to be applied by persons involved in the given cases and such requests had to be submitted to the given first degree bodies. First degree bodies officially refused any remedy requests that were wrongfully submitted (for example, not by the affected person) or were beyond the given timeline. Refusing orders could be requested to be revised at a higher degree court, and the respective decision of the second degree body was final.

Further to common rules, we find it important to emphasize that there were also material differences between appeals and revision requests, which can be derived from the complete law. One significant difference was that the jurisdiction of the body deciding on appeals also covered the assessment of legal issues as well as of the facts, whereas the request for revision only referred to the given infringement except in case the establishment of the facts took place through the violation of any legislation. Appeals were evaluated by the given direct superior body, whereas requests for revision were always evaluated by the given Minister. The body of appeal was entitled to amend the appealed decision, i.e. it had reformatory authority, while the revising authority was only allowed to cancel the lower degree decision, but was not allowed to replace it by its own, therefore it had only cassational entitlements.

The law did not stipulate it as a general rule that the authority had to make decisions on the procedures by resolutions; nevertheless, in each and every procedural issues mentioned in the law, resolutions were specified as the form of expressing decisions, in the case of, for example, applications for justification. *Furthermore, the law did not specify a general rule about the entitlement of appealing against any resolution at a higher degree body, yet this principle can be found with respect to the regulation of specific legal institutions.* Applying to a higher degree body as legislatively regulated tool of appeal gave the possibility to seek remedy against decisions considered as injurious.

The rules governing all the three forms of appeal were meant to simplify the remedying phase of public administration procedures. One of such legal institutions was the deadline for appeals. According to the law, the deadline for submitting appeals

[43] Article 139 of Act 26 of 1896.

[44] Act 20 of 1901 on Simplifying Public Administration Procedures.

[45] Article 12 of Act 20 of 1901.

[46] Within the system of water authorities, decisions related to permits were made by the primary officer of the legislative authority on the first degree, by the administrative committee on the second degree, and the Minister of Agriculture, Industry and Commerce (later, as of 1899, the Minister of Agriculture) on the third degree. *Takács*: cited work pp. 64.

to a higher degree (appeals, requests for revision and request for a higher degree proceeding) was – in a unified manner – 15 days upon the day following publication or dispatch of any public administration case, any resolution (measure, order) of any degree.

There were different rules stipulating the enforceability of resolutions with respect to the different forms of appeal. Appeals – just like regarding the currently effective rules and regulations – indeed had a suspensive effect on enforcement. This was stipulated in the law by listing such exceptional cases in which case appealable resolutions could be enforced prior to their becoming final. In other words, these were the cases of immediate enforceability.

In cases where immediate enforcement was allowed, such enforceability had to be explicitly expressed and motivated in the given resolution.[47]

Unlike in the case of appeals, requests for revision and application to a higher degree did not have suspensive effects; the submission of requests for these kinds of remedies did not hinder the enforcement of the given decisions. Accordingly, the possibility of revision procedures did not materially derogate interests related to the legal force of the given resolutions.

The legislations related to suspensive effect can be considered as modern regarding the circumstances of the given age; this is also proven by the fact that in the course of regulating the public administration procedures later on, such rules remained unchanged, to such extent that they are fully in line with the rules of the procedural law of Hungarian public administration effective as of today.

The law considered retrial as the forth type of remedies – but, rightfully, not as a remedy of appeal – which cannot be considered as a remedy of appeal, because the authority entitled to decide upon the request for retrial was the authority making the first degree resolution, i.e. this remedy had no devolutive effect. A disputed public administration case, i.e. "repeated authority trials and decision (resolution) of a case"[48] could take place in case the given party had acquired substantial evidence (after the effective decision on the main case) materially affecting the case, which could not be used during the main proceeding for no fault of their own. The retrial was proceeded by the authority making the first degree resolution. In order to ensure legal certainty, the law allowed retrial for maximum one occasion with respect to one case, and solely in written form and within a year following the announcement or dispatch of the final and effective resolution made in the main case. This remedy had no suspensive effect.

The law allowed the possibility of retrial in the cases of final resolutions. In this case, legal force – in our view – meant immutability, i.e. material legal force. The material legal force of a decision serves the interests of legal certainty by providing assurance for both the affected party and the authority *that the contents of the given resolutions have final and binding force. Ensuring the possibility of retrials breaks up this stable status for the sake of the affected party, because* the given party is able to request retrial in case they believe that the decision made in the course of the retrial would be more favourable for them. Nevertheless, the law did not allow retrials in all of the public administration authority cases, only in disputed public administration cases. The law did not define disputed public administration cases, and did not specify any listing or examples with respect to them.

As of 1901, rules of appeal became simpler and more easily comprehensible. The complicatedness of the system could be derived from the complexity of the public administration forum system, especially the broad sphere of authority of administrative committees.

5. Contemporary Criticism of Act 20 of 1901

In his work on the legal force of public administration, Baumgarten fiercely criticised the law, because, according to the reasoning of the law, the legislative authority found the expansion of allowing retrials for all the public administration unnecessary because, according to it, there were cases which did not become res judicata even if a final decision had been made, as they could be ordered to go through a new procedure. The motivation mentioned such cases as examples in which the authority proceeded in its discretional powers and made decisions based on practicality and reason without its operations violating the rights of any individuals. For example – as the ministry motivation of the law says – if a legal authority refuses granting financial contributions for certain purposes, or the minister refuses the issuance of a permit, it does not make it impossible for a different decision to be made regarding the same case – even in lack of retrial.

From this reasoning Baumgarten draws the conclusion that all the resolutions made in disputed public administration cases should be considered as effective, whereas in non-disputed cases, legal force or res judicata is not possible. According to Baumgarten, the point described in the motivation, according to which legal force would be expanded to the area of discretional measures, is totally absurd.[49]

The act on simplifying public administration procedures was also assessed in details by Tomcsányi.[50] According to him, retrial is not necessary in non-public administration disputed cases, as such cases can be re-processed at any time. Tomcsányi includes resolutions allowing or refusing the granting of permits in such cases.

Act 20 of 1901 did not discuss the right to apply for a higher degree or ministerial revision for authority officials that existed according to previous regulations. The government also continued to have the right of revision provided according to Act 21 of 1886. According to Baumgarten, keeping these regulations in effect was a wrong solution. He explained this reasoning through pointing out that based on the above measures public administration decisions with relative legal force are generated against which the affected persons have no rights of appeal,

[47] Article 9 of Act 20 of 1901.
[48] *Kmety*: cited work pp. 299.
[49] *Baumgarten Nándor*: Jogerő a közigazgatási eljárásban. Budapest, Grill, 1917. pp. 234–235.
[50] *Tomcsányi Móric*: A magyar közigazgatási jog alapintézményei. Budapest, egyetemi nyomda, 1926.

whereas the given public administration authority has a right for revision. This way, Baumgarten says, the law restricts the rights of the affected parties to request remedy, while it maintains the right of the authority to appeal against the case and the right of the government to revise the case.

Tomcsányi has a different opinion. According to him, the rights for different official appeals are appropriate, as the protection of lawfulness and the elimination of infringements should not just be protected from the side of the individual parties. This is particularly true in case the issue is a material breach of lawfulness, for example, the lack of authority. However, even Tomcsányi criticises the fact that the right of the authority to appeal against cases and the right of the government to revise cases were not properly supported with legislative restictions in order to avoid any potential misuse of them.[51]

We find this point of view acceptable as both the formerly and the currently effective general public administration procedural law contain so-called own motion remedies (decision revisions), which have become supported with adequate legislative guarantees by today.

According to Tomcsányi, the right solution would have been if the emphasis had been pushed towards the direction of administrative court protection with regards to remedying public administration infringements. The author thought it could have been accomplished by establishing court protection even against decisions of low degree bodies.[52]

Today, this solution would be difficult to support, as, according to our view, the first degree of remedy against public administration decisions should be ensured within the organisational system of public administration. Nevertheless, it needs to be considered that at the time of the publication of Tomcsányi's work written in 1926, the general rules of public administration procedures had not developed, and not even Act 20 of 1901 regulated remedy processing deadlines in a unified manner. All these issues could significantly slow down administrative processes, and it may have also occurred that cases got stuck somewhere before getting to the administrative court. In our view, we would have found it more appropriate if a proposal had been made on the unified regulation of processing deadlines available with respect to remedies – especially due to the fact that a law on the general rules of administrative procedures was adopted in Austria in 1925, which could have been used as a model – nevertheless, we also find acceptable the proposal of Tomcsányi based on the codified regulations of that time.

In summary – despite the faults and deficiencies – it can be concluded that the law adopted in 1901 brought significant changes with respect to the remedy phase of public administration procedures by introducing unified and simple rules on the grades of remedy, the possibilities of applying such remedies, remedy request deadlines and their calculations, as well as the issues of their suspensive effect, temporary measures and the suspension of a procedure, thus replacing complicated, varying remedies specified in different individual laws.

Although rules with respect to administrative courts did not mention the institution of legal force, the regulations provided a basis for jurisprudence and legislative powers to develop further. After using the court forum, one could not appeal against or change public administration-related decisions; therefore resolutions then became effective, both formally and materially.

Five years after the establishment of administrative jurisdiction, the law comprehensively and generally regulating the system of remedies within the organisational system of public administration – governing the majority of the respective cases – which did not explicitly contain regulations on legal force, either, but such stipulations could be concluded from the whole act. Together, the two laws can be considered as a turning point in the process of establishing a remedying system against wrongful public administration decisions. The majority of issues and problems brought up by science scholars, primarily from the 1870's, were solved by these two laws, and satisfied the need to ensure for external parties getting into contact with public administration as the embodiment of state powers could be entitled to request the revision and/or the correction of faults of decisions considered injurious by the party at the competent and authorized government agencies. General rules on the different forms of remedy also appeared in codified law, which was a significant step towards the requirements of legal certainty and the rule of law to be complied with.

By the turn of the century, the German and Hungarian special literature could present some serious academic works[53], and there were serious debates[54] about the legal force of public administration decisions. The combination of the academic achievements of the Austrian and German authors and the development of codified law resulted in the fact that by 1910, the most important institution of procedural law, i.e. legal force had drawn the attention of Hungarian public law; the first important outcome of such attention was the lecture of Elek Boér on legal force in public administration[55]; later on, Sándor Krisztics[56] and Nándor Baumgartner[57] assessed the issue monographically. By the 1920's, the public administration institution of legal force had become an important aspect of public administration procedural law, and it has remained so until today.

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[51] *Tomcsányi*: cited work pp. 170.

[52] *Tomcsányi*: cited work pp. 171.

[53] Among others, the works discussing legal force in details were *Edmund Bernatzik*: Rechtsprechung und materielle Rechtskraft. Wien, 1886.; *Philipp Zorn*: Kritische Studien zur Verwaltunggerichtsbarkeit. Berlin, 1893.; *Tezner*: Administrativverfahren. Wien,1896; *Otto Mayer*: Zur Lehre von der materiallen Rechtskraft in Verwaltungssachen. Archiv für öffentliches Recht,1907.

[54] Annual Assembly of German Lawyers of 1902.

[55] *Boér Elek*: A közigazgatási intézkedések jogereje. Budapest, Grill, 1910.

[56] *Krisztics Sándor*: A jogerő hatása és érvényesülésének korlátai a közigazgatásban. Budapest, 1915.

[57] *Baumgarten Nándor*: Jogerő a közigazgatási eljárásban. Budapest, Grill, 1917.

Women's Status in the Field of Labour Law in Hungary, through the Instance of Somogy County (1876–1914)

Kinga Császár *

Abstract

The role of women in society is characterized by their positions in their family, economic status, education, employment and political rights and their enforcement. My research on the social situation of Hungarian women starts at the second part of the 19th Century when the extension of women's rights begun as the result of the civil reforms in 1867.

The objective of my research, whose summary is demonstrated in the present paper, is the presentation of the status of women in the field of labour law. In my work, focusing on the examination of legal status of women, I concentrated on the typical female employments in agriculture. The paper focuses on the study of the available documents about female works in the Archives of Somogy. Likewise, the research enables us to make a review of the contemporary and latter literature.

In Hungary, women's employment became more widespread after 1890. The legislation of the Astro-Hungarian Dual Monarchy illustrates well women's status in labour law of the time. We are going to see that reforms in female education obtained results only by the end of the examined period. Until then women's role in society was determined by the traditional family-model, their limited educational rights, and especially by the lack of vocational training. In my study I am going to present that labour rights of women were closely connected with their educational rights in the age of Dualism. The present paper also proves that the ambitions of women's movement to improve women's situation were only answer to the given situation.

Key words: *female rigths; education; emancipation; female work; servants.*

1. The Subject of the Study

In Hungary, women's employment became more widespread only after 1890. The legislation of the Astro-Hungarian Dual Monarchy illustrates well women's status in labour law of the time. Until then women's role in society was determined by the traditional family-model, their limited educational rights, and especially by the lack of vocational training. We are going to see that reforms in female education obtained results only by the end of the examined period. This era was ended by the first World War, which changed the former circumstances.

2. Characteristics of Somogy County

Somogy county has always been a typical agricultural area and it's nature was not unique in Hungary. The instance of the county reflects well the situation of the whole country. Until the 1860's craft industry was the single industry that prospered and there was no urban development either. In the early days of Dualism (between 1913–25) only agricultural branches of industry were progressing. The only modern factory of Kaposvár (County town of Somogy) was the Sugar Factory founded in 1894.[1] Besides the sugar industry, the mill played a significant role. So, most of the workers – even women – were employed in agriculture as day-labourers, servants or dressmakers before 1894. We can not find the kind of industrial development similar to that in Pécs (County town of Baranya), where the Gloves-factory – due to its nature – employed a higher number of women. Industrial development started only in the interwar period in Somogy and it was closely linked to agriculture, especially to food industry, as it processed agricultural products.[2] Owing to its nature in this industry female employment was not significant.

3. Female Employments in Somogy

3.1 Educational Rights

At this point, it is indispensable to speak about women's status in education. In 1869 only 20% of women could read and write in Somogy.[3] We can declare that 80% of female illiterates belonged to the lower social classes. After the Astro-Hungarian Compromise of Constitutional law (1867) that cre-

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1 SZILI, Ferenc, *Munkássors – munkásgond Somogyban 1870–1945* [Life and difficulties of workers in Somogy 1870–1945], Kaposvár, 1977, p. 1–17.

2 T. MÉREY, Klára, *A gyáripar Somogy megyében a két világháború között* [Manufacturing industry in Somogy in the interwar period], Somogy megye múltjából. Levéltári évkönyv, Kaposvár, vol. 3/1972, p. 219., 227.

3 NAGYNÉ SZEGVÁRI, Katalin, *Az 1868. évi XXXVIII. tc. jelentősége a nőképzés szempontjából* [The role of the 1868:38 Act in women's education], CSIZMADIA, Andor, ed, Jogtörténeti tanulmányok I., Budapest, 1966, p. 55–72.

ated the Astro-Hungarian Dual Monarchy, the Law on public school education aimed at the realization of civil reforms in the field of education in 1868 (Act 38 of 1868 about Public primary education, hereinafter PE). The act related to *baron Joseph Eötvös'* name. This law could obtain essential results in women's education but only in the field of public primary education.

The main result of this reform was the reduction of illiteracy. The grounds of this limited results can be found in professional training and in secondary education. At the beginning vocational training was totally non-existent for women, and there were only two institutions of secondary education that women could attend: the teacher-training college and the bourgois girls' school newly established by the PE.

3.1.1 Primary Education

If the objectives of the PE could have been attained in practice, primary education of women would have changed radically. In my study I am going to present the circumstances that prevented the practical materialisation of these objectives in Somogy county, both in terms of the teaching material to be transferred, and the education system with two levels aimed by the Act. The preponderance of denominational schools had numerous consequences.[4]

Besides the traditional family-model that determined social relations, we can find many marks of indifference towards education in Somogy according to official statements of local authorities, based on the correspondence by local tribunals, municipalities and royal school inspectors.[5] There were villages where the new law was unheard of even after 2 years of its introduction. Social and economical circumstances at the time, such as attitude of parents, agricultural works, lack of infrastructure, and predomination of denominational schools also obstructed the realization of the reforms. Statistical data demonstrating the percentage of those attending schools covered only winter months, when however often the lack of adequate clothing and footwear prevented children from going to school. During the time of agricultural works children over the age of 10 were withheld from going to school, they had to work. As the majority of the population in Somogy was working in agriculture, a compromise solution was found already in February, 1868, when – taking into account parents interests – the school year was shortened to six months (from November to April) for children between the age of 10 and 12 years and continous school attendance was required only for younger children.[6]

The aims of the PE were to introduce general and compulsory education for the age group between 6–12 years and to provide the same teaching material for both sexes. In practice these aims could not be realized in Somogy. In addition to low standards of teaching, the special provisons of the Act about compulsory subjects in denominational schools resulted a controversial situation. On the one hand, teachers were not skilled enough and on the other hand the teaching material differed in denominational schools by the law, as they did not have to teach all subjects that were compulsory in public schools, which caused the low standard of local education. Denominational small-schools with only one teacher were widespread in Somogy, and the rate of municipal and denominational schools hardly changed in the examined period.[7]

3.1.2 Repeteur School in the Primary Educational System

According to the PE, public elementary education included two major units: everyday education lasting 6 years and repeteur education of 3 years. It ment that even those who didn't want to attend any upper public schools couldn't finish their studies, because children over the age of 12 and those who finished the 6 years of everyday school, had to attend the so called repeteur school.[8] According to the royal school inspector's report of 1872 there were no repeteur schools in Somogy county meeting the requirements provided by the Act, and later the institution wasn't even mentioned anymore. The absence of these schools was remedied by „Sunday-schools" to some extent, but not in every municipality. There was still no education in wastelands and domains.[9] Until 1890 there were almost no opportunities of vocal training for girls. According to local publications of the period, educational experts did not believe that women should have been employed in industry or in trade.[10]

3.1.3 Upper Public School

The PE provided that municipalities with more than 5000 inhabitants shall establish upper public schools, or if they can afford it, they shall establish and maintain bourgeois schools.[11] Although the Act contained rules that discriminated against women, such institutions did not exist in Somogy between 1867–70 at all.[12]

The provisions of the PE concerning upper public schools made a *direct differentiation* between the education of boys and girls, both in terms of training period and teaching material. The lack of this institution in the examined period in Somo-

[4] KELEMEN, Elemér, *Adatok a népoktatás Somogy megyei történetéhez (1881–1918)* [Datas of the history of the public elementary education in Somogy (1881–1918)], KANYAR, József, ed, Somogy megye múltjából. Levéltári évkönyv 11., Kaposvár, 1980, p. 329–334.

[5] KELEMEN, Elemér, *A népoktatás Somogyban a kiegyezés előtti években* [Public elementary education in Somogy before the Compromise of 1867], Somogy megye múltjából. Levéltári évkönyv 3., Kaposvár, 1972, p. 137–168.

[6] KELEMEN, Elemér, *A népoktatás Somogyban a dualizmus kezdő éveiben (1867–1870) [Public elementary education in Somogy in the very beginning of the Dualism (1867–1870)],* Somogy megye múltjából. Levéltári évkönyv 4., Kaposvár, 1973, p. 205–206.

[7] *Királyi tanfelügyelői jelentés [Report of the Royal School Inspector],* Somogy, vol. XXIX. 11/1893, Kaposvár, or Documents of the Administrative Committee, Archives of Somogy, vol. 263/1877.

[8] 1868. évi 38. tc. a népiskolai közoktatás tárgyában [1838:38 Act of public primary education], 48. §, 50. §.

[9] Somogy politikai és vegyes tartalmú hetilap [Somogy weekly paper of political and news item], vol. 20/1873.

[10] Iskolai szemle [School Review], vol. X. 2/1890, Csurgó.

[11] 1868. évi 38. tc. [1838:38 Act] 59. §.

[12] Somogy, vol. 20/1873.

gy proves that *absence of vocational training* of women is closely linked to the traditional understanding of female occupation.

3.1.4 Secondary Education

According to the PE major municipalities that could afford it, were required to establish bourgeois schools instead of upper public schools. These bourgeois schools separated male and female students and made no distinction between them based on religion.[13] But the Act and its implementing regulation contained no deadline for the realization.[14] The first bourgeois girls' school was established only in 1882 in Kaposvár with the help of state subsidy.[15] Subsequently several private and community maintaned bourgeois girls' and boys' schools were established throughout the county, but their common status was bad, although the standard of education proved to be sufficient due to the commitment of teachers.[16]

The School Syllabus of the girls' school (and the No. 29.999 ministerial order of 1887) served traditional female educational purposes. It covered only a small number of women and it didn't aim at women's participation in further learning but to give them a general education.[17] Since there were no secondary schools where women could take final examinations, consequently they could not attend universities either. Moreover, at the beginning there were no any other institutions of secondary education or technical training where less skilled students could carry on with their studies.[18]

In 1883 the XXX Act settled the admission requirements to secondary schools, making it possible for girls who attended a girls' school or an upper public school to get admission to a secondary school as a private pupil.[19] In my opinion only those girls had the chance to gain admission who could previously acquire the skills and knowledge required as a private student. In Kaposvár, the first grammar school for girls was established at the very end of this period, in 1918.[20]

After finishing the bourgeois girls' school, women could work as lower officials, as governess or as teachers. After 1889 some of them could attend upper secondary schools or female trade schools (estbalished in 1891 in Kaposvár), or after the 4th class of the bourgeois girls' school they could enter into the 5th class of a grammar school but only after severe entrance examination.[21]

For a long time, teaching was the single intellectual profession for women in Somogy.[22] It is important to notice, that one of the 5 teacher-training colleges established in the 1860's in Hungary opened in Csurgó, Somogy County. The number of applicants increased rapidly, and many of them did not wish to find a job as a teacher, but wanted to obtain a higher level of knowledge. The current school-policy discriminated against female teachers and relied on their lower expectations, ie. women's wages were much lower than men's.[23]

The new school system brought chaos in the field of female education. Neither the teaching staff could understand the difference between the three types of girls' schools, namely the upper public girls' school, the so called bourgois girls' school and the grammar school for girls. We can declare, that the conditions provided by the law (PE) were realized only by the turn of the 20th Century, but not completely. We can find flare-up at the beginning, when many schools were built between 1868–1870. But after that (1873–1878) this flare-up came to a sudden end that affected the entire civil era. As the rate of the native-speaker population was above 82 percent in the county in 1850, no larger state subsidies could have been expected for the realization of the national education-policy.[24]

The first major improvement of the school system took place between 1878 and 1884, and it went on in the first decade of the 20th Century. By the end of the examined period the number of public primary schools increased by 20%. The two institutions that I introduced above – namely the bourgeois girls' school and the teachers' training school – represented a major step forward, because in the former educational system only the children of wealthy families could carry on with their studies after the primary school. The education of the rest of pupils – the majority – consisted of attending seamstress-courses. By the end of the era of Dualism, women's demand for state secondary education became obvious. From this point on women started acting for their educational rights in an organized and public way.[25]

3.2 Regulation of the Individual Female Employments

3.2.A Servants and Agricultural Workers

Due to the system of landlordism, the number of agricultural workers was high in South-Transdanubia, where Somogy county is situated. Estates bigger than 100 Hungarian acres of land

[13] 1868. évi 38. tc. [1838:38 Act], 67. §, 71. §.
[14] TOBAK, Benő, *Nőnevelésünk jelen állapota* [Actual status of our female education], Somogy, vol. V. 4/1869, Kaposvár, p. 2.
[15] CSÁKÁNYI, *Polgári leányiskola* [Bourgeois girls' school], Somogy, vol. XVIII. 13/1882, Kaposvár, p. 1–2.
[16] Kgb. iratok [Documents of the Administrative Committee], Somogy Megyei Levéltár, vol. 184/1905, 99/1913, 265/1914, 81/1915, 33/1916, 38/1918.
[17] SZEGVÁRI, The role of the 1868:38 Act, p. 62.
[18] Tanterv a polgári iskolák számára az 1868-dik évi XXXVIII. tcz. értelmében [School Syllabus for the bourgeois schools in terms of the Act 1868:38], Néptanítók Lapja, 1869, in SZEGVÁRI, The role of the 1868:38 Act, p. 62–65.
[19] A vallás és közoktatásügyi miniszter 72.039 (XII.31.) sz. rendelete [Order of the Minister of Religion and Public Education, vol. 72.039], in NAGYNÉ CSORBA, Mária, *A Kaposvári Államilag Segélyezett Községi Polgári Leányiskola Értesítője az 1896–97. tanévről* [School report of the Communal State Supported Bourgeois Girls' School of Kaposvár from the Schoolyear of 1896–97], Somogy Megyei Levéltár, Kaposvár, 1897, p. 52–70.
[20] KELEMEN, Elemér, *Kaposvári dualizmuskori közoktatástörténetének vázlata* [Summary of the history of the public school education of Kaposvár in the age of Dualism], in Somogy (Cultural, Social and Economical Review), vol. 3/1973, Kaposvár, p. 121–125.
[21] CSORBA, Értesítő 1896–97 [School Report 1896–97], Kaposvár, 1897, p. 64–70.
[22] TOBAK, Nőnevelésünk [Our female education], p. 2.
[23] SZEGVÁRI, The role of the 1868:38 Act, p. 67.
[24] CSORBA, József, *Somogy vármegye ismertetése* [Introduction of Somogy County], Pest, 1857, p. 14.
[25] SZEGVÁRI, The role of the 1868:38 Act, p. 65.

took up 70,43% of the county and 49,85% of Baranya county. In the 19th Century seasonal agricultural workers showed up in Somogy.[26] In 1870, 91% of the population pursuing any professional or trade activity worked in the agriculture and only 8% of them was employed in industry.[27] By 1891 the rate of farmers decreased to only 69%, and 13% made a living by day-labour.

In my work, focusing on the examination of legal status of women, I concentrated on the typical female employments in agriculture in Somogy and Baranya. The research enabled us to make a review of the national and local standards relating to the legal status of servants. The present paper was based on legal cases involving servants in Somogy and in Baranya.There can be no doubt, that women did most of the domestic works, so most of the so called inner (domestic) servants – those who worked around the house – were women. Consequently, first I would like to introduce legal rules concerning domestic servants.

A.1. Features and Main Elements of the National Regulation Concerning Servants between 1867 and 1918

In Hungary, a standard regulation concerning servants did not exist before the end of the 19th Century. Unwritten law was dominant for long. In 1876 the first law about servants came into force (Act XIII of 1876, hereinafter Act of 1876). It was called the first law of servants. The lawmaker tried to bound servants and it did not defend their honour. The humiliation of servants by their landlords had been a common practice, and now it was justified even by law.[28] According to studies analysing the Act it was not suitable for resolving the problems neither legally, nor socially.[29] This act was the single law of the examined period that regulated the legal relationships of domestic servants. By the end of this era the regulations of the Act of 1876 became superseded. Female servants are mentioned only in two paragraphs of the Act, which shows the traditional interpretation of law. A good example of the lack of the protection of female work is that the law enabled the landlord to legally terminate the contract with the worker before the term of notice if the female servant became pregnant.[30]

In 1898 a new law came into force, which re-regulated the legal relations of agricultural workers and day-labourers. It was called „slave-act" mostly because it prohibited agricultural strike. The law did not contain any provisions about female servants.

The Act XLV of 1907 (hereinafter the Act of 1907) determined legal relations between lords and servants until the end of the period. The only positive change brought by this Act was that it prohibited forced labour. However legal rights of servants were fictitious, their enforcement depended on the lord's favour.[31] Domestic servants got forgotten again by the lawmaker. If statutory provisions were absent, the law provided the usage of local custom.[32]

Lords were legally obliged to pay the elementary school fees of servant's children who were employed throghout the year. At the same time they didn't have to pay the school fees of domestic servant's children, because – as provided by the Act of 1876, – lords only had to provide domestic servants' children the possibility to attend school. The above mentioned situation of public elementary education was closely connected with the living conditions of servants and with the agricultural nature of the county, since in this environment the level of children's education almost fell to the medieval level, and the chance and the value of their schooling was also very low.[33]

The lowest-paid class of servants were domestic workers, and they were not protected by legal guarantees – like the prohibition of child work introduced in 1907 – either. Their working hours and duties were not regulated during the examined period. They hardly got half day off every week and maybe could go home for holidays.

According to the rules of Somogy county of 1873, servants were permitted to attend Sunday's church service only if houseworks were done. Domestic servants could not educate themselves, they did not have any other work possibilities, and they did not get any old-age allowance either. So, servants who were singles, could serve on or worse, became prostitutes. This problem was connected with the high number of prostitutes both nationwide and locally. In the capital the third of the children born out of wedlock came from servants. Unfortunately also suicide was very common among them.[34]

A.2. Ordinances in Somogy County Concerning Servants

In Somogy – fulfilling the call of the Act of servants of 1723 – the first ordinance of servants was introduced in 1776, which was amended first in 1873. The terms of the statute were im-

[26] BAROSS, Károly, *Magyarország földbirtokosai és bérlői* [Landowners and tenants of Hungary], Budapest, 1893, in MÉREY, *Adatok a déldunántúli uradalmak gazdasági cselédségének életviszonyaihoz a századforduló idején* [Datas of the living conditions of agricultural servants of the estates of South-Transdanubia at the turn of the 20th Century], MTA Dunántúli Tudományos Intézetének Kiadványa, Pécs, 1957, p. 3–20.

[27] MÉREY, *A gazdasági és társadalmi viszonyok fejlődése Somogy megyében 1870–1918* [Progress of economical and social relations in Somogy county 1870–1918], in SURI, Károly, ed, A Magyar Szocialista Munkáspárt Somogy Megyei Bizottság Oktatási Igazgatósága, Kaposvár, 1973, p. 26.

[28] Corpus Iuris XIII. Act. 1876. 45–46. §.

[29] SÁPI, Vilmos, *A mezőgazdasági cselédség magánjogi helyzete a dualizmus korában* [Legal status of agricultural workers in private law in the age of Dualism], in CSIZMADIA, ed, Jogtörténeti tanulmányok II. A dualizmus korának állam- és jogtörténeti kérdései, Budapest, 1968, p. 300–302.

[30] Corpus Juris. XIII. Act. 1876. 51. § I. f.

[31] RÁCZ, Gyula, *A cselédtörvény javaslat bírálata* [Critique of the Proposal on Servants' Act], Budapest, 1909, in MÉREY, Adatok a déldunántúli uradalmak gazdasági cselédségének életviszonyaihoz [Datas of the living conditions of agricultural servants of the estates of South-Transdanubia], p. 3–20.

[32] Corpus Iuris XLV. Act. 1907. About legal relations between landlord and servants.

[33] *Mezei munkásság, házi cselédség [Agricultural workers and domestic servants],* Magyar Néprajz VIII. Társadalom, mek.niif.hu/02100/02152/html/08/98.html. p. 1–6.

[34] Státuszszimbólumuk a tejeskávé volt [Their status symbol was the white coffee], in Mezei munkásság, házi cselédség [Agricultural workers and domestic servants], p. 7.

posed by lords. This statute applied to domestic servants too. Their miserable situation is apparent also from the local regulation. The regulation even provided that servants should not be „picky" in their meals.[35]

Afterwards, two ordinances came into force which were based on the Act of 1907. Both of them concerned only agricultural workers. The first one regulated servants' employment period, the obligatory issue of wage note and the order of the holding.[36] The second ordinance, issued in 1908 provided for the housing of domestic servants based on the 29. § of the Act of 1907.[37] Although its provisons were never implemented, many new and healthy houses were built for servants in the county pursuant to the regulation.[38]

A.3. Conclusions of the Local Regulation

Legal relations between servants and lords were practically unchanged during the examined era.[39] Compliance with the laws and regulations was uncertain. From the 1st of November, 1907 two statutes regulated the legal relations of servants. The old one concerned inner (domestic) servants, while the new one related to agricultural (outsider) workers. Consequently the relations of domestic servants remained regulated by the Act of 1876 until the very end of the period. Unfortunately, available resources show that they were even out of the sight of local authorities.

The personal freedom of servants and their freedom of moving were limited. Use of physical and psychological violence against them was legal. Child labor was available from the age of 12. There were still jobs for free: until 1907 forced labour was in use. The wives of servants were bound to do 16 days of free work in the manor. Therefore, with time the average wage of married male servants became significantly higher than single men's and the wage of women were even less. There was a study analysing domestic servants wages of three years (1896., 1901. és 1904.) in the south-transdanubian region. It showed that while the average wage of married men was 454 kroner (total value of remuneration and cash), that of unmarried men was 320, and women's only 279,6 kroner. Based on data from 1905 wages of servants were not raised for the previous 50 years.[40]

The social welfare system was emerging under the Act XVI of 1900, but the benefits were only granted to agricultural servants and workers. Widows of servants and their children remained without state support. There's a well-known case recorded by the local newspaper called Somogy, according to which a servant (called György Szerelem) who had served for 39 years in the land of a greek prince, Ypszilanti at Simongát, died while he was working, because a tree fell on him. He left five children, among them four were minors incapable of work. In spite of all this, the directorate of the ducal estate of Vienna rejected his widow's request for support.[41]

Women were not entitled to get compulsory paid maternity leave until 1884 and neither got financial support for this period until 1891. Only the Act of 1907 provided for compulsory childbirth and maternity benefits, but domestic (house-) servants – the most of whom were women – were still left out of these benefits. This statute advanced only outside (economical) servants, as they had the right to a safe job, a healthy residence, maternity benefit, free medical care and old age pension.[42]

The regulations indicate also that there was a huge difference between Somogy and Baranya county with regard to the standard of living and the stage of economic development. Sources of the time show backwardness of Somogy.[43]

I would like to mention an order of the representative body of Kaposvár after the turn of the 20th Century, which concerned the case of servants. Under this order it was forbidden to tolerate servants' immoral lives without making a complaint to the competent authority. Female servants who went out after 9 in the evening were collected and medically examined. It was prohibited to provide a place to hide to runaway servants. Under this order they were interned. The order of the Police Superintendant of Bratislava was similar, according to which the daily work time of servants was 12 hours, with three hours of rest every two weeks. It also stated that servants stayed under the control of the house-owner.[44]

Servants had the most vulnerable social and legal position. Women's movements did not bring any changes in their status. They were totally deprived of civil rights until 1907.[45] When they got employed, they had to give up their freedom and lived under total control, even their responsibility in criminal law was

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[35] Az 1873. évi cselédrendtartás [Regulation of 1873 about servants], Somogy Megyei Levéltár kiállítási anyaga [Exhibition material of the Archives of Somogy].

[36] Somogy Megyei Levéltár IV.425. [Archives of Somogy IV.425.], Szabályrendeletek gyűjteménye 1. Vármegyei szabályrendeletek 1879–1943 [Collection of ordinancies 1. Ordinancies of the County 1879–1943], vol. 220/2.609-1908. kgy.

[37] Somogy Megyei Levéltár IV.425. [Archives of Somogy IV.425.], Szabályrendeletek gyűjteménye 1. [Collection of ordinancies 1.], vol. 213/2034/1908. kgy.

[38] Somogy Megyei Levéltár, Alispáni iratok 447/1930 [Archives of Somogy, Documents of the Deputy-lieutenant vol. 447/1930].

[39] SZILI, *Cselédsors az uradalmas Somogyban a két világháború között* [Life of servants in the estates of Somogy in the interwar period], Kaposvár, 1976, p. 5.

[40] MÉREY, Adatok a déldunántúli uradalmak gazdasági cselédségének életviszonyaihoz [Datas of the living conditions of agricultural servants of the estates of South-Transdanubia] p. 6–15.

[41] Somogyi Hírlap [Somogy Newspaper], Kaposvár, 1905.

[42] JÁNOSSY, Gábor, *A feminizmus Magyarországon* [Feminism in Hungary], Szombathely, 1911, p. 131–140.

[43] MÉREY, *A somogyi parasztság útja a feudalizmusból a kapitalizmusba* [Way of the peasants from feudalism to capitalism in Somogy], Budapest, 1965, p. 5. 1.

[44] BASSA, Endre, *Mit kell tudni a nőmozgalmakról?* [What is needed to know about the Hungarian women's movements?], Budapest, 1982, p. 67–76.

[45] Corpus Iuris XIII. Act. 1876.

limited. After the termination of the employment, they couldn't expect any unemployment benefit either.[46] The world war did not bring any changes in their status. In practice the law of 1907 was still in use in 1943.[47]

3.2.B. Sugar Factory Workers

The work began in 1894 in the Factory. At the beginning, it belonged to modern factories, but the development of the firm fell behind after two decades. The grounds of the decline can be found in local circumstances: infrastructural reasons, cheap but unskilled labor force prevented further development.

Women were employed only during the campaign in the factory. Otherwise they worked as day- labourers, or servants. Due to the lack of appropriate vocational training they were mostly unskilled seasonal workers, which was reflected in their wages.

Female work became significant in the factory only during the world war. Then from 1918 the number of female employees decreased again.[48] At the turn of the 20th Century, the weekly wages of skilled workers were five times the wages of day labourers. These wages were at the level of minimal subsistence anyway.[49] In the interwar period, among 120 workers who worked in the factory 5 were women. The situation was the same at the turn of the 20th Century. The average wages of women were less than 40% of men's in the same job.[50] Working time was long and it afflicted especially mothers, as there wasn't any state institutions for child care.[51]

3.2.C. Female teachers in Somogy

Though the new conception of public educational system regulated the professional training of female teachers too, but it is clear, that it did not relay on their work at the first time. The lawmaker planned to employ them in local public schools at the most.[52]

It happened only in 1879 that a woman got employed as an assistant teacher in Kaposvár. In this school-year only one more female teacher worked in the Jewish school in Kaposvár. Previously we know about the employment of women as teachers in the County (in Nagyatád and Szigetvár). So it was not usual at the time. Contemporiaries had the opinion that female teachers were worth male teachers and together with the disappearance of prejudices concerning their employment, their presence was going to increase, especially in girls' higher classes.[53] According to statistics, in 1872 no female teachers were employed in public elementary schools in Kaposvár yet, but in 1881 already 12 female teachers worked there, and in 1893 among 539 teacher 31 were women. By the turn of the 20th Century (in 1899), the number of female teachers rised to 61.[54]

3.2.D. Administrative Jobs in Somogy County

From the year of 1870, more women were employed in post offices, in telegraph offices and at train stations.[55] According to actual public opinion, women were mostly suitable for *teaching and medical professions.*

But in Somogy, women were not employed in local offices in the examined era, based on the Archives of Somogy county. This fact was connected with the lack of female education. The new educational system could achieve certain results after the turn of the 20th Century. Female employment in offices became usual only in the interwar period.

3.2.E. Prostitution

As a typical female profession, we must mention prostitution. The number of prostitutes increased significantly in the second part of the 19th Century in Hungary. Unfortunately, this phenomenon was also closely connected with their educational and labour rights.

4. Regulation of Old-age Pension in the Age of the Austro-Hungarian Dual-Monarchy (1867–1918)

For the first time, pension was qualified as a favour in the Monarchy, therefore only a private circle of civil servants – and their widows and children, later soldiers – could benefit from this privilege. In 1866 a new law came into force as a result of which pension became an allowance (pay) instead of a favour. No uniform regulation of pension existed in Hungary this time.

To my subject, the *question of teachers'* pension is important. Under the order of Maria Theresia (Ratio educationis publicae) which was introduced in 1777, teachers were entitled to full retirement pension after 30 years of service (while state servants got it only after 40 years). The scope of the law did not include non-chatolic teachers, so it applied only to teachers working in

[46] A. FÁBRI, F. BORBÍRÓ and E. SZARKA, ed, *A nő és hivatása II. Szemelvények a magyarországi nőkérdés történetéből 1866–1895* [The woman and her profession, Part II., Selected passages from history of the Hungarian women question 1866–1895], p. 185–243.

[47] Az igali járás főszolgabírója 5419/1943 [Chief Constable of Igal district vol. 5419/1943], in SZILI, Cselédsors [Life of servants], Inserts.

[48] SZILI, Ferenc – ERDÉSZ, István, *A Kaposvári Cukorgyár története 1894–1994* [The history of the Sugar Factory of Kaposvár 1894–1994*]*, Kaposvári Cukorgyár, 1994, p. 7–15.

[49] ANDRÁSSY, Antal, *A somogyi munkásmozgalom 1919–1944 között* [Working-class movement in Somogy between 1919–1944], Előadói segéganyag a történelmi szakosztály részére [Auxiliary materials of lectures for section of history], in SZILI, Munkássors – munkásgond [Life and difficulties of workers], p. 12–15.

[50] SZILI, *Munkásság és a tisztviselők életkörülményei a Kaposvári Cukorgyárban és a béruradalomban* [Life conditions of workers and functionaries in the Sugar Factory of Kaposvár and in the leased estates of Somogy], in SZILI, A cukorrépa termesztése Délkelet-Dunántúlon és a MIR Kaposvári Cukorgyára 1893–1948 [Growing of the sugar-beet in South-East Transdanubia and the Sugar Factory of Joint-stock Company of the Agricultural Industry between 1893–1948], Kaposvár, 1986, p. 305–310.

[51] KŐVÁGÓ, László – PINTÉR, István, *Munkássors-munkásgond 1919–1944* [Life and difficulties of workers 1919–1944], Budapest, 1962, p. 80.

[52] SZEGVÁRI, The role of the 1868:38 Act, p. 67.

[53] Somogy, vol. 37/1879.

[54] *Királyi tanfelügyelői jelentés* [Report of the Royal School Inspector], Somogy, vol. XXIX. 11/1893, Kaposvár, p. 1.

[55] FÁBRI, BORBÍRÓ and SZARKA, ed, A nő és hivatása II. [The woman and her profession, Part II.], p. 188.

schools supported by the catholic confession or the state, or the local community.

In 1875 a new regulation came into force (Act 32 of 1875, hereinafter Act of 1875) which regulated the pension of teachers of public educational institutions. This was the first law which provided for the relations of female teachers! It means, that they were not entitled to pension before. In terms of the law female teachers had equal rights with men, but husbands were not entitled to get widow's allowance. This statute put women at a disadvantage, because the continuity of years of service was a pre-requisite of pension in case of women too.

From 1885 the pension of teachers of state bourgois schools was paid from the state budget. The amendment of the Act of 1875 (Act 43 of 1891) brought detailed rules for women, thus a higher number of women began to work. Until this time, wives who were more than 20 years younger than their husbands, did not get any widow's allowance. From now on they were entitled to the allowance, but they also had to support their husband's children even if they were born from the husband's previous marriage.

In 1912 the new law (Act 65 of 1912, hereinafter Act of 1912) provided that the pension of teachers of state public schools, state upper public schools, and state bourgois schools had to be paid from the state budget hereafter (until this time the Act of 1875 was applicable to them too). The scope of the new law did not cover employees who were not in state employment, instead the state provided financial support to help the establishment of pension funds for them.

It means that teachers who were not employed in a state school (teachers of denominational schools, local- and private schools) did not get any compulsory old-age pension until 1894, in most of the cases they did not receive any pensions at all. The Act introduced in 1894 (Act 27 of 1894) settled the case of the pension of teachers who worked in denominational schools, local schools, foundational grammar schools, upper girls' schools, trade grammar schools. The members of religious orders did not receive any allowances.

Day-labourers, agricultural and other workers received allowance under the Act of 1912, but only those who were permanent employees at state offices and state companies.This new law did not cover the employees of municipal and local authorities, as they belonged to the municipal pension fund. The law did not concern agricultural and other servants – the lawmaker planned to introduce a separate regulation for them, but it did not happen in this period. For workers not old-age pension but sickness and accident insurance with state contribution was established first.

5. Conclusions

Labour rights of women were closely connected with their educational rights in the age of Dualism. The lack of institutional education of women afflicted Somogy county, thus professional training of women – except for crafts and teachers training – was totally missing until 1891. Women had to face the fact that their possibilities of getting admitted to educational institutions were limited.

They were almost absolutely locked out of politics. And we can not forget the survival of the traditional family-model. Women also faced the problem of prostitution and the difficulties of organization of every-day life. The lack of protection of female- and child-work was a huge problem. Moreover, average wages of women were about half of men's even in 1917.[56] Radical changes were needed in workplace safety just like in maternity care.[57]

By the 1860's this problem seemed almost impossible to solve and it was closely connected with the absence of women's vocational training. So the political struggle, especially the fight for voting rights had never an end in itself, it became the means of women's emancipation. Women stood up with demand to participate in public life in order to take the very first steps to legal and political equality, to obtain rights to educate and work and to get aknowledgment of maternity, child-care and housework. They believed that if they could obtain results in these fields, the „woman question" would change.[58]

[56] E. BRESZTOVSZKY, *A magyar ipari munkásság életviszonyai a háború alatt* [Living conditions of the Hungarian industrial workers during the World War], Huszadik Század, 1916, p. 23–24.

[57] SZEGVÁRI, *Út a nők egyenjogúságához* [Way to women's emancipation], Budapest, 1981, p. 116–121.

[58] ZIMMERMANN, Susanne, *Die bessere Hälfte? Frauenbewegungen und Frauenbestrebungen in Ungarn der Habsburgermonarchi 1848–1918*, Vienna-Budapest 1999. p. 9–17.

Efforts to Simplify Authority Procedures in Hungary in the Period between 1901 and 1944
(Regulating Authority Procedures in Hungary until the Adoption of the First Relevant Law, Act 4 of 1957)

István Turkovics *

Abstract

Social and economic relations also had a significant impact for the regulation of administrative procedure. The management of certain social issues, such as public health, education, pensions or social affairs led to the increasingly larger differentiation of public administration. In the thus created situation, a drastic increase in the number of legislations regulating public administration could be witnessed. The need expressed by the society, according to which the regulation of public administration procedures should be collected in a transparent and well-arranged form was fulfilled by the legislative authority through Act 20 of 1901, for the first time in the history of Hungarian law. The law, as it can be seen above, stipulated the remedying system in a detailed manner and made these rules applicable in each and every type of public administration authority procedures. In the history of regulating public administration authority procedures, the largest breakthrough was the adoption of Act 4 of 1957, which is, practically, a code of authority procedures.

Key words: *Simplify Authority Procedures; administrative law; remedy; public administration as a separate branch of state authority; Mid-20th century in Hungary.*

The issue of regulating authority procedures does not have a rather long past in the history of Hungarian law (and the same tendency can also be observed in international practices). Typically, legislations are made based on causal bases; accordingly, the fact that the issue of regulating authority procedures was brought up rather late in the history of law may be attributed to the lack of appropriate circumstances. In Hungary, public administration as a separate branch of state authority became independent from other branches rather late; therefore one of the reasons for such late regulation was the rather late separation of the public administration and justice branches.[1] In the long period preceding the separation of these two branches, public administration procedures were characterized by the application of judicial rules, often by authorities responsible for judicial functions.[2] In this situation public administration – including the aspect of regulating authority procedures – was not on the agenda. It should be taken into consideration that – regardless of separating the authority branches – the executive authority not necessarily had interests in regulating these activities, because in case executive powers are implied within a legislative framework, it results in limitations of exercising power. Furthermore, developments of certain economic and social relations also affected the issue of regulating authority procedures. Before the Austro-Hungarian Compromise of 1867, there was no independent public administration regulation in Hungary; it was under strong Austrian influence.[3] As a result, the opportunity for establishing separate regulations became only available after the Compromise. Further to these issues, social and economic relations also had strong impacts on the need for regulating public administration procedures. The management of certain social issues, such as public health, education, pensions or social affairs led to the increasingly larger differentiation of public administration.[4] Similarly, changes occurring in national economy, such as the establishment of new industries based on technical progress, also resulted in an increased number of branches within public administration. In the thus created situation, a drastic increase in the number of legislations regulating public administration could be witnessed. Obviously, this system did not properly serve the development of efficient public administration-related law and legal certainty. An obvious consequence of the situation was an increased demand to simplify public administration processes.[5]

Accordingly, the issue of regulating authority procedures was first brought up in relation to the need for simplifying public

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1 Corpus Iuris Hungarici („CIH") Section 1 Act 4 of 1869.

2 Vida István: A bírósági végrehajtás, Közigazgatási és jogi könyvkiadó, Budapest, 1978, pp. 122.

3 CIH Act 12 of 1867, regulating the Austro-Hungarian Compromise of 1867, can be considered as the first step towards the establishment of independent Hungarian public administration. Please note that the effects of German legal literature could be witnessed throughout the whole Hungarian legal system, e.g. private law and property law, see: Katalin Ibolya Koncz. Community Property as one of the Special Institutions of Hungarian Matrimonial Property Law of the 19th Century; Journal on European History of Law,Vol.4/2013, No.2, pp. 129–133.

4 CIH Act 14 of 1876: On the Regulations of Public Health; CIH Act 28 of 1876: On Public Schooling Authorities.

5 Csizmadia Andor: A magyar közigazgatás fejlődése. A XVIII. századtól a tanácsrendszer létrejöttéig. Akadémiai kiadó, Budapest, 1976, pp. 254.

administration. One of the potential tools for simplifying public administration is making procedures more transparent and, consequently, more simple. Regarding authority procedures, an obvious tool for simplification was to establish a general set of rules for the procedures.[6] As you will see, one of the first steps in this process could be the generalisation of rules with respect to appeal procedures.[7] The time period assessed in this study can be divided into two, well-separable periods for practical reasons, and the First World War can be considered as the dividing line between them. The First World War and its impacts resulted in such economic and social changes in Hungary that also appear in the reasons behind simplifications in the first period. In the first phase, the reasons for simplifications were, beside financial aspects, strongly based on legal, professional aspects, and such latter aspects were even considered as priorities. In the period after the First World War, the demand for cost efficiency was rather more dominant.

The Period before the First World War

In the period following the political compromise in 1867 and the economic compromise in 1868, economic and social relations in Hungary – as an organic member of the Austro-Hungarian Monarchy – evolved on the basis of monarchy affairs. This period was characterised by an *economic situation considered to be rather stable*, the reason of which was the structure of the monarchy.[8]

In pre-20th century Hungary, public administration procedures were not regulated on a general level. *Individual procedural rules* set out in individual laws *governed* each and every administrative branch.[9] Such laws also included general rules independent of the special issues of the given specific administrative branches, but not in unified forms. Accordingly, the need for comprehensive regulation of public administration procedural law became more and more acute. Furthermore, more and more new government duties were created, thus the number of special administrative branches also increased. The number of tasks to be addressed by public administration grew to an enormous extent, entailing extensions in the respective legislations. Typically, almost all of the individual legislations with respect to different special administrative branches were adopted in the last third of the 19th century, therefore legal development in this field had quite a large extent. The result of the fast-paced development of regulating policies was a completely *non-transparent system*, which did not satisfy the requirements of the rule of law at all.[10] The regulatory concept of procedural law in the era was that, each special administrative branch needed to have individual and special rules of procedure.[11] On the other hand, the establishment of unified rules for public administration procedural law brought up several problematic issues. A basic dilemma was whether it was practical at all to establish a legislation containing unified and binding provisions with respect to all kinds of tasks to be carried out by public administration, at least regarding procedures. However, according to the perception of the given era, the notion of establishing a unified set of authority procedures was not fully accepted.[12]

Regarding the regulation of public administration, the appearing need for making procedures simpler, faster and cheaper also had to be considered. Another issue to be solved was that the possibility for citizens to enforce their rights had to be properly ensured, a basic guarantee of which was to establish efficient rules for remedy. This was required because complete disorder could also be witnessed in the field of regulating remedies within public administration. The need expressed by the society, according to which the regulation of public administration procedures should be collected in a transparent and well-arranged form was fulfilled by the legislative authority through *Act 20 of 1901*, for the first time in the history of Hungarian law. This act could be perceived as a sort of experimental legislation as it only addressed certain partial issues – such as unifying remedies – solved by the government (the Széll Government). However, the goal for the future, i.e. to carry out the general codification of public administration procedures, was set.[13] The preparatory activities for the legislation were coordinated by Károly Némethy, who was the Head of Legislative Preparatory Department within the organisation of the Ministry of the Interior; the task of this department was to prepare the future administrative reforms.[14] Némethy considered settling the issue of public administration procedural law as a priority from the aspect of implementing a simple, fast, modern and cheap public administration system. Accordingly, he placed the issue of reforming authority procedures in front of organisational reforms and issues related to officials (whether they should be appointed or elected).[15]

Further to the need to solve the above requirements, the completion of the work was also hindered by the fact that

[6] Ministry of Interior Circular No. 125,000 1900, contents of preamble Belügyi közlöny, V. évfolyam, 21.szám, Budapest, 1900. november 27., pp. 475.
[7] Ministry of Interior Circular No.125,000 1900, Directive No. 2; Belügyi közlöny, V. évfolyam, 21.szám, Budapest, 1900. november 27., pp. 476.
[8] Pölöskei Ferenc-Gergely Jenő- Izsák Lajos: 20. századi Magyar történelem 1900–1994. Korona kiadó, Budapest,1997. pp. 11; hereunder: „Pölöskei – Gergely – Izsák", 1997.
[9] Kmetty Károly: A magyar közigazgatási jog kézikönyve, Budapest, 1902, pp. 296.
[10] Csizmadia Andor: a Magyar közigazgatás fejlődése. A XVIII. századtól a tanácsrendszer létrejöttéig, Akadémiai kiadó, Budapest 1976, pp. 248; hereunder: Csizmadia, 1976.
[11] Szűcs István: Az államigazgatási hivatali eljárás főbb elméleti kérdései. Budapest, 1976, pp. 164; hereunder: Szűcs, 1976.
[12] Kmetty Károly: A közigazgatási jog kézikönyve, Budapest, 1902, pp. 64; hereunder: Kmetty, 1902.; Concha Győző: Közigazgatástan, Eggenberger-Féle Kiadó, Budapest, 1905, pp. 105; hereunder: Concha, 1905.
[13] Némethy Károly: A közigazgatási eljárás egyszerűsítése., Budapesti Könyvnyomda Részvénytársaság, Budapest 1903., hereunder: Némethy, 1903.; Pap József: Jogirodalom, in: Jogtudományi közlöny, harmincnyolcadik évfolyam, 10.szám, Budapest, 1903. március 6., pp. 84.
[14] Pótsa János: Némethy Károly közéleti tevékenysége és irodalmi munkássága. in: Némethy emlékkönyv, Pallas Kiadó, Budapest, 1932. pp. 348; hereunder: Pótsa, 1932.
[15] Csizmadia, 1976., pp. 254.

conditions with respect to settling similar issues on the international scene were in no better position. Consequently, *there were no international models to follow* or any international practices that could provide guidance Hungarian legislation in this field. Practically, no country had any valid and effective general procedural law for public administration. One single exception to be mentioned is a law adopted in 1889 in Spain regulating rules of procedure.[16] This situation could be attributed to reasons similar to those in Hungarian regulations.

Within the international platform, the issue of public administration procedures was most debated among *Austrian legal scholars*. In this field, legislations only covered the procedures related to administrative courts at first, as Austrian administrative courts were established in 1895. The further development of legislations can be closely related to legal practices formed by the administrative courts, as well as with the theoretical principles set out by theoreticians dealing with the respective subjects. Even as a result of all these activities, the first law comprehensively regulating public administration procedures (Verwaltungsverfahrensgesetz) was only adopted as late as in 1925. The best way to highlight the significance of the law is to state that Czechoslovakia (Govt. Decree issued on 13 January 1928), Poland (Act issued on 22 March 1928), and Yugoslavia (Act issued on 9 November 1930) all took over the Austrian law, naturally with some amendments here and there.[17] The situation was no better in Western European countries, either; in Germany, there was no effective general law on procedures until 1 January 1977. Nevertheless, earlier successful efforts were made in the different provinces; Thuringia issued a law in 1926, and Württemberg published the draft of its Decree in 1931. General procedural laws were adopted as late as in 1968 in Switzerland, in 1994 in the Netherlands and in 1990 in Italy.[18]

Accordingly, the legislative authority in Hungary was not in a fortunate situation – at the time of preparing the first law for public administration procedures – to create the legislation for procedural law in the knowledge of experiences gained regarding a legislation already put to the test. Nevertheless, it needs to be mentioned as a positive circumstance that administrative courts, as the most significant special courts, were also established in Hungary in the meantime. This body gained its final organisational form through the adoption of Act 26 of 1896. Accordingly, practical experience gained by courts could provide a certain extent of support in the course of preparing the legislation.[19] Also, the competent minister carried out extensive professional preparatory activities through large-scope academic consultation.[20] In such a highly professional environment, thorough and well-organised preparations are also verified by the fact that in the year of the law's adoption, the Ministry also issued a decree titled Remedy Regulations, to facilitate appropriate enforcement.[21]

Further to the aspects mentioned above so far, legislative authorities also had to consider other problems typically characteristic to public administration, occurring primarily on the client side. Regarding authority procedures, a common feature is that the client side is usually made up of non-professional people in most of the cases. The procedure is also made more cumbersome by the fact that clients, due to the characteristics of the cases, do not usually have legal representatives (as there is no counterparty, or even if there is one, the subject of the case is not property-related). This condition provides further justification for the need of making regulations more transparent. This is particularly true with respect to remedies, as the party suffering the infringement – in our case, typically, the client – is provided the actual opportunity of enforcing its rights through remedies. Regarding the legislation, it can be stated that it introduces *progressive regulation* with respect to the field of public administration procedures, although it only addresses one of the key issues of public administration procedures, i.e. remedies. Accordingly, this law cannot be considered as a comprehensive procedural legislation containing provisions on all phases of the procedure and for all important procedural law issues. Practically, the new regulation can be viewed as the first, yet very important step towards simplifying authority procedures. Also, one of the main goals of the law was to make procedures faster and cheaper by simplifying the authority forum system through the reduction of number of degrees of appeal with respect to remedies.[22]

The first chapter of the law includes provisions on remedies. As a result of the precise work of the legislative authority, the chapter does not only stipulate available remedies,[23] but it also clarifies basic issues regarding remedy procedures. Such issues include the following: the scope of right for appeal, deadlines for submitting appeals, the locations and means for submitting requests, and the respective suspensive effects.

However, *deficiencies* with respect to the law can also be found in relation to basic issues. The law does not contain any regulations on *the jurisdiction of the authority* acting with respect to the evaluation of appeals. Guidelines for this – particularly cardinal – issue can be stated from other provisions of the law, from the aims of the legislative authority, and from known legal practices. According to such guidelines, the authority of higher degree, in cases of *appeals,* are entitled to have full (meritorious) power to make decisions in the given cases.[24] This policy can also be derived from the fact that the proceeding authority in cases of appeals are entitled to decide on factual and legal matters. Regarding *requests for revision*, the proceeding authority – namely

[16] Paulovics Anita: Az általános és különös eljárási szabályok a közigazgatásban. Bíbor Kiadó, Miskolc, 2003, pp. 31; hereunder: Paulovics, 2003.
[17] Valló József: Közigazgatási eljárás. Budapest székesfőváros házinyomdája, Budapest, 1937. Preamble Hereunder: Valló, 1937.
[18] Paulovics, 2003, pp. 34–40.
[19] Stipta István: A magyar bírósági rendszer története. Multiplex Média, Debrecen, 1997. pp. 150; hereunder: Stipta, 1997.
[20] Ministry of the Interior Circular No. 125,000 1900. B. M., On the Subject of Requesting Detailed Proposals on Simplifying Public Administration Procedures.
[21] Hungarian Royal Ministry Decree No. 4600/1901 dated 18 December 1901,Remedy Regulations; Térfi, 1909., pp. 24.
[22] CIH Section 2, Act 20 of 1901.
[23] CIH Section 6, Act 20 of 1901. Interestingly, the law did not include retrial among the means of appeal, despite regulating it.
[24] Kmetty Károly: A Magyar közigazgatási jog kézikönyve. Politzer-féle könyvkiadó-vállalat kiadása, Budapest, 1907. pp. 238 Hereunder: Kmetty, 1907.

the competent Minister – was only allowed to make decisions on legal issues, as the request itself was based on legal infringement. However, ministers' spheres of authority were restricted with respect to appeals as they were only entitled to annul the disputed decision and order a new procedure to be conducted.

In cases of retrials, the situation was different as the procedure was practically re-started based on the decision made regarding the request presenting new facts, and this new situation may have affected the facts as well as potential deliberation.

Furthermore, the legislative authority also left another key issue open in relation to the jurisdiction of authorities of appeal. It is the issue of "*reformatio in peius"* i.e. whether a court of appeal may amend an appealed decision to the detriment of the appealing client. The settlement of this issue would have been favourable, as no unified standpoint was formed in this subject in the legal practices of public administration authorities, and even the opinions of theoreticians extensively differed in this issue.[25]

Further to remedies, the law also included the issue of *application for justification.* This legal institution – according to its function – has several similarities with the institution of applying to a higher degree body; however, this latter type could only be based on factual reasons. Regarding factual well-groundedness, the proceeding authority was allowed to make a decision in its own discretion; the only restriction set out by the law was that the examined facts needed to be insuperable obstacles. However, in the motivation provided for the law, the Minister expressly called the attention of proceeding authorities to the fact that unfamiliarity with the legislations – in this case, more specifically, with the deadlines regarding appeals – did not provided substantial basis for application for justification.[26] Otherwise, the same rules applied with respect to applications for justification as for the given appeals. Accordingly, different rules only differed in the cases of submitted applications for justification in the aspect of their effects on execution.

The institution of application for justification was not unfamiliar in Hungarian codified law even prior to the adoption of the law. It was applied both regarding regular court and administrative court procedures, but in some cases, it was applicable in regular public administration procedures.[27]

The law, as it can be seen above, stipulated the remedying system in a detailed manner and made these rules applicable in each and every type of public administration authority procedures. However, the rules did not apply to administrative court procedures, which we can consider as a rightful concept. Administrative court procedures continued to fall under the provisions of other legislations. Another key element of regulating remedies was that it only regulated remedies applicable by clients; it only discussed remedying authorities related to officials by stating that such authorities were applicable by the already existing rules, and powers of such authority could only be provided by law. However, the kinds of agencies entitled to remedying processes were stipulated; this was specified by the law by not restricting the rights of appeal of these agencies or bodies, which were the following: "főispán" (~supremus comes) (the mayor of the Royal Seat and Capital), the Chief Heads of the public administration branches, as well as their representatives, official counsels, and the government.[28] Further to remedies, the law also stipulated the rules of dispatching decisions, and does not only discuss legal issues related to authority procedures, as there is, for example, a separate chapter for the so-called criminal court proceedings.[29] A clearly positive aspect regarding the new legislation is that a characteristic aspect in its establishment was professional preparation, facilitating appropriate rule of law.

Act 20 of 1901 providing general regulations for the public administration procedure – or its remedy – was not in force for a long time, although it was an act definitely pointing forward, and unique of its kind even in international aspects. Countries neighbouring Hungary also adopted legislations of similar subjects only after 1925. The reason for the short effective period of the law can be sought and found in changes occurring in international political relations, and the respective changes in the tasks of public administration authorities.

The Period between the Two World Wars

In the history of Hungary, this period was characterised a series of tragedies. It may be stated that there may not have been any period in Hungarian history during which so many extensively tragic events struck the country. The political and economic relations existing in the first years of the 20th century led to the break-out of the First World War. Regarding Hungary, this historical event had immensely significant effects, which seriously affected legislative processes as well. Consequently, public administration, and the respective authority procedures came to the attention of legislative authorities.

In the first half of this period it was still the Procedural Law of 1901 in effect; however, in the light of historical changes, its sustainment was not favoured. Eventually, the legislative authority had to face the increasing need for making public administration procedures cheaper while maintaining their efficiency. This task was addressed by the adoption of *Act 30 of 1929*. This law can be considered most characteristically as the legislation implementing the comprehensive simplification of public administration. Actually, it is not a procedural law, rather a legislation containing regulations belonging to different branches of law in a modern sense. Further to procedural law regulations, the law also included provisions in the subjects of local-level voting rights, offences and labour rights.[30] A typical characteristic about the prepara-

[25] Márffy, 1926., pp. 249.
[26] CIH 1900. pp. 109.
[27] CIH Section 13, Act 28 of 1889.
[28] CIH 1901. pp. 112.p.
[29] CIH Act 20 of 1901. II. Criminal Justice, Sections 13–22. IV. Dispatch, Sections 25–30.
[30] CIH Act 30 of 1929. Chapter I Legislative authority administration (Sections 1–42), Chapter II. Restrictions on Authority Degrees and Remedies in Criminal Justice Cases (Sections 59–60) Chapter III. Regulations on the Personal and Employment Issues of Public Administration Officials and Other Officials (Sections 65–94).

tory conditions of the law is that in case, for example, a person had a certificate of poverty, they could apply for lawful remedies free of charge. Evidently the extra burden the government had to thus settle was enormous.[31] The experts of the given era considered the simplification of authority procedures as a potential tool for decreasing state budget expenditure. On the other hand, the burdens of the impoverished population had to be decreased as well, a method for which was the government taking over the payment obligations for authority procedures. However, such a stalemate situation further emphasizes the need for making procedures less costly.

Regarding remedies, the new law largely relied on *the rules of Act 20 of 1901*. There are no significant changes in relation to applicable remedies, perhaps the only issue is that the law mentions the institution of court complaint several times but it does not provide any specific regulations on them. Regarding remedies, the law stipulated the location for submitting requests for remedies, deadlines for remedy issues, the range of persons entitled to apply for them, as well as the effect of remedies on the execution of decisions. In this respect, there were no significant differences compared to the previous regulation. Also, just like in the previous case, the new law only deals with the regulation of remedies applicable upon request, and, again, the same solution is used for remedies that can be requested on an official basis as the previous procedural law.

Specifically, the law does not stipulate the issue of third degree resolutions; nevertheless, from other provisions, it can be concluded that such resolutions were final. In my view, the previous solution for this issue was more favourable, as it addressed the issue specifically. On the contrary, the new regulation excludes the possibility of remedy against a notice of appeal, which is a less significant issue compared to the previous one. This law contains only one general restriction on remedies, according to which remedy can only be requested against public administration resolutions if there are no legislations excluding such request.[32] This solution is less favourable from the aspect of the rule of law than its predecessor, as it means the practical exclusion of appeals, although it is also true that it ensures a cheaper solution. Regarding this regulation, a potential legislative authority intention for strengthening government powers may also be presumed, as this way clients' entitlements decreased against government decisions.[33]

Appealing, as the most general tool for remedy was also restricted, as no appeals could be submitted against second degree final decisions, unless a law explicitly allowed so.[34] The law also specifies non-appealable final decisions regarding the regulation of appeals against first degree decisions – which, in my view is a less significant issue – especially, because in these cases no appeals were allowed earlier, either. Obviously, the legislative authority wished to emphasize its intentions to achieve cheaper procedures through these efforts. Nevertheless, the law provided rights of appeal for the "főispán" (~supremus comes), the Chief Heads of the public administration branches, as well as to the official counsel.[35] This rule is particularly interesting because, according to our current interpretation, only clients are entitled to apply the right to appeal. Accordingly, this regulation can be considered or interpreted as the predecessor of decision revision procedures.

Changes occurring with respect to *requests for revision* only gave the respective minister some extra work by stating that the minister should make a decision in such issues and may get the lower degree proceeding authorities to supplement the procedure, in order to get a material that provides a solid basis for making such decisions. The Minister was also entitled to order the proceeding authority to conduct a new procedure.[36]

The rules of *requesting appeals at higher degree authority* did not change; however, it is a progressive issue that the law introduced a new rule regarding application for justification, setting out a six-month limitation period. This regulation covered cases when an impediment was eliminated later or a default was learnt by the affected party later on, and the remedy deadline started from that date.[37]

The rules of *retrials* also basically remained the same; an exception was the location for submitting request for retrials, as the law set it out to be always the authority proceeding on the first degree.[38] A novelty – although it made the procedure more complicated – was that the law allowed an opportunity to appeal against the resolution made with respect to authorising retrials. Undoubtedly, this resulted in the extension of client rights.

A different remedy regulation was applicable for *cases of offense*, which was apparent in the limitation of appeals,[39] and waiving the right to appeal[40] also became available, which could accelerate procedures.

It is a positive aspect that *authority degrees* were defined, thus the order of administrative activities became more transparent.[41] Also, the law contains provisions on examining spheres of authority, as well as how authorities should keep contact with one another.[42]

Nevertheless, *it can be stated as a summary* that the legislation did not make clearly positive effects, because the goal of the legislative authority, i.e. to make public administration opera-

[31] Szokolay Leó: Jogi alapismeretek. Székesfőváros házinyomdája, Budapest, 1944. pp. 71 Hereunder: Szokolay, 1944.
[32] CIH Section 46 (1), Act 30 of 1929.
[33] Csizmadia, 1976., pp. 384.
[34] CIH Section 49 (1), Act 30 of 1929.
[35] CIH Section 47 (3), Act 30 of 1929.
[36] CIH Section 50 (2), Act 30 of 1929.
[37] CIH Section 51 (2), Act 30 of 1929.
[38] CIH Section 52 (3), Act 30 of 1929.
[39] CIH Section 60 (1), Act 30 of 1929.
[40] CIH Section 63 (1), Act 30 of 1929.
[41] CIH Section 57, Act 30 of 1929.
[42] CIH Section 61, Act 30 of 1929; Inter-authority Relations, Section 62 Examining legal force and sphere of authority.

tions significantly cheaper, was not accomplished in the desired extent.[43] Furthermore, the new regulations did not improve the requirements of the rule of law, which, most presumably, was not a primary issue to consider in the given economic situation. Actually, – as this legislation cannot be considered as a classical procedural law[44] – the primary reasons behind regulation are not the settlement of procedural and remedy issues. The reasons behind the regulation were dominantly authority issues, which can provide reasonable explanations for the above statements.[45]

The fact that the regulation of public administration procedures failed to be implemented completely (especially the goal of making such procedures less costly) in a way that it would have met the demands of the given period is most characteristically proven by the fact that *a new legislation, was adopted as early as in 1933, (Act 16 of 1933).*[46] However, this regulation maintained the effect of the 1929 act, and only provided amendments to it.[47]

The new regulation became required due to the global-scale economic crisis that had an unprecedented magnitude. The recession – also reaching Hungary – forced the legislative authority to construct public administration even less costly than at that time. Such cost cutting would have affected the organisational system as well as the procedures. Accordingly, a basic principle expected from the legislation was to simplify the system of appeal. This included the initiative that ministries had to be taken out of the appeal system, and even administrative court procedures had to be simplified as well as court organisations, the latter of which is related to this case by the fact that the court reforms had to be prepared in the legislation regulating public administration procedures.[48]

In the following, let us see the specific rules that substantially amended the remedy system of public administration.

The law only allowed *one degree of appeal*, thus intending to significantly reduce the costs related to procedures.[49] Through the provision removing ministers from the range of authorities of appeal, the legislation intended to give back the original controlling, governing, and actually, the whole public administration management functions to the ministries. Accordingly, this amendment of the sphere of authority of ministries can be considered as justifiable; however, the problem is that no other authorities took over the places of the ministries. The legislation excluded the right for appeal against second degree decisions,[50] and allowed it only in some exceptional cases, for example in disciplinary cases, which is now regulated by labour law, and in religious cases which used to be decided by the Minister of Religious Affairs and Public Education prior to the legislation entering into force.[51] The exceptional procedure of religious affairs had constitutional reasons, as in such cases affecting the Roman Catholic Church, decisions were the entitlements of the apostolic king as the holder of supreme patronage right.[52] From the introduction of the parliamentary government system, this royal entitlement was actually practiced by the king through the current Minister of Religious Affairs and Public Education. Accordingly, the legislative authority believed that the regulation was justified not to be amended from a constitutional law aspect.

The other radical intervention was *the complete elimination of the possibility of revision*. Further to the fact that this regulation clearly had economic reasons, the legislators of this law brought up the reasoning that according to current practices, parties applied for revision even if their legal bases did not exist. The preparers of the bill expected the bill to be attacked for this aspect – I believe they had a good reason to expect that – claiming that the bill did not fully ensure the enforcement of lawful rights. Accordingly, they justified this restriction by stating that the procedural law aspect is only one part of reforming public administration, and the public administration court as well as the organisational system of public administration also have to be reformed. In these aspects, the Minister could more efficiently be responsible for the supervision of public administration authorities and could more effectively represent the property responsibility of proceeding authorities and the disciplinary responsibility of proceeding administrators.[53] – Regarding the motivation, it must be noted that the comprehensive reform of administrative courts was only implemented in relation to the adoption of Act 20 of 1949 on the Constitution, when Act 2 of 1949 eliminated administrative courts.[54] – In my opinion, this solution is not appropriate as relative legal uncertainty develops due to the constantly changing regulations – under which I mean the material legislations – and this has the inherent hazard of the proceeding authorities making several faulty decisions even if being most considerate. The above solution does not provide appropriate guarantee to remedy such faults, on one hand, and, on the other hand, it places the proceeding au-

[43] However, it needs to be noted that it is the period before the start of the Great Depression, and the economic situation was relatively good, in consideration of the given era.

[44] Most of the issues with respect to the basic procedure are practically not stipulated; actually, not even the procedure phases are specified in the legislation.

[45] Csizmadia, 1976., pp. 385.

[46] CIH Act 16 of 1933.

[47] Act 16 of 1933 on amending and supplementing Act 30 of 1929 on Regulating Public Administration.

[48] CIH, 1933. from the Ministry motivation of Act 16.

[49] CIH Section 1, Act 16 of 1933.

[50] CIH Section 3 (1), act 16 of 1933.

[51] CIH 1934. pp. 117.

[52] CIH 1933. pp. 117.

[53] CIH 1933. pp.115.

[54] Stipta István: Történeti érvek az önálló közigazgatási bíráskodás és a körültekintő igazság-szolgáltatási reformok mellett. in. KÖZÉRDEKVÉDELEM. A közigazgatási bíráskodás múltja és jövője. A Pázmány Péter katolikus egyetem jog-és államtudományi karának Könyvei.3. PPKE JÁK–KIM, Budapest, 2011pp. 62.

thorities and the administrators in a disadvantageous position. What is more, if the financial responsibility of bodies is brought up, the question to ask is how much cheaper this measure would make public administration? Furthermore, the legislation entitled certain bodies and persons to have rights to appeal, in order that lawfulness, public interests, the treasury or the interests of clients could be protected.[55] It is worth considering how much cheaper authority procedures become this way. Undoubtedly, procedures often initiated by clients without proper justification will be eliminated; however, in case bodies with right to appeal enforce such rights stipulated by law, the number of cases may increase. Nevertheless, it is undisputable that – as a result of the procedures of the given bodies – the state budget could often receive extra revenues. After the law entering into effect, the legislative authority could only order such right to appeal to a higher degree body through a legislation-level regulation, whereas the respective provisions of lower degree legislations could remain in effect. Such right to submit appeals to higher degree bodies were ensured by other legislations for – for example – administrative committee representatives, forest inspectors, the state architectural agency, the inspector of industrial affairs, the Hungarian Royal Chief Veterinarian, the river engineering and cultural engineering agencies as well as the Hungarian Royal Railway and River Navigation Inspectorates.[56]

Several attempts were made for regulating public administration procedures later on within this period; first, *József Valló* prepared a bill in 1937.[57] Later, in 1939, *Jenő Szitás*[58] prepared another bill, and then József Valló was requested again to prepare a new bill in 1942. However, these bills never entered into effect as they were not accepted and approved by the Parliament.[59]

In summary, it can be stated that the general regulation of public administration authority procedures was only partially implemented, as neither basic procedures nor authority execution were regulated in a unified manner.

The Period After the Second World War

After the Second World War, Hungary went through complete political and economic transformation, and a one-party system was established. Changes affecting public administration also took place, for example, the establishment of a council system. Nevertheless, the provisions of Act 30 of 1929 remained in effect in the first years following the Second World War. The need for regulating authority procedures was kept on the agenda even in the newly established situation. The first step in this process was the establishment of Act 1 of 1950, the so-called Council Act. Regarding the subject of this study, the most important provision of this act was the unification of local level administrative procedures.[60] Despite the fact that this law became repealed[61] prior to the 1957 Code of Procedures entering into effect, it can still be considered as an important step, as the thought of establishing a unified procedure appeared in that legislationt. Certain procedural activities were also regulated in a unified manner not only on legislative, but also on decree levels, such as the rules of dispatching official documents[62]. The marked legislations only partially repealed the 1929 law. In the history of regulating public administration authority procedures, the largest breakthrough was the adoption of Act 4 of 1957, which is, practically, a code of authority procedures.

As it can be seen above, it took more than fifty years from the first efforts (1901) to actually effectuate the code of procedures; nevertheless, I believe that it can be concluded that all the steps made in the process towards unification were necessary, and ultimately, they led to the actual adoption of the code of authority procedures.

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55 CIH 1933. pp. 122.

56 Such legislations include: Act 6 of 1876; Act 20 of 1877; Act 31 of 1879; Act 21 of 1886; Act 1 of 1890; Act 28 of 1893; Act 12 of 1922; Act 19 of 1928; Act 30 of 1929; Act 18 of 1930; Act 35 of 1931; Decree No. 45.689/85 of the Ministry of Agriculture, Industry and Commerce (MAIC); Decree No. 5000/89. of MAIC; Decree No. 62,740/90. of the Ministry of Commerce, see: CIH 1933. pp. 123.

57 Valló, 1937., pp. 34.

58 Szitás Jenő: Közigazgatási eljárás. A korszerű közszolgálat útja. 9. sz. Budapest, 1939, pp. 56.

59 Paulovics, 2001., pp. 348.

60 1950. évi I. törvény 65.§.

61 through Act 10 of 1954.

62 Ministry Decree 43/1953 (VIII. 20.).

Lessons to be Learnt from the Transformation of Community Life in Hungary (1945–1989)

Napsugar Mondovics *

Abstract

This paper aims to reviewing the most important influences of legislation in establishing associations, civic fundraising and courage. I came to the conclusion that characteristics of associations were determined by prohibitive, restrictive legislation, which created new organizations as well. This sector was entirely or partially run by the state. By analysing statistics, acts and decrees I've researched the status of associations in retrospect before II World War.

Key words: *transformation of associations; state control; social organization; working people; fund-raising; expropriations; property; social self-sufficiency.*

This paper has attempted to chart the ways in which the operational possibilities of citizens' initiatives, associations, and circles – today commonly referred to as the civil sector –, and the courage and determination characterising them, changed as a result of government regulation in the period of our concern. The purpose of my research was to draw conclusions from, and to find useful models or traditions in, the positive or negative events of our past.

I will be elaborating on social self-sufficiency, and on the organizations working to achieve it, from two aspects: a) the ground they were granted by relevant *legislation,* b) and the *fund-raising schemes* they adopted for creating the financial resources for the objectives set by associations. Research on legislation in relation to the history of self-organization, however, would not be sufficient for elucidating my topic, so in addition to that, it will also be necessary to elaborate, in a parallel fashion,[1] on legislation in the sphere of *social policy,*[2] and on the establishment of the related administrative system, because the development of public care was affecting, primarily, civil courage and initiative for addressing social challenges, which was a typical distinguishing mark of the sector at the beginning of the century.

Source research has to take into account the fact that the terminology of associations today referred to as civil society organizations has changed significantly over the past two hundred years;[3] not only during the heyday of associations (until 1914), but after World War II as well, when the term *social organization* came to the fore in legislation and in studies[4] – indicating also the whole new direction of the development of civil society after 1945.

Although the periodization of the present study starts with 1945, we must consider the legislation prior to 1945 as well, it remained in force, either amended or not, so the communist political system could well rely on the Horthy era legislation. In fact, although public legislation on associations that was adopted between the two world wars and during World War II was relatively strict,[5] associations were not dissolved in a massive and systematic way, with the 'only' exception of the complete elimination of Jewish organizations in the summer of 1944, a sort of dress rehearsal[6] of what was to be the inevitable fate of the remaining associations as well.[7] The implementation of legislation in relation to civil organizations, aiming chiefly at liquidating them, remained chiefly to be done by the new political system, as follows.

I.1 Legislation and Trends after the Liquidation of the Civil Sector

Legislation on associations was mainly regulated by means of decrees, and former legislation was typically supplemented by

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1 Bartal also in parallel fashion focuses this topic. See Bartal, Anna M., *Kié a szegény?* [Whose poor is he?], Valóság, vol. 2/1996.

2 I've focused on social tasks and social associations.

3 Domaniczky, Endre, *A jogállam és a civil szektor Magyarországon, különös tekintettel a helyi önkormányzatokra,* [Government of laws and civil sector in Hungary with special regard to local governments] Publikon, Budapest, 2009, p. 25.

4 Ádám, Antal, *Egyesületek a társadalmi szervezetek rendszerében*, [Associations in the frame of social organizations] Budapest, 1964.

5 Halmai, Gábor, *Az egyesülés szabadsága. Az egyesülési jog története*. [Freedom of Association. The history of right of association] Atlantisz, Budapest, 1990, p. 126.

6 Domaniczky, Endre, *Adalékok a civil szektor felszámolásához Magyarországon (1937–1945),* [Datas to disbanding of civil sector in Hungary (1937–1945)] Jogtörténeti Szemle, vol. 3/2010, p. 12.

7 By Lehotay Veronika from 1940 the cionist associations were disbanded, and their property was confiscated by the county. See Lehotay, Veronika, *Közjogi korlátozások Magyarországon a Horthy-korszak második felében*, [Public Law restrictions in Hungary in the second period of Horthy area] Miskolci Jogi Szemle, vol. 2/VI, p. 73.

decrees in order for legislators to be able to adopt amendments of details easily and quickly. Below is a survey of the main legislation of the war years; which, at the same time, points out the tendencies leading towards the transformation of associations and civil society.

Act II of 1939 on National Defence was a piece of *prohibitive, restrictive legislation,* prohibiting the establishment of new associations. Its provisions and terminology were reiterated by Prime Ministerial Decree 8110/1939 on the restriction of the right of association, referring to defence as a civic duty: this also prohibits the establishment of new or branch associations, or "any organization by any designation that bears the character of an association."[8] Note the umbrella term indicating the diversity among civil society organizations in the era. Police control over existing organizations is increased, with the obligation to submit proposals to the Minister of Interior Affairs to restrict or suspend the operation of controlled associations; however, the Ministry could take direct action, without having to wait for such proposals.[9] The person who violated the ban on setting up associations, or a suspended association that continued to operate despite the suspension, committed an offense, and was also punishable by a fine.

This was confirmed by Prime Ministerial Decree 8120/1939, dated on the same day, on the restriction of the right of assembly (also referring to the Defence Act), which has a supplement lists of the exceptions, such as the general assemblies of commercial companies or of associations and funds established by a special act of law.[10]

In addition to the *power of the police*, the Minister of Interior Affairs also increases his sphere of authority as regards the establishment of associations: he can make exceptions from the general ban in case of associations for purposes of military charity, national defence, the struggle against endemic diseases, or in case of public interests bearing national importance. Obviously, the latter created a wide discretion for representatives of the armed forces.[11] The decree of the following year[12] – again, complementing Prime Ministerial Decree 8110/1939[13] – further widened the scope of the exceptions for setting up associations, since it not only national, but also local pressing interests – for reasons of public education or economy – could allow for the creation of new organizations. This was followed by a further amendment, in which the decree already listed by name that 'Levente' (boot camp) Associations, Red Cross Societies, Volunteer Fire Brigades, Flying Clubs, Air Raid Leagues, Fire Fighters Associations could be set up due to public interest, as well as new associations of the above purposes that receive *exemption* from the Minister of Interior Affairs, given that a decree stipulates the creation of such organizations.[14] Due to the frequent changes in legislation, the authorities themselves were at a loss what to do with the new associations and branch associations that had been set up prior to the release of the decree on the limitation of the right of association (September 2, 1939); so they were the ones the reigning Minister of Interior Affairs was addressing in this amendment.[15]

A further exception was the establishment of associations under the authority of the Minister of Industry, Trade, and Transport, but sectoral ministers could authorize them only from 1941, and in agreement with the Minister of Interior Affairs.[16] In line with national interest, certain associations were singled out and withdrawn from the scope of the Minister of Interior Affairs, and it was the sectoral minister to exercise the right of supervision over these. The reason apparently was that some objectives were regarded as part of the best interests of the country; and thus they were granted support through the specialized ministries. The legislation also mentions by name, as a result of their importance, university students' unions, the German Youth Organization, the Boy Scouts movement, 'levente' associations and social sports organizations, in addition to insurance societies.[17]

Act IV of 1939 on "limiting the conquest of space of Jews in the economy and public life" forbade the participation of Jews in civil organisations related to public service, while *limiting the proportion of Jews* to 12 percent in associations serving other purposes. The provision did not extend to religious organizations of the Jewish confession (religious education and training), and these associations were allowed to function as before; their disbanding began in the years to come, and not on the basis of the second Jewish law. The Hungarian Official Gazette listed the names of liquidated Jewish organizations county by county – that is to say, their elimination was carried out with the active involvement of local authorities. Between April and July of 1944 Jewish organizations made up 90 percent of the targeted organizations.[18] It is worth noting that the first disbanding decisions were issued on April 23, 1944, within short time after the German occupation of Hungary,[19] one of which is addressed the Budapest-based Hungarian Jewish Association.

In any case, I must highlight Prime Ministerial Decree 360/1945 setting up the National Hungarist Youth Organization, which ordered *compulsory* membership over a certain age, and presaged the post-1945 era, when politics intervenes from above in the lives of the sector by imposing obligations. Compulsory membership was expressly forbidden before; and its violation entailed severe consequences, as the legal scholar of that era points out:

[8] 8110/1939. Prime Ministerial Decree 1. §.
[9] 8110/1939. Prime Ministerial Decree 3. §.
[10] 10630/1939. Prime Ministerial Decree.
[11] 10620/1939. Prime Ministerial Decree.
[12] 8850/1940. Prime Ministerial Decree.
[13] This decree was modified four times from the 1st of Sept 1939 to 3rd of Febr 1941.
[14] 365.500/1939.
[15] 355.500/1939. Minister of the Interior Decree.
[16] 850/1941. Prime Ministerial Decree.
[17] 185.000/1943. Prime Ministerial Decree.
[18] Domaniczky, 2010/3 p. 12.
[19] The lists about jews to collect them was already made until 31st of March in 1944, the lsits of jewish associations was previously made, because the Minister of the Interior had power over the existing organizations.

"Every Hungarian citizen who meets the statutory conditions is completely free to determine whether to enter an association or to keep their membership. Should it come to light that an association compels its members to become a member of an association... then, as it is customary, the Hungarian Royal Interior Minister, by right of violation of statute, shall apply retaliatory measures against the relevant association."[20] The above decree, therefore, clearly raises the question as to what extent the above mentioned organizations – failing to meet the minimum legal requirements of free association and joining – can be called associations.

In the light of the legislation we have reviewed we can state that a general ban was in force on establishing associations citing interests of national defence; and we witness a significant increase in police powers and control of the Minister of Interior Affairs over the existing associations. However, referring to public interest, the Minister constantly made *exceptions* from the general prohibition on the establishment of new associations, so some associations have enjoyed a privileged status. At the same time, Jewish organizations were the first ones to be disbanded, while compulsory membership was required for other (e.g. Hungarist) organizations.

The interim government's first actions included the adoption of Prime Ministerial Decree 529/1945 on the dissolution of fascist political and paramilitary organizations, which addressed the issue of pro-Hitler and anti-UN organizations. Its amendment[21] shows that the Minister of Interior Affairs had regained all and total powers to dissolve organizations and to seize all their assets.

This continued with organizations such as the volunteer fire brigades[22] and hunting associations.[23] There were separate decrees about the formulation and endorsements of their ground rules or statutes, but that does not imply that the legislation failed to dissolve other organizations. Such legislation included Decree 20.165/1945 of the Ministry of Interior Affairs on the revision of the operation of associations, and Supplementary Decree 289.000/1946 on the general requirements to the statutes of organizations. Both regulations were difficult to meet, as the former required the association's leadership to prepare a detailed report, retroactively, as far back as 1939, on their previous administrators, their political affiliations, as well as on the post-war changes they implemented in the spirit of democracy; and the latter required local groups to become independent associations, in addition to submitting attachments and other data. However, the legislation we have examined so far does not provide a complete explanation as to the way in which the civil sector was disbanded. This is called a 'white spot' by legal historians.[24]

According to the data in the Hungarian Official Gazette publishing the interior ministerial decrees *10,443* organizations were disbanded between August 1945 and 1950,[25] ranging from social and scientific societies to charity organizations, which are the most important ones for our topic, and to religious organizations, which were also involved in charity to a great degree.[26] Thus, compared to the 1932 statistical data, when there were 16,747 organizations on Hungarian soil, only 6,304 of them survived the disbanding.[27] Statistical surveys were conducted fairly rarely on associations – clearly indicating their degree of 'importance' –, and the next time we have data about then-current associations is from 1970.[28] This is revealing even if we take into account the significant changes in the sector. By that time we learn about 8,886 organization, which indicates a non-governmental sector shrunk by half respect to 1932, which could not regain its recreational capacity and dynamism after the post-war efforts to get them disbanded.

Papers that were published up to the regime change argued that the reason for this was the lack of demand for most of the previous associations: due to the social and economic development and the newer conditions of production "in our country today there is no need for charitable associations,"[29] which virtually lost their raison d'ętre. Starting with the 1932 data, there were a total of 4,581 associations that "had lost their raison d'ętre," and thus were not reorganized after 1945, including – in addition to the charitable associations mentioned above – ones concerning public health, sickness benefit, pension and stakeholder representation.[30] Why these associations were the ones to disappear was due, in addition to the political preferences, to the nationalization of health and social institutions and services, which I am going to detail in the following chapter. Prior to that, though, let us take a look at the fate of the assets of the disbanded associations.

At first glance, there is no significance of what happened to the real estate organization and cash assets of the more than 10,000 organizations disbanded until 1950. Still, as one of the cornerstones of my topic is winning civil society as a potential investor, and the encouraging or discouraging effects of both legislation and the political milieu, it is worth a closer look at the amount of assets that was involved, and the way in which its withdrawal affected the willingness of society at that time to support associations.

Act XVII of 1938, prohibiting the very concept of associations, declared, clearly as a form of *sanction,* the immediate dissolution of such associations and the translation of their assets to public welfare purposes, in the competence of the Minister

[20] Páskándy, János, *Egyesületi és gyülekezési jogszabályok kézikönyve*, [The Companion of Association and Assembly Law] Budapest, 1931. p. 11.
[21] 3830/1946. Prime Ministerial Decree.
[22] 10.280/1946. Prime Ministerial Decree.
[23] 291.684/1946. Prime Ministerial Decree and 450.000/1947. Prime Ministerial Decree.
[24] Domaniczky, Endre, *Adalékok a civil szervezet felszámolásához,* [Datas to disbanding of civil sector in Hungary (1945–1950)] Jogtörténeti Szemle, vol. 2/2009, p. 2.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Jobb, Sándor, *Egyesületek Magyarországon*, [Associations in Hungary] Statisztikai Szemle, vol. 12/1972, p. 1226.
[29] Ibid p. 1225.
[30] Jobb, Sándor, *Egyesületi élet Magyarországon*. [Associtaion's life in Hungary] Statisztikai Szemle, vol. 8–9/1984, p. 825.

of Interior Affairs or another sectoral minister. The resolution for disbanding the associations constituted an official record of ownership registration with the power of law.[31] Already in Roman times, the private law of association included as a basic principle that the assets of the association, when the association is terminated, can not be shared among the members; yet there were two guarantees regarding the settlement of property. In one case the assets were transferred to the persons specified in the articles of association, thus enforcing the will of the members; and in the other case, the state saw to it that the will of the members is fulfilled, in order to meet the statutory objective.[32] The confiscations we have examined completely exclude the former option, and they provide no guarantees as to the transferral of assets defined by the original purposes of the association.

One may find statistics on the assets of the associations only from 1932, when the associations in Budapest had a revenue and expenditure of 60M Pengős. These included 235 homeowner's organizations with a total of 82M Pengős of real estate property values.[33] Regardless of whether this amount of wealth can be regarded to be abundant or scarce, the disbanding must have had *widespread* influence under two aspects: firstly, the significant number of members of the 10,000 organizations amounted to approximately two million people, former payers of membership fees,[34] who have seen the results of their previous work wasted; the another aspect is the political perception that saw the sector as a traditionally undesirable opponent,[35] and accordingly, disbanded the organizations in dictatorial ways. Further archival research will have to examine whether there were any locally or nationally allocated funds to which the property of associations were transferred. The fate of real estates formerly owned by associations would be even easier to understand by the local land register. At this point, it may be established with certainty that the nationalization of the property of associations – similarly to the procedures underlying the resolutions for their disbanding – was based on Horthy-era legislative measures.

I.2. Non-civilian, from above

Before displaying revealing statistical data to show the characteristic image of associations in the early 70s, with their new ways of organization according to new interests, we need to consider those acts that are prompted by the post-1945 legislation, starting with the example of the re-establishment, or rather, reorganization, of fire brigades.

The dissolution of the old fire brigades and the creation of new ones took place with the disbanding, with one stroke of a pen, of long-standing volunteer fire fighting organizations and their umbrella organization, the Hungarian National Fire Fighting Association, and, in a parallel fashion, with the reorganization of the fire department.[36] It is beyond dispute that this sector bears public interest, still the example perfectly shows the mechanism of the reigning system to interfere, by means of legal measures, with a sector which that far had proved to be quite viable. The regulation sets up by the 'unified Hungarian fire brigade,' and at the same time eliminates the volunteer firefighter associations – obviously, transferring their entire assets to the property of local councils.

Act I of 1946 on the form of the State of Hungary mentions the right of association among the natural and inalienable rights of the citizens, but the events of Communist takeover left no time to express this further. The 1949 Constitution, created after the Soviet pattern, highlighted the interests of the working people and the construction of socialism as the guarantees of the right of association; while at the same time it probably did not recognize 'man *in genere*' as the legal entity of the right of association, given that it regulated the public capacity of man in a differentiated manner.[37] Thus, man as a general entity is replaced by the members of the working people, similarly to the terminology of the 1919 Constitution of the Hungarian Soviet Republic, in which the right of association had been downgraded to an aspect of freedom that is the due of "*workers and peasants*".[38]

Since the Constitution in question remained in force until its amendment in 1989, it is worth taking a closer look at the relevant §56. According to paragraph 1 the right of association was granted "in order to develop the social, economic and cultural activities of workers." Paragraph 2 specifies, without leaving any doubt, that the Constitution "relies on self-conscious workers' organizations in fulfilling the tasks of the People's Republic."[39] The list of tasks – such as the protection of the order of popular democracy, increased participation in socialist construction, the broadening of the work of cultural education, the implementation of the rights of the people and the care for international solidarity – make it clear which are the recommended goals and interests for practising the right of association. The legislator specifies by name the organizations that were "welcome": trade unions, women's and youth organizations, mass organizations enjoyed support, which were united by the Popular Front, headed by the working class which was called upon for leading it. This way, the constituent power declared that grassroots associations were to be replaced by the organizations brought to life *from above;* that policy makers *defined* objectives instead of just leaving them unrestricted freedom to choose their aims; and that the Popular Front was to merge all activities into a 'democratic' whole, instead of voluntary associations and co-operation.

We continue to see the adaptation of a series of public regulations on associations. Decree LXXIII of 1954 of the Council of Ministers on Exercising the right of main supervision of associa-

[31] Act XVII of 1938, 3.§.
[32] Benke, József, *Kizárólag személyesen gyakorolhatja-e az egyesület természetes személy tagja az Etv.-ben meghatározott jogait?* [Are the membership rights in Association Act allowed to be practiced by exclusively personally?] p. 16.
[33] Dobrovits, Sándor, *Budapest egyesületei*, [The associations of Budapest] Statisztikai Közlemények, 1936, p. 95., 97., 108., 111.
[34] The membership of associations was 200 person. See Jobb, 1984, p. 826.
[35] Benke, p. 10.
[36] 10280/1945. Prime Ministerial Decree.
[37] Benke, p. 13.
[38] Benke, p. 13.
[39] Act XX of 1949, 56.§.

tions is followed by Legislative Decree XVIII of 1955 on Associations (after 1959 the legislation on the creation, the operation and the termination of associations is to be sought in the Civil Code),[40] introducing the requirement of both a minimum of ten people for founding an association, and the recognition of the legal entity of the local association. The legislation further complicated the operation of the associations, as it introduced different regulations for registering and controlling associations, depending on whether they were formed as national or local associations or an alliance between local associations. Above the local associations supervision was exercised by the county executive committee, but the minister and the ministry also were entitled to supervise them. Later, from 1970, the right of supervision was temporarily centralized, until 1981, when it returned to local authorities.

Until 1956 it is sectoral ministers, in addition to the Minister of Interior Affairs who keeps practicing real and final authority over the associations,[41] who verify the proper operation according to the statutes, evaluate the implementation of the interests of the people's democracy, and disband the associations threatening the public socio-economic order. However, after 1956, the authority to control them from the viewpoint of '*public safety*' was transferred to the minister of armed forces and public safety.[42]

The aforementioned Section 73 of the Civil Code[43] is related to the volunteer work, which the present paper will be elaborating on later. In fact, this section states that "The members of the association partake in the work of the association, and contribute to the fulfilment of the tasks of the association." This is the earliest legal record of volunteer work within associations.

It is also important to note here that the legislation, by referring to the Constitution, recognizes the organizations listed in the Constitution as social organizations;[44] and also enables them to establish companies – thus defining them also as potential economic stakeholders –, while it relegates the associations under a subsequent heading, narrowing their activities by using the adjectives 'social' and 'cultural'. A number of studies have been conducted on the demarcation between social organizations and associations, but no consensus has emerged so far.[45]

Legislative Decree XXXV of 1970 is aiming again at transforming the supervisory authority. It is relevant as it is here that the opportunity to remedy appears for the first time on the legislative level. Its 1981 amendment already included the obligation to notify the authorities about one's efforts to organize an association, which gave new powers to the supervisory body; in fact, the authorities were thus enabled to examine in advance whether such efforts constituted a threat to the existing order, and whether the prospective statute corresponded to the requirements for registration.[46]

For some reason, in the same year the first comprehensive survey on associations was conducted after World War II. I wish to illustrate with the table below the way in which the above mentioned "regressive and concession"[47] legislation transformed the civilian sector.

1. chart[48]

Type of association	**Number of association**			**Membership**		
The year of statistics	**1932**	**1970**	**1982**	**1932**	**1970**	**1982**
Scientific	102	99	119	39,1	131,9	276,5
Artistic, cultural	1827	14	90	276	6,4	41,5
Sport	1331	4575	3013	195,4	1149	720,1
Hunting	---	734	740	---	21,9	30,7
Fishing	---	371	694	---	92,8	239,2
Insurance	1389	9	12	790,8	322,7	329,1
Firefighting	---	2705	1481	---	93,8	57,1
Animal shelter	---	328	295	---	27,5	27,6
Charity	836	---	---	160,4	---	---
Social circles	3807	---	---	476,5	---	---
Economical	2350	---	---	604,3	---	---
together:	**14365**	**8886**	**6570**	**2998,2**	**2171,2**	**2304,5**

[40] Domaniczky, 2009, p. 58.
[41] Domaniczky, 2009, p. 56.
[42] 3/1957. Governmental Decree.
[43] Act IV of 1959.
[44] Act IV of 1959, 68. §. the political organizations, labour unions, women's and youth organizations and other social organizations of workers.
[45] Papházi, p. 128.
[46] Benke, p. 14.
[47] Benke, p. 13.
[48] Jobb, 1984, 2nd chart.

In addition to the charitable societies already mentioned, social circles also completely disappeared, and so did business associations gathering the representatives of single professions, which also functioned as advocacy organizations. As to the causes, then-current statisticians pointed out that social circles could live on, transformed, within the framework of later clubs or cultural centres; while the objectives of advocacy bodies lived on in the context of trade union work endorsed by the Stalinist constitution. The number of artistic and cultural associations also decreased dramatically: in 1970 their number turned into less than one hundredth – obviously not under the auspices of cultural diversity. Then there is the oft-repeated reason of social changes that prompted the political elite to offer people culture through the much tamer forms of choirs and federations of libraries, which were much less 'dangerous' to the elite. In connection with the resurgence of reading circles, for example, the central leadership of the Hungarian Workers' Party adopted a resolution in February 1955 commissioning popular front committees to draft the statutes of such circles, thus ensuring the party's *influence.*[49]

However, there were different reasons to prompt the decrease of insurance and self-help organisations, which were also in competition with one another. Despite the fact that their numbers dropped to one hundredth, this trend affected their membership headcount to a lesser degree; that is to say, the few organizations that remained had a sharp increase in their membership: their 560-strong average membership of each grew to about 27,500. This all indicates that associations that today are mainly pension and other insurance organizations could only operate in the number required by the state.

It is interesting to note that the number of scientific societies did not change, but their membership doubled. A sad detail is the fact that scientific associations did not operate any longer, apart from a few exceptions.[50] Apparently, self-organized academic workshops were not limited; their intense activity is reflected in the income from their meetings, which was 3 to 4 times higher than similar incomes of other associations.[51] The biggest increase was experienced by sports clubs that accounted for 46 percent of all associations. Also, previously little-known hunting and fishing associations also enjoyed great popularity.

The artificially created new 'civilian' sector could not be dominated by the previous willingness of civilians, as the Communist takeover destroyed almost all continuity within society.[52] The 'know-how', the accumulated knowledge, social capital and operating experience was lost partly as a result of war-time casualties; and partly legislation was stressing the right ways of thinking and directions, and was organizing affairs in place of the individual trying to find solutions. The image of the life of associations in the last third of the century is no longer a picture of citizens solving problems by living autonomously and practising their civil rights (the right to assembly, freedom of association, freedom of thought); in fact, what we witness is complete or partial state control. Even after the regime change researchers found that the inadequacies and disorder in the operation of civil associations could be attributed to the fact that under Communism they had no real opportunity to develop.[53]

Approaching to the final time horizon of our topic, the year 1989, I limit myself to a single remark: the already mentioned Legislative Decree XXIX of 1981[54] was, for nearly two decades, the only legislative measure on associations, which, for that matter, further multiplied the levels of authority over the associations[55] – a telltale sign of the crisis of the system.

II. Social Policy and Community Support

The chapter title is a rather odd pairing; it connects social care undertaken by the state with a fundamental characteristic of previous civil society. However, it is not accidental that they are discussed here together: measures of social policy – especially at the local level – repeatedly called upon the local population to hand in 'donations'. In fact, the social services gradually came to be, from the early twentieth century, recognized and espoused by the state; more precisely, the state took these over from the previous civil sphere, and therefore it is not sufficient to survey the procedural legislation for the associations only, but at the same time one needs to be familiar with norms of social policy too. The following sources show the way in which power intervened, from above, into earlier practices of private philanthropy.

Later, in a nutshell, I will address the reasons why the social and health area was the first that the state took over, producing a number of legislative measures as a result. Already the 'beggar regulation',[56] adopted among the first social norms, was passed because poverty – as well as the health and social risks it entails (epidemics, deterioration of public safety) – forced the local authorities to sit up and take action. Specialist physicians called for improving the situation of the people, seeing their health and eating habits.[57] They did so because private philanthropy had some 'blind spots', facing contingency and disorganization; while with the growing number of beggars and the rural masses flocking to metropolises it became clear that *state intervention* was required in order to face the challenge of integrating everyone.

Hungarian Norm was introduced in 1936 and survived until 1950. It became a nation-wide institution on the example of the Eger Norm, introduced in 1927. It was based on the principle

[49] mnl.gov.hu/letoltes.php?d_id=90 (22nd of Apr 2014).
[50] In 1982 in Budapest 116, and in 3 country cities 1-1 scientific associations worked. See Jobb, 1984. p. 828.
[51] In 1982 incomings from management (evenings) was 57%, but other associations this relation was only 8–21%. See Jobb 1984. p. 829.
[52] Ferge, Zsuzsa, *Elszabaduló egyenlőtlenségek*, [Running inequalities] Hilscher Rezső Szociálpolitikai Egyesület, Budapest 2000, p. 96.
[53] Women were the main caracters of change. See *Nők a rendszerváltásban*, [Women in regime change] Szociális és Családügyi Minisztérium, vol. 6/1999, p. 102.
[54] Legislative Decree XXXV of 1970 and Legislative Decree XXIX of 1981.
[55] Domaniczky, 2009, p. 59.
[56] Act XL of 1879.
[57] Ferge, Zsuzsa, *Fejezetek a magyar szegénypolitika történetéből*, [Lessons from the history of Hungarian pro-poor policy] Magvető, Budapest 1986, p. 69.

to organize community fundraising, to suppress begging, and to supply beggars, by means of a triple collaboration of state, society, and church. In this time Hungary was called the "country of three million beggars", and therefore church initiatives set up several organizations: the Poor Care Agency, the Committee for the Poor and the Sisters for Poor Care. The Agency registered the needy, put together a personal file for each of them, the Committee organized the programs and the cooperation between the state, society and the church, while the sisters were looking after the poor. Lay women helped out by going begging for them, in an organized manner. The collected money was spent on maintaining care homes. This was, therefore, the first form to charity organized on the national scale, for coordinating charity and poor care and for making them professional.

A result of the Norm, by 1943, was that many people felt charity as coercion,[58] although the experts of the time disagreed with this assessment, saying: "Unorganized social philanthropy is a greater burden on society than charity organized in line with the Eger Norm."[59] It can be certainly established that when legislature attempted to organize society along these lines, it did not rule out public donation at all; in fact, legislators still relied on public donation on a complementary basis.[60]

All intents and purposes already in the Horthy era they started to involve social organizations into the unified public administration to control them. This is when the institutional population and family protection law is born, but the sector is still unable to run on state funding only, as the public is called over and over again to engage in actions of charity. Some scholars believe that a real breakthrough took place in the context of social rights with respect to the rigid liberalism during the dualism.[61]

The different levels of the new social administration, according to Prime Ministerial Decree 6300/1945: the Minister of Welfare, then the chief social supervisors, and social secretaries working onsite. As the Minister for Social Welfare stated: "it is a public task to improve the social conditions of the working classes", therefore a specific budget allocation was assigned to it, managed by the Minister of Public Welfare. And locally, social funds were created and allocated, and social committees got involved in addition to mayors. The responsibilities of social secretaries were similar to those of the Poor Affairs Agency as reflected in the Hungarian Norm; and they had to cooperate with those few social organizations which started to get back on feet after World War II.[62] The above quoted decree on the re-organization of the fire department, as well as Prime Ministerial Decree 3830/1946 and Decree 4287/1949 of the Council of Ministers regulated the assets of dissolved associations, ordering it to be spent on objectives of public interest to ensure that local authorities would be capable to carry out the tasks of previous associations. Act I of 1950, Section 27, states that the local council is responsible for social, cultural and economic tasks. The grant funds that were being established, though, proved to be insufficient for the penniless social organizations.[63] Legislative Decree 1955:18 on Associations authorized local authorities to monitor the property management of associations, which reduced forward the remaining financial independence of organizations. On January 8th, 1945 the town of Nyíregyháza passed a decree that the supplies of the poorhouse and the sick-relief house had to be given over to the Department of Social Policy, so that people could make use of the supplies through these bodies. This local provision aims also at centralization.

According to a directive, the furnishing of poorhouses *had to be collected* through community donations, and their maintenance had to be funded out of the local budget reserve. In the early 50's, for example, in Szabolcs-Szatmár county the only way to set up social homes was to call for social work for the locals to provide furniture and appliances.

District social secretaries were responsible for organizing collection efforts, which is sometimes connected with evening entertainment programmes. Typically, this is also done by women, the main difference being that this time it was organized and provided by the state. It was not easy for social secretaries to find cooperation, since the remaining civil organizations that survived the war, were weakened, only a few new organizations could be set up, with more limited chances to reach supporters, to raise funds than at the beginning of the century, as the two world wars had caused massive impoverishment. A feather collection programme called "A handful of feathers" for supplying residents of nursing homes with duvets and pillows indicates that even low-value community donations were targeted by associations in order to perform efficiently.[64]

In the summer of 1949, the county supervisor addresses the local party organizations in writing to make them organize a collection and to issue specific collection forms for this purpose. In Nyíregyháza, at the request of the mayor, the local Calvinist minister conducted the functions of the social department organizing collections in the town with the support of social organizations.

Expropriations provide the basis for the network of social institutions; that is to say, castles are transformed into poorhouses (e.g. the social homes in Győrtelek). Real estates of individual owners were not the only victims of expropriations: the Kisvárda poor house of the Franciscan Order, for instance, was nationalized in 1951. In parallel, as a result of land reform, poorhouses maintained by churches were also struggling with serious financial difficulties.

The viability of church-related social institutions is shown by the fact that the Nyíregyháza shelter of the Hungarian Jewish National Office (MIOI) was established by means of an ad-

[58] Kamocsay, Jenő, *Társadalom és szegényügy*, [Society and poor-law] Nép és családvédelem,vol. 11/1943, p. 403–404.
[59] Pálos, Károly, *Szegénység, szegénygondozás*, [Pauperism and poor care] Martineum Könyvnyomda, Szombathely, 1934, p. 46.
[60] Bartal, p. 96.
[61] Gyáni, Gábor, Szociálpolitika és jótékonyság a két világháború közötti Magyarországon, In: *Szociális kérdések és mozgalmak Magyarországon (1919–1945*), [Social questions and movements in Hungary (1919–1945)] Editor, Szilágyi, Cs., Gondolat, Budapest, p. 2008.
[62] Gaál, p. 618.
[63] Domaniczky, p. 78.
[64] Gaál, p. 443.

vance payment by the Jewish community in Budapest, and the MIOI could see to it that this should be the primary home for incapacitated, elderly Israelites, in 1953 – even after their nation-wide network of institutions had been nationalized.[65] The viability of the MIOI's aiding scheme was also demonstrated by the fact that the local council proposed to take it over.[66] The support of Christian churches and congregations also remained a most secure target of proceeds for the maintenance of hospices and shelters for the sick.

III. Summary

We have reviewed, surveying relevant legislative contents, the way in which legislature, in an important historical period of the civil sector, intervened in the lives of the associations; we have seen the ideals of legislation and the consequences of its implementation. We have found that the post-war political era intervened dramatically, in several ways, in the operations of the civil sector.

First, the over 10,000 organizations that survived the two world wars were disbanded, with reference to different decrees here and there, and then new foundations were laid for the exercise of the right of association. The latter were no longer defined as a human right, but the right of the working people; also pointing out which goals are compatible with the interests of the working people. In addition to listing the desired types of associations, legislators introduced the concept of social organization, thus relativising the institution of association. Legislators then sought to bring under the party's influence and control the associations that still managed to survive; in fact, they even decreed that they should be the ones to supervise the procedure, including all communications, to establish associations. On top of all this, the property of disbanded associations was nationalized, confiscated for public purposes.

At the same time, in a highly public positions such as social policy, the state took the place of previous charitable associations; and the latter completely disappeared by the seventies, as a result of social 'progress'. Hardly could these events be called 'development', which is evident from the experiments to social organization from top to bottom: calls for donation and cooperation required by law, and organized by politicians, party bureaucrats, only worked for a short time. The most obvious solution for performing the newly assumed social and health responsibilities, and for establishing the institutional network, was the expropriation of the existing (religious or privately owned) institutions.

It is no coincidence that the civil sector, as a result, was completely transformed, *losing* its 'civil' attributes and its essence; that is, reasoning independently from the state, and behaving proactively, as well as the individualisation of people, which means care and the readiness to make sacrifices, both by and on behalf of individuals. The sector, or whatever came to replace it, was entirely or partially run by the state. This is how this impoverished and poorly regulated sector arrived at regime change,[67] totally unprepared to take over and professionally carry out social tasks.

The past 25 years have not been sufficient for rebuilding the whole intellectual know-how lost after 1945, whose positive traditions are to be found in the few decades of the second half of the nineteenth century which saw the heyday of associations – and not in this the period we have discussed. Still, the above examined period is certainly suitable for understanding important lessons to be learnt.

[65] Gaál, p. 487.,489.
[66] Decision 155/1958. Szabolcs-Szatmár-Bereg County Council.
[67] Bartal, p. 24.

The Standpoint of József Eötvös on Education

Ibolya Katalin Koncz *

Abstract

In this study, I examine the role of Eötvös in educational policies and his standpoints on education. He declared all through his career that the development of economic and political life was inevitably correlated to culture and education. The standpoint of Eötvös in the basic question is clear: culture and education should be the responsibility of the state. Based on his well-preparedness and extensive knowledge in various fields, he was able to prepare and implement his programme with creative self-reliance. It can be stated that József Eötvös know that enormous financial investment would be required for the execution of the provisions set out in the law on public schools, and that its impacts would be felt only decades later.

Key words: *József Eötvös; Elementary Education; the 19th Century in Hungary; compulsory schooling.*

József Eötvös was one of the outstanding personalities of the Hungarian Reform Era, the ages of absolutism and of the Austro-Hungarian Compromise (1867). He carried out a wide range of activities, and there were very few political, economic, literature or cultural issues he was not involved in. In this study, I examine the role of Eötvös in educational policies and his standpoints on education.

The education policy standpoints existing before the works of Eötvös can be reviewed as follows. At the turn of the 19th century, Archduke Alexander Leopold (as the Palatine of Hungary) reported to the Monarchy Emperor, Francis, about the conditions of country and the works to be carried out. In this report, Alexander Leopold stated that he was concerned about the rather deficient extent of care paid to the field of education. Supervision of education was neglected, therefore teachers carried out teaching activities in accordance with their own personal views. The applied methods did not motivate students to learn. According to the report of the palatine, it is apparent that he did not find any interests in the education of common people. According to him, teaching the children of peasants to read and write was an unnecessary effort. He thought it was sufficient just to teach such children how to fulfil their religious obligations. In his view, if a peasant learnt more than that, they would not want to do ploughmen's work, and would be more inclined to adopt new ideas.[1]

Later, in 1806, "II Ratio Educationis" was published, the draft authorising royal document of which especially highlighted the enforcement of sovereign rights with respect to public education. Just the fact itself that "Ratio" was published as a royal decree and not as a law approved by the Parliament, was an infringement of Hungarian rights of sovereignty.[2]

As early as during the Parliament session of 1825 to 27, Parliament members objected to the Austrian guardianship over Hungarian educational affairs, the foreign approach on public education. In relation to discussing the issue of national education, the precedence of the Hungarian language was urged to be acknowledged. The draft discussing the works on developments, which became known with the title "Opinio" was proposed by Dénes Pázmándy, the father of the future Chairman of the 1848 Parliament. The demands included in the prepared draft covered nearly all fields of cultural affairs. However, it needs to be stated that the declaration of compulsory education included in the proposed draft was only implemented later, in the age of Eötvös.[3]

The committee acted in an exemplary manner and it did not only submit the proposal (discussed for years) in 1830 to the Parliament, but it also sent it to the counties. The official bodies of nearly the whole country responded to the call for the county and town legislative authorities to submit their comments. In county authorities and in the Parliament, oppositions and debates were more and more frequent in the subject of public education. A large amount of proposals was submitted to the Parliament of 1832 to 36 by different legislative bodies.[4]

In the light of this background, the personal motivation of Eötvös with respect to education needs to be examined. Unlike the children of other noblemen of his era, Eötvös was not a priva-

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1 The documents of Archduke Alexander Leopold, Palatine of Hungary. Published by Elemér Mályusz Bp., 1926. pp. 826–827.

2 Felkai László: Eötvös József közoktatási tevékenysége. Bp., 1979. (hereunder: Felkai, 1979.), pp. 21.

3 Felkai, 1979, pp. 22–23.

4 Felkai, 1979, pp. 23.

te student; he went to public school. In the Grammar School of Buda, where went, he was able to meet children of gentry or not noble families, who brought different political views from their homes. His fellow students did not like Eötvös due to his principles in favour of the Habsburg monarchy. Eötvös once asked his teacher whether his grandfather had indeed committed treason. Pruzsinszky replied as follows: "Yes, indeed, and your father was a traitor too, and you are preparing to be one as well, because you do not even speak Hungarian properly." [5] Based on this response, Eötvös began to study Hungarian language more thoroughly, and he spoke to everyone around him in Hungarian.[6] With Szalay on his side, he established relations with the figures of the contemporary Hungarian literature. He and Szalay contacted Benedek Virág, Pál Szemere, and then Ferenc Kazinczy, the great figures of Hungarian literature at that time. He made his "maiden speech" in 1840 at the Upper House of the Parliament in Pozsony; and this speech was most characterised by his philanthropy. His primary goal was to fight for the rights and justice of people, as well as to establish the conditions for proper education.[7]

With this background, Eötvös declared all through his career that the development of economic and political life was inevitably correlated to culture and education: "… both reason and experiences caution me that the development of material interests is impossible in case spiritual interests are not likewise developed at the same time".[8] According to the belief of Eötvös, "We cannot build factories and we cannot reform transportation or commerce until we ensure appropriately trained skilled labour force; financial prosperity cannot do without general intellectual growth". This was, however, a political issue as well; he related the lack of democracy in educational affairs, as it could be seen, to the spirit of the whole Hungarian constitution, and he believed that one of the assurances for equal rights to be in equal access to culture and education.[9] He truly believed that the only way to affect the moral education of the public can be found in the education of the people. "Just as God started creating the world by creating light, if one wishes to create a nation (and surely, people striving to make this chaotic population to be one nation, have this intension), the first step is to give them light and the rest will follow".[10]

Eötvös submitted its bill on elementary education on 24 July, 1848. "The goal of elementary education is to ensure children's access to the first stage of sciences. It is the obligation of the public authorities to ensure everyone's participation in education." – This was the first paragraph of his bill.[11]

Nevertheless, we also need to consider the fact that there was no experienced staff of advisors available for the minister with respect to general state administration or cultural and educational affairs at the time of the country gaining her independence. Experiences gained in the course of the Hungarian Reform Era proved to be insufficient, and other countries were not to be followed blindly, either. After Hungary gaining independence in 1848, and then, after the fall of Austrian absolutism, in the era of the Compromise, it was the task of the public education government authorities to determine the means of their operations, particularly the extent of state influence.

In the state budget for the year 1847, there was no expenditure item as provision for costs related to public education. The bill submitted by Eötvös forecast a budget of nearly one million forints.[12]

In Eötvös' case, it may seem evident that he carried out such a large variety of public activities, as the sphere of his ministry's authority covered all kinds of cultural and educational institutes ranging from kindergartens to universities, from museums to botanical gardens. However, Eötvös did not become the official moderator and manager of a well-prepared and already operating mechanism; he was rather the creator of cultural and educational forms and laws: in his official position, he carried out creative work ranging from organising activities to drawing up legislations. Eötvös considered the elements of culture in their complexity.[13]

Education is the main goal in teaching and in all forms of schooling; Etövös states that all schooling is only a little part of education.[14]

Based on his well-preparedness and extensive knowledge in various fields, Eötvös was able to prepare and implement his programme with creative self-reliance. The guiding principle of his originality is being realistic: he sought issues that could be implemented, he was guided by the norms of active politicians and he wanted to reconcile his ideals with actual possibilities in order to achieve his goals.

Having known Hungarian circumstances, Eötvös fought for legally compulsory education. [15]

As a sign of the neglected status of common people's education, there were no institutionalised measures on the further education of masses unable to receive elementary education. Accordingly, it can be stated that public education was rather far from being general and compulsory.[16] Disadvantages caused by fragmentation based on particularist interests came out.

[5] Pulszky Ferenc: Jellemrajzok é.n. Bp, pp. 8.
[6] Felkai, 1979, pp. 28.
[7] The reform diets fundamental efforts included the implementation of an ever wider range of the state tasks of the laws are recorded. For example, more details of the state intervention into the private legal relationships: István Turkovics: The Regulation of Commerce in the 19th Century in Hungary, Journal on European History of Law,Vol.4/2013, No.2, pp. 133–136.
[8] Quotation in his 1846 article on public education; Eötvös József: Kultúra és nevelés Magyar Helikon, Bp., 1976. (hereunder: Eötvös, 1976), pp. 20.
[9] Eötvös, 1976, pp. 21.
[10] Eötvös József: Vallomások és gondolatok Magyar Helikon kiadó, Budapest, 1977, pp. 798 (2096).
[11] Eötvös, 1976, pp. 284.
[12] Felkai, 1979, pp. 16.
[13] Eötvös, 1976, pp. 16.
[14] Eötvös, 1976, pp. 17.
[15] Eötvös 1976, pp. 18.
[16] Felkai 1979, pp. 16.

Schools belonging to different religious main authorities applied different curricula. In lack of unified teaching materials and schoolbooks, the quality of teachers' work could be significantly different in different schools.

When addressing the above described problem, Eötvös, already a Minister at that time, stated that it was not sufficient just to codify compulsory and free public education, free access must also be ensure for it: everyone needs to be take equal share in all and any grades of schooling, and the system of social benefits needs to be established for poorer people; everyone should be free to decide whether they send their children to a religious school, a public school or have the children taught by private teachers in their homes, because "if this right is reserved for the wealthy, why should not we give this right and freedom to poorer people as well".[17]

In the historical situation he took over the responsibility of public education affairs, the greatest difficulty and perhaps the most important task for Eötvös was to find a way how the government should exercise its respective rights in this sphere of authority.[18]

Eötvös could not and did not want to evade this rather difficult issue; this is proved by the fact that he – for the first time in the history of Hungarian education – described the rights and obligations of the state regarding public education affairs. He made a total of fourteen speeches on elementary education at different parliament sessions. He pointed out the contradiction that whereas tuition fees had been collected in Hungarian elementary schools earlier, teaching had been free in upper schools.[19]

The standpoint of Eötvös in the basic question is clear: culture and education should be the responsibility of the state. According to his theory, this obligation can be led back to the task of the government to ensure well-being for its citizens and eliminate any impediments that hinder the growth of the population in material and intellectual properties.

Regarding reforming the laws, regulations and organisations of education, he was aware that the state and centralised powers could do very little, and he also knew that centralist principles could only be applied in cultural and educational policies upon the consideration of the circumstances and the possibilities.[20] County and communal management have great advantages, as they are more willing to contribute to the financial funding of education; also, regarding the selection of teachers, highly important factors were trust, the given personalities and the direct knowledge of the teachers' qualification backgrounds. In the work of the controlling bodies, the school councils, the experiences of locals were irreplaceable.[21]

Eötvös also explained in theory that the authority of the state is rather limited in the field of education. The state could set out the subjects of education, but not the spirit, and effects of the different subject and teachers on individuals were unmeasurable. Accordingly, education itself could not be regulated in a way that "it could be managed by all parties in a manner favourable for the constitution."[22] That is why individual efforts needed to be implemented with special care in order that it could serve the state, because the state was unable to properly serve the tasks of smaller units of public administration. The reconciliation of the two authorities always depended on the circumstances, and was not a theoretical but a practical issue.[23]

The main rights of the state regarding public education affairs originated from its respective responsibilities; they were related to the execution of compulsory education, the supervision of schools and to imposing the taxes the cover the costs of the schools' operations. The issue that the introduction and execution of compulsory education was the first and foremost priority for Eötvös out of the above listed activities can be shown by the extent of efforts he made for having the law on public education adopted. The reason for the fact that compulsory education remained formal in Hungary and was implemented at a slower pace than in other, more developed countries, can be attributed to the backwardness of the Hungarian social system, and, in relation with it, to feudally based classes continuing to validate their influence and posing the most diverse obstacles possible to government operations as early as in the law adoption process. The school system similar to that of the feudal age, the diversity of the school network (even in the aspect of managing organisations), the predominant extent of religious schools, the large number of one-classroom schools, and last but not least, the social relations of the population were all hindering aspects with respect to the successful introduction of compulsory education. Another contributing factor was the approach of parents to their children's schooling.

Eötvös mainly used his speeches to express his viewpoint on the distribution of rights and obligations regarding the education of children between the state and the parents. Like in several other cases, he was again guided by his liberal views. From the fundamental freedoms to be ensured for individuals, he derived the conclusion that parents need to be given the opportunity to decide whether they wanted to send their children to religious or municipal schools, thus using the rights and opportunities granted by the public education law freely. However, Eötvös did not provide unlimited rights for parents, as some parents would not have allowed their children to take part in compulsory schooling. Accordingly, the state maintained its entitlement to control compliance with compulsory education. Further to the potential negligence of parents to be monitored, the state also had this controlling task as it was obligated to protect underage minors unable to vindicate their own rights.

[17] Eötvös, 1976., pp. 19.
[18] Felkai, 1979., pp. 254.
[19] Eötvös, 1976., pp. 307.
[20] Eötvös, 1976., pp. 23.
[21] Eötvös, 1976., pp. 24.
[22] Uralkodó eszmék IV. kötet 7. fejezet cited by Eötvös, 1976., pp. 25.
[23] Eötvös, 1976., pp. 26.

Further to the implementation of compulsory education, the other two basic rights of the state in the field of public education were executing supervision and control as well as to impose and collect taxes on the population to cover public education expenses.

Although both these rights were disputed both at the public education committee meetings and by the different churches, Eötvös stuck to his principles (with some smaller modifications) and had it stipulated by law that educational costs are to be borne by the population of the whole country. Several different approaches opposed against one another in this subject. According to one of such approaches, parents would have been directly liable for covering schooling costs for their children; another approach stated the responsibility of the state regarding providing for public education. Eötvös had the standpoint that public education was of national interest, therefore its costs should be accepted to be borne in a shared manner, just like to costs of the construction of railways or prisons. Just like people not using any means of transportation or not going to prison were unable to exclude themselves from the obligations to pay relevant taxes, people were also obliged to contribute to the costs of public education whether or not they had children, as education was of national mutual interest.

While Eötvös found the appropriate representation of local interests ensured regarding the management of schools and the direct control of public education through the operation of school councils made up of settlement representatives and school and county-level school councils, he also enabled the state to be able to supervise and control public education at the highest level through appointing school inspectors, maintaining the controlling rights in the case of schools and the supervisory rights in the cases of religious schools.[24]

His reforms in education addressed conflicts between the secular, civil programme and feudal religious institutions in a more radical manner. Such conflicts surfaced in the state control of educational affairs; the separation of religious education from education as a whole, the limitation of the roles of religious schools; cut-back in state support; and the system of vocational education. Nevertheless, Eötvös was very careful and diplomatic both regarding the respective bill and its discussion; he made several concessions to churches: despite attacks from the opposition, he ensured state support for religious schools; he legalised religious education in every type of school; also, he mentioned the virtues of the church in the previous centuries in the field of education several times.

Church leaders, however, protested vehemently, as – despite the different concessions – it was clear and apparent that education fell under the full control of the state, and education started heading towards a more secular, civil direction.[25]

Perhaps the greatest accomplishment in the field of establishing the conditions for modern culture was decreasing the extent of illiteracy, and, in parallel, the establishment of a modern educational system. The programme for these measures was developed by József Eötvös the Minister of Educational Affairs of the 1848 and the 1867 governments. He said, "I find the future of the Hungarian nation to solely depend on the issue of culture, therefore I consider the issue of education, public education to be the most important issue of the whole nation.[26]

In 1868, he set up the system of public schools by acknowledging and leaving unchanged the already existing religious schools. Accordingly, Eötvös only ordered the establishment of communal schools where religious schools had not been in operation.

In the course of the census carried out at the end of 1869, it was revealed that only one third (32.8%) of the population of Hungary above the age of six could read and write. Literacy percentage among men was 41%, and 25% among women. (This literacy level was present in England 200 year earlier, and in 100 years earlier in France). According to the 1869 census, 14% of the settlements had no schools.

The imperial government of the period between 1848 and 1867 also placed high emphasis on the development and modernisation of education. As a result, the number of public schools increased by 3,000 between 1851 and 1865.

The reason behind the high percentage of illiteracy could be actually attributed to the fact that more than half of the children in the compulsory schooling age range did not go to school. When assessing the issue on nationality level, it can be stated that only 54% of Hungarian-speaking children in the compulsory schooling age range went to school; this percentage was 68% in the German minority, 51% in the Slovakian minority, 30% in the Romanian minority, and 36% in the Serbian minority. One of the most significant achievements of the new education policy was that by the mid-1880's, 80% of the children in school age regularly went to school.

At the time of the Compromise, the majority of Hungarian educational institute were either religious or municipal. In the subsequent period, the state did not stop at regulating and supervising education, and became actively involved in the development of the school network. During the dualist era, more than three thousand public elementary and secondary schools were built, not to mention the new vocational schools, colleges and universities. The most rapidly growing item in the state budget was the expenditure on education affairs. During the world was years, an annual average of 123 million crowns were spent on this item, which is 9% of the total state expenditure. Further to costs on education, a gradually increasing amount of support was granted to academic and scientific institutes, central and local public collections as well as to creative arts.[27]

After the Austro-Hungarian Compromise of 1867, primary education was regulated by the Act on Public Education (Act 38 of 1868) developed by József Eötvös. The elementary school consisted of six grades, but after finishing the fourth grade, children were allowed to proceed to secondary schools. Students

[24] Felkai, 1979, pp. 256.
[25] Eötvös, 1976. pp. 28.
[26] Felkai, 1979. pp. 216.
[27] Katus László: A modern Magyarország születése Kronosz Kiadó Pécs, 2012., pp. 522.

completing the 6 grades were obliged to go to "refreshment classes" until the age of 15. Within public education, everyone had to study in their mother tongues. Hungarian as the compulsory language in education was only introduced in 1879 in every school where other languages were used for education (Act 18 of 1879). Between 1869 and 1914, the number of public schools increased from 13,798 to 16,929. However, the real development of public education can be better demonstrated by the fact that the number of teachers doubled (from 17,794 to 35,253 teachers). Nevertheless, it needs to be mentioned as a deficiency that 59% of the elementary schools operated in a single-teacher and single-space manner even before the First World War.

As Minister of Cultural and Educational Affairs, József Eötvös made extensive efforts to modernise the supply of teaching materials and equipment of public schools. In 1868, he established a 'schoolbook committee', which intended to develop the quality of textbooks, schoolbooks and "guidebooks" (teachers' guides).

Many new schoolbooks were needed. Eötvös and the schoolbook committee established "free competition" with respect to writing schoolbooks: they requested well-known professional experts to write schoolbooks, but anyone was free to submit their draft schoolbook versions. These Eötvös-type schoolbooks had several editions, and some of them were even translated into minority languages and published for such minorities. Up until the end of the 1910's, these books were used for the teaching of minorities.

In summary, it can be stated that József Eötvös know that enormous financial investment would be required for the execution of the provisions set out in the law on public schools, and that its impacts would be felt only decades later. Based on the law on public education, Hungarian elementary education could be significantly modernised, but this development was the result of a long process. Changes launched on the basis of the activities of József Eötvös can be considered as remarkable even if the implementation of his concepts were not precisely and uninterruptedly followed in the subsequent decades. Without József Eötvös, such extensive development in Hungarian public education affairs until the First World War – even together with its flaws – would not have taken place.

Alexander I about the Polish Issue in the *Memoirs…* of Prince Michael Kleofas Ogiński*

*Przemysław Dąbrowski***

Abstract

The Memoirs… of Prince Michael Kleofas Ogiński are a very precious source of information about the social and political life on the territory of Poland, remaining under partitions. Moreover, they picture the initiative to restore the role of former Polish-Lithuanian Commonwealth, with reference to France or Russia, and present the numerous attitudes of the Polish and Lithuanian society towards the rulers of the two powers. The picture shown by Ogiński was full of radical loyalism and servility joined with „blind" belief in Tsar's promises. It seems as if it was a need of the hour, which should have been used and treated as a moral and political obligation in view of a lost state, even with a possibility of failure. This viewpoint was definitely a result of geopolitical realism, which influenced the proposals presented to the Tsar by the Memoirs' author.

Key words: *Prince Michael Kleofas Ogiński; Alexander I.*

The *Memoirs…* of Prince Michael Kleofas Ogiński extend from 1788 to the end of 1815. They constitute of four not very large volumes. The *Memoirs* are a very precious source of information about the social and political life on the territory of Poland, remaining under partitions. Moreover, they picture the initiative to restore the role of former Polish-Lithuanian Commonwealth, with reference to France or Russia, and present the numerous attitudes of the Polish and Lithuanian society towards the rulers of the two powers. That is why in order to characterise the outlook of Alexander I on the so called Polish issue [1], not only his opinions on the matter should be presented, but also the attitude of Ogiński himself towards the emperor and the proposals addressed to him *ad meritum*. It is really crucial, because it creates an image of a young Tsar, who was believed to solve the Polish issue. At the same time, Ogiński's proposals become a slightly forced inducement to Tsar's responses, forming his opinions on the future of the Kingdom of Poland. It also needs to be considered, whether the subject of this article sheds any new light on the general stance of the ruler of the Russian Empire with respect to the Kingdom of Poland. Are the recollections of Ogiński any different from the stance of the Russian emperor?

Alexander I, straight after taking the throne in 1801, had expressed his plans for restoration many times, of the former Polish-Lithuanian Commonwealth, in different configurations, but of course with close alliance with Russia [2]. It was his „favourite idea", thanks to which he could be perceived internationally as a liberal and thoughtful emperor, trying to obliterate the traces of his grandmother's, Catherine the Great, rule on these territories [3]. At first, he did so, following the suggestions and requests of his friend Adam Jerzy Czartoryski, who at the time was responsible, in the rank of deputy minister, for the Russian Ministry of Foreign Affairs [4].

Alexander I many times expressed his stance on the Polish issue in the letters to Czartoryski. Tsar wanted to convince the society and the authorities of the Duchy of Warsaw to fight against the Napoleonic France in return for the restitution of the former Polish state, but in the alliance with Russia. The future „state-like creation" in the East was supposed to be outlined by the riv-

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1 The notion of a „Polish issue" has to be considered in a broader context, because while writing about the Kingdom of Poland, Ogiński had in mind the territory of the Duchy of Warsaw together with eight western guberniyas. In the following *Memoirs* that Alexander I received, the Lithuanian and Russian territories were to constitute the Kingdom of Poland. Therefore, Tsar's replies and presented projects considered the possible restoration of the former Grand Duchy of Lithuania as the Kingdom of Poland.

2 M. Ogiński, *Pamiętniki o Polsce i Polakach od roku 1788 aż do końca roku 1815*, Poznań 1871 (1872), v. III, p. XI; Ogiński was fully aware of the fact. It was not possible, contrary to common opinion, that Alexander I approved the separation of Russian territories and creation of an independent and free state.

3 J. Czubaty, *Księstwo Warszawskie (1807–1815)*, Warszawa 2011, p. 440; H. Mościcki, *Ziemie litewsko-ruskie pod zaborem rosyjskim w świetle źródeł*, [no data] p. 1.

4 D. Szpoper, *Litewskie koncepcje odbudowy państwowości w sojuszu z Rosją do 1815 roku*, [in:] *Doktryny polityczne i prawne u progu XXI wieku*, ed. by M. Maciejewski i M. Marszał, Wrocław 2002, p. 225; see: W. Fiodorow, *Aleksander I*, [in:] *Dynastia Romanowów*, ed. by A. Iskenderow, Warszawa 1993, p. 291; H. Izdebski, *Litewskie projekty konstytucyjne z lat 1811–1812 i ich wpływ na Konstytucję Królestwa Polskiego*, [in:] „Czasopismo Prawno-Historyczne", v. XXIV, i. I, Poznań 1972, pp. 96–97.

ers of Dźwina, Berezyna and Dniepr (new territory was planned to comprise all the territories that used to be Polish in the past, together with Russian provinces, without White Russia). What is more, the emperor promised to grant the Kingdom of Poland „forever" bound with Russia a liberal constitution, which could fulfil the „wishes of the people"[5]. The Russian Emperor would automatically become the king of Poland and the clerks, authorities and the army were supposed to be national, that is Polish[6]. This plan, however, did not come true, because it was rejected in the beginning of 1811 by Prince Józef Poniatowski[7].

Czartoryski's mission became a failure, which prompted the Tsar to look for new allies needed to complete his plans. Michał Kleofas Ogiński was to play an important role in these plans, being a representative of conservative Lithuanian and Russian aristocracy, which after the Treaties of Tilsit intensified its claims[8]. He was the hope for the Tsar with his biography being a great advantage[9]. Ogiński turned to Alexander I, because he understood that the changes brought along with the French revolution, both for France and other countries, not necessarily meant a free and independent state for the Poles[10]. Ogiński claimed that Napoleon, while striving to create the „universal monarchy", would use the Poles as a „powerful leverage and threat against Moscow", still promising the restitution of the old Polish statehood.

The state formed in such a way, would definitely not be a free, independent and powerful organism. It would infringe the *status quo,* and being fully dependent of France would only have a slight autonomy[11]. That is why, while analysing the geographical location of the former Polish Lithuanian Commonwealth, Ogiński was closer to the conclusion that the political existence of the state should be conducted „under the emperor Alexander's protection", because such solution would bring „less problems and more facility"[12]. It was a chance that should have been used by every „good" Pole, because „[…] the emperor who from early childhood has been respectful and lawful, perceived the division of Poland as a wilfulness both unfair and not political"[13]. He justified: „Poles raised in the school of misery, educated by the long years of experience, deprived of any hopes for restoration of their freedom and independence, keeping the sad souvenir of the anarchy of their authorities and internal disputes, which defeated them, would feel content with joining under Alexander, with restored nationality, with profiting from the act adapted to their habits, with the ministry of justice run by truthful people and public offices held by their compatriots"[14]. Ogiński trusted Tsar openly[15]. In his opinion, the young emperor was a lawful and noble person, favourable towards the Poles[16]. On the other hand, the factor that could give even greater hopes for the proposals to succeed, was the constitution of 1809 received by the Grand Duchy of Finland[17]. Ogiński also raised this argument[18].

The author of the *Memoires* noted that Alexander I wanted to „give back" the Poles their „homeland" and legislation to bind them with himself even stronger, at the same time obliterating former difficult memories, and move the two Slavic nations, which were supposed to constitute the „unity"[19]. Tsar was aware of the fact that this plan could not be completed at once, but only under „favourable conditions"[20]. Also during the meetings of Ogiński and the Tsar in April and May, 1811 in Petrsburg, Alexander I made it clear to his adversary that the positive settlement of the Polish issue is very possible. The emperor did not deny, giving some hopes to restore the former Poland. His opinions were a response for Ogiński's oral demands, which were

[5] K. N. Szilder, *Aleksandr I. Jewo żizń i carstwowanie*, Moskwa 2010, p. 221.
[6] For more see: D. Szpoper, *op. cit.*, pp. 228–229.
[7] Ibidem, p. 229; H. Izdebski, *op. cit.*, p. 109.
[8] D. Szpoper, *op. cit.*, p. 226.
[9] Ibidem, p. 229; S. W. Mironienko, *Samodierżawie i reformy. Politiczeskaja borba w Rossjii w naczale XIXw.*, Moskwa 1989, p. 18; A. Zahorski, *Powstanie kościuszkowskie 1794*, [in:] S. Kieniewicz, A. Zahorski, W. Zajewski, *Trzy powstania narodowe: kościuszkowskie, listopadowe, styczniowe*, pod red. W. Zajewskiego, Warszawa 2000, p. 24; 81; D. Beauvois, *Wilno-polska stolica kulturalna zaboru rosyjskiego 1803–1832*, Wrocław 2010, p. 473; G. W. Makarow, *Rossija i sazdanie konstitucjonnawa Karoljestwa Polskawa*, [in:] *Polsza i Rossija w pierwoj trieti XIX wieka. Iz istorii awtonamnawa Karoliestwa Polskawa 1815–1830*, ed. by S. M. Falkowicz, Moskwa 2010, p. 32; he was a former *podskarbi* of the Grand Duchy of Lithuania. He was appointed by Alexander I a senator of the Russian Empire and became a secret counsellor.
[10] See: D. Szpoper, *op. cit.*, p. 230; M. Ogiński, *op. cit.*, v. III, p. 11; idem, *Pamiętniki o Polsce i Polakach od roku 1788 aż do końca roku 1815*, Poznań 1870, v. II, pp. 260–267; 290–292; F. Skarbek, *Dzieje Polski*, part II, *Królestwo Polskie od epoki początku swego do rewolucji listopadowej*, Poznań 1877, pp. XI–XII; at the same time, Ogiński understood fully the arguments supporting the French stance.
[11] M. Ogiński, *op. cit.*, v. III, pp. 6–7; see: idem, *Memoriał przedłożony Jego Mości Cesarzowi Wszech Rosji w miesiącu maju 1811r. w Petersburgu*, [in:] ibidem, pp. 25–33; 37–38; [idem], *Zapiski o Litwie i Litwinach wraz z odpowiedzią na pytanie: Czemu Napoleon znalazł mieszkańców tej prowincji daleko mniej ufającymi, zimniejszymi i wiele mniej skwapliwymi do gromadzenia się około swych sztandarów, aniżeli Polaków zamieszkujących Księstwo warszawskie*, [in:] ibidem, pp. 191–192; idem, *Pamiętniki o Polsce i Polakach...*, v. II, p. 294; Ogiński gave further arguments: „Poland rescued by France from total damage of Tsardom of Moscow (which should be considered as a unique matter) would definitely become a state of war for generations".
[12] Idem, *Pamiętniki o Polsce i Polakach...*, v. III, p. 7; G. W. Makarow, *op. cit.*, p. 31.
[13] M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. III, pp. 7–8; see: idem, *Pamiętniki o Polsce i Polakach...*, v. II, p. 284; Ogiński wrote that the emperor claimed that he had never participated in the partition of Poland, and in the depth of his soul he had criticised it, but as with Moskals, the generation of his time was not responsible for the miseries of the Poles.
[14] Idem, *Pamiętniki o Polsce i Polakach...*, v. III, p. IX.
[15] Ibidem, p. VI.
[16] Idem, *Pamiętniki o Polsce i Polakach...*, v. II, p. 250; idem, *Pamiętniki o Polsce i Polakach od roku 1788 aż do końca roku 1815*, Poznań 1873, v. IV, pp. 71–72; D. Szpoper, *op. cit.*, p. 231.
[17] E. Aleksandravičius, A. Kulakauskas, *Pod władzą carów. Litwa w XIX wieku*, Kraków 2003, pp. 71–72; H. Izdebski, *op. cit.*, p. 94.
[18] H. Izdebski, *op. cit.*, p. 114.
[19] M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. III, p. X; see: idem, *Memoriał przedłożony Cesarzowi*, [in:] ibidem, p. 61.
[20] Idem, *Pamiętniki o Polsce i Polakach...*, v. III, p. 8.

written down on request of the Tsar in a special memorial. The author of *Memoirs* proposed that the Russian army should enter Prussia, passing the Duchy of Warsaw. In his opinion, Prussian army would join the Russians to fight back the French attack. At the same time, if Alexander I proclaimed himself a king of Poland, which would be „a most sure measure, most natural", swearing at the same time the people of the Duchy of Warsaw to join Lithuania to „their country"[21] (he mentioned eight guberniyas creating it, these of Grodno, Vilnus, Minsk, Vitebsk, Mogilev, Kiev, Podolia and Volhynia[22], which were to be governed by the Duchess Catherine Pavlovna as the governor)[23], he would gain a twelve million crowd of followers[24]. Lithuania in such a shape would have a binding Lithuanian statute, a separate tax system, senate or a judicial tribunal, however without the possibility of appeals[25]. According to Ogiński, completion of these plans, that is joining the Duchy of Warsaw with Lithuania, would result in the restoration of Poland[26]. Władysław Wielhorski noted that Ogiński wanted to attract the people of the Duchy of Warsaw and move them closer towards the Tsar. In such a way Napoleon would lose precious support of the Poles in the face of an inevitable war with Russia[27].

Alexander I always listened to these proposals with due respect, answering Ogiński that „I am really content that our ideas have met. For six months I have been working on something that is close to what you propose" or he finished with words „it is proper, it is real. These are historical facts"[28]. Moreover, the Tsar stressed that eight guberniyas is an area too big for one governor to manage. He also asked whether the people of Volhyn, Podolia and the guberniya of Kiev would agree to call themselves Lithuanian, and he also wondered about the fiscal, military and trade benefits of a possible union. He also pointed that the candidacy of his sister, Grand Catherine Pavlovna, for the governor of administration of the eight guberniyas seemed rational, because Grand Dukes Nicholas and Michal were too young and Grand Duke Constantine wanted to „engage in military service"[29]. At the same time he presented Ogiński with a certain alternative dependent on the geopolitical situation – in case of war with France, he would create the Kingdom of Poland, joined under an imperial sceptre. If the war had not broke out, he would have fulfilled „our" great Lithuanian project[30]. Saying that, Tsar suggested that he is fully interested in solving the Polish issue, eliminating all the doubts and uncertainty[31].

It seems as if Ogiński's proposals were extremely interesting. However, a question arises: to what extent was it possible at the time to separate guberniyas from Russia, who perceived them as native Russian and, regardless of a form and scope, uniting it with any Polish statehood? Such significant changes in the territorial division of the Russian state would definitely cause a lot of criticism and resentment. It has to be remembered that Alexander I must have had in mind the assassination of Paul I that ended his reign. Russian political scene was not unanimous with respect to Tsar's plans[32]. The Russian conservatives led by Nikolai Karamzin, the author of voluminous *History of the Russian State*[33], were against the compromise in favour of the Western Krai, claiming that such activities would cause the protest of Austria and Prussia. They did not agree with Poles' argumentation, who reminded in their postulates the constitution of 1809 received by the Grand Duchy of Finland. The liberals, on the other hand, were supported by a lawyer and politician Michał Sperański – author of *Introduction to the Collection of Laws* of 1809[34].

Maybe because of the support of many people[35], Ogiński went one step further in his postulates and in October 1811 he

[21] Idem, *Memoriał przedłożony Jego Mości Cesarzowi Wszech Rosji w miesiącu maju 1811r...*, p. 35; G. W. Makarow, *op. cit.*, p. 33; while describing the attitude of Lithuania towards the Tsar, Ogiński wrote: „Despite the natural disdain one feels, while switching from independence to the obligation to listen, despite many infridgements, which were present in Lithuania's government, despite the general poverty that is being suffered in this country, the Lithuanians have never stopped being free of the emperors of Russia, since they have been dependent of them and they are full of trust to Your Majesty from whose grace they have benefited on many occasions, they were encouraged to expect everything from the justice and wisdom of Your Imperial Highnesss".

[22] See: D. Szpoper, *Sukcesorzy Wielkiego Księstwa. Myśl polityczna i działalność konserwatystów polskich na ziemiach litewsko-białoruskich w latach 1904–1939*, Gdańsk 1999, p. 3; after the January uprising, the territory of six guberniyas: of Vilnus, Grodno, Kovno, Minsk, Vitebsk and Mogilev, constituting at that time the so called *Siewiero-Zapadnyj Kraj* were an area within the Grand Duchy of Lithuania. On the territory of previous Polish-Lithuanian Commonwealth also three other provinces were created: of Volhynia, Podole and Kiev accounting for the *Jugo-Zapadnyj Kraj*.

[23] Idem, *Memoryał przedłożony Jego Mości Cesarzowi Wszech Rossyi w miesiącu maju 1811r...*, p. 36; Ogiński justified his stance by saying that „the governor as I understand should have a representation, which would brighten the province and be a great benefit to the city being the home of a government, would revive the communication between the citizens and would repair, only if the present environment enables that, the condition of a jingling coin"; see: H. Izdebski, *op. cit.*, p. 97; the governor was supposed to work as a deputy.

[24] M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. III, pp. 18–20.

[25] Idem, Memoryał przedłożony Jego Mości Cesarzowi Wszech Rossyi w miesiącu maju 1811r..., p. 37; J. Czubaty, op. cit., p. 441; see.: A. I. Miller, *Ot konstitucjonnoj hartii k riežimu Paskiewicza*, [in:] *Zapadnyie okrainy Rossijskoj Impierii*, Moskwa 2006, p. 95.

[26] M. Ogiński, *Memoriał przedłożony Cesarzowi...*, p. 64; see also: D. Szpoper, *Litewskie koncepcje odbudowy państwowości...*, pp. 235–237.

[27] W. Wielhorski, *Polska a Litwa. Stosunki wzajemne w biegu dziejów*, Londyn 1947, pp. 183–184.

[28] M. Ogiński, *Memoriał przedłożony Jego Mości Cesarzowi Wszech Rosji w miesiącu maju 1811r...*, p. 41.

[29] Idem, *Pamiętniki o Polsce i Polakach...*, v. III, pp. 20–21.

[30] Ibidem, p. 43.

[31] Ibidem, pp. 42–43; 51.

[32] Zob. też: D. Szpoper, *Litewskie koncepcje odbudowy państwowości...*, pp. 244; 248–249.

[33] L. Bazylow, P. Wieczorkiewicz, *Historia Rosji*, Wrocław-Warszawa-Kraków 2005, p. 186; 201; 351; Nikolai Karamzin after the Congress of Vienna wrote a memorial to Alexander I, in which he reminds the heritage of Catherine II and said not to „please the enemies", because „they will never be truthful brothers or trusted allies".

[34] Ibidem, p. 194; 195; A. Chwalba, *Historia Polski 1795–1918*, Kraków 2000, p. 216; H. Izdebski, *op. cit.*, pp. 111–113.

[35] D. Szpoper, *Litewskie koncepcje odbudowy państwowości...*, p. 232; it has to be rememberes that *Memoirs'* author was not alone in his postulates as he had many supporters, including prince Franciszek Ksawery Drucki-Lubecki, count Kazimierz Plater, prince Kazimierz Lubomirski, prince Konstanty Lubomirski, colonel Stefan Grabowski, Tomasz Wawrzecki, Karol Prozor oraz Adam Sołtan.

introduced some amendments. One of the proposals enabled every general governor to serve the post of a governor of Lithuania[36]. This idea, however, was not included in the draft of *ukaz* (so called project of constitution of the Grand Duchy of Lithuania) by Prince Franciszek Ksawery Drucki-Lubecki[37], which consisted of an introduction and eleven articles[38]. Its content suggested that eight guberniyas mentioned by Ogiński, similarly to the borough of Bialystok and Tarnopol, would constitute one province under a name of the Grand Duchy of Lithuania with a capital in Vilnus, governed by tsar's deputy[39]. The Chancellor's office would be created, governed by a minister appointed by „us", which would decide on the public matters of the Grand Duchy of Lithuania. The internal management was the task of the Administrative Council under the tsar's deputy, consisting of departments, managing director and counsellors. The civil law would remain the Lithuanian statute, Polish would be used in drafting the official documents, and public offices would be staffed by the citizens living on the territory of the province, who would able to prove a right of ownership[40].

Tsar reacted positively to these proposals, however, a final decision was not made[41]. In the following months, he even was said to delegate drafting the act to the people of Lithuania and preparing the army organisation plan in eight „Polish voivodeships" joined with the Russian Empire[42]. Were the concessions of tsar a reflection of his true intentions, "a warranty […] of a constant striving to their [Lithuanians' — P.D.] happiness"[43]? Or maybe they were a cold calculation aimed at gaining a vast majority of Polish society with strong armed forces in view of an inevitable war with France?[44]. Was Ogiński aware of the fact? His reply to the Tsar of 1811, which took form of a long memorial — in which he repeated his previous proposals, was a proof of last hopes to solve all these issues. Ogiński decided to help tsar with the armed forces only after regulation of the political situation of the eight guberniyas. He wrote: "I do not want to mislead you, Your Majesty, and suggest the things that are not real. The plan to be successful and efficient, useful for the state and worthy of Your Imperial Highness' feelings must be a consequence of western guberniyas' reorganisation"[45]. What is more, he suggested again that the restored Polish state could only be based on a close union with Russia. He explained that the people of the Duchy of Warsaw did not have any special feelings for Napoleon or were not especially grateful to him, but this emperor „[…] feeds their hopes and they see a rescuer of their state in him"[46]. He even proposed, in light of a conflict with France, for Alexander I to appoint himself a king of Poland in the first place. When he clarified this point, he then resigned from joining of the Lithuanian territory to the Duchy of Warsaw. He demanded the formation of a temporary Kingdom of Poland, but from eight Lithuanian guberniyas, which before 1569 constituted the Grand Duchy of Lithuania[47].

Ogiński, looking for arguments to support his brave, interesting yet almost unreal project, said: „The formation of the Kingdom of Poland is much easier than the organisation of Lithuania. One would have to propose, analyse and rewrite a new way of management for Lithuania, while proclaiming the existence of Poland, one would cause all the Poles to unite under an old form of governance […]. New Poland could be governed and divided into eight guberniyas, as it is now [...]"[48]. The most important source of law would be a shorter version of a constitution „close to" the Constitution of May 3, 1791 – „[…] which has always been highly valued by the Polish nation and would please the Polish families"[49]. Without a doubts, Ogiński's proposals were extremely original. It is interesting that Alexander I did not dismiss them, quite the contrary – he accepted it enthusiastically. He stressed that Ogiński maintained the "integrity of intentions" and he did not "discredit" him in the eyes of the "compatriots". Tsar claimed that the „proposed restoration of Poland is not contrary […] to the Russia's interest, is not depriving of the acquired provinces but on the contrary – they could serve as a powerful shield for the Empire and bind millions of citizens with Russia, the ones who have not yet forgotten their past existence. Poland will thus not separate herself

[36] M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. III, p. 44.
[37] D. Szpoper, *Litewskie koncepcje odbudowy państwowości...*, p. 237.
[38] Szerzej patrz: H. Izdebski, *op. cit.*, pp. 97–108.
[39] [F. K. Drucki-Lubecki] *Kopia projektu ukazu...*, [in:] ibidem, p. 46; por.: K. N. Szilder, *op. cit.*, p. 223.
[40] [F. K. Drucki-Lubecki] *Kopia projektu ukazu...*, [in:] ibidem, pp. 47–48; patrz: D. Szpoper, *Litewskie koncepcje odbudowy państwowości...*, pp. 237–238; G. W. Makarow, *op. cit.*, p. 34.
[41] W. Wielhorski, *Polska a Litwa...*, p. 184.
[42] M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. III, p. 52; W. Wielhorski, *Polska a Litwa...*, p. 184.
[43] M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. III, p. 51.
[44] Ibidem, p. 56; see.: H. Mościcki, *Pod berłem carów*, Warszawa 1924, p. 78; J. Czubaty, *op. cit.*, p. 440; E. Aleksandravičius, A. Kulakauskas, *op. cit.*, pp. 124–125; H. Izdebski, *op. cit.*, p. 109; one may suppose that this differentiation was rather leaning towards the second point. Tsar knew perfectly that a won war with France will end the dialogue on Lithuania's political autonomy. Main goal in case of wining would be reached, which would form a base for the discourse to disappear. Tsar mentioned his goals in one of the letters addressed to Ogiński, in which he wrote that „What hurts me is that we will not have time to finish our project with regards to Lithuania. It is not the matter of administrative measures and organisation of our eight guberniyas anymore; we need to think about increasing the military power to defend ourselves, therefore I ask you to communicate your thoughts on the resources I can receive from your fellows under my reign both to make the army bigger and to deliver any requisition, which would be useful for us. I count on your diligence and for your attachment to me".
[45] Idem, *Memoriał przedłożony Cesarzowi...*, p. 58.
[46] Ibidem, p. 62.
[47] Ibidem, p. 66; W. Wielhorski, *Litwini, Białorusini i Polacy w dziejach kultury Wielkiego Księstwa Litewskiego*, [in:] „Alma Mater Vilnensis", z. 2, Londyn 1951, p. 139; 144; Ogiński wrote: „[...] if the Duchy of Lithuania is going to be governed and organised according to political system directions, there is no doubt that a much more beneficial thing to Russia would be to transform it to Poland and proclaim oneself king".
[48] M. Ogiński, *Memoriał przedłożony Cesarzowi...*, pp. 67–68.
[49] Ibidem, p. 68; see: K. N. Szilder, *op. cit.*, p. 223.

from the Russian Empire and the citizens can be happy and content as long as they have the act. When it comes to the title, why ought I not to accept the title of the king of Poland, if it makes them happy?"[50]. At the same time, Tsar asked Ogiński to suggest the people, who could be responsible for the organisation of eight guberniyas constituting the Kingdom of Poland or the Grand Duchy of Lithuania[51].

At the beginning of 1812, Alexander I said to *Memoirs'* author that the project of „Polish act", drafted and proposed by the Tsar's clerks did not include many important stipulations. Therefore, he asked Ogiński to prepare another one. He replied that he had been working on something of this sort together with prince Lubecki and count Kazimierz Plater. The emperor asked only not to forget about the farmers while deciding on the legal status of particular social groups, because „[…] they are the most useful class and Your peasants have been always treated like the Helots". Without a doubt, this matter was one of the most important and most difficult and Ogiński informed the emperor about that[52]. From this time, however, Alexander I did not deal with solving the Polish issue as often as before[53]. The geopolitical situation had changed also as the Napoleonic war with France started.

In October, 1812, after temporary success of Napoleon, Tsar in a conversation with Ogiński said that he wanted to issue a proclamation to the Poles „people of the Empire" to ensure „[...] my care and my trust"[54]. At the same time it was supposed to raise hopes of the restoration of Poland when „the time comes"[55]. The project of manifesto preparation was entrusted to Ogiński. In the letter addressed to the emperor, Ogiński once again suggested that he should proclaim himself king as this would be more effective in making promises[56]. What is more, according to Memoirs' author, it would be highly appreciated by the western powers. He ascertained: „they will weigh the energetic measures used to continue the war against a common enemy, and they will double their efforts to support Your Majesty's wishes and will contribute to the triumph of his army"[57]. The projects prepared by Ogiński did not include anything more than demanded before. Restored Kingdom of Poland was to be eternally joined with the Russian Empire and contribute to strengthening Russia's powers. Tsar announced to create a separate management and grant a legislation and form of government based on the Constitution of May, 3rd as the fundamental law of the Polish nation[58]. Ogiński's draft, however, changed the tone of Tsar's statement. Tsar is believed to have said firmly „[…] in the face of heaven and earth" that he will perform the restitution of the Kingdom of Poland. It would consist of all the territories joined with the Empire as a result of three partitions, including the borough of Bialystok and Tarnopol and the territories of the Duchy of Warsaw. Until the displacement of French army, a temporary government with Poles would be appointed. An amnesty would also be announced[59]. Ogiński's proposals once again were received with kindness by Alexander I. He decided, however, that proclamation of such kind would be premature[60]. Most important move in this situation was the defeat of Napoleon and only after that the introduction of any system and territory changes. Tsar supported his claim saying „After all that had happened there cannot be any agreement between me and Napoleon. The war cannot finish that quickly, fall of him or me is needed. When I see him on the verge of losing and unable to cause any harm to the Poles, I will restore Poland. I will do this, because it is compliant with my opinion, with my feelings and even it lies within the interest of my Empire. I know I will have much trouble with the fulfilment of my plan but as long as I am not dead I will make it real"[61].

Ogiński did not have any reasons not to believe Tsar's responses and promises[62]. Alexander I put great faith in him, and their relations can be described as proper. He for sure had not been a key partner of Tsar in the strategy preparation and completion, as his proposals were private and did not enter the public sphere, and therefore could enter into force. The restoration of the Kingdom of Poland seemed certain at the time[63], the only uncertainty was the territory. It seemed very unlikely that the borders would be marked according to Ogiński's wish-

[50] M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. III, p. 71.

[51] Ibidem, p. 72; Ogiński pointed Ksawery Lubecki, Tomasz Wawrzecki, Wincent Gieczewicz, Szadurski, Ludwik Plater, prince Kazimierz Lubomirski, Tadeusz Czacki and Adam Rzewuski (in his place Tsar recommended choosing senator Kozłowski).

[52] Ibidem, p. 74; see also: J. Ochmański, *Historia Litwy*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1982, p. 197; H. Mościcki, *Pod znakiem Orła i Pogoni*, Warszawa-Lublin-Łódź-Kraków 1915, pp. 23–24.

[53] M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. III, p. 99.

[54] Ibidem, p. 148.

[55] Ibidem, pp. 149–150.

[56] Ibidem, p. 152; G. W. Makarow, *op. cit.*, p. 52.

[57] M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. III, pp. 153–154.

[58] Ogiński opracował: *Projekt listu, jaki jego Cesarska Mość ma wyprawić do księcia marszałka Kutuzowa...* oraz *Projekt proklamacji do narodu polskiego...*, [in:] ibidem, pp. 155–163.

[59] Idem, *Projekt proklamacji do narodu polskiego...*, p. 162.

[60] Idem, *Pamiętniki o Polsce i Polakach...*, v. III, pp. 168–169.

[61] Ibidem, p. 169.

[62] See: idem, *Pamiętniki o Polsce i Polakach...*, v. IV, p. 116; 118; 121; in the second half of 1812 Alexander I accepted the delegation of guberniyas of Grodno, Vilnus, Minsk, Vitebsk, Mogilev, Kiev, Podolia and Volhynia and also the borough of Białystok. In his words to the guests he said „Gentlemen! We need some time and patience and you will be much more content with me". In December 1812, when Tsar was leaving Petersburg he assured Ogiński that after displacing Napoleon from the Duchy of Warsaw, „[…] I will keep my promise and will think about the measures to restore Poland". He added: „you know my intentions in this matter […]. For now remain patient and bear trust".

[63] M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. IV, p. 128; Alexander I assured numerous times in the correspondence with many people that Poles will get their „homeland" and „their name" back.

es that is including eight guberniyas[64]. This assumption was confirmed by the events of 1815, when under the stipulations of Congress of Vienna the creation of the Kingdom of Poland became a fact.

Information about the formation of the Kingdom of Poland came to Vilnus and Minsk already in June 1815. According to the declarations, new political creation was supposed to include eleven provinces that is: of Warsaw, Vitebsk, Piotrkow, Grodno, Vilnus, Lublin, Żytomierz, Mogilev, Minsk, Podolia and Kiev. Each one of them consisted of two voivodeships. The basis of a new political system of the Kingdom of Poland also was established. The authorities had strived extremely to find the source of this untrue information[65].

In November 1815 representatives of the nobles from guberniyas of Vilnus, Minsk and Grodno were delegated to Warsaw, where Tsar was residing[66]. On private meeting with Alexander I held on 12 November, Tsar dressed in a Polish general's uniform with „huge White Eagle embellishment"[67], was convincing again that he was going to fulfil his plan to join the Western Krai to the Kingdom of Poland, because he is a reliable person and always "fulfils all […] the obligations", He added: „I created this Kingdom on a very firm base, because I forced the powers of Europe to grant its existence with the treaties. I will do as I promised, but it may not happen at once. Trust is needed. I should be trusted after what I have done and my decisions will not be subject to change[68]. These assurances could not be guaranteed, which Ogiński understood very well[69]. What is more, Tsar asked him not to mention the inclusion of Lithuanian and Russian territory during the visit of the representatives of three guberniyas, because it was supposed to be „triggered by me, that I want this" and not from numerous demands from the outside[70]. He said: „There is no one who could suppose that I am going to restore these provinces from Russia […]. On the contrary — I want to assure the influences that bind Russia with my country and I will prevent my people from complaining […]. You are unhappy in Lithuania and you have the right to feel that way so long until you will not be united with your fellows and until you will not benefit from the constitution. Only then will the union with Russia strengthen the trust and consent between the nations[71]. Tsar needed time again and a sign of trust to fulfil his promises to Ogiński, representing the aristocracy of Russia and Lithuania. The delegates present during the meeting felt disappointed with the talks to the emperor. One of the witnesses wrote that „They have looked at us gloomily […] they did not seem content and they did not hide that Mogilev, Vitebsk, Volhynia, Podolia and Lithuania should be given back to them". They left Warsaw „[…] bearing in heart a justified feeling that the Polish issue does not have any better ally to its national spirit and more certain hope to its own powers"[72].

Just a small part of Lithuanian proposals was included in the constitution of the Kingdom of Poland. It is not known whether it was a result of Ogiński's and others' initiatives and talks with the Tsar[73]. The author of *Memoirs*, however, failed to achieve his biggest goal to restore the former greatness of Lithuanian and Russian territories in a union with the Kingdom of Poland or constituting the Kingdom of Poland, which meant the fiasco of „mission of Ogiński", being the result of false hopes to restore the Grand Duchy of Lithuania[74].

The proposals of Alexander I were not a „deed of gift" or a „benefit without obligation". From the very beginning it was clear that the prepared Kingdom of Poland was supposed to be a „counterweight" with Russia to France, despite the initial Alexander's fascination with Napoleon. Nevertheless, it is worth showing the other arguments, supported by voluminous and extremely interesting sources to justify the positive settlement of Polish issue that were occurring to the end of 1815. On the other hand, the picture shown by Ogiński was full of radical loyalism and servility joined with „blind" belief in Tsar's promises. Such a viewpoint had been explained by him in his memories: „to celebrate and judge these benefits, one has to definitely be a Pole or at least one should have seen the motherland torn into pieces, destroyed, countrymen dispersed, all the relationships broken and get it all back by a benevolent hand, reclaim the homeland, the name of the state, the safe shelter, the rule of law and the constitutional government after the years of adversity"[75]. It seems as if it was a need of the hour, which should have been used and treated as a moral and political obligation in view of a lost state, even with a possibility of failure. This viewpoint was definitely a result of geopolitical realism, which influenced the proposals presented to the Tsar by the *Memoirs'* author.

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[64] D. Szpoper, *Litewskie koncepcje odbudowy państwowości...*, p. 244; H. Mościcki, *Pod berłem carów...*, p. 80; already at the begining of January 1813, Alexander I wrote in a letter addressed to Czartoryski: „Do not forget that Lithuania, Podolia and Volhynia have been so far considered as Russian provinces and no logic in the world will convince Russia to see it under the reign of a different ruler, different to the one of Russia".

[65] More in: D. Szpoper, *Litewskie koncepcje odbudowy państwowości...*, p. 245.

[66] The members of the delegation in: ibidem, pp. 245–246; M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. IV, p. 167; see also: great prince Nikolaj Michajłowicz, *Impierator Aleksandr I. Biografija*, Moskwa 2010, pp. 188–189; S. W. Mironienko, *op. cit.*, p. 153.

[67] M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. IV, p. 169.

[68] Ibidem, p. 170.

[69] D. Szpoper, *Litewskie koncepcje odbudowy państwowości...*, pp. 245–246.

[70] Ibidem, p. 246; M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. IV, p. 171; 247; H. Mościcki, *Pod berłem carów...*, pp. 86–88.

[71] M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. IV, p. 172.

[72] Cit. by: H. Mościcki, *Pod berłem carów...*, p. 88.

[73] See: H. Izdebski, *op. cit.*, p. 94; 131–135.

[74] See: M. Ogiński, *Pamiętniki o Polsce i Polakach...*, v. IV, p. 177; at the end of his memories, Ogiński wrote: „I end my diaries at the time when my age and my weakness force me to abandon the public service to seek pleasure of rest and comfort in a remote after a turbulent life, which would present me with only unpleasant memories, if the hopes had not risen in me sometimes and the service to my country and my countrymen made me happy".

[75] Idem, *Pamiętniki o Polsce i Polakach...*, v. III, pp. XIV–XV.

Czeslaw Milosz against the Communist System – Contribution to the Discussion

Mikolaj Tarkowski *

Abstract

On the base of the scientific literature arose the disputes related to the question of whether literary works of Czesław Miłosz – exemplified by novel Zniewolony umysł – was a symptom of anti-communist or anti-totalitarian beliefs of Miłosz. We should note, apart from this dispute, that the views of the Polish poet are difficult to analyze in isolation from criticism that Miłosz spoke about the idea of nationalism and achievements of Polish Romanticism – especially the idea of messianism. Analysis of works of Czesław Miłosz, with emphasis on the anti-nationalist and anti-messianic factor, allow us to conclude that Miłosz did not represent the type of right-wing anti-communism.

Key words: *anti-communist thought; anti-totalitarian thought; Polish emigration; Czeslaw Milosz.*

Czesław Miłosz, who lived from 1911 to 2004, was one of the most influential Polish figures in the literary life of the twentieth century. He left behind a huge intellectual legacy, which to this day is a source of literary and socio-historical analysis. Czesław Miłosz should be counted among the Poles, who in the last century had a significant impact on the fate of Polish culture and society. Polish poet belongs to a group of such eminent Poles as pope John Paul II, cardinal Stefan Wyszynski, or the president Lech Walesa. This type of comparison was done particularly after the awarded by Czesław Miłosz, the Nobel Prize in Literature. An important observation is that the period of activity of *Solidarność* and later such an opinion became the reason to his internal frustration. Czesław Miłosz, contrary to expectations of the precursors of the social movement – *Solidarność*, never accepted the role of national hero. He rejected the idea of being the poet and mentor of Polish nation, which was derived from the accomplishment of Polish culture in the Romantic period. According to the members of opposition he had to play this role, which was also a proof of its legitimacy and moral support for the social movement of *Solidarność.* Czesław Miłosz did not accept this role and did not agree with the placement of his person in the Pantheon of national heroes. He tried to get out of this difficult situation for him. According to the organizers of the anti-communist protests in Poland, he was too moderate. According to them, this attitude precluded unequivocal expression of support for workers, who acted against the communist government. According to Miłosz, his attitude was due to the fact that in the decisive moments of the fall of communism (80. years), the spiritual profile of the Polish nation began a dangerous maneuver aimed at achieving the nationalist course [1].

At this point, touching the very characteristic anti-nationalist elements of the views of Czesław Miłosz, we should go back to his childhood and student time. In this period we can observe the formation of the views of Polish writer, which determined his ideological decisions in the next decades. The anti-nationalist atmosphre remained in a family house of Miłosz. Czesław Miłosz was born in 1911 in Szetejny (nowadays the Republic of Lithuania). His family cultivated the tradition of the multicultural history of Grand Duchy of Lithuania.

Through the ages of exist the common Polish and Lithuanian state, in the spirit of mutual intelligibility coexisted with each other Poles, Lithuanians, Belarusians and Jews. Polish poet remembering his childhood, he emphasized that patriotism – which was represented by members of his family – did not focus on the love of the nation or the state, but it was understood as patriotism of nearest region – home province. Patriotism of Czesław Miłosz was not inspired by a national spirit, but his sense of patriotism corresponds to the spirit of the tradition of the former Grand Duchy of Lithuania. In these lands family of Czesław Miłosz lived for centuries. The cultural heritage of this land and its associated dreams of creating a federation of territories inhabited by Lithuanians, Poles, Belarusians, was finally struck in the first half of the twentieth century by the triumph of the idea of nation-states. From the point of view of ideological choices, the interwar period, and especially the decade of the thirties was decisive for the younger generation, which was centered around the University of Stefan Batory in Vilnius and Research Institute of Eastern Europe in Vilnius. Miłosz maintained close contacts with the staff of the Institute at a time when he studied at the Faculty of Law on Univeristy of Stefan Batory in Vilnius. Franciszek Ancewicz – Lithuanian, who rep-

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1 A. Franaszek, *Miłosz. Biografia*, Kraków 2011, s. 702.

resented anti-soviet views and social democrat Teodor Bujnicki dealt with studies related to the history of the Eastern Europe and researches on the Soviet Union. Some of the representatives of the young generation of left-wing looked for the roads leading to better and more equitable social arrangements. The same part of the youth rejected nationalism, that represented by the right-wing parties[2].

Czesław Miłosz – in his student years – was the representative of the left-wing views, he criticized the capitalist order, but he had also very much doubt that involved a model of governance in the Soviet Union[3]. In his memoirs, the poet said that his early views coincide with ideas of Stanisław Brzozowski, who was the author of novel – *Płomienie*[4]. It should be noted also that the youthful leftist worldview of Czesław Miłosz stood in opposition to the traditional Polish patriotism based on religious values[5]. The views of Miłosz characterized also by strong disapproval of nationalist and racist views. The cooperation of Miłosz with a group of communists gathered around a charismatic Henryk Dembinski was the proof that he – in the face of growing fascist tendencies of the Polish right – would not remain in the sphere of intellectual isolation. Miłosz knew that this type of insulation also meant social exclusion[6].

It should be noted that Polish poet in the group of Henryk Dembinski remained at the antipodes of this committee. Especially because he was not as radical as his peers. In particular, Czesław Miłosz considered, that the total state did not give any chance to the development and normal functioning of the cultural sphere. After his return from Paris in 1935, he realized that he departed significantly from people, who were before partners for intellectual conversations and meetings. Miłosz said that the cause of breaking the connections were ideological differences, which consisted of radical communist views represented by his former colleagues[7].

After the Second World War in Poland prevailed stalinist regime. A characteristic feature of this period was the fact that the state totally captured the cultural sphere. This was done through collective indoctrination of the human mind, but also by influencing the system to individual people, particularly intellectuals, including writers and poets. Stalinist period in the history of Polish People's Republic was a time of implementation the ideas of Hegel into the Polish society. The new reality was explained by the idea of *historical necessity*, which was referred by the Miłosz the *New Faith*. Authorities, which was programmed to produce enslaved minds resistant to any criticism of government policy, wanted to prove that course of development, that took by the communist state was the only right solution, designated by historical destiny[8]. Communism as a universal idea that could unite people of all continents, was perceived by intellectuals as an attractive form of development of societies. This idea seduced some intellectuals from Western Europe, who were able to ignore the practice of enslaving the people that existed in the Soviet Union, in the name of achieving historical purposes – „bright future", „better world" for all people. However, the Russian intelligentsia (experienced directly by the practice of authorities of the Soviet Union), the gap between the lofty slogans and slavery conditions in which they live, rationalized by dialectical method combined with a mystical-religious gnosis. The method strengthened the belief that the communist governments based on a lie, but can lead to the truth. Meaning of creating a communist state also was explained by referring to the parallel, which was constructed by the symbolist poets such as: Aleksnadr Blok, Andrej Biely, Walery Boriusow. According to this parallel the birth of communism was compared with the birth of christianity[9].

In the first years after Second World War II Czesław Miłosz decided to cooperate with the communist authorities in Poland. In the years 1945–1951 he held positions in the Polish diplomatic missions in the United States and France. This agreement was the result of an internal compromise. The poet was aware of the risks posed by the communist regime. He did not live in the illusion. The situation, in which he found himself at that moment, was very complicated. He approved of communist rule in Poland, out of necessity, but he was far from full recognition of the new communist reality. Travel abroad, Miłosz treated as a necessity. Miłosz took advantage of former relationship with Jerzy Putramnet (writer, who supported the post-war communist authorities in Poland). This allowed him to leave Poland[10]. Removal to the United States seemed to him the best possible solution, regardless of the moral losses. According to Polish poet, the political system in Poland was a real threat. On the one hand it lead to the physical elimination of people, who were hostile to the regime. On the other hand, Czesław Miłosz feared that the authorities that enslave society and individuals, deprived of their identity. Miłosz was afraid to play the role of *homo sovieticus*. Despite these concerns he decided to cooperate with the foreign service of Polish People's Republik. Service at the Ministry of Foreign Affairs had an impact on the opinion of Miłosz in the future. For example, Polish poet Jan Lechoń, in one of the statements, alleged Miłosz that the communist government paid him the money, at the same time, when the authorities shooted „the best Poles"[11].

Not only Czesław Miłosz struggled with similar dilemmas. Members of Polish intelligentsia, who worked in the communist state, measure their strength against the new circumstances. The

[2] J. Bardach, *W obiektywie nauki i lustrze pamięci*, Warszawa 2004, s. 99.
[3] M. Kornat, *Czesława Miłosza spotkania z Rosją*, [w:] *Rosja. Widzenia transoceaniczne. Tom II. Mosty napowietrzne*, Cz. Miłosz, Warszawa 2011, s. 11.
[4] Cz. Miłosz, *Widzenia nad zatoką San Francisco*, Kraków 2000, s. 192.
[5] This kind of patriotism was named by Andrzej Walicki as: „bogoojczyźniany"; see: A. Walicki, *Zniewolony umysł – po latach*, [w:] *Poznawanie Miłosza 2. Część druga 1980–1998*, red. A. Fiut, Kraków 2001, s. 189.
[6] E. Pasierski, *Miłosz i Putrament. Żywoty równoległe*, Warszawa 2011, s. 140.
[7] M. Kornat, op. cit., s. 11–12.
[8] Ibidem, s. 17.
[9] A. Walicki *Zniewolony umysł – po latach*, [w:] *Poznawanie Miłosza 2..*, s. 193–194.
[10] E. Pasierski, op. cit., s. 192.
[11] M. Kornat, op. cit., s. 26.

appearance of ,,ideocratic" doctrine of the Polish state, caused among the representatives of the Polish intelligentsia different models of behavior toward communist reality. Some groups did not accept the communist regime, which caused the obvious repression. Others, such as catholic intellectuals were immune to indoctrination because of the compromise reached with the cummunist authorities. Others completely accept communist totalitarian ideology. However, some of them made concessions did not anticipate that it lead to a full cancellation of their identity [12].

How did the socio-political reality refer Czesław Miłosz? After the conditional compromise with the official government, he took the fight, which was aimed at his full intellectual liberation. Biography of Miłosz shows that in 1951 he gave up the post of secretary of the Polish Embassy in Paris. Polish poet in his memoirs, believed that it was a very risky move, which condemn him to lose contact with homeland. This decision marked also the severance of ties with the recipients of his literary works. The poet himself called that decision a suicide. Despite this awareness he decided to live as an emigrant. During this period he analyzed his own attitude towards the communist regime. He did this on the basis of literary works.

Czesław Miłosz in the journal *Kultura*, which was edited by Jerzy Giedroyć, published in 1951 in the article, that entitled *Nie (No)*. In this article he pointed out that he was never a communist. Miłosz explained that he worked with the communist Polish state because he thought that Poland in the initial period sought to socialist model. His collaboration with the state was possible because the youth and workers had an open path to the university. His satisfaction was growing because of the land reform. What decided, that Miłosz shattered chance to stay in Poland? First of all, author of *Zniewolony umysł* regarded Poland as a country where the real authority launched the idea *New Faith*. Miłosz genuinely considered that the communist idea became a captivating force. In his eyes Poland changed into a *ideocratic* state. Polish poet differ from some of the anti-communists (operated after the period of rule of Edward Gierek), who totalitarian doctrine of social relations were defined as the apparent play of power, directed to cause of fear. In the fifties Miłosz felt real risk of loss – by the Polish intelligence – their own identity as a result of the crushing impact of totalitarian ideology. In the opinion of Miłosz, totalitarian Soviet Union, which was the source of a new ideological current, was at the same time real force in international politics. This did not mean that the Polish writer affirmed the constitution and political practices of that country. The opposition of the eighties in Poland on the same ideologies watched from a different, that is, from a historical perspective. They also claimed that totalitarianism was a threat, but the communist enemy at that time was much weaker [13].

One of the most debated, but the most distinctive theses, which was presented by the author of *Zniewolony umysł*, was the opinion that the totalitarian regime created (during its initial power in Poland) unprecedented psychological pressures. The mental stress that shaped attitude of Polish society was effectively used by the authority. This method corresponded with other means of terror, which meant physical persecution [14].

This thesis was met with criticism of the Polish emigration, which operated in Western Europe. According to Gustaw Herling-Grudzinski, Polish writer who worked in exile, thesis presented in the book *Zniewolony umysł* was made up. In his view, these thesis justified the opportunism of the Polish intelligentsia, including the Czesław Miłosz. The author of book, that entitled *Inny świat* recognized attitude of Polish poet's unbelievable. Gustav Herling-Grudzinski, in contrast to Miłosz did not believe at all in the idealism of people, who were in power. In his opinion those people were guided only low feelings such as: desire for gain and personal benefits. However, Herling-Grudzinski explained the obedience those people in power by the fact that in communist reality there was the fear of terror, which was also directed by the state against those people who have served this system. Herling Grudzinski made such a social analysis and ignored the factor of destructive ,,psychological pressure" [15].

Czesław Miłosz characterized in the novel *Zniewolony umysł* method of dealing with the communist reality. This method was described by the Polish writer. It relied on the participation of conscious mass play with the system. *Ketman*, because this name was given to this method, developed in all the countries of people's democracy. It was a symptom of adaptation of communist societies, which accepted (only apparently) the assumptions of the ,,New Faith". In practice *Ketman* was a symptom of the collective ,,art" that played on a massive scale. At the same time, people who take part in this performance, hid their true thoughts and feelings. These feelings were not associated only with the ruling state system, but in general in all areas of life. Czesław Miłosz, believed *a contrario* that an open fight against totalitarian ideology was doomed to fail [16]. The aim of this fight was to preserve the idea of ,,love and good". In accordance with the views of a friend Czesław Miłosz – Tadeusz Kroński (communist) – the fight against a totalitarian state focused on the protection of ,,precious values of the European heritage". *Ketman* that Czesław Miłosz presented in *Zniewolony umysł* as reaction on ,,ideocratic" rule was criticized by anti-communist opposition in eighteen in Poland. Some of the representatives of opposition alleged that such an attitude was a sign of cowardice and opportunism [17].

Such voices intensified after a visit by Czesław Miłosz in Gdansk in June 1981. Czesław Miłosz was qualified by the activists of the union of ,,Solidarność", one of the great Polish heroes, whose work, was recognized internationally. The proof of this recognition was that in 1980 he was awarded the Nobel Prize in literature. According to the opinion, which was represented by the activists of *Solidarność*, Polish poet had to make

[12] A. Walicki, *Zniewolony umysł – po latach*, [w:] *Poznawanie Miłosza 2…*, s. 209.
[13] Ibidem, s. 204; zob. też: M. Kornat, op. cit., s. 25.
[14] A. Walicki, *Zniewolony umysł – po latach*, [w:] *Poznawanie Miłosza 2…*, s. 208.
[15] Idem, *Nieporozumienia wokół antykomunizmu*, [w:] *Antykomunizm po komunizmie*, red. J. Kloczkowski, Kraków 2000, s. 215.
[16] Idem, *Zniewolony umysł po latach*, Warszawa 1993, s. 249.
[17] Idem, *Zniewolony umysł – po latach*, [w:] *Poznawanie Miłosza 2…*, s. 203.

a clear sign of support and ,,holy" aspirations of Poles in the struggle to overthrow the communist system. A fragment of one of his poems – *Który skrzywdziłeś (Who hurt)* – was placed on *Monuments to the Fallen Shipyard Workers* 1970 (*Pomnik Poległych Stoczniowców 1970*). This monument was erected by activists of *Solidarność* in 1980 in the vicinity of the Gdańsk Shipyard, which was the center of Polish fight with communist system. This monument to this day is considered one of the artifacts of the anti-communist resistance. The same rank was BHP hall, where activists held a meeting with Czesław Miłosz. In this hall the opposition activists and government representatives signed in 1980 *August Agreements* (*Porozumienia Sierpniowe*), which ended a nationwide strike. Most Poles associate this mythical place with the creation of *Solidarność.* It was expected that in the eyes of union Czesław Miłosz gave moral support, which was supposed to help in the fight with the system of communist power. However, contrary to expectations Miłosz during the visit avoided the role of political strategist and mentor of people of *Solidarność*. He marked the other hand, that it was not a political activist. He also said that he did not come to Polish as a moral guide that would tell people what to do. However he stressed, that he came to Gdansk to take lessons from socially committed trade unionists and working people. An interesting issue was his attitude towards the election of John Paul II as pope. He obviously did not oppose this choice, but he suggested – again in a very subtle way – it could be the beginning of the rebirth of Polish messianism, so strongly presented in the Polish culture in the Romantic period. In June 1981, at the end of the meeting, Lech Walesa made one more attempt to clearly identify the purpose of visit of Czesław Miłosz in the Shipyard. He asked the Polish poet of instructions to help fight for a better future. Czesław Miłosz chose then the characteristic silence, without commenting on these opinions. He probably remembered his earlier promise that made him shy away from the role of ,,herald of the opposition", whose every word would be used in the political objectives [18].

Literary works of Miłosz was interpreted by activists of *Solidarność* in the spirit of the struggle for national sovereignty. Polish poet did not want to his literary works was included in the circle of messianic literature. Miłosz often pointed out that the national idea – implying a breath of messianism – so clearly presented in the works of Adam Mickiewicz and Fiodor Dostojewski, led both to false generalizations and patterns that hinder proper development of Polish-Russian relations [19]. We should add at this point, that the anti-totalitarian or anti-communist beliefs of Czesław Miłosz were never directed against the Russians and their culture. On the contrary, these ideas struck the structure of the Soviet state that wanted to spread its ideology directed against the independent cultural symptoms. Polish poet also supported the anti-communist aspirations of other nations. When Soviet troops brake manifestation of supporters of Sąjūdis gathered at the TV tower in Vilnius in January 1991, he protested together with Josif Brodsky and Tomas Venclova against ,,inhuman aggression" of the Soviet Union [20].

Today in Poland, in the scientific literature arose the disputes related to the question of whether literary works of Czesław Miłosz – exemplified by novel *Zniewolony umysł* – was a symptom of anti-communist or anti-totalitarian beliefs of Miłosz [21]. We should note, apart from this dispute, that the views of the Polish poet are difficult to analyze in isolation from criticism that Miłosz spoke about the idea of nationalism and achievements of Polish Romanticism – especially the idea of messianism. Analysis of works of Czesław Miłosz, with emphasis on the anti-nationalist and anti-messianic factor, allow us to conclude that Miłosz did not represent the type of right-wing anti-communism.

[18] S. Chwin, *Miłosz. Interpretacje i świadectwa*, Gdańsk 2012, s. 204–214.
[19] Cz. Miłosz, T. Venclova, *Powroty do Litwy*, Warszawa 2011, s. 250.
[20] T. Venclova, J. Brodski, Cz. Miłosz, *List otwarty: Poeci dla Litwy*, [w:] ibidem, s. 258.
[21] M. Urbanowski, *Myśl antykomunistyczna w literaturze polskiej 1939–1989 (rekonesans),* [w:] *Antykomunizm po komunizmie…,* s. 157.

Henryk Krajewski – Advocate, Insurgent 1863

*Ewa Stawicka**

Abstract

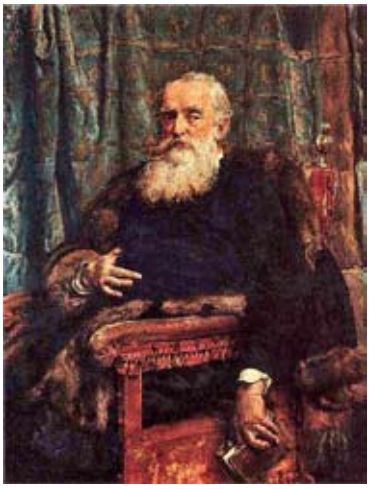
Henryk Krajewski (1824–1897) was active in the underground independence movement in Warsaw. He became one of members of the underground Polish government in the time of the January Uprising, 1963–64, against the Tsarist Russia. Krajewski was imprisoned and three times exiled to Siberia. Thoroughly educated (as a young man, he graduated from law faculty at Moscow University and during long-term stays in Siberia he made a lot of self-study), the last 27 years of his life he practiced as a lawyer in Warsaw, earning fame both in civil and criminal cases and trying to organize advocates' self-government.

Key words: *Advocates' Aid Found; Duchy of Warsaw; January Uprising; Polish Kingdom; Spring of Nations.*

Jan Matejko

Jan Matejko's father was a Czech immigrant and his mother was of German origin. Their son was born, lived and worked mostly in Cracow – although once he got a proposal to take a professorship at the Academy of Fine Arts here in Prague. He became the most famous Polish historical painter. A significant part of his great legacy are portraits. He used to seat some of his models in his favorite, old arm-chair, in which he presented also himself at a self-portrait.

Matejko painted the hero of this story as they both were old men already; it was at the end of the 19th century. They lived more or less in the same time. However, whilst Matejko spent almost all his life in Cracow, Henryk Krajewski's existence was closely associated with the Polish lands which remained under Russian rule, for the most part – with Warsaw. The so-called partitions of Poland took place at the end of the 18th century. As the result, Poland ceased to exist for about 130 years (until 1918) for its lands were divided between Austria, Prussia and Russia. But the people kept on feeling the unity all that time. A consequence of this phenomenon were i.a. several attempts to get independence which were undertaken by common efforts of Polish patriots acting in different lands.



Henryk Krajewski

Henryk Krajewski, who was born in 1824, finished legal courses in Warsaw and then left for Moscow in order to continue his studies (the Warsaw University had been closed after the collapse of the November Uprising 1830). He settled back in Warsaw in 1846 and started an advocate apprenticeship at the Civil Tribunal but soon was nominated as a clerk at the state Revenue Department. It seemed that he could start a quiet career, like two brothers of him – who both became famous physicians. But, contacts with Russian liberals and Slavophiles established during the stay in Moscow, prompted him to take the underground activity immediately after returning to Warsaw. His aim was to get national awareness of the masses, and finally – full state independence. A group of well-educated women called "Devotees" supported this movement intellectually and organizationally. These brave girls usually gathered at a small flat of novelist Narcyza Żmichowska.

In 1848 the Spring of Nations' moods dominated almost throughout Europe. The Tsarist regime was so harsh at that moment that it would be absolutely unrealistic to initiate an uprising at the territories annexed by Russia. However, Warsaw con-

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spirators – Henryk Krajewski among them – developed plans for assistance and cooperation with Polish insurgent troops acting in Prussia and Austria. The uprising in Great Poland (around Poznań) collapsed soon, and afterwards Russian secret services gradually shelled all its helpers in Warsaw. Krajewski was arrested in 1850. Another conspirator testified against him, so the interviewers had a possibility to pressure on our hero. Nevertheless, Krajewski remained silent within two first years of stay in Citadel harsh conditions. Finally, the investigators used very brutal methods. Severely beaten, Henryk Krajewski decided to reveal some names of colleagues whose role in the conspiracy was marginal (none of them was punished afterwards). He could not forgive himself that he had betrayed and, still staying arrested, twice tried to commit suicide. He broke his leg jumping from the second floor of the jail. After recovery, a year later, he jumped from the top of a very high stove – and broke his jaw in such a complicated way that since that time he had to wear a beard to hide facial disfigurement. It is not known when and how he lost a finger on his right hand the lack of which is shown in the portrait.

In 1854 he was sentenced to eight years hard labor in Russia and transported to a village near Baikal. As in 1856 Tsar Alexander 2nd was crowned as King of the so-called Polish Kingdom (which had, in fact, nothing to do with a real autonomy), a partial amnesty was announced. This allowed to move Krajewski to the category of settlers – that meant some kind of latitude – with indication of the place of settlement in Siberia. Sending disobedient Poles to Siberia was not only repression but also an important economical activity of Russia, because well-educated settlers investigated and carried civilization to wild territories, sparsely populated but rich in natural resources. Henryk Krajewski helped to establish a school and a bank there.

During Krajewski's stay in Siberia, his fiancée Anna Domaszewska joined him and they married there. They had a little daughter who died as a child. The wife died soon as well. Narcyza Żmichowska described Krajewski's fate at the time in a novel called "Adeodat". It was published in 1857 and has been understood as a critique of indifference Polish society towards such great patriots.

Henryk Krajewski was allowed to return to Warsaw in 1860. As a former exile, he had no chance to work neither at any state position nor as an advocate. He found a job in the office of the ancestral estate of the Zamoyski family. Immediately after his arrival to Warsaw, Krajewski engaged in underground work. He became member of the so-called Municipal Delegation – a half-legal body that tried to negotiate with the Tsar's governor-general some form of self-government for the inhabitants of Warsaw. Namely, it was the time prior to the outbreak of the January Uprising 1863. Since 1860 intensive demonstrations took place in the city, some of them ended in a massacre carried out by the tsarist army on defenseless civilians. The Russians were aware that they should try to find either a cruel remedy or a way of knowing with the local society, otherwise the situation would completely got out of their control. Finally, in October 1861 they decided to introduce a martial law and that enabled to impose an administrative intern (without any court judgment) on many opposition activists. Thus, Henryk Krajewski was in the depths of Russia for the second time in his life. Yhis time, he managed to return very soon, after three months – thanks to the intercession of some Russian friends.

Therefore, Krajewski was back in Warsaw just before the outbreak of the January Uprising of the year 1863. Initially, he returned to work at the Municipal Delegation. Political disagreements between two fractions of the leaders of the Uprising (one of them set itself the goal of full independence whilst the second tended rather to autonomy that would enable economical growth of the Polish land) made Krajewski stay away from participating in the insurgent National Government. Soon, military purposes caused that even those patriots who were not sure whether the Uprising had chances to win, engaged themselves into illegal structures of the underground Polish state. In May 1863, Henryk Krajewski became a member of the Department of Foreign Affairs of the National Government and became very active on this position, trying to convince the authorities and nations in Europe that they should break off diplomatic relations with Russia and support the Polish ambitions to become independent. Krajewski participated in the activity of underground Polish Government to the very end. He was arrested in April 1864. Fortunately, the evidences against him were very weak. So, whilst five main activists of the National Government were publicly hanged in August 1864, Henryk Krajewski was formally acquitted but preventively sentenced to exile in Siberia where, this time, he spent three years.

He returned again to Warsaw in 1870 and managed to get a nomination as an advocate. Until his death in the year 1897 – twenty seven years of his life – he devoted himself to the Warsaw Bar and enforcement of the legal profession.

The formal regulation of the Bar on the territory of the Polish Kingdom was a mixture of residual rights of the Duchy of Warsaw and the rights of the Russian Empire. The Duchy of Warsaw existed in the years 1807–1815, established by the Treaty of Peace between Napoleon Bonaparte, Russia and Prussia. Its rights – i.a., the Code Napoleon, were relatively liberal and regulated also advocacy, binding it with the structure of judiciary. This partial regulation of the Bar (although it was not a full professional self-government) remained after the Vienna Congress, when on a part of the former Duchy the Polish Kingdom was established, completely subordinated to Russia. The Tsar regulated the Bar of Russia only in 1864, simultaneously with the reform of the judiciary, but effect of this regulation was extended to the territory of the Polish Kingdom only in 1876. However, with an important exemption: namely, Polish advocates were not given the privilege of their Russian colleagues to establish self-government structures in the form of Bar Councils. Polish lawyers were subordinated to the Emperor's district courts instead.

In fact, until 1918 despite many attempts, Polish lawyers failed to establish the Bar on the territory of the Russian occupation. A kind of substitute of a self-government structure was the so-called Advocates' Aid Found in Warsaw. Henryk Krajewski was very active in the framework of this body. He also many times negotiated disputes between the Tsar's authorities and Warsaw advocates. Of course, Krajewski supported also attempts of any kinds to establish a real self-government.

Henryk Krajewski enjoyed great authority as a very good lawyer as well. He had much experience in various political structures and was very well educated – during his first, long stay in Siberia he spent most of the six-years-time on self-study. He took care of good knowledge in the field of law, but also of a general education. He knew Russian, French, German and English. As an advocate in Warsaw, he undertook both civil cases and criminal defenses. Krajewski was famous for his extraordinary thoroughness and accuracy. For example, in one of civil cases of his clients it had been found significant, what the structure of a human eye was. Krajewski spent many time studying medical sources in order to be able to ask the doctors examined at the court professional questions. As a defender, he gained fame i.a. thanks to acquittal of a well-known Warsaw shoemaker named Stanisław Hiszpański who as accused of murder of a physician. It might be quite probable that the false accusation was inspired by Russian secret services as a kind of revenge – at the time of January Uprising, Hiszpański had been a member of the Municipal Delegation and spent some time in Siberia afterwards.

The current year was proclaimed in Poland the year of the January Uprising because it is the Anniversary of 150 years since that national spurt. It is hard to believe, but the structures of the National Government of the time of January Uprising became a model for the state of underground during the Second World War. That experience served the Polish nation even after eighty years!

Henryk Krajewski was extremely modest. Having no family, in his last will he set aside his library for the Warsaw Advocates' Aid Found, his entire estate to a special fund named "Charitas" for education of young peasants and his portrait painted by Jan Matejko – for "any public gallery" as "Image of the unknown man".

The Polish advocacy proudly holds memory of Henryk Krajewski. Some years ago, a copy of his portrait – showing his head only – was painted on request and now it garnishes the premises of the Warsaw Bar Council. I still prefer the original exhibited in the National Museum: the painter seems to suggest that his model briefly left reading a book – just to look at us with his wise eyes.

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Italy's *mutilated victory* after World War I as Depicted in Polish Historiography of the 20th century

Marek Białokur *

Abstract

The article present the Italian embitterment after the First World War in terms of Polish historiography based on syntheses on the history of the 20th century. The term Vittoria mutilata, i.e. "mutilated victory", has become an inherent part of the early 20th century political mythology. It is believed to have been coined by Gabriele D'Annunzio (1863–1938), an Italian poet and novelist, after his seizure of the city of Fiume (Rijeka) in 1919, when he led a group of ardii (daredevils). Thus the Italian poet became actively involved in the politics of the country which he deemed betrayed – its victory mutilated – by its allies, the Triple Entente. Although D'Annunzio's term mainly referred to the nationalist sentiments of the time, it has quickly become popular in other circles of the Italian socjety. The myth of "mutilated victory" depicted on the pages of the discussed syntheses lent credence to the words of an Italian economist and sociologist, Vilfredo Pareto, who wrote in one of his syntheses that the chaos which engulfed Italy after World War I was an announcement of a new turning point.

Key words: *Italy; Polish historiography in the XX century; Vittoria mutilate; The Paris Peace Conference.*

The term *Vittoria mutilata,* i.e. "mutilated victory", has become an inherent part of the early 20th century political mythology. It is believed to have been coined by Gabriele D'Annunzio (1863–1938), an Italian poet and novelist, after his seizure of the city of Fiume (Rijeka) in 1919, when he led a group of *ardii* (daredevils).[1] Thus the Italian poet became actively involved in the politics of the country which he deemed betrayed – its victory mutilated – by its allies, the Triple Entente. Although D'Annunzio's term mainly referred to the nationalist sentiments of the time, it has quickly become popular in other circles of the Italian society.[2] At this point it is worth reminding that the term "mutilated victory" is often compared to one that was equally popular in political mythology of the 20th century, namely the "dolchstosslegende", the "stab-in-the-back" myth which originated in Germany after 1918.[3] It needs to be emphasised that such terms have almost always originated the same way. First, information appears, describing socio-political reality in a way that manipulates the consciousness of the target community. The second step is the transformation of said information so that it becomes a common judgement on the socio-political situation it describes. This is followed by the third stage, known as the myth expression or articulation, i.e. the manifestation of its principle through specific actions in the political context.[4]

In his 2003 book, *Historia powszechna XX wieku*, Antoni Czubiński, who died shortly before publishing his work, wrote that the general history of the last century had not yet been described by many Polish historiographers. Associated with the Adam Mickiewicz University and the Institute for Western Affairs in Poznań throughout his professional career, Czubiński emphasised that Polish historians were mostly interested in, and devoted their numerous monographs and syntheses to, spe-

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1 On 12th September 1919, Gabriele D'Annunzio and his armed volunteer troops seized the city of Fiume (Rijeka), which, after the conclusion of military operations, had become an object of dispute between the Kingdom of Italy and the Kingdom of Serbs, Croats and Slovenes. More details about the dispute can be found further on in this article.

2 The term's popularity and the accuracy with which it reflected the sentiments of the Italian society after 1918 is depicted in a series of documentaries called *History of 20th century Italy* directed by Folco Quilici and produced by the Italian television in 1994, in which one of the 35-minute long episodes was entitled "mutilated victory".

3 The "stab-in-the-back" legend disseminated by German nationalist and conservative circles appeared more or less at the same time as „mutilated victory". Its aim was to blame the civilians, mainly democrats and socialists, for Germany's defeat in the Great War because of their lack of sufficient support to the German army. In its propaganda, the national socialist movement also accused German and international Jewish circles.

4 A political myth is most often defined as a form of political ideology which rejects reasonable and empirical search for truth in politics in favour of instinctive belief in a given political claim. Its distinctive feature is that in its dissemination the intellectual factor (knowledge) is the most marginal, whereas the emotional one is crucial. It is significant that a political myth stems from human needs and emotions whose fulfilment is expected by a particular entity or, much more often, a community, thus justifying certain political actions. For more details about the function of political myths, see T. Biernat, *Mit polityczny*, Warszawa 1989.

cific countries and the European continent rather than to historiography in its global context.[5] In 2012, however, the ratio of syntheses describing the 20th century politics in detail presented itself in a more positive manner. It is possible, therefore, to present the Italian embitterment after the First World War in terms of Polish historiography based on syntheses on the history of the 20th century.

Before we move on to the crucial part of the article, it is worth reminding that historical studies in the form of syntheses are distinguished by several significant elements especially valuable to the writers of those history books that are published in the greatest number of copies, namely textbooks. Their value is first and foremost reflected in the fact that:

- On several hundred pages they present a concise history layout, from which it is fast and easy to subtract information needed for preparation of a synthetic statement or a standard lecture.
- Extensive and often complicated problems from the past are discussed in a concise manner, without going into details which have to be avoided by authors of other studies because of spatial limitations.
- It is easier to access syntheses than detailed monographs, as those have lately been published in scarce amounts.[6]
- Syntheses are often written by eminent historians whose scholarly achievements guarantee high levels of factuality.
- A large portion of syntheses is prepared for students in the form of typical academic textbooks, which in turn facilitates the work of textbook authors who can use ready-made descriptions and analyses. It is not impeded by the fact that for many years history as a discipline studied at universities has been divided into two sets of classes: national and general, which is what academic publishing houses take into consideration.[7]

The first study aspiring to the role of a 20th century synthesis was edited by Henryk Mościcki and Jan Cynarski and published as early as 1934, which may be somewhat surprising. Although entitled *History of 20th century*, for obvious reasons it gave an account of events which occurred up to the Great Depression between 1929 and 1933 (inclusively). In the second half of the 20th century „Książka i Wiedza" along with "PWN" published two popular series of scholar syntheses on general history. Unfortunately, the last "Książka i Wiedza" volume written by Ludwik Bazylow as well as the PWN's study written by Janusz Pajewski, comprised events up to the last year of the First World War. In the 1990's, after the breakthrough of 1989, Wyższa Szkoła Pedagogiczna (a school of education) in Opole published a general history book written by Ignacy Pawłowski, which consisted of three volumes. Unfortunately, the way it describes the period between 1918–1939 makes the work of the academic lecturer from Opole only a fraction of synthesis. Furthermore, its limited number of copies did not grant it much acclaim.

Over the last few years, however, there has been a marked improvement when it comes to syntheses on the 20th century written by Polish historians. One of the first publishing houses to compile a general history synthesis of the former century was Wydawnictwo Kurpisz in Poznań. The idea to publish such a synthesis was conceived after the publishing house had decided to reprint *Wielka Historia Powszechna*, initially published in 7 volumes (divided into 24 parts) between 1934 and 1939 by Księgarnia i Dom Wydawniczy TEM (a popular Warsaw publishing company and bookshop owned by Władysław Trzaska, Ludwik Józef Evert and Jan Michalski). Since the layout described events that had occurred before 1918, after reprinting the book in 1998 its subscribers obtained the first of six volumes which were to present general history from the year 1918 onwards, until the end of the 20th century. The first two volumes, published in 1998 and 1999 respectively, were written by Stanisław Sierpowski and covered the periods of 1919–1929 and 1929–1939.[8] The Second World War was covered by Antoni Czubiński in 2000 and also released in two volumes. In the same year, the first of two volumes covering the period after 1945 was published, written by Wiesław Olszewski. The same author published the last volume of the series in 2001. Today, the mentioned publication still constitutes the most thorough synthesis of the 20th century history written by a Polish historian.

At the very end of the 20th century (1999), as part of the popular series "Zrozumieć Dzieje", Wydawnictwo Poznańskie published "Wiek XX" prepared by Tomasz Schramm. Four years later, another synthesis on the 20th century appeared on the market. The study, written by Antoni Czubiński and entitled *Historia powszechna XX wieku* was 900 pages long. It is worth mentioning that in this case its publisher was, once again,

[5] A. Czubiński, *Historia powszechna XX wieku,* Poznań 2003, p. 9.

[6] In this context it is quite significant that in most cases such studies are published by small private publishing houses or university colleges, which face many restrictions when advertising their books, such as shortage of money. In this situation, study reviews which appear in various scholarly and scientific periodicals play the key role. Those which deserve honourable mention are „Dzieje Najnowsze", „Sobótka" or „Mówią Wieki". Additionally, the significance of e-book stores has been growing for several years now due to their availability and, most importantly, expertise with which they inform of studies available on the market. The credit also goes to websites run professionally by history lovers, who often publish reviews of new publications.

[7] An example, here, would be one of the newest successful series of academic textbooks (not yet finished) released by Wydawnictwo Naukowe PWN (Polish Scientific Publishers PWN). The textbooks were published with a unified graphic layout and divided into two separate series of volumes – one about national history (dubbed "red and white" by students) and the other about general history (with white and navy-blue covers). So far, the series which focuses on the history of Poland consists of three volumes: U. Augustyniak, *Historia Polski 1572–1795,* Warszawa 2008; J. Zdrada, *Historia Polski 1795–1914*, Warszawa 2009; R. Kaczmarek, *Historia Polski 1914–1989,* Warszawa 2010, whereas the one concerning general history comprises the total of six books: A. Ziółkowski, *Historia powszechna. Starożytność*, Warszawa 2009; R. Michałowski, *Historia powszechna. Średniowiecze*, Warszawa 2009; K. Mikulski, J. Wijaczka, *Historia powszechna XVI–XVIII wiek,* Warszawa 2011; A. Chwalba, *Historia powszechna. Wiek XIX*, Warszawa 2008; J. Tyszkiewicz, E. Czapiewski, *Historia powszechna. Wiek XX*, Warszawa 2010; A. Chwalba. *Historia powszechna. 1989–2011*, Warszawa 2011.

[8] *Dzieje powszechne XX wieku:* S. Sierpowski, *Między wojnami 1919–1939*, Part 1: years 1919–1929, Poznań 1998; *Dzieje powszechne XX wieku:* S. Sierpowski, *Między wojnami 1919–1939*, Part 2: years 1929–1939, Poznań 1999.

Wydawnictwo Poznańskie. In 2004, the Krakow academic circle marked its presence in the group of authors specialising in the 20th century history. This was due to a co-written synthesis entitled *Historia polityczna świata XX wieku* published in two volumes, both several hundred pages long, by the Jagiellonian University publishing house.[9] In the first decade of the 20th century, the first part of *Wielka historia świata* was published. It was meant to contain twelve volumes and came out under the auspices of the Polish Academy of Arts and Sciences in Krakow.[10] The history of the 20th century is presented on the pages of the last three volumes of the mentioned publication.[11] The newest study which thoroughly describes the former century is the above-mentioned *Historia powszechna. Wiek XX* written by Jakub Tyszkiewicz and Edward Czapiewski. The work, co-written by the two researchers from Wroclaw, is promoted by Wydawnictwo Naukowe PWN as "The newest description of the *shortest century*", as it covers the period between 1914 and 1989.

For the purposes of this article, five most comprehensive and at the same time most up-to-date studies were chosen from the above-mentioned compilation, published over the last fourteen years. Although the chosen source database is somewhat limited, it allows historiographic analysis of the problem introduced in the title of this work.

Let us begin the analysis with an account of the overall climate in the Italian society at the end of the First World War, presented on the pages of the analysed syntheses.[12] In his study, Stanisław Sierpowski states[13] that what Italy achieved after the Great War, namely the annexation of Trento, South Tyrol and Trieste as well as the shift of its north border to the Brenner Pass, combined with the fragmentation of Austria-Hungary, seems to have been nothing but a dream at the beginning of the 20th century.[14] Thus, the last shreds of land which Italians had considered their own were incorporated into the borders of the newly and permanently unified Italy. According to Sierpowski, this constituted the finalisation of the process of *Risorgimento*.[15]

The widespread joy upon the end of the Great War, combined with the annexation of new lands to which Italy had aspired, allowed the Italians to believe that they would play an important role at the Paris Peace Conference, and to expect further gains. Most importantly, they hoped that Britain and France would keep to the word they had given to Italy as early as in 1915, before its participation in the war on the side of the Triple Entente.[16] In this context, the authors of the newest synthesis, *Historia powszechna. Wiek XX* remind their readers that both the Treaty of London and the 9th point of President Woodraw Wilson's statement from 8th January 1918 (in which he explicitly pointed to the need for a more beneficial demarcation of Italian borders along its ethnic line) constituted reference points for Italians.[17] For those of Italian politicians and diplomats who took part in the conference, obtaining international recognition was a matter of great importance, for the country's internal affairs had already been deteriorating due to the post-war crisis. Reparations were also expected, mostly from the defeated Germans. Stanisław Sierpowski emphasised that the supporters of Italian participation in the conflict were forced to account for their promise of a short and profitable war. When unfolding

[9] At this point it needs to be stressed that in the 1990's a team led by Marek Bankowicz developed and released a dictionary of the 20th century history. See: B. Bankowicz, M. Bankowicz, A. Dudek, *Słownik historii XX wieku*, Kraków 1992 and B. Bankowicz, M. Bankowicz, A. Dudek, *Leksykon historii XX wieku*, Kraków 1996.

[10] In the prologue to the first volume of the series, Jerzy Wyrozumski, one of the three members of the drafting committee (the other being Stanisław Grodziski and Józef Andrzej Gierowski), wrote that the idea of developing and publishing a multi-volume history of the world had arisen directly after the implementation of a less ambitious enterprise, namely *Wielka historia Polski*, consisting of ten volumes. Both series were published by Oficyna Wydawnicza FOGRA in Krakow. In the mentioned prologue, J. Wyrozumski tellingly pointed to problems faced by historians when writing syntheses on general history. "It has long been pointed out that the conventional understanding of *general history* as it is taught in schools cannot be a compilation of national histories, but instead should present leading, supranational themes which ought to vary in different epochs, forming a coherent whole. Meanwhile, general history studied and taught in Europe is largely Eurocentric and tends to be affected even further in certain countries, for their educational purposes." (J. Wyrozumski, *Słowo wstępne,* [in:] *Wielka historia świata,* vol. 1: *Świat przed „rewolucją" neolityczną*, Kraków 2004, p. 5).

[11] *Wielka historia świata,* vol. 10: *Świat od Wiosny Ludów do I wojny światowej*, ed. J. Buszki i S. Grodziskiego, Kraków 2006; *Wielka historia świata,* vol. 11: *Wielkie wojny XX wieku (1914–1945)*, ed. M. Zgórniaka, Kraków 2006; *Wielka historia świata,* vol. 12: *Od Drugiej wojny światowej do XXI wieku*, ed. W. Rojka, Kraków 2006.

[12] The article ignores, mainly due to the limitations of the author's sheet, the question of Italian participation in World War I. It is worth noticing that, as some of the authors of the analysed syntheses remark, Italy as a nation constituted an exception during the war in that the majority did not support their country's involvement in the conflict. This was influenced by the attitude of the Catholic Church and the Italian Socialist Party, both quite powerful on the Apennine Peninsula. We read that „It is even possible to state that the government and the army fought the war while a large part of the society stood aside." This state of affairs changed only after the Italian defeat at Caporetto, a battle which took place between 24th October and 1st December 1917 (J. Tyszkiewicz, E. Czapiewski, op. cit., p. 70).

[13] Stanisław Sierpowski, one of the authors of the analysed studies, is a historian with the most scientific background in the field of Italy and Polish-Italian relations in the 20th century. It is enough to mention that he published i.a.: *Faszyzm we Włoszech 1919–1926* (1973) *Stosunki polsko-włoskie w latach 1918–1940* (1974), *Historia najnowsza Włoch w historiografii polskiej* (1996).

[14] *Dzieje powszechne XX wieku:* S. Sierpowski, *Między wojnami 1919–1939*, Part 1: years 1919–1929..., p. 182 (hereinafter shortened to: S. Sierpowski, op. cit., p. 182).

[15] Ibid.

[16] Such commitments to Italy were made in a secret Treaty of London on 26th April 1915 by the representatives of the Triple Entente: Britain (sir Edward Grey), France (Jules Cambon) and Russia (Aleksander von Benckendorff). In return for Italian participation in the war on the side of the Triple Entente, Rome was promised Trento, South Tyrol, Venezia Giulia, Trieste, the Isonzo Valley, Istria, northern part of Dalmatia with Zadar and Sibenik, part of Albania with Vlore, recognition of Italian sovereignty over the Dodecanese, and in case of Turkey's partition – the right to occupy the Antalya district, all that within the first month after signing the treaty. Under its obligation, Italy declared war on Austria-Hungary on 24th May 1915.

[17] J. Tyszkiewicz, E. Czapiewski, op. cit., p. 86.

such visions before the Italian society, they had emphasised particularly strongly that the outcome of the war was preordained from the very beginning thanks to England's colonial power, Russia's enormous wealth and France's desire to take revenge on Prussia.[18] When describing the widespread popular feeling in Italy between 1918 and 1919, S. Sierpowski stressed that the hopes arising from the new status quo were so high that "[...] for several months after the war, there was stagnation in trade. Waiting for the return of prices from before the conflict was as frustrating as waiting for 'the old times'."[19] At that point the author did not elaborate on the damage caused to Italians by the war, although from the tables and graphs included in his synthesis it follows that 5.600 thousand people were conscripted for military service, of which 450 thousand died and another 800 thousand became war invalids.[20]

The situation in Italy between 1918 and 1919 was similarly described by the remaining authors of the analysed syntheses. A. Czubiński remarked that the First World War resulted in great frustration and discontent of the majority of Italians, who had counted on considerable territorial acquisitions. Instead, the conflict brought great losses, devastating part of the country.[21] Analogically to S. Sierpowski, the author of *Dzieje powszechne XX wieku*, he emphasised that during the conflict Italy ran up a debt to its allies, which was particularly hard to settle after the war. The authors of *Wielka historia świata* pointed to the fact that Italy was the first country to have experienced the crisis of parliamentary democracy. They remarked that "leaning towards totalitarianism began in Italy almost directly after the end of the First World War."[22] Among the reasons for this situation they listed, first and foremost, the war as an event that deepened social and economic disparity, which had already emerged in the 19th century. Moreover, they pointed to an economic differences between the south and the north of the country as well as between the modern industry and the old agrarian structures.[23] They stressed that the war destroyed industry, mainly in the north east and caused major shortages of raw materials in the whole country. The discontent and radicalisation of public feeling was heightened by the impoverishment of small producers and those who relied on tourism. The authors of the study emphasised that the war had a lasting effect on the psyche of the Italian society, mostly owing to the 800 thousand young people who had died and the 1.5 million of those who had became war invalids.

Antoni Czubiński, the author of *Mocarstwa świata* also refers to figures, stating that Italy enrolled 5.6 million soldiers, constituting almost 9% of all the countries that had taken part in the conflict, and that total expenditure on the war amounted to 3.2 billion dollars.[24] Moreover, he noted that the conflict consumed as much as 20% of government expenditure each year. According to A. Czubiński, the figures concerning the dead and the wounded were different. He states that the war engulfed 635 thousand lives and 500 thousand Italians were wounded. It was not without impact on the Italian morale that over one million soldiers were kept in captivity for a long period of time. According to A. Czubiński, the costs of war incurred by Italy amounted to 65 billion lire and its debt to Britain and the United States, the greatest creditors, was 2.5 and 1.5 billion dollars respectively. Similarly to the previously mentioned studies, he pointed out that the war caused great perturbations in the economic and agricultural development of Italy. He later described the state of Italy after World War I more bluntly, stating that in the years 1919–1922 the country plunged into a deep economic and political crisis.[25] As one of few, however, he distinctly stressed that the war resulted in the increase of the role of the state in the social, political and economic sphere of the country. The author of *Dzieje powszechne XX wieku* also noted that the state of Italy after the First World War was largely conditioned by the diminishing significance of European countries for the benefit of the United States of America and Japan, both of which enjoyed a period of great economic boom during the Great War.[26] In his description of the situation on the Italian Peninsula, A. Czubiński drew the attention of the readers of his synthesis to the fact that Italy was influenced by strong internationalist sentiments, whose eulogists claimed that Russia was "the motherland of proletariat" and therefore it needed to be protected.[27] This issue, as a feature distinguishing Italy from France or Great Britain, was also touched upon by the authors of a synthesis published by Wydawnictwo Naukowe PWN in 2010.[28]

Perhaps it is worth to begin the analysis of the next synthesis by giving some figures that illustrate the effect World War I had on Italy. In Marek Bankowicz's studies, these are as follows: 600 thousand dead and 950 thousand wounded, of which around 200 thousand became invalids. According to the authors of the study, the Italian State spent the total amount of 148 billion lire on the war, which was twice what had been spent between 1861 and 1913.[29] The scale of the problem is

[18] S. Sierpowski, op. cit., p. 182.
[19] Ibid., pp. 183–184.
[20] S. Sierpowski, op. cit., interleaf with images following page 48 and table on p. 74.
[21] A. Czubiński, op. cit., p. 174.
[22] *Wielka historia świata,* vol. 11: *Wielkie wojny XX wieku (1914–1945)...,* p. 200.
[23] They pointed out that peasants, exploited in latifundia in the south of the country, were de facto condemned to poverty (*Wielka historia świata,* vol. 11: *Wielkie wojny XX wieku (1914–1945)...,* p. 201).
[24] A. Czubiński, op. cit., p. 120.
[25] Ibid., p. 174.
[26] Ibid., p. 122. This significant change was also noted by authors of other syntheses. See: J. Tyszkiewicz, E. Czapiewski, op. cit., p. 84.
[27] A. Czubiński, op. cit., p. 126.
[28] J. Tyszkiewicz, E. Czapiewski, op. cit., p. 106.
[29] It is worth emphasising that the mentioned study reiterates some of the information. This was caused by the fact that the book was co-written by several authors, which helped alleviate slight discrepancies. This applies to such data as the number of Italian victims of the First World War. At times the number of those killed is 650 thousand, other times it amounts to 600 thousand. (*Historia polityczna świata XX wieku 1901–1945*, ed. M. Bankowicza, Kraków 2004, pp. 117, 193).

most clearly illustrated by Italy's state deficit, which in 1914 had been 2 billion lire, and amounted to 30 billion within the next five years. Unfortunately, again, these figures differ from one another. This clearly indicates that on the basis of Polish syntheses on the 20th century history, written over quite a short period of time between the 20th and 21st centuries, it is hard to establish a definite number of those who were killed, injured or permanently crippled in Italy as a result of the First World War, which had great significance for the public feeling in the country. *Historia polityczna świata XX wieku*, does mention, however laconically, that the joy Italians shared after their victory in World War I was quickly thwarted as the country faced a serious crisis, thus creating perfect conditions for fascists to come to power in 1922.[30] The synthesis goes on to elaborate on the reasons of this phenomenon. We read, for example, that "After the First World War internal developments in Italy became significantly exacerbated. The country's economic state was downright disastrous. Industrial production started to plummet rapidly. Apart from high costs of living, the lack of food and fuel resources became prominent. Hundreds of thousands of demobilised soldiers joined the ranks of the unemployed. Burdened by the cost of the post-war crisis, the masses came to adopt extreme political views. Soon, this dissatisfaction and social tensions amounted to an alarming scale."[31] The authors of *Historia powszechna. Wiek XX*, published in 2010, assessed the situation in a similar manner, stating that Italian fascism arose as a result of "an incomplete/mutilated victory".[32]

The Paris Peace Conference of 18th January 1919, which took place 68 days after signing the Armstice of Compiegne at a small railway station in Rethondes, was to implement the aforementioned commitments included in the secret Treaty of London of 1915. The analysed studies are consistent in placing Italy among the five great powers which were to decide the new political order in Europe.[33] The Italian prime minister, Vittorio Emmanuele Orlando, and the minister of foreign affairs, Giorgio Sidney Sonnino, were members of the Supreme Council, which, due to the its composition (two representatives of each: the United States, Britain, France, Japan and Italy) was dubbed the Council of Ten.[34] As one reads in S. Sierpowski's work, the Italian delegation in Paris was to propose the "Treaty of London + Fiume" programme,[35] but it became apparent from the very beginning that the proposition was best described as "mission impossible." The authors of *Wielka historia świata* stressed that the Fiume (Rijeki) issue was "a sensitive point of the Italian agenda."[36] Jakub Tyszkiewicz and Edward Czapiewski pointed to the fact that Italy's hopes, fuelled not only by the treaty, but also by the disintegration of Austria-Hungary as well as fierce competition among successor states, revolved around land annexation.[37] The Italians thought that the seaport bordering with Croatia, half of whose population were of Italian nationality, should belong to their country. Within the next few weeks of the conference they realised that they had been deceived. Their frustration was worsened by the fact that it was their allies who had wronged them. Allies, for whom they shed blood. When the tension reached its peak, Italian delegates made a spectacular decision of leaving Paris in order to "consult the nation". S. Sierpowski writes that upon their arrival in Italy, they were greeted by an excited crowd, thanking them for rejecting the unsatisfactory propositions of their former allies.[38] "Newspapers tried to outdo each other in nationalistic exaltations," Sierpowski writes, "stating that Italy was the only superpower which did not lay imperialist claims and that its expectations were in line with international principles of justice."[39] To the disadvantage of Italy, as S. Sierpowski emphasised, the secret Treaty of London had been disclosed by the Bolsheviks before the war ended. Moreover, Yugoslavian politicians were supported, more or less openly, by the leaders of the three most important nations, namely the United States, Britain and France.[40] Other syntheses also mention superpowers' opposition to territorial aspirations which Italy laid out at the Paris Peace Conference.[41]

The authors of the analysed syntheses are unanimous in their assessment of the Italian criticism of Thomas Woodrow Wilson.[42] Stanisław Sierpowski stressed that the American president, greeted enthusiastically in the capital of Italy not so long before, suddenly found himself in a group of the most hated people in the world, as he now was believed to have precluded The Italian agenda for the Parisian conference, namely the "Treaty of London + Fiume". In the mentioned study, the author emphasised that for the American president Orlando and Sonnio's claims were a manifestation of "Italian imperialism" with no chance for implementation, which he tried to

[30] *Historia polityczna świata XX wieku*…, p. 118.
[31] Ibid., p. 194.
[32] J. Tyszkiewicz, E. Czapiewski, op. cit., p. 110.
[33] A. Czubiński, op. cit., p. 174; *Historia polityczna świata XX wieku*…, p. 144; *Wielka historia świata,* vol. 11: *Wielkie wojny XX wieku (1914–1945)*…, pp. 172–173; J. Tyszkiewicz, E. Czapiewski, op. cit., p. 89.
[34] The Council consisted of prime ministers, the president of the USA and ministers of foreign affairs of the mentioned countries.
[35] S. Sierpowski, op. cit., p. 182.
[36] *Wielka historia świata,* vol. 11: *Wielkie wojny XX wieku (1914–1945)*…, p. 202.
[37] J. Tyszkiewicz, E. Czapiewski, op. cit., p. 88.
[38] See also: A. Czubiński, op. cit., p. 174.
[39] S. Sierpowski, op. cit., p. 182.
[40] Ibid., p. 99.
[41] J. Tyszkiewicz, E. Czapiewski, op. cit., p. 88.
[42] A. Czubiński, op. cit., p 174; *Wielka historia świata,* vol. 11: *Wielkie wojny XX wieku (1914–1945)*…, pp. 173, 201–202; J. Tyszkiewicz, E. Czapiewski, op. cit., pp. 88–89.

explain to the people of Italy in a special appeal on 22nd April 1919.[43]

The authors of the eleventh volume of *Wielka historia świata* and other studies stressed that the treaty with Austria, signed on 10th September 1919 in Saint-Germain near Paris, was in fact a confirmation of the Italian territorial claims, which had been met under the provisions of the armistice signed on 3rd November 1918.[44] This situation was similarly commented on by A. Czubiński, who also remarked that, under the treaty, Austria was to return monuments and other cultural goods which it had previously stolen from Italy.[45] *Historia polityczna świata XX wieku* only lists territories annexed to Italy, without the author's commentary.[46]

In his synthesis, A. Czubiński places Italy among the countries in which peace treaties signed as a result of the Paris Peace Conference triggered dissatisfaction and want of appeal. As far as Germany, Austria, Bulgaria and Turkey were concerned, such sentiments were understandable. When it comes to victorious Italy, its attitude may have come as a surprise.[47] The author of *Dzieje powszechne XX wieku*, however, believed that the reasons for the unfavourable decisions made during the Paris Peace Conference were different. He claimed that the Italian delegation consisting of prime minister Vittorio Emmanuele and the minister of foreign affairs, Giorgio Sidney Sonnino, failed to enforce the territories which had been promised to Italy during World War I.[48] At the same time he emphasised that Italy did not receive what it had been promised. All this led to the radicalisation of the public feeling, which was exploited by political activists, like Benito Mussolini, who openly spoke of Italy's "mutilated victory" while the talks were being held in Paris.[49] The term, in combination with the demand for respect and better living conditions for Italian soldiers who had fought in the war, as well as for a strong country that Italians deserved, laid the ground for the future status of the Italian fascist movement.

Until September 1919, the development of the dispute over Fiume constituted yet another proof of the Triple Entente's (mainly France and the United States), biased attitude towards Italy's territorial claims. However, although it was T. W. Wilson who opposed the Italian plans during the Paris Peace Conference, the person who objected to the claim of Fiume was French prime minister, Georges Clemenceau. The attitude of the French, who sympathised with Italy's adversaries, spurred a strong wave of Francophobia. In his *Między wojnami* (in between wars), S. Sierpowski writes that "Brooding over the sustained injustice, which was readily equated with French plotting, became an important part of social consciousness of the Italians. The tricoloured flags of France and Italy, having two identical colours located in the same position (white and red) reflected similarities, but also aversion or even animosity. Italians were more quick-tempered and inventive when it came to 'knocking the stuffing out of' their Latin sister"[50] The emotions concerning Fiume's territoriality reached their height in September 1919, when Gabriele D'Annunzio, against the government's formal position, led a group of *ardii* (daredevils) to the city and began its occupation, which lasted for over a year.[51] The whole Italy wanted the problem of Fiume to be internationally discussed. This is why, as we read in one of the syntheses, "When the government's army removed D'Annunzio's troops by force, the society turned its back on Italian politicians. From the psychological point of view, it complemented the downfall, the notion of defeated victory and unnecessary victims, whose number was almost the same as the loss of life in France. The blame for this status quo was often put on democracy, the rules of which the Italians had assimilated before, thanks to prime minister Giovanni Giolitti."[52] According to the authors of *Historia polityczna świata XX wieku*, the "Fiume question" determined the spread of the "mutilated peace" myth on the Italian Paninsula.[53]

According to Stanisław Sierpowski, the widespread notion of "mutilated victory" constituted a synthesis of the Italian society's emotional state, as it fed on the lost hope for a radical and pronounced improvement. "The post-war reality disappointed the italians," he writes, "as the state struggled with great financial difficulties The reparations expected from the defeated countries could not compensate for a permanently negative balance of payments. Before the war, shortages had been covered from savings provided by emigrants and tourism. During, and immediately after the conflict these sources of income were practically lost."[54] The situation in the country became increasingly tense. By autumn 1919, the nation resonated with voices of discontent at the outcomes of the war, which had fallen short of expectations. The press released articles, whose

[43] S. Sierpowski, op. cit., p. 182. It is beyond doubt that by doing this Woodrow Wilson gave evidence to his political idealism, believing that he would persuade Italy to resign from its claims to territories and a larger sphere of influence. Compare: *Wielka historia świata,* vol. 11: *Wielkie wojny XX wieku (1914–1945)…,* p. 202.

[44] *Wielka historia świata,* vol. 11: *Wielkie wojny XX wieku (1914–1945)…,* p. 177; J. Tyszkiewicz, E. Czapiewski, op. cit., p. 93.

[45] A. Czubiński, op. cit., p. 134.

[46] *Historia polityczna świata XX wieku…*, p. 147.

[47] A. Czubiński, op. cit., pp. 136, 167.

[48] Ibid., p. 174.

[49] Ibid., p. 175.

[50] S. Sierpowski, op. cit., pp. 182–183. The cited work directs the reader's attention to the characteristics of Britain's policy towards the described situation. Its author writes that the British prime minister, David Lloyd George „[...] successfully dodged between the Big Three and the irritated Italians," emphasising that the expansion of Francophobia on the Apennine Peninsula was caused by a mixture of emotions, including envy, ambition and fear dictated by the premonition that the aim of French policy was to maintain the country's dependency on Paris.

[51] A. Czubiński, op. cit., p 174; *Wielka historia świata,* vol. 11: *Wielkie wojny XX wieku (1914–1945)…,* p. 202.

[52] *Wielka historia świata,* vol. 11: *Wielkie wojny XX wieku (1914–1945)…,* p. 202.

[53] *Historia polityczna świata XX wieku…*, p. 194.

[54] S. Sierpowski, op. cit., p. 184.

authors called for judgement on politicians who were responsible for involving the country in the conflict, accusing them of making profit on spilled blood. As a result, the notion that in 1915 Italy could have persuaded Austia-Hungary to cede Italian lands and to end the process of *Risorgimento* without spilling one drop of blood gained popularity. And since favour had already been shifted to the Triple Entente, and since 650 thousand Italian soldiers had died in the war, the toll being further raised by deaths resulting from post-war damage, under no account should the benefits of partaking in the conflict be limited by Italy's neutrality. The scale of the public feeling in Italy at the end of 1919 is best reflected, as S. Sierpowski describes, in the fact that prime minister Francesco S. Nitti ordered prefects to not fly the Italian flag on the fist anniversary of the victory, as it could stir the public.[55]

The rejection of Italian claims by the leaders of the Triple Entente during the Paris Peace Conference, along with the dispute over Fiume and unforgettable losses in lives and resources resulting from the war are all major, but not the only factors which assured the Italians in their notion of "mutilated victory". In his *Między wojnami* Sierpowski often writes of the country's deepening economic problems, which turned out to have painfully affected its citizens. In this context, it was not without significance that the situation worsened suddenly and without immediate prospect of improved living conditions. Sierpowski emphasises that Italian budget deficit was ten times higher than it had been before the war. Additionally, inflation occurred, which had been practically unknown before 1914.[56] The frustration of the Italian public was further deepened by rapid impoverishment of a large group of small- and medium-sized producers. This situation was only slightly compensated by the increase in the importance of large businesses, including FIAT ("Fabbrica Italiana Automobile Torino"), which by that time had already gained worldwide popularity. The mentioned economic crises was yet further deepened by land claims made mostly by villagers who had been called up during the war. The problem occurred as early as 1919, when masses of demobilised Italians began to ask for lands which had been promised to them, leading to a mass "land occupation movement" of Italian citizens who took over wasteland.

In the best of the analysed syntheses (in terms of the topic introduced in the title of this article), namely the work of S. Sierpowski, the reader's attention is directed to other factors which worsened the resentment and disappointment felt by the Italians, who believed that their country had been betrayed, regardless of its victory. "As the most rebellious of all the nations that fought and won the war, the Italians were characterised by a great variety of attitudes and behaviours. This was partly caused by differences between certain regions of the country. The north and south or Sicily and Sardinia are like different worlds. People from Sardinia could hardly understand Romans, not to mention those from Genoa or Milan"[57]. As S. Sierpowski tellingly remarks, the war disrupted the structure of the Mafia (based in the south), in which the traditional model of connections with local authorities (and often with Italian Carabinieri) was now accompanied by a new one, which "drew from war experience shared by demobilised soldiers."[58] The south of Italy, which the historian labelled as the home of the Mafia, was also distinguished by the greatest emigration of the poor. "In 1919, 250 thousand people left Italy. Another year it was 600 thousand. This meant that prospects for this group of people and their large families were hardly optimistic, and definitely far from expectations."[59].

The public feeling in the post-war Italy is tellingly illustrated in one of the analysed studies, which states that when it came to strikes in Europe, Italy was unrivalled. In the period between 1919 and 1920, the average of six strikes were held, per day. This shows that people believed in the imminence of revolution. However, the awaited culmination which would change the status quo did not come.[60] The same phenomenon is pointed to by the authors of *Historia polityczna świata XX wieku*, who write that in 1919 as many as 1663 strikes in industry and 208 in agriculture were recorded, altogether attended by 1.5 million people.[61]

In his *Między wojnami* S. Sierpowski writes that undoubtedly, the situation in post-war Italy was greatly affected by young people – a real driving force of change – who, having put away their military uniforms, had no jobs, no capital and, what was worse, no respect from the locals. "Military decorations were often mocked. A number of reserve officers who had played an important role in the Italian army were embittered by their allies' contempt. This pushed them towards nationalism, whose popularity had significantly increased during the war. The propaganda of thought and aspirations was accompanied by struggle against rebels fuelling the wave of strikes, believed to have purposely weakened the strength of the nation. In their struggle, the nationalists were joined by numerous combatant organisations, frustrated at the government and the rebels for wasting the fruits of victory. Additionally, they were irritated by the fact that those who had previously opposed or sabotaged the war, now reached for power."[62] The authors of other syntheses also point to serious socio-economic problems. In *Dzieje powszechne*

[55] Ibid., p. 183.
[56] In order to illustrate the phenomenon, Sierpowski noted that in June 1914 one dollar cost 5.18 lire. In December 1919 the rate was 13.7 lire and one year later the price of one dollar reached as much as 26.6 lire. Thus, less than two years after World War I, the value of a lira constituted only one fifth of its value from before the war (S. Sierpowski, op. cit., p. 184).
[57] Ibid., p. 185.
[58] This process affected the radicalisation of the Mafia's activities and methods of maintaining control and respect, which became more and more ruthless. Among these, vendetta – "blood feud" – was the most common (S. Sierpowski, op. cit., p. 185).
[59] S. Sierpowski, op. cit., p. 186.
[60] Ibid., s. 187.
[61] *Historia polityczna świata XX wieku*…, p. 194.
[62] S. Sierpowski, op. cit., p. 188.

XX wieku, for example, A. Czubiński writes that as a multi-party monarchy, Italy failed to handle the problem of bankruptcy in workplaces, which led to increased unemployment.[63]

One of the last issues that influenced the attitude of the Italian society after the First World War was the question of territory which Italy was to obtain at the expense of Turkey. When analysing the peace treaty signed on 10th August 1920 in Sevres near Paris, A Czubiński reminded that the leaders of the Triple Entente had promised Italy Adalia (now Antalya) and the Dodecanese islands as early as 1915. On 17th April 1917, they confirmed this promise in Saint Juan de Marienne, granting Italy south Anatolia (Antalya and Izmir) if Turkey disintegrated. A Czubiński emphasises that the Triple Entente's decision was influenced by its negative response to the information about Turkey's participation in the conflict on the side of the Central Powers. Later in his work Czubiński writes that although Turkey's defeat in the war created favourable conditions for the fulfilment of the mentioned obligations, Italy did not even wait for the outcomes of the Paris Peace Conference and seized Antalya in the spring of 1919.[64] Its attempt at taking over Izmir, however, was unsuccessful, and Italians were forced out by Turkish troops.[65] Antalya, allocated to Italy on 10th August, did not stay long under its rule as a result of a strong opposition of Turkish authorities, who forced the superpowers to revise the resolutions made in Sčvres.[66]

The public feeling in Italy was further worsened by the country's unsuccessful attempt to seize Albania in 1920.[67] This issue is described, i.a., by S. Sierpowski, who stresses that the attempt to subjugate Albania by Italy was a classic example of a situation in which "Failure, often seen as national calamity, increased the drive to veto a different defeat, often to a different competitor, a weaker opponent. Thus, various, sometimes even exotic alliances were made."[68] In this particular case, it was the alliance between Italy and Greece, which aimed at dividing Albania between these two countries. Eventually, Albania defended its independence in 1920, thanks to the superpowers, mainly France and Britain, which had changed their mind on subjugating Albania to Italy and began to openly support Greek and Yugoslavian claims. Thus, as S. Sierpowski remarks, the Balkan "hornet's nest" was stirred and, as a result, the issue became yet another bone of contention, increasing the disappointment of the Italian society.[69]

The author of *Dzieje powszechne XX wieku* is one of the few who direct the reader's attention to a decision made in Spa, during a conference held in July 1920, pursuant to which Italy was to obtain 10% of the 132 billion marks (in gold) that Germany was to provide as reparations for damage sustained by the victorious countries.[70] At this point it is worth mentioning that this decision was to compensate – in part – losses incurred during the war.[71]

To sum up the analysis, it should be emphasised that the authors of certain syntheses describe the formation of the political myth of "mutilated victory" factually and objectively. The syntheses draw the readers' attention to the fact that it was mostly right-wing circles that spoke openly of wasting Italy's victory in the First World War. Their voice was strengthened by the Triple Entente, which remained biased against the territorial plan presented by Italy during the Paris Peace Conference. The public feeling was further radicalised by the difficulties that Italy had to face after the war. This radicalisation was reflected in the criticism of Italian prime minister, Vittorio Orlando, who expressed his readiness to give the city of Fiume to the Kingdom of Serbs, Croats and Slovenes after the demise of Austria-Hungary. This situation was changed by D'Annuzio, who seized the city with 2,600 *arditti* on 12th September 1919 and occupied it for nearly sixteen months, thus creating Reggenza Italiana del Carnaro. The time has told that this short imperial period in Italian politics after the First World War exerted significant influence on the Italian society and left a permanent mark in the history of the country. When Benito Mussolini came into power, he often referred to D'Annunzio's actions and rhetoric, which was manifested in his Fascio di Combattimento. The leader of Italian fascists skilfully fuelled the notion of "mutilated victory" in a war which cost over one million lives and 148 million lire, as Adolf Hitler did with the German "stab-in-the-back" legend to justify the Triple Entente's victory over the German Empire. The myth of "mutilated victory" depicted on the pages of the discussed syntheses lent credence to the words of an Italian economist and sociologist, Vilfredo Pareto, who wrote in one of his syntheses that the chaos which engulfed Italy after World War I was an announcement of a new turning point.[72] However, this constitutes a problem which shall be described in a different article, analysing chosen fragments on the history of Italy as depicted by Polish historiographers in their general history syntheses.

[63] A. Czubiński, op. cit., p. 174.
[64] Ibid., p. 135. As a territory to which Italy expressed its claims, Antalaya is also mentioned by authors of other syntheses. See. e.g.: J. Tyszkiewicz, E. Czapiewski, op. cit., pp. 88, 93.
[65] A. Czubiński, op. cit., p. 174.
[66] *Historia polityczna świata XX wieku*…, p. 149; J. Tyszkiewicz, E. Czapiewski, op. cit., p. 95.
[67] A. Czubiński, op. cit., p. 174. Italy's unfulfilled aspirations towards Albania are also mentioned by: J. Tyszkiewicz, E. Czapiewski, op. cit., p. 110.
[68] S. Sierpowski, op. cit., p. 100.
[69] Ibid., p. 101.
[70] In comparison, France, as a country with the greatest losses was to obtain 52%, Britain – 22%, and Belgium – 8% of the reparations (A. Czubiński, op. cit., p. 154).
[71] J. Tyszkiewicz, E. Czapiewski, op. cit., p. 88.
[72] This concept was noticed by: M. Król, *Historia myśli politycznej. Od Machiavelliego po czasy współczesne*, Gdańsk 1998, p. 203.

Scanderbeg's Canon and Crimes against the Person

Engjell Likmeta *

Abstract

Within the testimony of an ancient criminal legal tradition, particular attention should be paid also to the Albanian canons as an invaluable asset of the country and the Albanian people.

This paper aims to treat the legal system in Albania during the period of our national hero Gjergj Kastriot-Skanderbeg.

In particular, in this essay a well-deserved attention will take account of canon norms of criminal nature found in the Kanun of Skanderbeg, the predictions of rules for the offenders, their responsibility, and those kinds of punitive measures taken against them for committing offenses against the person and the basics of criminal responsibility.

Also, special attention shall be given to the type of offenses against the person in the canon, such as murder, feuds, ambushes, etc., as well as punitive measures. An important part of this paper will take also the principles that characterize Canon of Skanderbeg, in particular, the principle of the protection of life. The purpose of this paper is to bring to the attention of the reader, the canons, as an important source of information with regard to how social relations were protected by the criminal law in the medieval period.

Key words: *Customary right; canon; criminal activity; crimes against life; murder; blood feud; revenge.*

Introduction [1]

The mores (*doke, zakone*) law acted for thousands of years to regulate social relations in various spheres of life.[2] The mores law has developed over the centuries with the development of Albanian society, and has always stood as a shaft for maintaining the Albanian community.[3] Norms of mores law operated in the field of criminal relations. One of the main sources of criminal law until now remains the popular tradition, where the material is collected in canons.[4] On their basis, it is concluded that the Albanian canons contain norms of customary law, and one of the most important canons is Canon of Skanderbeg.[5]

Kastriots were a noble family and the most important dynasty of political and military life in Albania in the fifteenth century.[6] Undoubtedly, in this family a very special and important part takes the hero figure of the Albanian nation, Gjergj Kastrioti.[7] Skanderbeg named his state with the national medieval ethno-geographic name "Arberia" and carried himself the official title "Lord of Arbëria".[8] For this reason, the law that operated in areas of Kastriots, at the time of his rule, has come to our days as a result of folk tradition and celebrates the label "Canon of Skanderbeg" [9], which also can be called the *Canon of Arbëria*.[10]

According to ethnographers, Skanderbeg's Canon is implemented in areas once ruled by Kastriotis [11]. Patriot and high representative of Roman Catholic religion Mr. Dom Frano Ilia maintains stance that the Canon of Skanderbeg stretched in Central Albania and among provinces of Kastriotis [12]. As well Barleti [13] says: "Kruja was the head of the Epirius Kingdom, located on top of a high cliff of a mountain, unexplored and

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1 In deep gratitude of assessment and reverence for worthy representative performance of the community and distinguished Roman Catholic religion, Mr. Dom Frano Illia, without whom services could not be to take precious an offense, as is the Skanderbeg;s Canon, not only in the area of law, clear evidence of ancient indigenous European civilization!

2 Ismet Elezi, „The customary law of albanians" publishing house „8 Nëntori", Tirana, 1983, page 6.

3 Academy of Sciences of Albania, „History of Albanian People", TOENA Editions, Tirana 2002, page, 432.

4 With canon should be understand the unwritten law that operated in medieval Albania.

5 Ismet Elezi, „*The customary law of albanians*", Publishing house "8 Nëntori", Tirana, 1983, page 32.

6 Academy of Sciences of Albania, the Albanian People's History I, TOENA Editions, Tirana 2002, page, 313.

7 Idem., page, 392.

8 Idem., 433.

9 Aleks Luarasi, „The state and the albanian law before and during the era of Skanderbeg", Dissertation topic, Tirana 1981, page 205.

10 Dom Frano Ilia, „Canon of Skanderbeg, publisher La Rosa, Milot, 1993, page 15, Article 2.

11 Ismet Elezi, „*The customary law of albanians*", Publishing house "8 Nëntori", Tirana, 1983, page 50.

12 Dom Frano Ilia, „Canon of Skanderbeg, publisher La Rosa, Milot 1993, n. 1; page 15.

13 Marin Barleti, the first Albanian writer, coexistent of Skanderbeg time, theologian and Catholic priest, 1460–1513.

almost unreachable by every way and so well strengthened by the action of nature that, except hunger, can easily overcome any enemy rage. Therefore, Skanderbeg praised everyone's willpower and the undying memory of freedom in the hearts of the people, whenever he was urged by his people".[14] Therefore we can say that every man legitimized his power.

Principles of Skanderbeg's Canon

- Norms of Skanderbeg's Canon played the role of a central power, civil as well as military, in the absence of functionality of the state authorities at that time. Such thing could be easily spotted, if we consider the norm that would say: "Whoever kills will be killed, canon replaces civil and military power."[15]
- Canon of Skanderbeg predicted that a person's life encouraged equal protection. To better understand and materialise what we just said, the norms of canon which clearly expressed: "The blood of man does not have any difference between good man and bad man, little man and big man, wealthy and poor, the children and elder".[16] And that "[…] the blood of women of every age, mental and physical condition may be no change between good and evil, youngster and elderly, the wealthy and poor home".[17]
- Canon of Skanderbeg sanctioned the individual criminal responsibility for every act committed, saying that: "The blood goes by finger."[18], in this respect "the finger" refers to the individual responsibility of the person who committed the criminal act.
- Canon sanctioned the ancient principle of *talion*, although it did not legitimized crimes against the person. Thus, according to the canon norms "Canon says do not kill [...] canon does not give the right to kill. If you kill, you go in blood feud, blood is settled with blood, head to head".[19]
- The principle of protection of human life, yet unborn, is a principle sanctioned in the Canon of Skanderbeg. Thus, the canon norms expressed, as above, mean that the life of man is protected regardless of his age. And that, by man, the canon norms understood even an unborn man.[20] I think that this is a principle that truthfully represents the continuity of European legal tradition in Albania.
- Commandment to respect the dignity of the victim in case of a murder for revenge was another principle that was appraised by the Canon of Skanderbeg. According to the Canon, desecration, harm, or violence exercise on the victim's body was not allowed. Furthermore, injury and mutilation of the victim's body also violated the principles of the human spirit.[21]
- Canon of Skanderbeg recognized the institute of cooperation, but the criminal responsibility for accessory to murder fell just on the organizer and in every case avoided the collaborator or the executor.
- Canon of Skanderbeg prohibited, euthanasia, after expressing that: "if someone takes another's life one after his request, falls in blood feud, even if there is a witness in such requirement."[22] While for the aide in the suicide crime, Canon of Skanderbeg did not condemned him with any criminal responsibility, according to the rule: "Whoever pushes or gives a tool for suicide, does not fall into the blood feud, according to the norm: "The one who does not take any action, is a bad person and the bad person does not fall in blood feud"[23].

Crimes

Canon of Skanderbeg defined the meaning of crimes, which as a concept had in its composition damages and guilt. According to the Canon of Skanderbeg with fault we would understand any real violation, physical and moral of the individual that may be developed by any person with free will and complete desire. So, the guilt at any moment consisted in two crucial elements that were knowledge and intent. While damage was considered every violation or harm that was directed against the legal rights of an individual[24], and that could be done intentionally or carelessly.

The main object that can be affected in case of damages and guilt in each case were the fundamental human rights such as the right to life, property, dignity, personality, etc. In view of the subjective side, the damage could be accomplished in three main forms. These forms of the damage display were intentional, unintentional and by carelessness.[25] The intentional damage was a mistake and was considered a crime by the canon. Crimes could be directed against an individual or a community of individuals. They could affect the vital interests of a single individual or many people.[26] Based on the consequences, Skanderbeg's Canon classified crimes in two main types, minor and serious offences.[27] Skanderbeg's Canon predicted specific sanctions for

[14] Marin Barleti, „*The story of the life and deeds of Skanderbeg*", adapet by Stefan I the Priest, publishing house "INFBOTUES", Publication IV, Tirana, 2005, page 15–16.
[15] Dom Frano Ilia, „Canon of Skanderbeg, publisher La Rosa, Milot, 1993, page 188, Article 2944.
[16] Idem., page 187, Article 2938.
[17] Idem., page 187, Article 2440.
[18] Idem, p. 186.
[19] Idem., page 187, Article 2942.
[20] Idem., page 187, Article 2939.
[21] Idem., page 181, Article 2766, 2768, 2814–2816.
[22] Idem., Article 3013.
[23] Idem., Article 3012.
[24] Idem., Article 2728.
[25] Idem., Article 2730.
[26] Idem., Articles 2731–2733.
[27] Idem., Article 2734.

every crime. These penalties could be demanded in three forms of reward, which were moral, spiritual and material reward.[28]

Crimes against Life

Canon of Skanderbeg predicted crimes against life on its lengthiest part with the title "Damages and crimes against life".[29] Crimes against the person accounted for 12% of total volume of 3534 canon norms provided in the Canon of Skanderbeg. Crimes against life are foreseen in canon provisions nr. 2728–3153, and in ratio to the other norms with criminal nature take 60.1% of their total volume. While, criminal norms that protect property and honor respectively take 27.1% and 11.8% of total volume of the canon norms with criminal nature prescribed in canon.

Canon of Skanderbeg provided some of the main types of crime against the person; killing, blood feud, revenge, ambush, wounding, killing over certain subjects, the killing of animals, murder by negligence, murder within family, suicide, murder of the priest of the church, as well as murder in bail. Authors of crimes against the person were subject to canon penalty. According to the Canon of Skanderbeg, the penalty was a payback for illegal activity that the offender had made. Two main types of penalties were material and moral. Moral penalties affected in violation of the honor and dignity of the culprit. Material penalties were given by representatives of the community in accordance with the canon. The aim of these sentences was to set the violated right and the protection of society. For crimes against life, the main sentences were exclusion from society or the community where the offender lived for a period of time assigned by the canon, deportation, sanctions, leaving land fallow, and the death penalty.[30]

Murder

Murder, to be called a crime, should be provided under the common law as an offense that was inconsistent with it.[31] In this sense, the Canon of Skanderbeg gave the meaning of murder. In one of his paragraphs, Canon of Skanderbeg stated that: "killing is to take someone's life with any tool "[32]. According to canon, to kill it meant to take a human life with any tool. But, according to canon, the main types of murder were not only death but also human injury.[33] Regarding to the way of committing the murder we can say that the canon provided several ways. The ways canon provided could be with gunfire, with offensive weapons, as well as any other tool that could harm human life up to causing his death. For the effect of the canonical qualifying for the crime of murder what we observe is the fact that it did not matter the tool and its type from which a individuals life is taken. Motives for committing the crime of murder were numerous as to blood feud, interest, cruelty etc. In any case, canon allowed the violation of human life just for revenge. Thus, according to canon, "[…] who kills to get revenge does not fall in blood, has taken its revenge".[34] This meant murdering for interest or any other motives were not allowed. Canon of Skanderbeg through this norm sanctioned the principle of equality in terms of punishment of human life, inherited as Professor Ismet Elezi Commentary articulates from the tribal order.[35]

Blood Feud

One of the essential features of law and mores practice was what had to do with the institution of blood feuds. Blood feud is said at that time; put the entire family at war. From blood feud there was no escape not even for representatives of the leading elite. Thus, in 1416 after a murder, *Balshaj* community had entered the feud with the *Hotë* community. Indeed, even people of religion were involved in acts of violence and blood feud in the name of "honor".[36] Although the right to live is a special right, whose observance is the first and fundamental condition for the existence of all freedoms and other rights,[37] the custom of feud was a right moral and religious duty. Whoever took revenge was honored by the norms of moral and custom. Whereas whoever that did not take revenge was dishonoured or was expelled by his tribe and his genus.[38] Killing for revenge was committed intentionally and driven by motives to get revenge for his relative.[39]

The blood feud should be understood only when the murder case was to get the revenge for a person killed or injured before.[40]

Revenge

Meanwhile, revenge means the retaliation of a person towards another for an act of harm, violence, injustice, insult done etc., through punishment or causation of damage in different ways and forms. The subjects of vengeance are categorized by the canon in two main groups. The first group belonged the people who had direct right to commit murder, and here we can mention the males whom members of the family or tribe were deceased, the daughters of the tribe's family, uncle for his

[28] Idem., Article 2734.
[29] Idem., page 178.
[30] Idem., Articles 2217–2226.
[31] Ismet Elezi, „*The Albanian customary law of albanians*", Publishing house "8 Nëntori", Tirana, 1983, page 146.
[32] Dom Frano Ilia, „Canon of Skanderbeg", publisher La Rosa, Milot 1993, page 178, Article 2736.
[33] Idem., Article 2740.
[34] Idem., Article 2738.
[35] Ismet Elezi, „*The customary law of albanians*", Publishing house "8 Nëntori", Tirana, 1983, page 103.
[36] Academy of Sciences of Albania, *The Albanian People's History I*, TOENA Editions, Tirana 2002, page, 332.
[37] Marek Antoni Nowicki, *About the European Convention on human rights*, A publication of the Albanian Center for Human Rights, "Morava" Editions, Tirana, 2003, page 94.
[38] Ismet Elezi, „The Albanian customary law of albanians", Publishing house"8 Nëntori", Tirana, 1983, page 103.
[39] Idem., page 18.
[40] Group of authors, *History of state and law in Albania, Part II*, Publishing house "Luarasi, Tirana, 1997, page 50.

nephew and vice versa, mother for her son, husband for wife and vice versa, aunt for her niece or nephew and vice versa, as well as parents and tribe for the married wife. While in the category of subjects who had the transversal right to revenge included the auxiliaries.[41]

One of the institutes that had strongly influenced the restriction of blood feuds and revenge has been Albanian Institute of Loyalty. Loyalty appeared in two types, little faith that was given for 24 hours after the murder and huge faith given for 30 days. The institute of reconciliation has influenced in the limiting of blood feud which was done by intervention of friends and relatives.[42]

Ambush

About the time of committing the murder we can say that this time was different. At the same time I think that, time served to classify the murder of a person in certain types of murder as the instant murder, impromptu, murder caused by an instant brawl, face to face murder and as well as in ambush. Ambush meant taking a man's life in secrecy. Usually, related with the elements of objective side of the crime of murder by ambush we can say that was not only done in complete secrecy but usually at night. In other words, in my judgment, ambush was nothing other than the crime of murder committed in collaboration. People who participated in ambushes were generally people close to each-other. While other collaborators outside the family circle that helped, in execution of the ambush killing according to Skanderbeg's canon were called *simahuer*.[43] Responsibility in the case of murder by ambush fell just on the organizer and not on the others including here also his aides.[44]

Injury

Injury meant the killing of a person with no intention to take one`s life. Injury consisted in physical injuries that sometimes could also be serious as various human limbs fractures or light injuries like sprains of hands, wrists, beating, etc.[45]

Murder against Certain Subjects and in Certain Places

Canon of Skanderbeg patronized a certain number of subjects versus those who were not legitimized to ambush, to murder, even if it was for revenge. The Canon stated that: "In the canon of manhood, ambush does not fall on unarmed children and elderly". The man could not get snarled with children and infants".[46] Canon of Skanderbeg did not legitimize harming of children, of elders, men who got old and women. In the case of murder of a pregnant woman, the offender was subject of two main different sentences. Firstly, the woman's family who sought redemption for the victim's death. Secondly, the pregnant woman`s husband.[47] Also, we can say that the Canon of Skanderbeg did not allow committing the crime of murder in places where religious activities were practiced and their representatives.[48] Thus, according to the canon, killing was forbidden in churches or in other religious locations.[49] Also canon ordered to respect the dignity of the victim caused by vengeance. So according to canon profanation, damage or acts of violence on the victim's body were not allowed. Furthermore, mutilation of the victim's body was not a right provided by canon as it violated norms and principles of human spirit.[50]

Killing by Animals

Canon of Skanderbeg provided in its norms also the protection of human life from the actions of someone's animals. So, according to the canon if a person got wounded or killed by working animals, pets of a neighbor or a fellow countryman, the responsibility laid with the animal or pets owner. For the effect of canonical specifications killing was called committed from the moment the effect came regardless the way of its realization, as with stroke, with bites, with horns etc.[51]

Canon norms provided canonical responsibility for the owner of the dog in case the dog caused damage to human health and human life due to the actions of the dog because of his illness.

Killing by Negligence

Another type of killing that took a special place in the canon norms in Skanderbeg's Canon was also killing by negligence, or as the canon called unintentional kill. This type of killing meant violation of human life without any specific purpose to cause it, and comes as a result of negligence, the lack of specific purposes devoted to human actions. For this kind of murder, though no special purpose was required as an indispensable element of subjective side, would bear canon responsibility or in other words criminal responsibility of its author. Criminal responsibility would also bear on the head of the house if his child committed murder.

Murder within Family

A special type of murder was the killing occurred within the family. In the case the murder happened within the family, in the strict sense of it, canon did not provided criminal responsibility for the culprit, but only against his moral responsibility. He was labeled by the community as an evil man and the act committed by him was considered a curse, an act incomparable by canon. So his criminal action was subjected to moral sanc-

41 Dom Frano Ilia, „Canon of Skanderbeg", Publisher La Rosa, Milot 1993, page 184, Article 2866.
42 Group of authors, *History of state and law in Albania, Part II*, Publishing house "Luarasi, Tirana, 1997, page 52.
43 Dom Frano Ilia, „Canon of Skanderbeg", Publisher La Rosa, Milot 1993, page 179, Articles 2748–2756.
44 Idem., Article 2764.
45 Idem., Articles 2745–2747.
46 Idem., Articles 2757–2758.
47 Idem., Article 2788.
48 Idem., Articles 3529–3531.
49 Idem., Article 2760.
50 Idem., Articles 2766, 2768, 2814–2816.
51 Idem., Articles 2966.

tion only if criminal acts occurred within family. While in case someone committed a crime within the meaning of the family frame he did not bear responsibility for the criminal act in the law aspect but simply his act was considered by the community as improper.[52] Despite carrying no criminal liability, the canon prohibited the crime of murder within family. Meanwhile, in the case of the murder of the husband or the wife, Canon of Skanderbeg provided criminal liability for the culprit, as if the mother killed her child.[53]

Suicide

Skanderbeg's Canon prohibited and punished the crime of suicide. Interestingly, even euthanasia[54] was not allowed. In case that a person committed such an act, for him, criminal liability would bear. Interesting in the fact how the lawmakers of canon expressly provided "if someone kills another one after his request, falls in blood feud, even if there is a witness in such requirement."[55] As for the assistant in the suicide act, Canon of Skanderbeg did not bear any criminal responsibility for him, according to the rules: "Whoever pushes or gives a tool for suicide does not fall into the blood feud. The one, who does not take any action, is a bad person and the bad person does not fall in blood feud".[56]

Murder on Escrow

Another type of murder provided by Canon Skanderbeg was the murder in escrow. According to canon, one could face this canon norm, if the victim's family members committed murder to the subject of crime, after its forgiveness, in accordance with social rules enshrined in canon. Meanwhile if affected relatives of the victim of the first murder, committed murder for other reasons related later, criminal responsibility was bared occasionally.[57]

Conclusions

Albanian Canons are precious legal monuments that have arisen from European civilization, and reflect the deep and ancient roots of our indigenous right and our customary law. The unwritten Albanian right is a right that has lived beside Roman law and other ancient rights.[58]

These norms are not simply a relic of the past, but are also valuable resources of scientific data that shed light on many aspects of its content and on main features of the common law in our country's ancient times.[59]

Legal regulation of crimes against life in common law, in Skanderbeg's Canon presents great interest in both legal and theoretical aspect, not only for the history of the Albanian criminal law or the history of the state of law in Albania since the fifteenth century until the establishment of national independent Albanian state (1912)[60], but also for the legal history of European legal families, as civil law or common law.

Regarding the Canon of Skanderbeg, we can say that crimes against the person accounted for 12% of total volume of norms provided in the canon. Crimes against life took 60.1% of total volume of norms with criminal nature. While norms that protected property and honor occupied respectively 27.1% and 11.8% of total volume of canonical norms provided in this canon.

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[52] Idem., Articles 3004, 3006.
[53] Idem., Articles 3007–3008.
[54] Euthanasia, is otherwise called as good or easy death. It is an act by which a person who continuously suffers, undergoes death without suffering anymore.
[55] Dom Frano Ilia, „Canon of Skanderbeg", Publisher La Rosa, Milot, 1993, page 191, Article 3013.
[56] Idem., Article 3012.
[57] Idem., Article 3151.
[58] Vangjell Meksi, „Canon of Lek Dukagjinit and Canon of Skanderbeg – valuable historical moment of albanian law", *People's Justice*, No. 4, Tirana, 1967, page 52.
[59] Zejnulla Ballanca, „History and state of law issues in Albania during Byzantine rule," *People's Justice*, No. 2, Tirana, 1982, page 78.
[60] Ismet Elezi, "*Krimes against life*", University Book Publishing House, Tirana, 1989, page 14.

The Personality of the Czech King George of Poděbrady and his Peace Project of 1462–1464

Karolina Adamová, Antonín Lojek***

Abstract

In 2014 we will be commemorating the anniversary of a peace project proposed by Czech ruler George of Poděbrady. It was a grand 15th century plan that was later to a certain extent reincarnated as the League of Nations, United Nations and the European Union.

In our three-part Contribution (not counting the Conclusion) we will introduce the Czech king George of Poděbrady as a person, then we will focus on the predecessors of George's project and, last but not least, we will analyze the basic ideas, aims and importance of George's peace plan.

Key words: *George of Poděbrady, Bohemia, peace project.*

1. The Personality of Czech King George of Poděbrady

We will first look at the personality of George of Poděbrady in general and then we will examine his distinctive personality. This will help us to better understand him and his goal of creating a peace organization of Christian states.

1.1 George of Poděbrady

George of Poděbrady was the Czech king between 1458 and 1471.He was born on 23 April 1420 to Victor of Poděbrady and Anna of Wartenberg[1]. We know very little about his childhood. At the age of seven he lost his father and three years later also his custodian Boček of Kunštát and Poděbrady and George was sent to another custodian, his distant uncle in Moravia Haralt of Kunštát[2]. His ancestors belonged to ancient nobility, to the highest aristocracy and they were a purely Czech family.[3]

As for education, George never enrolled in an university and he is not known to have studied at any of the city schools. We can only assume that the Kunštát family invited a Utraquist priest to teach George reading, writing and arithmetic. We do not even know what books he read. We may assume that he read Czech chronicles and essential religious literature in Czech. Until his death George had not learned Latin and only very little German.[4]

Enea Silvio Piccolomini Bartolomeo, who became later Pope Pius II, described his physique as follows: "...short square figure, white complexion, sparkly eyes, lovable morals"[5]. Josef Macek described George based on paintings by contemporary painters: "A figure appears that is not tall, but certainly very wide, even fat, with massive head on short neck, with mustache under the nose and round gloomy eyes ".[6] George suffered by being fat in his adulthood. This is confirmed by a letter he wrote to the Pope at the age of 45 where he states that he cannot come to Rome "because We are now ladened with excessive thickness of our body." Nearing his death George's obesity and swollen legs prevented him from moving and forced him to stay in bed or armchair.[7]

George of Poděbrady married twice: first he married Kunhuta, the daughter of Šmil Holický of Šternberk, with whom he had seven children – a daughter whose name was lost and children who reached adulthood: Boček, Viktorin, Kunhuta, Jindřich and twins Kateřina and Zdeněk. His second wife was

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1 ŘEHÁK, K. L. *Jiří z Poděbrad, český král-kališník.* Prague 1910, p. 8; Genealogists have certain difficulties with the puzzle of his mother. George is considered to be an illegitimate child based on various gossips. That was the reason why they referred to him later as sheaf or thatch King ŠMAHEL, F. Jiří z Poděbrad. In: *Čeští králové.* Paseka, Prague, Litomyšl 2008, s. 263.

2 ŠMAHEL, F. Jiří z Poděbrad. In: *Čeští králové.* Paseka, Prague, Litomyšl 2008, p. 263.

3 MACEK, J. *Jiří z Poděbrad.* Prague 1967, p. 25.

4 MACEK, J. *Jiří z Poděbrad.* Prague 1967, p. 28.

5 Cited from MACEK, J. *Jiří z Poděbrad.* Prague 1967, p. 9. Srv. ŘEHÁK, K. L. *Jiří z Poděbrad, český král-kališník.* Prague 1910, p. 9.

6 MACEK, J. *Jiří z Poděbrad.* Prague 1967, p. 9.

7 MACEK, J. *Jiří z Poděbrad.* Prague 1967, p. 9.

Joanna of Rožmitál, with whom he had Henry, Anežka and Ludmila.[8]

George of Poděbrady died on 22 March 1471 in Prague during a war with Matthias Corvinus. His Remains were deposited in the St. Vitus Cathedral – a part of the Prague Castle complex. George was the last king of Czech ancestry and the only elected ruler from Bohemia. His motto "The Truth Prevails" is even today on the presidential standard of the Czech Republic.[9]

1.2 George as a Politician

His political career ascended very quickly in Bohemia, as well as within Europe. He was notorious not only for his resolute actions but also for the respect his countrymen, as well as foreigners had for him. Especially German aristocracy, who often approached him to arbitrate their disputes.

George was only 20 when he became the governor of Boleslavsko, which at the time included also Poděbrady. Together with the highest governor Hynek Ptáček he ruled one quarter of the Czech Kingdom.[10] At the age of 24, after Hynek Ptáček died, George became in 1444 the governor of the Kouřim, Čáslav, Chrudim and Hradec regions.[11]

Supported by Friedrich III he was elected for two years the ruler of Bohemia in 1452 at the age of 32. In this position he showed his usual decisiveness and managed to bring peace and order to the state in a relatively short period of time.[12] He recovered royal property, managed to secure trading routes and mitigate tensions between religious groups.[13]

While king Ladislaus was under age George was the ruler for six years and remained in this function even after Ladislaus became Czech King.[14] Ladislaus also appointed George his steward.

On 2 March 1458 George was elected Czech king, supported by Zdeněk Konopišťský of Šternberk.[15] Subsequently he was recognized as the Czech king by Friedrich III during a convention in Brno and he received the title Elector. Moreover, an agreement was concluded between the Emperor and George of Poděbrady binding the Emperor not to act in matters of the Hungarian Kingdom and the German Empire without an advice from the Czech king.[16]

1.3 George as a Diplomat

George had a strong diplomacy skills reflected, among others, in his plans through which he was acquiring new diplomatic contacts. Very soon he proved himself a capable diplomat, who was strongly influencing the politics of the Europe. The Czech state was becoming more respected in Europe and Prague became an important city for political matters.

As his earliest diplomatic assignment he was elected to the convention in Brno to lead negotiations with the delegation from the Basel council.[17]

In all his victories George never treated those he defeated as the his subjects – he tried to settle the situation peacefully and, if it benefited the state, he was, in the words of Franz Schulz, the first one to "... gladly lay down arms open and assembly halls. The understanding and respect for constitutionality were the cornerstones of all his political activities, he preferred negotiations over battlegrounds."[18]

George never forced his adversaries to accept an agreement, but once they voluntarily committed he would tolerate no breach of such agreements.[19]

His diplomatic skills were manifested clearly when George in 1458, together with his son Victor, released from prison Matthias Corvinus and accompanied him in a ceremonial procession to Strážnice, where he handed him over to Hungarian aristocracy, which then elected him the king of Hungary. King Matthias valued this favor and help not only through grateful friendship, but also by concluding a wedding agreement with his daughter Kateřina.[20]

The same year George again proved his excellent diplomatic skills during his struggle for the Czech kingship. He won over the Czech aristocracy by offering various benefits and favors. He organized his campaign along the lines of nationalism and patriotism. George convinced the catholic leader Zdeněk of Šternberk to join his side, which also granted him the votes of catholic aristocrats. At the assembly election of 1458 Zdeněk was the first one to kneel in front of him and call upon him to be the Czech king.[21]

Various conflicts among German aristocrats were strengthening George's power and they approached him frequently to mediate for them. George used diplomatic means to take advantage of these disputes. For example, he arranged a renunciation of kingship claims based on certain concessions with the Saxon duke Wilhelm. He Also resolved peacefully disputes with Saxon Elector Bedřich over some estates at the border between both countries. Thanks to his diplomatic skills both Saxon dukes waived their collateral towards the cities of Most, Osek and Duchcov.[22]

[8] LIŠKA, V. *Jiří z Poděbrad – Národohospodář.* Kap. I, Prague 2010, p. 4–5.
[9] LIŠKA, V. *Jiří z Poděbrad – Národohospodář.* Kap. I, Prague 2010, p. 12.
[10] SCHULZ, F. Jiří z Poděbrad. *Matice lidu*. Volume II., issue 5, Prague 1868, p. 53.
[11] ŘEHÁK, K.L. *Jiří z Poděbrad, český král-kališník.* Prague 1910, p. 15.
[12] ŘEHÁK, K.L. *Jiří z Poděbrad, český král-kališník.* Prague 1910, p. 22; ŠMAHEL, F. Jiří z Poděbrad. In: *Čeští králové.* Paseka, Prague, Litomyšl 2008, p. 264.
[13] ŠMAHEL, F. Jiří z Poděbrad. In: *Čeští králové.* Paseka, Prague, Litomyšl 2008, p. 264.
[14] ŘEHÁK, K.L. *Jiří z Poděbrad, český král-kališník.* Prague 1910, p. 32–33.
[15] ŘEHÁK, K.L. *Jiří z Poděbrad, český král-kališník.* Prague 1910, p. 43.
[16] ŘEHÁK, K.L. *Jiří z Poděbrad, český král-kališník.* Prague 1910, p. 49.
[17] SCHULZ, F. Jiří z Poděbrad. *Matice lidu*. Roč. II., číslo 5, Prague 1868, p. 45.
[18] SCHULZ, F. Jiří z Poděbrad. *Matice lidu*. Roč. II., číslo 5, Prague 1868, p. 115.
[19] SCHULZ, F. Jiří z Poděbrad. *Matice lidu*. Roč. II., číslo 5, Prague 1868, p. 116.
[20] SCHULZ, F. Jiří z Poděbrad. *Matice lidu*. Roč. II., číslo 5, Prague 1868, p. 174.
[21] LIŠKA, V. *Vládci českých zemí.* Prague 2009, p. 28.
[22] ŘEHÁK, K.L. *Jiří z Poděbrad, český král-kališník.* Prague 1910, p. 46–47.

George of Poděbrady launched an extensive diplomatic scheme between 1463 and 1464 when he was preparing a peace project and requesting European states and rulers to join in – see the third chapter.

1.4 George as a Soldier and Commander

In Czech historical tradition George of Poděbrady has the reputation of a peacemaker who prefers negotiations over weapons, However, this does not mean that he was cowardly nor that he would avoid using weapons.

His preference for peaceful solutions is quite clear in the testimonies of his contemporaries. For example Jan Dlugosz called him a man "who was not hasty to spill blood."Another of his contemporaries, Řehoř of Heimburg, considered him "the most moderate king" and "a very humane king, who only when forced takes his sword and loves peace above anything else".[23]

Already in 1451 George formulated his motto: "We desire peace and we wage war not to wage it but to win peace. Unwillingly we bear arms, unwillingly we engage in fights."[24]

On 12 September 1460 he wrote to Pope Pius II: "Non Armis, sed consilia Magis" – not with arms but by negotiating. And he tried to abide by this rule. However, he did acquire his power position in the Czech kingdom using arms.[25]

As a fourteen-year-old he stood by the side of his uncle, aristocrat Herald of Kunštát from Moravia, on the Lipany battleground against Žizka's Orphans.[26]

He proved his aptitude for battle while fighting against Duke Albrecht of Austria in 1438. George lead a campaign against the city of Tábor to help Casimir IV and at the young age of eighteen years he defeated his cavalry. From then on he is seen as a renown warrior.[27]

As the leader of the eastern Bohemian Hussite union, succeeding the deceased Hynek Ptáček of Pirkštejn, in 1448 he conquered Prague, which was until then controlled by the Catholics.[28]

In the early fifties he revived respect for the Hussite weapons abroad during his campaign in Míšeň. In 1462, under the banner of the chalice and host, he lead troops to Vienna.[29]

In 1465 rebelling Czech catholic aristocracy formed a support unity on the Green Mountain (Zelená Hora). After failed attempts at reconciliation with them, George declared war against them and conquered many of their fortifications in just a few months.[30]

George was undaunted by the crusade expedition against Hussites led by his former son-in-law Matthias Corvinus, who became the leader of the crusade in March 1468[31] and in 1469 invaded Bohemia. But Matthias' army fell under siege, and only thanks to George's amicable attitude he avoided a crushing defeat. Here also George proved to be not only a soldier but also a diplomat when he released Matthias on his word of honor. Even when the war broke out anew (1469–1470) Matthias was again forced to Moravia and at that time also Rome started considering an amicable settlement with George. However, George died before the final decision could be made.[32]

1.5 George's Management of the Economy

George can also be seen as an economist and manager, who knew the value and importance of money, which he saw as the basis for political success and growth of royal power.

Even before he became the Czech ruler he was one of the richest nobles in the country. His economic interests were in trade and commerce. He acquired money through solicited donations, loans, ransom, etc.

At the age of eighteen years he takes over the estates after the death of his father. In Bohemia it was the estate Poděbrady and Litice, in Moravia Kunštát and Boskovice. Shortly before his death Emperor Zikmund gave him twelve towns and villages (e.g. Pečky, Osek, Libice etc.). Empress Barbora, widow of Zikmund, ceded to him in 1445 the city of Jaroměř. In 1450 George bought the Visemburg estate and two years later the Častolovice estate. In 1454 Emperor Frederick III. gave George 16,000 ducats in debentures for services he rendered. In the same year George received the Lehnice principality from Czech king Ladislaus the Posthumous. In 1455 George bought Náchod, Skuhrov, Kladsko with the castle, and even an entire county and a year later the Minsterberg principality in Silesia.[33]

During his reign he had regular income from the regals, from special and general taxes, proceeds from the municipal census, profits from court fines and loans.[34]

He can also be described as a sober and prudent ruler, which was reflected in the facilities and equipment used by the royal court. Less gold utensils, parades are not as flashy, there are fewer servants. The royal court has no special sculptors, masons and architects. And no painters or poets were around. There was no court chronicler and the court also had few butlers, hunters and other staff to help pass the time.[35]

With an increasing age George's thrift bordered with covetousness. For example, it was known at the Bavarian ducal court that "the Czech king loves money." His contemporary Řehoř of Heimburku said that "the King is becoming increasingly stingy"

[23] MACEK, J. *Jiří z Poděbrad.* Prague 1967, p. 21.
[24] MACEK, J. *Jiří z Poděbrad.* Prague 1967, p. 21.
[25] ŠMAHEL, F. Jiří z Poděbrad. In: *Čeští králové.* Paseka, Prague, Litomyšl 2008, p. 266.
[26] ŠMAHEL, F. Jiří z Poděbrad. In: *Čeští králové.* Paseka, Prague, Litomyšl 2008, p. 263.
[27] SCHULZ, F. Jiří z Poděbrad. *Matice lidu*. Roč. II., číslo 5, Prague 1868, p. 46. ŘEHÁK, K.L. *Jiří z Poděbrad, český král-kališník.* Prague 1910, p. 11.
[28] POLIŠENSKÝ, J. *Jiří z Poděbrad, král český. Velcí Češi, velcí Evropané.* Prague 1997, p. 5.
[29] ŠMAHEL, F. Jiří z Poděbrad. In: *Čeští králové.* Paseka, Prague, Litomyšl 2008, p. 266–267.
[30] ŠMAHEL, F. Jiří z Poděbrad. In: *Čeští králové.* Paseka, Prague, Litomyšl 2008, p. 267.
[31] ŠMAHEL, F. Jiří z Poděbrad. In: *Čeští králové.* Paseka, Prague, Litomyšl 2008, p. 266–267.
[32] ŠMAHEL, F. Jiří z Poděbrad. In: *Čeští králové.* Paseka, Prague, Litomyšl 2008, p. 270–271.
[33] LIŠKA, V. *Jiří z Poděbrad – Národohospodář.* Kap. I., Prague 2010, p. 6–7.
[34] VESELÝ, Z. *Jiří z Poděbrad – Národohospodář.* Kap. II., Prague 2010, p. 47.
[35] MACEK, J. *Jiří z Poděbrad.* Prague 1967, p. 16.

and even his sympathizer Ctibor Tovačovský suggested to the king "not to be stingy".

2. The Predecessors of the Peace Project Designed by George of Poděbrady[36]

When reflecting upon projects with similar focus as the one devised by George of Poděbrady, we should mention two projects that preceded George's peace proposal. It was a proposal by a French scholar and lawyer Pierre Dubois[37] and a French economist and diplomat Antonio Marini[38].

Pierre Dubois was born in 1250 and died in 1320. He was an important jurist, but came to be known primarily by preparing a proposal that was to be the basis of a unified Christian Europe. Dubois was an adviser to English King Edward I and in 1306 he sent the king his peace plan. He was proposing a confederation – "République Chrétienne", under which the member states were to be independent in their internal affairs but disputes among states were to be resolved through an arbitration system, on the basis of which they would peacefully resolve these disputes. It is especially the idea of maintaining peace and peaceful arbitration what appealed to the creator of George's project.

An important body was to be the council, which in George's project was to be the congregation – i.e. a supreme body consisting of representatives of the member states which was to have decision-making powers.

Unlike George's project, the project of Pierre Duboise would give an important role to the pope, who would convene the council. He was also to be the supreme judge in the arbitration organization with the right to expel violators of peace in Europe to the Orient.

The peace organization was to be under the protection of French king Phillip IV, who would be given the title of Roman Senator, granted by the Holy Church. And it is the French king to whom Dubois appeals at the end of this project based on contractual relations between the future members. The French king was to be the secular head of the community of Christian states, while the pope was given the spiritual leadership.

Pierre Dubois thought about this union of states as an organization securing everlasting peace, as well as liberating the Holy Land and Constantinople. This fact follows from the very name of the project – De recuperatione Terrae sanctae.

Another project to which George's concept of peace project was directly linked was a short sketch by Antonio Marini, who was later one of the main authors of Czech king's peace project.

A. Marini summarized his ideas about peaceful organization in 1462 in a writing titled Memorandum.[39] It follows from this work that Marini aimed to unify Christian rulers under the Pope and the Holy Roman Emperor to avert threats of Turkey invading Europe. This project was based on purely Medieval notion of power map of Europe. The Emperor was to be at the top of the secular hierarchy and pope of the spiritual hierarchy. Also he thought about peaceful ways of resolving conflicts between the members states by a special arbitration body.

In the project prepared for George of Poděbrady, as we shall see, Marini gave up the old concept of power divided between the Emperor and the Pope. Under the influence of George he emphasized the peace idea and arbitration to resolve disputes between member states.

3. The Content and Importance of George's Peace Project[40]

The peace project of king George, created between 1462–1464[41] assumed connecting Christian states of Europe based on an multilateral agreement within the community that was to ensure peace and defense not only against the Turkish threat. George inspired this peace plan based on the idea of justice, however, the real authors were Antonius Marini and likely also Saxon jurist Martin Mair.[42]

According to the project, whose aim was beautifully expressed in the connection of two words – cultus pacis, a league of Christian states was to be created as an open community allowing other countries respecting Christian values to join in.

The organization was to reside in Basel. After five years the headquarters would move to one of the French cities, after five more years into one of the Italian cities and then back to Basel.

The head of this community or union would be a president. This role was reserved for the French king Louis XI. Other bodies included: *congregatio* – in modern terminology general assembly, *concilium* – a council of rulers, secretariat and a court of conciliation. Common army would protect this Christian unity.

The most important body was general assembly, where delegations from individual member states would have sessions. Decisions would be made according to the rules of equality and majority.

The court of conciliation would resolve disputes between the member states in the form of arbitrage – i.e. by agreement, reconciliation. Its role within the community was to unify and stabilize.

Also currency and the law would be common. The provisions about common law are sketchy, but very significant indeed.

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[36] MACEK, J. *Jiří z Poděbrad.* Prague 1967, p. 16–17.

[37] About the person of P. Dubois see BOIS, J. P. *L Europe a l´époque moderne*. Paříž 1999, p. 51–53.

[38] K A. Marini see e.g. POLIŠENSKÝ, J. *Tisíciletá Prague očima cizinců*. Prague1999, p. 91–94.

[39] Compare ADAMOVÁ, K. A propos de lú histoire de l integration européenne. In: *Livret – annuaire* 15, Paris 1999–2000, p. 220–221.

[40] Project of King George compare Vaněček, V.: Všeobecná mírová organizace podle návrhu českého králeJiřího z Poděbrad, Prague 1964 and Cultus pacis / ed. Vaněček, V./, Prague 1966. Here article by Jiří Kejř about several manuscripts of George's peace project and the place of their storage – Kejř, J.: Manuscrits, éditions et traductions du project, p. 75–82.

[41] Text of the project compare ADAMOVÁ, K., SOUKUP, L. *Prameny k dějinám práva v českých zemích*. Plzeň 2004, p. 83–89.

[42] Martin Mair was a notable lawyer and theologist of the 15th century (died in 1481). He was also a diplomat for King George of Poděbrady. Later he turn away from him and joined his opponents who considered George a heretic. For more on Martin Mair see BARTOŠ, F. M.: Návrh krále Jiřího na utvoření evropských států a jeho původce dr. Martin Mair, *Jihočeský sborník historický*. p. 74–81. Let us recommend here that in 1464, shortly before his death, pope Pius II. summoned George to his court, where George was accused of heresy. However, George never came to this trial.

They say that the source of common law is the nature, which documents the application of the naturalistic idea of the law.

The concept and text of the project was diplomatically discussed with many rulers of other European countries. George found support, for example, from Hungarian king Matthias Corvinus and Polish ruler Casimir IV. Also France initially took a positive standpoint and the French king was far from rejecting the idea of him being at the head of a union of states.

However, the Roman Emperor was not in favor of the project because he was to be only one of the rules, in the text he was titled "Prince of Germania", and his ambition to be the first among equals and play the prime role in Europe was not taken into consideration. Also pope Pius II. did not welcome the project warmly because according to the rules he was to have a preventive role, in which he would be influencing the representatives of Christian states to avoid wars. The Pope also had certain financial competencies – he would make sure that revenues the Church had from tithes would be kept together in union's treasure to ensure the realization of peace aims of the community.

The Czech King also aimed to counterbalance with his union the power of the Holy Roman Empire.

The peace project of George of Poděbrady did not materialize. The final blow was inflicted by the French king, who, according to the original plan, was to call the first meeting of the member states of the union. Under the influence of the Pope, mediated by French clergy, he quietly backed away from the project. The delegation of Czech king arriving in France in mid 1464 was not explicitly rejected, but negotiations did not take place and the delegation lead by A. Marini and Albrecht Kostka of Postupice took home only a Czech-French treaty on friendship between the two countries. Disappointed Antonius never returned to the Czech kingdom and stayed in France.[43]

Jaroslav, who also took part in the Czech peace delegation in France in his diary writes in Czech at the very end: "On Friday we went three miles to Brno. And here we gave the documents to the King and completed the message. And praised be Lord for all eternity! Amen."[44]

4. Conclusion

We briefly introduced the personality of the Czech king George of Poděbrady and the scope and aims of his peace project. In the light of integration tendencies in Europe we must remember George's peace project, which was based on the principle of a federation contract. A well-known expert on international public law Vladimír Outrata referred to the project some time ago as "an early attempt to formulate and complete legal system of collective security"[45] and he was certainly right

Even today it is inspiring to read again the text of this project because some of its objectives can be seen also in the integration of Europe. We refer to the preservation of peace and cooperation of member states, for example in the area of criminal law, but also common principles of the building of European community – unity and justice. And last but not least – the conviction that peace can only be preserved if justice and humanity are respected.[46]

[43] This delegation should not be confused with a later delegation lead by Lev of Rožmitál, which was to spread the importance and glory of the Czech Crown in the world. A report about this delegation was written in Czech by one of the members, Václav Šašek of Bířkov. The report is titled Diary about a ride and traveling of Lev of Rožmitál and of Blatna from Czech Kingdom to the end of the world 1465–1467. It has not survived in Czech, only as a translation in Latin from 16th century. This report inspired Czech author from end of the 19th and beginning of the 20th century Alois Jirásek to write a book Z Čech až na konec světa [From Bohemia to the end of the world].

[44] Diary of squire Jaroslav. In: TICHÁ, Z. (ed.) *Jak Češi poznávali svět.* Prague 1984, p. 94.

[45] OUTRATA, Vl. Some legal principles reflected in the Projet and their historical perspective. In: *Cultus pacis*, cited p. 126.

[46] See KARDOS,T. Die Ideen des Humanismus und des allgemeinen Friedens. In: *Cultus pacis*. cited, p. 127–133.

The New Czech State Citizenship Act: the Further Liberalization of Individual Rights or the Enpowerment of State Authority?*

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Abstract

On 1 January, 2014 a completely new Czech State Citizenship Act is coming into force as the Act N. 186/2013 Coll. It is the sixth act so far in the history of the Czech lands that regulates the legal title of state citizenship as integrated and complex. In comparison with the previous legislation, the act is very detailed and extensively articulated. The bill preparation and the legislative process was going on in the context of criticism from the side of nongovernmental organizations working with migrants who were pointing out, in their opinion, more restrictive conditions of Czech citizenship acquirement for foreigners.

These are the conditions not included in the previous legislation. However, we should rather talk about more detailed specifications than about stricter stipulation. In addition to this, the new Czech act enables all Czech citizens – naturalized citizens as well as citizens by birth – to have Czech citizenship and also a foreign citizenship in parallel. This means not only significant legislation liberalization, but also an important act adopted in a period when some European countries including EU members are moving in the reverse direction through highlighting the single citizenship principle.

The act also preserves the historically proved dominating ius sanguinis principle in the title of citizenship acquirement through birth, however, it also supports the elements of the competitive ius soli principle. In my opinion, the final conclusion is unambiguous. The act is liberal and prefers the rights of an individual to the political authority of the state and, in the case of the naturalization conditions, it equally respects the rights of individual as well as the state priorities.

Key words: *State Citizenship Act; ius sanguinis; individual rights; Czech citizens; EU; naturalization.*

Introduction

On 1 January, 2014 a completely new Czech State Citizenship Act is coming into force as the Act N. 186/2013 Coll. It is the sixth act so far in the history of the Czech lands that regulates the legal title of state citizenship as integrated and complex. In comparison with the previous legislation, the act is very detailed and extensively articulated. Whereas only six articles were dedicated to this legal title in the first state citizenship legal stipulation, which was from the Austrian Common Civic Code of 1811, the Act N. 186/2013 Coll. contains eighty-four articles.

The bill preparation and the legislative process was going on in the context of criticism from the side of nongovernmental organizations working with migrants who were pointing out, in their opinion, more restrictive conditions of Czech citizenship acquirement for foreigners. The website *Migraceonline.cz* even published a statement that "today (before passing the new bill) the Czech Republic has become the strictest European Union (EU) membership country, concerning the awarding of citizenship to foreigners", and that the new bill is going to make the conditions much stricter for foreigners.

The critics were focusing on the sixth part of the second chapter and especially on certain points whose provisions werestipulating state citizenship acquirement through awarding (namely naturalization). Nevertheless, awarding is just one of the seven titles of citizenship acquirement, according to the new act. In addition to this, the act also stipulates the loss of citizenship and other related issues.

The act requires a holistic critical evaluation as a complex consisting of proportionally linked provisions, as well it should be compared with our previous legislation and legal regulation valid in other countries and, especially, EU membership countries. A comparison with the worldwide trend of extending individual rights and limiting the political power of states over their citizens is also advisable. As late as the above mentioned had done, we will be able to deduce whether the new act means further liberalization of individual rights or, on the contrary, empowers the state authority. Such conclusions would not be available if just one single part of the new act was evaluated.

The Outlasting Principle *ius sanguinis*

In the field of citizenship acquirement the new legislation reassumes the previous stipulations continually, and the existing principles of citizenship as a legal institution have basically not been changed at all. In the most frequent citizenship acquirement title, namely through birth, the existing principle

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ius sanguinis is preserved, namely citizenship taken after predecessors, which has been a traditional concept on the Czech territory, practically since its first implementation of 1811. *Ius soli* (namely through the birthplace), the other of the two basic principles, has never been implemented in the Czech Lands. Currently, hardly any country is implementing one of the two basic principles, *ius sanguinis* or *ius soli*, in their pure form. Both principles are usually combined in legislation and one of them slightly dominates.

The *ius sanguinis* principle dominates in the legislation of Central European countries (namely Germany, the Czech Republic, Austria, Poland, Slovakia, Hungary, and others),[1] where the creation of modern nations on the base of the ethnocentric principle was enforced in the past, which means that the "ethnic nation" does not equal the "state nation" as a community of state citizens.

On the contrary, the *ius soli* principle is specifically used in Latino American countries where the nationality and citizenship have always been integrated and the political nation genesis has always included all state citizens. A legislation comparison proves the fact that the countries implementing the *ius soli* principle in the title of birth tend to be also more liberal in the awarding of citizenship to foreigners. They mostly tolerate multiple citizenship and, concerning the residence period on the state territory, there is no imposition on the citizenship applicants. Namely Canada requires only three years[2] and Australia even only two years of continual legal residence on state territory.[3] Moreover, both countries enable their citizens a dual citizenship. On the contrary, namely the Slovenian legislation (Slovenia implements the *ius sanguinis* principle) stipulates a ten-year period and makes no dual citizenship possible.[4]

Some stipulations of the new Czech State Citizenship Act further confirm the elements of the *ius soli* principle in the system based on the *ius sanguinis* principle domination, which is matching the liberalization tendencies in legislation of most countries in the world.

The Permissibility of Multiple Citizenship

The most important historical change introduced by the new legislation is the permissibility of multiple state citizenship of Czech citizens, and thus in the widest possible extent.

The Czech Republic, whose legislation had been following the single citizenship principle, accepted a very distinctive legislation liberalization beneficially preferring the application of individual rights to the state political authority. The Czech Republic no more belongs to the countries that are treating multiple citizenship as unwanted phenomenon and are trying to suppress it, opposing the international treaties reflecting the existence of multiple citizenship as simple reality.[5]

According to the new act, a foreigner applying for the Czech citizenship no more has to renounce his original citizenship.[6] Between 1811 and 2013 such renouncement used to be a key condition in all legislation with no chance of liberalization. The original citizenship renouncement condition related to the Czech citizenship awarding was also included in the last legislation, namely the Act N. 40/1993 Coll.[7]

According to the new act, a Czech citizen does not lose his state citizenship after being awarded a foreign state citizenship. The previous automatic citizenship loss condition is now fully ignored in the new legislation. At the same time the previous legislation enabled a person to acquire a foreign citizenship in addition to the Czech one only through birth or marriage. All other cases were subject to the automatic citizenship loss penalty.

Multiple citizenship had not been accepted by the former Austrian legislation and this tradition continued in Czechoslovak legislation after 1918. Art. 4 of the first Czechoslovak Constitution of 1920 even defines the Czechoslovak citizenship as "unique and unified". According to Art.4 – par. 3, "A foreign state citizen can never become a citizen of the Czechoslovak Republic at the same time."

The first State Citizenship Act N. 236/1920 Coll. was covering all of the concerned eventualities to foreclose the occurrence of dual citizenship resulting from the fall of the Austro-Hungarian Empire. Individuals, living on the republic territory, who had had the former right of abode in other parts of the no more existing monarchy, as well as individuals living in other parts of the monarchy, who had had the right of abode on the newly established republic territory, were granted the optional right to select foreign or Czechoslovak citizenship. Consequently, three international treaties fully excluding dual citizenship were signed (namely with Austria,[8] Germany[9] and Poland[10]).

Keeping the original citizenship was also foreclosed in the cases of Czech and Slovak repatriants who were allowed to resettle from abroad after 1945 and were awarded Czechoslovak citizenship according to the Act N. 74/1946 Coll., on state citizenship awarding to the countrymen returning to the motherland, or according to the Czechoslovakian-Soviet treaty on the Volyne Czechs resettlement of 10 July, 1946.

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1 KOSTAKOPOULOU, D., *The Future Governance of Citizenship*. Cambridge: Cambridge University Press, 2008. P. 26–27.

2 Canadian Citizenship Act 1985, R.S.C., 1985, c. C-29, Part I – The Right to Citizenship.

3 Australian Citizenship Act 2007, SECT 22.

4 Citizenship Act of the Republic of Slovenia 1999, Articles 10–16.

5 Particularly the European Convention on Nationality of 1997. MRÁZEK, J., *Dokumenty ke studiu mezinárodního práva*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2005. P. 177–182.

6 The state citizenship awarding conditions are summarized in Art. 13 of the new act. The original citizenship renouncement condition is no more listed there.

7 ČERNÝ, J., VALÁŠEK, M., *České státní občanství*. Prague: Linde, 1996. P. 127–128.

8 The so-called Brno Treaty of 7 June, 1920 which became a part of the Czechoslovak legislation as the Treaty N. 107/1921 Coll.

9 The Treaty on state citizenship between the Republic of Czechoslovakia and the Empire of Germany of 29 June, 1920 which entered the Czechoslovak legislation as the Treaty N. 308/1922 Coll.

10 The Treaty on legal and financial issues between the Republic of Czechoslovakia and the Republic of Poland of 23 April, 1925 which entered the Czechoslovak legislation as the Treaty N. 56/1926 Coll.

Czechoslovakia even signed eight multilateral international treaties to preclude dual citizenship with other countries (namely the so-called *naturalization convention* with the USA in 1928 and later seven treaties with the so-called socialist countries, including two treaties with the Soviet Union).

Also the penalty clause "punishing" individuals for any foreign citizenship acquirement by the automatic loss of Czechoslovak or Czech citizenship was included in every Czech citizenship legislation until 2013.

Some older Czechoslovak legislation even enabled to denaturalize a citizen staying abroad also in the case of not having acquired any foreign citizenship abroad. The example of such legislation is namely the Act N. 71/1922 Coll., which enables denaturalization by request, but only after having passed the compulsory service in the Czechoslovak army. The Czechoslovak State Citizenship Act N. 194/1949 Coll. and also the Czech National Assembly State Citzenship Act N. 39/1969 Coll. – both passed and implemented in the communist-era – equally contained the legal institute of so-called denaturalization related not only to the foreign citizenship acquirement, but also to the political activities of the emigrants, illegal emigration or fail to obey the official return notice.

On the other hand, in the past there were two bills passed, which, on the contrary, unwillingly contributed to the establishment of dual citizenship related to the Federal Republic of Germany. These were the Constitutional Decree N. 33/1945 Coll., that preserved the Czechoslovak citizenship to certain Czechs, namely the ones born in Czech-German mixed families, who acquired German citizenship during the WW2, and also the Act N. 34/1953 Coll., that re-naturalized the not-expulsed ethnic Germans collectively (on no individual request). Thus the German citizenship holders from the Nazi-occupation period did not have to apply for Czechoslovak re-naturalization after the war, their German citizenship was preserved and later legalized in post-war German federal legislation by a special act in February 1955.

Introducing the multiple citizenship permissibility by 1 January, 2014 Czech legislation surely makes a great historical step forward.

To compare: the permissibility of dual (or multiple) citizenship acquired through naturalization (not birth) are excluded in the legislation of many EU membership countries, namely Scandinavian countries (except Sweden), all of the three Benelux countries, Germany, Austria and Poland.[11] Some of the EU membership countries are even opposing the general liberalization trend in the field of multiple citizenship permissibility and, vice versa, are confirming the single citizenship principle. E.g. last year German legislators denied a bill that should have opened up the new prospect of dual citizenship for foreign immigrants´ ancestors born on German territory. So, in the future, after reaching the lawful age, they will have to select one single citizenship. The Netherlands and France are even considering whether to introduce the institute of state citizenship loss related to a foreign state citizenship acquirement through naturalization.[12] The above mentioned countries are going to introduce a legislative title totally abolished by the Czech legislature related to the new Act.

The New Naturalization Conditions

As a new aspect, the sixth part of the second chapter of the Act 186/2013 brings a detailed comprehensive definition of conditions stipulated for foreigners applying for Czech citizenship. This part has become the object of the nongovernmental organizations criticism. They were particularly pointing out the fact that the new act, except for (significant) unique cases, does not reduce the required five-year residence in the country,[13] gives no claim for naturalization [14] and, in comparison with the previous legislation, stipulates stricter (consisting of more specific details) conditions for the citizenship applicants.

According to the new act, a foreigner applying for state citizenship has to be integrated into the Czech society,[15] must not be a threat to state security,[16] must not have been sentenced of an intentional crime or unconditionally sentenced of a negligent crime in the past,[17] has to prove the knowledge of Czech language,[18] has to prove the knowledge of the constitutional system and the basic knowledge of the life in the Czech Republic,[19] must not have broken the Czech immigration legislation seriously in the past three years,[20] has to prove his total financial income and its legality in the past three years, including taxation,[21] and his social security system claims must not have been inadequate and lacking any serious reason in the past three years.[22]

Concerning the five-year permanent residence condition and the ten-year legal residence condition, according to the new Czech act, we must not forget the fact that, e.g. the *Staatsangehörigkeitsgesetz* (StAG) in the neighbouring Germany stipulates an eight-year legal residence condition. So, some foreigners may be naturalized in the Czech Republic faster than in Germany and some only two years later. Nevertheless, this means only a minimally-long required residence.

Also a naturalization claim denial in the case of fulfilling all of the formal conditions is not an unusual point in other legislatures in European countries. On the contrary, acceptance seems to be exceptional.

[11] European Bulletin on Nationality, Council of Europe, 2004.
[12] KOSTAKOPOULOU, D., *The Future Governance of Citizenship*. Cambridge: Cambridge University Press, 2008. P. 47–61.
[13] Stipulated by Art. 14 – par. 1 of the Act N. 186/2013 Coll., concerning the state citizenship of the Czech Republic and amendind certain acts.
[14] Stipulated by Art. 12 of the Act.
[15] Stipulated by Art. 13 – par. 1 of the Act.
[16] Stipulated by Art. 13 – par. 2 of the Act.
[17] Stipulated by Art. 14 – par. 3 of the Act.
[18] Stipulated by Art. 14 – par. 4 of the Act.
[19] Stipulated by Art. 14 – par. 5 of the Act.
[20] Stipulated by Art. 14 – par. 6 of the Act.
[21] Stipulated by Art. 14 – par. 7 of the Act.
[22] Stipulated by Art. 14 – par. 8 of the Act.

The critisized condition requiring integration into the Czech society, stipulated by Art. 13 – par. 1 of the Act[23], is based on the premise that the state citizenship is supposed to be the potentially highest residence status awarded to a foreigner, granting him a status legally equal to other citizens (the Czech legislation does not distinguish between true-born citizens and the naturalized ones – in contrast with the e.g. United States´ legislation). According to the Czech Constitutional Court Judgement N. 207/1994 Coll. of 13 September,1994, state citizenship generates "a permanent legal relationship between an individual person and the state". It is impossible to imagine "the permanence of the relationship" without any integration. The previous integration requirement, as the basic naturalization condition, is matching the international understanding of the very meaning of the term citizenship itself. State citizenship would be lacking its international effectiveness without a full integration into the states society, which has been fluently proved by the well-known *International Courte* sentence of 1955 in the case of *Nottenbohm*, when an individual of German origin was still judged as German on the American continent, hence her new Liechtenstein citizenship (despite being acquired legally) was not based on "a permanent relationship" (integration) with the new state.[24] Long ago, Roman law also had a very similar meaning of citizenship.

The state security stipulation and the required knowledge of the language, constitutional system and the way of life in the country also belong to the usual naturalization conditions in other EU membership countries. The German federal legislation includes all of the above mentioned requirements. Compared to Czech legislation: according to the new act, the Czech state citizenship applicant should prove his knowledge of the language at the level B1, whilst in Germany C1 is required, which means a higher level than the Czech act stipulates.

The other requirements, like being without criminal record, proof of income, following immigration rules, proper taxation and no inadequate social security system claims, also belong to the usual conditions for foreigners applying for state citizenship in other EU membership countries.

Liberalization for the Benefit of EU Citizens

The new Act N.186/2013 Coll. reflects a substantial shift in the material base of the citizenship legal concept in relation to the fact that the Czech Republic acceded to the European Union (EU) on 1 May, 2004. The Act introduces an entirely new liberalization of the citizenship acquirement conditions for the other EU countries citizens. It is the first time in the Czech lands citizenship legal concept history when the law comprehensively defines the list of foreign countries whose citizens can acquire Czech citizenship on more convenient conditions than other foreigners. Only certain exceptions on the part of the Slovak Republic citizens, thus reflecting the citizenship changes after the dissolution of Czechoslovakia, were valid in the previous legal concept.

Regarding this the law has been adapted to the legal concept trends of the other EU countries. This means a certain indirect reciprocity with the other EU countries, which is rather based on goodwill than on obligation. Neither the Community acquis, nor any international treaty obliges the membership countries to do so. They can decide themselves whether they should introduce such liberalizing citizenship acquirement conditions valid for the other EU membership countries and, eventually, decide on their sphere of action and extent.

First of all the new Act is liberalizing the essential naturalization condition for Czech citizenship applicants among the citizens of the other European Union membership countries, Switzerland and the countries-contractual parties of the European Economic Area Treaty (namely Norway, Liechtenstein and Iceland). The usually required pre-application permanent residence period on the Czech Republic territory has been shortened by Art. 14 – par. 1 – point b of the above mentioned Act to 3 years only, which means one of the most liberal legal regulations in this field ever, as well as in the European context.

The liberalization for the EU membership countries citizens has also been implemented into provisions relating to establishing paternity through determination. Due to Art. 7 – par. 1, a child born to a EU citizen mother and a Czech father acquires Czech citizenship at the very moment of the consensual acknowledgment of paternity.[25] On the contrary, the following par. 2 also stipulates the condition of DNA-test paternity determination for mothers coming from non-membership countries. In the other cases the child acquires Czech citizenship after the final and conclusive paternity determination judgement.[26]

A brief comparison with the Federal Republic of Germany legal regulations shows that the *Staatsangehörigkeitsgesetz* (StAG), as currently in operation, does not liberalize the German citizenship acquirement naturalization conditions valid for the other EU membership countries citizens as much as the new Czech act does. This especially means the eight-year required residence period stipulated by Art. 8 of the StAG and valid for the EU as well as for non-EU countries´ citizens.

Nevertheless, the liberalization of the citizenship acquirement naturalization conditions valid for the other EU membership countries[27] is implemented into the above mentioned German act provisions, relating to the multiple citizenship of these subjects. Despite all of the up-to-now liberalization tendencies, the Federal Republic of Germany permanently prefers the single citizenship concept in contrast to the Czech Republic. According to Art. 25 of the federal act the German citizenship applicants coming from other EU membership countries do not have to renounce their original citizenship in the frames of the naturalization process and can keep it legally after having acquired German citizenship. Regarding this the new Czech act is again more liberal because

[23] Verbatim quotation of the Art. 13 – par. 1 of the Act: "The state citizenship of the Czech Republic can be awarded if the applicant is integrated into the society of the Czech Republic, particularly concerning the family, work or social integration."

[24] ČEPELKA, Č, ŠTURMA, P. *Mezinárodní právo veřejné*. Prague: C. H. Beck, 2008. P. 330–331.

[25] The same condition is also valid for female foreigners coming from the non-EU countries in case of their permanent residence on the Czech Republic territory or no certain citizenship to be determined at all.

[26] According to Art. 6 of the Act N. 186/2013 Coll.

[27] The federal *Staatsangehörigkeitsgesetz,* just as the Czech act, includes the term "the other membership country citizen" covering also the citizens of Switzerland and the contractual parties of the European Economic Area Treaty.

the original citizenship renouncement condition has been abolished not only for EU citizens, but for any applicants at all.

The Art. 4 (namely citizenship acquirement through birth) of the German *Staatsangehörigkeitsgesetz* also awards German state citizenship to the children of other EU citizens who can prove a valid permanent residence on the Federal Republic of Germany territory at the moment of the children´s birth. No minimal period of stay is stipulated by the law. The Czech act does not introduce any similar citizenship acquirement through birth liberalization for other EU membership countries´ citizens. Regarding this, the German law is more liberal.

Restitution for Past Wrongs

The new act is also solves the issue of restitution for past wrongs. We can even claim that this field is being treated widely enough, so, it is getting finalized and closed.

Under the communist regime, especially after 1969, a lot of Czechoslovak citizens, who had left the state territory permanently for political or economic reasons, were denaturalized against their own will, mostly through the citizenship deprivation. This was obviously breaking the international obligations of Czechoslovakia and could have been judged as a gross intervention into the civil rights of the affected individuals.

In 1990 a socially urgent need for a nationwide restitution for such wrongs arose. The Act N. 88/1990 Coll. abolished all the Ministry of Interior Acts on citizenship deprivation and changed them reversibly into standard denaturalization. At the same time the affected individuals – emigrants – were guaranteed the right to express one´s will towards the citizenship preservation, namely until 31 December, 1993. Nevertheless, the citizenship loss of emigrants appeared to be wider than expected. A lot of emigrants also lost their citizenship through denaturalization as a consequence of a foreign citizenship acquirement or resulting from the so-called Czechoslovak-American *naturalization convention* (they emigrated when forced by the lack of political freedom in Czechoslovakia and not because of expressing "one´s own free will").[28]

The so-called *naturalization convention* was denounced by the Czech contractual party on 20 August, 1997,[29] logically with no retroactivity. Two years later our legislators passed the Act N. 193/1999 Coll., on the state citizenship of certain former Czechoslovak citizens, which enabled the Czechoslovak citizenship restitution to all communist-era emigrants, thus also to the ones naturalized on the US or Israeli territory through a simple declaration and, at the same time, dual citizenship was accepted in case of individuals that had acquired a foreign citizenship through naturalization. The Act was affecting all of the former Czechoslovak citizens who had lost their state citizenship in the period between 25 February, 1948 and 28 March, 1990 as a result of deprivation, denaturalization, a foreign citizenship acquirement, or on the base of the so-called *naturalization convention* or other treaties on the dual citizenship foreclosing, and who had acquired Czech citizenship after 1969 or would have acquired it by 1 January, 1969.

The new Act N. 186/2013 Coll. introduces even wider restitution for past wrongs. According to Art. 31 of the Act the Czech citizenship can be acquired through a simple declaration by any former Czech or Czechoslovak citizen who would have been able to become a Czech citizen by 1 January. 1969, no matter when and how he lost citizenship. The article also includes individuals who lost their Czech citizenship upto 31 December, 2013 through the implementation of the existing rule of automatic loss in the case of the foreign citizenship acquirement. The above mentioned individuals can renew their Czech citizenship. There exists a legal claim for the citizenship acquirement through the declaration, but not for its award. Citizenship gets renewed on the day of the declaration.

According to the stipulation of Art. 33, also the ancestors of Czech (Czechoslovak) citizens born between 1 October, 1949 and 7 May, 1969 can acquire Czech citizenship through the declaration. Nevertheless, such a declaration has to be made by 31 December, 2014.

A Redundant Article?

In connection with the quite extensively articulated seventh part of the Act dedicated to the citizenship acquirement through a declaration, I would like to point out the obviously redundant stipulation of Art. 32, which awards the right to acquire Czech citizenship through a declaration also to the individuals who had been Czechoslovak citizens until 31 December, 1992 – the last day in the history of Czechoslovakia. At the same time the above mentioned individuals were neither Czech Republic nor Slovak Republic citizens.

We must remark that in the course of the Czechoslovak federation[30] existence that both Republic citizenships, thus Czech and Slovak, used to be primary legal titles from which the Czechoslovak citizenship was only derived, despite being the only internationally accepted legal title[31] in comparison with the Republic ones. Citizenship used to be acquired according to the Republic law during the whole federation existence period. In the Czech case it was *The Czech National Assembly* Act N. 39/1969 Coll., to regulate the acquirement and loss of the Czech Socialist Republic citizenship.

Act N. 165/1968 Coll., to regulate the national citizenship issues, passed before the federation started, was stipulating conditions of dividing the existing Czechoslovak citizens into two categories, thus Czech and Slovak, so that nobody would be left without citizenship after the establishing of the federation. Two basic principles were stipulated by the Act; every Czechoslovak citizen had to be one of the two republic´s citizen and no dual-republic citizenship was allowed at the same time.[32]

The fact that no one could be a Czechoslovak citizen without being also one of the Republic´s citizens by 31 December, 1992

[28] ČERNÝ, J., VALÁŠEK, M., *České státní občanství*. Prague: Linde, 1996. P. 129–131.
[29] The Ministry of Foreign Affairs Notification N. 229/1997 Coll.
[30] The Czechoslovak Federation was existing under different official names from 1 January, 1969 to 31 December, 1992. It was established according to the Constitutional Act N. 143/1968 Coll., on the Czechoslovak Federation.
[31] Stipulated by Art 5 of the Constitutional Act N. 143/1968 Coll., on the Czechoslovak Federation.
[32] ČERNÝ, J., VALÁŠEK, M., *České státní občanství*. Prague: Linde, 1996. P. 82–86.

is the result of the above mentioned. Such an eventuality would be out of the question in the case of individuals born in the federation period, reflecting the fact that the national citizenship acquirement was fully stipulated by the republic law. Theoretically, there might have been single former Czechoslovak citizens born abroad before 1969 who had never lived on the Czechoslovak territory before the establishing of the federation and whose parents had been permanent residents of the two different later republics.[33] Moreover, such individual would later not to be allowed to acquire the republic citizenship through declaration, thus would be henceforth staying abroad without any contact with the Czechoslovak authorities. How many such individuals would be willing to acquire Czech citizenship through a declaration according to the Art. 32 of the Act today?

The So-called Benes Decrees Anti-Breach Policy

The articulation of the seventh part (namely the citizenship acquirement through declaration) of the Act N.186/2013 Coll. Contains a specific policy for the cases of the so-called *Benes decrees* breach attempts. In Art. 31 – par. 1 the Act explicitly stipulates that the Czech national citizenship cannot be acquired through declaration by an individual that lost the Czechoslovak national citizenship according to the Constitutional Decree N. 33/1945 Coll. In 1945 the above mentioned decree meant the deprivation of citizenship for the individuals of German (and also Hungarian) nationality in connection with their postwar displacement from the state territory.[34]

According to the same stipulation Czech citizenship cannot be acquired through a declaration by the former Czechoslovak citizens living on the current Carpatho-Ukraine territory who lost their Czechoslovak citizenship according to the Czechoslovak-Soviet international treaty on ceding the Carpatho-Ukraine to the Soviet Union signed on 29 June, 1945.[35]

All the Slovak citizens who acquired Czech citizenship in the Czechoslovak Federation period and retained it after the states dissolution are also excluded from the group of individuals qualified for the citizenship acquirement through the declaration.

The only valid exception is for the former Slovak citizens who emigrated in the Czechoslovak period and whose last permanent address was in the Czech Republic territory. Of course, on condition that they did not become Slovak citizens after the state dissolution.[36] The reason for such an exception is evidently a legal fiction based on the earlier existing Czech citizenship of such individuals because in the period of the Czechoslovak federation the republic citizenship could have been changed through a simple declaration in the case of establishing permanent residence in the other republic, and with no stipulated period. A major part of Czechoslovak citizens migrating from one republic to another in the federation period did not change their republic citizenship because such a change would not have had any practical impact on their lives. The Czechoslovak citizens began to understand the importance of the republic citizenship first in connection with the prepared common state dissolution of 1992.

The Ethnic Principle Rejection

The new Czech legislation does not include the title of naturalization through just national origin. "Czech nationality" cannot become a reason for any liberalization of the naturalization conditions. The citizenship acquirement procedure remains based entirely on the civil principle, which is fully according to the existing attitudes to the issue, also stipulated by the previous legislation.

The liberalizing conditions valid for some of the Czech citizenship applicants, stipulated by Art. 15 of the act, only enables easier access to citizenship for the former Czech and Czechoslovak citizens, their ancestors and relatives, and further to individuals with a factual relationship with the Czech Republic, not taking into consideration their nationality, language or origin.

Following such principles and conceiving the liberal concept, Czech legislation has got significantly closer to the legislation of countries, namely Anglo-Saxon ones, where the *ius soli* principle is preferred in the title of citizenship acquirement through birth. In accordance with British, American, Canadian, Australian or French legislation the "origin" is understood as an individual status only in the case of being eventually related to the former existence of state citizenship.

In the context of this civil concept the new act is, on the contrary, different from the legislation implemented in some of the neighbouring countries which, as well as the Czech Republic, prefer the *ius sanguinis* principle in the title of citizenship acquirement through birth. Namely German or Hungarian legislation includes the title of citizenship acquirement through nationality. Whereas this title has been rather reduced in the German legislation of last twenty years, it newly appeared in the Hungarian legislation as late as in 2010.[37] Likewise also Bulgaria awards its state citizenship to the inhabitants of Macedonia as "ethnic Bulgarians" and Romania to the inhabitants of Moldavia as "ethnic Romanians and former Romanian citizens".[38] Hidden but still obvious elements of the ethnic principle are included in the Baltic countries legislation.[39] Ob-

[33] According to Act N. 165/1968 Coll., the republic citizenship used to be determined by the place of birth, last permanent residence.

[34] KUKLÍK, J., *Mýta a realita takzvaných Benešových dekretů*. Prague: Linde, 2002. P. 288–325.

[35] *The Treaty between the Czechoslovak republic and The Union of Soviet Socialist Republics on the Carpatho-Ukraine* signed on 29 June, 1945 that was implemented into the Czechoslovak legal order as *Treaty N.. 186/1945 Coll.*, followed by the *Constitutional Decree N.. 60/1945 Coll.* and the *Government Act N. 61/1945 Coll.* (regulating the option right exercise itself). According to the Treaty, the Carpatho-Ukraine inhabitants, who had been serving in the Czechoslovak armed forces in exile in the WW2, were, together with their families, given the option right to preserve their Czechoslkovak citizenship. The others became Soviet Union citizens.

[36] Stipulated by Art. 31 – par 2 of the Act N. 186/2013 Coll.

[37] In case of individuals having been settled outside of their motherland for generations nationality is not judged by their own declaration but by the language knowledge level, by proving the "national feeling" and by other subjective criteria.

[38] European Bulletin on Nationality, Council of Europe, 2004.

[39] The ethnic principle directed against the immigrants coming from the other republics of the former Soviet Union is particularly included in the official language knowledge requirement.

viously, the most distinctive example of awarding citizenship through nationality is the Israeli state citizenship act containing the so-called *right to return.*[40]

In the past the title of citizenship acquirement through national origin also used to be included in the Czech and, particularly, in the Czechoslovak legislation. However, this phenomenon was merely marginal (differing from the exclusion from citizenship based on the same principle). Otherwise in the 18th and 19th centuries the Czech political nation was being formed on the purely ethnocentric principle and the Czech lands of that period became a battlefield for a harsh struggle between two nation-oriented programmes, nevertheless, in the newly established independent state there was no need for any wider implementation of the ethnic principle.[41] After 1918 the majority of Czechs were living on the territory of the Czechoslovak Republic and there were only negligible local Czech minorities in the surrounding states. Czechs have never suffered from the divided-nation complex just like the majority of other Central and Eastern European nations (e.g. Germans, Hungarians, Poles, Serbs, Italians, Romanians and others).

A very limited implementation of the citizenship acquirement through nationality was enabled by the first State Citizenship Act N. 236/1920 Coll., which, as stipulated in Art. 4 – par. 4, gave the option right to get the Czechoslovak citizenship to individuals who are "Czechoslovaks by the language and race" [42] and live on the territories of the other succession states of the former Austro-Hungarian empire, despite neither the above mentioned individuals, nor their predecessors, ever having the right of abode on the territory of the newly established Czechoslovak Republic.

To compare: Czech legislation related to the dissolution of Czechoslovakia by 31 December, 1992 never included such a possibility. The state citizenship issues were solved by the permanent residence, eventually from the places of birth of the affected individuals or their parents. No more attention was paid to the mother tongue or subjectively selected nationality in 1993.

The ethnic principle also appeared in the international *Treaty between the Czecho-Slovak Republic and the German Empire on the state citizenship issues and option right* of November 1938.[43] Its stipulations enabled the individuals of "Czechoslovak nationality" living in the occupied borderland to use the optional right to preserve their Czechoslovak citizenship. But the Treaty has never become a valid part of the Czechoslovak legislation.[44]

The Constitutional Decree N. 33/1945 Coll. of 2 August,1945 also regulated Czechoslovak citizenship, accordingly to the ethnic principle, in cases when the individuals of German nationality had to undergo a mass deprivation of the Czechoslovak citizenship. According to the decree, the citizenship could not have been acquired, but only confirmed.

After 1945 two separate bills were passed and two international treaties accepted. They enabled Czechoslovak citizenship to be awarded to the ethnic Czechs and Slovaks returning to the renewed republic from abroad. We mean namely the Act N. 74/1946 Coll., on awarding the state citizenship to the countrymen returning to the motherland, and Act N. 179/1946 Coll., on awarding the state citizenship to countrymen from Hungary, and later two treaties between Czechoslovakia and the Soviet Union on the Carpatho-Ukraine of 29 June, 1945, and on the optional right and reciprocal civilian relocation of 10 July, 1945, which dealt with the Czech minority settled in the Volyne region of Western Ukraine. According to the above mentioned treaties, the individuals of Czech and Slovak nationality living in the Carpatho-Ukraine and Volyne were given the optional right to select Czechoslovak state citizenship.

Last time the ethnic principle was reflected by the stipulation of Art.11 of the Act. N. 40/1993 Coll., which was the liberalization of among other things the conditions of the five-year permanent residence for the state citizenship applicants – ethnic Czechs coming from Ukraine and Kazakhstan "on invitation by the Czech government" until 31 December, 1994.

Conclusion

The new Czech State Citizenship Act N. 186/2013 Coll. really stipulates new conditions of the Czech state citizenship acquirement for foreigners in the sixth part of its second chapter, which might have been righteously criticized by nongovernmental organizations. These are the conditions not included in the previous legislation. However, we should rather talk about more detailed specifications than about stricter stipulation. Only proving the knowledge of the Czech constitutional system and the Czech way of life basics represent downright new conditions, however, closely related to the general requirement of the applicant´s integration into the Czech society, making such acquired citizenship internationally effective.

In addition to this, the new Czech act enables all Czech citizens – naturalized citizens as well as citizens by birth – to have Czech citizenship and also a foreign citizenship in parallel. This means not only a significant legislation liberalization, but also an important act adopted in a period when some European countries including EU members are moving in the reverse direction through highlighting the single citizenship principle.

The act also preserves the historically proved dominating *ius sanguinis* principle in the title of citizenship acquirement through birth, however, it also supports the elements of the competitive *ius soli* principle. In my opinion, the final conclusion is unambiguous. The act is liberal and prefers the rights of an individual to the political authority of the state and, in the case of the naturalization conditions, it equally respects the rights of individual as well as the state priorities.

[40] Law of Return 5710-1950.

[41] In 1919 only the radical National democrats suggested to the Revolutionary National Assembly to award the Czechoslovak citizenship on the Czech Lands territrory only to the individuals of "Czechoslovak nationality", – understood as ethnic Czechs in that period.

[42] We can derive the fact that this means the entitled individuals from the verbatim formulation of Art. 4 – par. 4 of the Act N. 236/1920 Coll.

[43] Published in the Collection of Laws and Governmental Acts of the Czechoslovak Republic; N.300/1938 Coll.

[44] All of the legal acts and standads issued by the home authorities on the Czechoslovak territory after the acceptance of the so called Munich Agreement of 30 September, 1938 were later declared primarily invalid.

ALAI Association Littéraire et Artistique Internationale – Groupe Autrichien – Michel M. Walter (Hgg.)

The proceedings of the ALAI Study Days in Vienna 2010, focused on the topics of duration of copyright and related rights (English; Français; Español)

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Die vorliegende Veröffentlichung versammelt die Beiträge der Studientage der ALAI *(Association Littéraire et Artistique Internationale)* vom 09.09. bis zum 11.09.2010 im historischen Redoutensaal der Hofburg in Wien. Die Konferenz beschäftigte sich eingehend mit der Frage der Schutzdauer des Urheberrechts und der mit ihm verwandten Schutzrechte. Hierzu wurden sechs Arbeitsgruppen gebildet, von denen die erste die historischen Perspektiven der Problemstellung auslotete, weswegen sie für den Urheberrechtshistoriker von großer Bedeutung ist. Die internationalen sowie die transnationalen Aspekte wurden sodann jeweils in einer eigenen Sektion beleuchtet. Eine weitere Arbeitsgruppe widmete sich der Urhebernachfolgevergütung, auch Urhebergemeinschaftsrecht (= Domaine Public Payant) genannt, und den in diesem Zusammenhang aufgeworfenen sozio-kulturellen Fragen. Die vierte Arbeitsgruppe beschäftigte sich eingehend mit der Frage, wie ein wirksamer Schutz des Urheberrechts vor dem Hintergrund von Globalisierung und Digitalisierung ausgearbeitet sein muss. Darüber hinaus wurde die von der Europäischen Kommission erfolgreich gestartete Initiative, das Schutzrecht für die Werke aufführender Künstler sowie für bestimmte verwandte Schutzrechte, wie das Phonogramm, zu verlängern, ebenfalls von einer eigenen Sektion detailliert behandelt.

Der Tagungsband selbst besteht aus drei identischen Teilen. Jeder Teil enthält einmal in englischer, einmal in französischer und einmal in spanischer Sprache die Grußworte von Victor Nabhan, Heinz Mayer, Victor Vázquez-Lopez, Brigitte Schenk sowie Claudia Schmied, desweiteren die nach ihrer Zugehörigkeit zu den sechs Arbeitsgruppen geordneten Beiträge der einzelnen Vortragenden nebst sich an den Vortrag anschließender Diskussion sowie die Schlussworte Victor Nabhans. Vorangestellt findet sich ebenfalls in den genannten drei Sprachen eine knappe Einleitung mit Hinführung zur Thematik sowie eine in englischer Sprache abgefasste Teilnehmerliste.

Die Beiträge greifen dabei im Einzelnen die überaus zahlreichen und vielgestaltigen Facetten der durch den Titel der Tagung angesprochenen Thematik auf. Michel Walter und Silke von Lewinski bieten jeweils aus historischer Sicht einmal einen Vortrag über die Konvergenz der Schutzfristsysteme sowie zum anderen einen komparatistischen Überblick über die für die Schutzdauer einschlägigen internationalen Verträge sowie nationalen Gesetze. Carlos F. Ballesteros wirft die Frage auf, ob die Schutzdauer 50, 70 oder mehr Jahre betragen sollte. Marshall Leaffer legt die US-amerikanische Sichtweise auf die Schutzdauer des Urheberrechts anhand der vom Supreme Court in der Entscheidung „Eldred vs. Ashcroft" entwickelten Auffassung dar, bezieht aber auch aktuelle Entscheidungen von US-amerikanischen Instanzgerichten in seine Darstellung mit ein.

Ejan Mackaay setzt sich mit der Frage auseinander, welche Begründungsmodelle den Schutz des Urheberrechts sowie seine zeitliche Reichweite gerade auch aus ökonomischer Sicht rechtfertigen. Ysolde Gendreau befasst sich – basierend auf dem kanadischen Recht – mit dem Schutz der rechtlichen wie wirtschaftlichen Interessen der Erben des Urhebers sowie den Auswirkungen, die das im kanadischen Recht fest verankerte Rechtsinstitut des „revisionary interest" auf die Situation der nachfolgenden Generationen von Erben des Urhebers hat.

Der Beitrag von Thomas Dreier gibt einen Überblick über den die Dauer der verwandten Schutzrechte betreffenden gesetzlichen Rahmen, der von verschiedenen internationalen Verträgen gebildet wird, wobei auch in einer vergleichenden Zusammenschau die nationalen Regelungen vorgestellt werden. Dabei geht der Autor nicht von den gesetzlichen Grundlagen aus, sondern stellt bestimmte Einzelaspekte, wie den Schutz von Persönlichkeitsrechten, in den Mittelpunkt seiner Ausführungen, anhand derer er dann die gesetzlichen Regelungen erläutert. Shira Perlmutter beschäftigt sich sodann eingehend mit der Initiative der Europäischen Kommission, die Schutzdauer zu verlängern und erläutert nicht nur die Hintergründe und die Entwicklung der Initiative, sondern auch den Stand des Gesetzgebungsverfahrens. Bernd Hugenholtz geht in seinem Beitrag der Frage nach, wie hoch der Einfluss der Industrie auf die Schutzdauer des Urheberrechts anzusetzen ist und wie dieser Einfluss zu bewerten ist. Tilo Gerlach beleuchtet die Frage, warum eine Ausdehnung der Schutzdauer aus der Perspektive des ausübenden Künstlers sinnvoll ist, Abel Martin Villarejo zeigt die Sichtweise des audiovisuellen Künstlers auf.

Margarida Almeida Rocha erläutert anhand aktueller Entwicklungen im portugiesischen Recht die Schwierigkeit, eine Balance zwischen der Schutzdauer für Urheberrechte und für verwandte Schutzrechte zu schaffen, wobei sie schwerpunktmäßig auf die Entwicklung des „acquis communautaire" eingeht. Pál Tomori beschäftigt sich mit den die Verlängerung der Schutzdauer betref-

fenden begleitenden Übergangsmaßnahmen und betont deren immense Bedeutung für die zukünftige Entwicklung dieses Aspekts des Urheberrechts.

Die These, dass im digitalen Zeitalter die Harmonisierung der Schutzdauer generell ausreichend weit fortgeschritten sei und daher der Fokus darauf zu legen sei, den erreichten Schutzumfang zu vermitteln und zu verteidigen, wird von Samuel Ricketson in seinem Beitrag aufgestellt. Mira Sundara Rajan stellt die spezifischen Problemstellungen der Schutzdauer bei einem von mehreren Urhebern kreierten Werk heraus und beschäftigt sich in diesem Zusammenhang unter anderem mit der Harmonisierung der Regelungen zur Schutzdauer.

Der Einfluss von Kriegen auf die Ausdehnung der Schutzdauer sowie die Frage, inwiefern sich die festzustellende anhaltende Friedenszeit negativ auf mögliche weitere Verlängerungen der Schutzdauer auswirken könnte, wird von Astri M. Lund untersucht. Miyo Tonami beschäftigt sich anschließend mit dem Schutz von Persönlichkeitsrechten. Die von posthum veröffentlichten Werken aufgeworfenen Implikationen im Spannungsfeld von Rechten des Autors sowie von verwandten Schutzrechten werden von Albrecht Haller dargelegt. Der Frage, ob technische Maßnahmen und die Schutzdauer von Urheberrechten in Konflikt geraten können, geht Séverine Dusollier nach. Mihály Ficsor stellt vor dem Hintergrund des Verfahrens „Golan" Art. 18 der Berner Konvention und Section 514 des US Uruguay Round Agreement Act vor, wobei insbesondere auf die Vielzahl zur Thematik bereits ergangenen Gerichtsentscheidungen abgehoben wird. Wie der oberste französische Gerichtshof (die Cour de Cassation) Art. 18 (1) und Art 5 (2) der Berner Konvention miteinander in Einklang bringt, wird anhand des den US-amerikanischen Film „His Girl Friday" betreffenden Verfahrens von Jane Ginsburg näher vorgestellt. Die Auswirkungen von Übergangsregelungen auf die Ausländer(gleich)behandlung beschreibt Valérie-Laure Benabou vor dem Hintergrund des EuGH-Urteils zum Fall „Sony vs. Falcon (Bob Dylan)". Ramón Casas Vallés widmet sich der aus seiner Sicht vernachlässigten Problematik, welche Auswirkungen eine Verlängerung der Schutzdauer auf durch den Urheber über die Verwertung des Werks abgeschlossene Verträge haben kann. Verschiedene Systeme einer Urhebernachfolgevergütung (= Domaine Public Payant) werden von Delia Lipszyc vorgestellt.

Adolf Dietz setzt sich ebenfalls mit der Urhebernachfolgevergütung auseinander und erläutert sehr plausibel ein von ihm entwickeltes Konzept, mit dem für 20 Jahre die Rechte der Gemeinschaft der lebenden Autoren und ausübenden Künstler anstatt die Rechte der Erben geschützt werden sollen, um eine Brücke zwischen der internationalen Schutzdauer von 50 Jahren zur siebzigjährigen Schutzdauer im deutschen Recht zu schlagen. Igor Gliha setzt sich vor dem Hintergrund der geschichtlichen Entwicklung des Urheberrechts seit der Antike mit Aspekten auseinander, die die Urhebernachfolgevergütung in Frage stellen können, während Ryu Kojima die Schutz-dauer für Urheberrechte und ihre Verlängerung aus Sicht der Kulturpolitik beleuchtet. Gernot Graninger geht der sozio-kulturellen Funktion der Verwertungs-gesellschaften nach und Gerhard Ruiss fragt, was angesichts von „Dauerbrennern" wie „Jedermann" und „Fledermaus", aber auch vor dem Hintergrund von aktuellen Entwicklungen wie „Google Books" mit Urheberrechten nach Ablauf der Schutzfrist für das Werk hinsichtlich der Urhebernachfolgevergütung geschehen soll.

Die sich im Tagungsband spiegelnde Vielfalt der Problemstellungen zeigt, wie wichtig es war, dieser national wie international vieldiskutierten sowie rechtlich wie wirtschaftlich bedeutenden Problematik eine ganze Konferenz inklusive umfangreichem, mehrsprachigem Tagungsband zu widmen. Der Tagungsband stellt für den Leser die Möglichkeit dar, sich auf rund 300 Seiten in der jeweiligen Sprache seiner Wahl entweder einen umfassenden Überblick über die durch die Schutzdauer und ihre Verlängerung aufgeworfenen Problemstellungen insgesamt zu verschaffen oder sich detailliert mit einem der einschlägigen, vielfältigen Aspekte des Themas zu befassen. Victor Nabhan hebt in seinen Schlussworten daher nicht nur die bedeutende Rolle von Michel M. Walter als Initiator/Organisator der Tagung hervor, sondern betont auch, dass die Tagung in repräsentativer Weise die zum Thema anerkannten Spezialisten versammelt habe, was natürlich in gleicher Weise für den Tagungsband gilt.

Thomas Gergen*

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Christian Baldus/Herbert Kronke/Ute Mager (Hrsg.)

Heidelberger Thesen zu Recht und Gerechtigkeit

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Jubeltage geben häufig auch den Anstoß dazu, sich rückzubesinnen, Bilanz zu ziehen und Vorschau zu halten. Die Ruprecht-Karls-Universität Heidelberg, eine der ältesten europäischen Universitäten und die erste in Deutschland,[1] feierte im Jahr 2011 den

[1] Vgl. etwa *Cser*, Kleine Geschichte der Stadt Heidelberg und ihrer Universität, 2007, S. 31 ff. Siehe aber auch *Gramsch*, Erfurt – Die älteste Hochschule Deutschlands. Vom Generalstudium zur Universität, 2012.

625. Jahrestag ihrer Gründung. Aus Anlass dieses Jubiläums widmeten sich die Mitglieder der Juristischen Fakultät im Rahmen einer Ringvorlesung dem Leben und Werk bedeutender Heidelberger Juristen der Vergangenheit und untersuchten deren Thesen nicht nur auf ihre Wirkung, sondern auch auf ihre Aktualität für die heutige Rechtswissenschaft.[2] Unter dem Generalthema „Heidelberger Thesen zu Recht und Gerechtigkeit" haben 22 Vortragende dafür die Fakultätsgeschichte in einen größeren Kontext gestellt. Die im Wesentlichen chronologisch geordneten Schriftfassungen dieser Jubiläumsvorlesungen finden sich in dem hier besprochenen, während der Dekanate der drei Herausgeber, *Christian Baldus*, *Herbert Kronke* und *Ute Mager*, entstandenen Sammelband neben hilfreichen Personen- und Sachverzeichnissen (S. 485–495) publiziert. Das Buch bietet den Leser/innen einen rechtshistorischen Querschnitt durch fünf Jahrhunderte und beleuchtet die Verflechtung von Heidelberger Rechtsdenkern mit den großen rechtswissenschaftlichen Strömungen. Das Werk will das Ringen der Gelehrten um grundsätzliche Fragen und grundlegende Antworten, aber auch die Zeitgebundenheit rechtlicher Probleme und ihrer Lösungen ebenso veranschaulichen, wie die zeitlose Bedeutung systematischen Denkens und der Suche nach Gerechtigkeit.[3]

So ist der erste Beitrag von *Christian Hattenhauer* mit „Ius suum cuique tribuere: Der Mensch als Fundament des Privatrechts bei Hugo Donellus" betitelt (S. 1–25) und damit einem der ersten und bedeutendsten zivilrechtlichen Systematikern gewidmet, der von 1573 bis 1579 in Heidelberg wirkte (S. 2). Auf zahlreiche Belege und weiterführende Hinweise aufbauend zeigt der Autor auf, wie Donellus das Recht auf die berühmten drei rechtlichen Gebote: honeste vivere, alterum non laedere, suum cuique tribuere,[4] zurückführte, den Menschen als Rechtsträger ins Zentrum des gesamten Privatrechts stellte (S. 11 f.) und davon ausgehend Maßstäbe setzte, die bis heute weiterwirken (S. 3). Die Recherchen zu den anschaulichen biografischen Angaben (S. 3–11) haben überdies zu weitergehender Forschung geführt.[5]

Rüdiger Wolfrum fragt in „Samuel Pufendorfs Blick auf die EG. Eine Hypothese" (S. 27–38) nach der Bedeutung der Staatsformenlehre des von 1661 bis 1668 in Heidelberg lehrenden Wissenschaftlers und dessen naturrechtlicher Sicht eines Gemeinwesens für die Europäische Union in der Fassung des Vertrages von Lissabon (S. 36). Der Autor weist bereits eingangs auf das „Wagnis" hin, „einen modernen völkerrechtlichen Vertrag zur Integration Europas durch die Brille eines Rechtsphilosophen, Historikers und Völkerrechtlers des 17. Jhd. sehen zu wollen" (S. 27), ortet aber eine Parallele vor allem in der Friedenssicherung als oberstem Ziel der Gemeinschaftsbildung (S. 38).[6]

In seinem Beitrag „Das Steuerrecht als Staatsspiegel. Leben und Einsichten des Heidelberger Publizisten Karl Salomo Zachariae von Lingenthal (S. 39–65)" berichtet *Ekkehart Reimer* nicht nur aus dem Leben des Gelehrten (S. 41–49), sondern er fragt nach Zachariaes Beitrag zur zeitgenössischen Wissenschaft vom Finanzrecht (S. 49) und streicht vor allem dessen Überlegungen zu Legitimität und Legitimation von Steuern hervor (S. 65).

Peter-Christian Müller-Graff zeigt in „Recht überwindet Grenzen: Thibaut, Bluntschli, Goldschmidt und andere Heidelberger" (S. 67–94) auf, wie bedeutende Heidelberger Gelehrte das Recht als grenzüberwindenden Öffnungs- und Befriedungsfaktor begriffen, und richtet seinen vergleichenden Blick auf transnationales Recht im Europa der Gegenwart (S. 67). In den Vordergrund stellt er insbesondere Thibaut, der durch Recht Grenzen zwischen Privaten abzubauen suchte, und Bluntschli, der sich den Grenzen der Souveränität im Interesse des staatlichen Zusammenwirkens widmete, aber auch etwa den, wie der Autor betont, ersten modernen Wirtschaftsrechtler Goldschmidt und dessen Sicht auf die grenzüberwindende Kraft des Handelsrechts (S. 92).

Andreas Piekenbrock diskutiert in „Rechtsverlust durch Zeitablauf in zwei Jahrhunderten: Von Thibaut zur Schuldrechtsreform – und darüber hinaus" (S. 95–117) das Verjährungsrecht in zwölf spannenden Schritten. Auf der Spur der Thesen von Thibaut und Bluntschli gelangt der Autor über das badische und preußische Landrecht, die erste und zweite Kommission zum BGB sowie die Schuldrechtsreform bis hin zum Gemeinsamen Referenzrahmen[7], samt vergleichendem Blick auf andere nationale Rechtsordnungen.

Werner F. Ebke behandelt in „Ein Gesellschaftsrecht für Europa: Lehren von Thibaut und Savigny" (S. 119–141) die Frage der Verteilung der Regelungszuständigkeiten in Mehrebenensystemen im Bereich des Gesellschafts- und Unternehmensrechts. Ausgehend vom berühmten Kodifikationsstreit zwischen Thibaut und Savigny (S. 120 ff.), untersucht er verschiedene Zielsetzungen und Zuordnungsansätze für die Regelbildung (S. 123 ff.). Darauf aufbauend zeigt der Autor eine an die Erfahrungen in den USA angelehnte Modellgesetzgebung, erarbeitet auf Basis rechtshistorischer, rechtsvergleichender und interdisziplinärer Forschung im Rahmen des European Law Institute,[8] als zukunftsträchtigsten Ausgangspunkt für eine Angleichung der Regelungen über die Binnen- und Außenverhältnisse von Aktiengesellschaften in der EU auf (S. 136 ff.).

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[2] Zur Fakultätsgeschichte siehe auch *Schroeder*, „Eine Universität für Juristen und von Juristen". Die Heidelberger Juristische Fakultät im 19. und 20. Jahrhundert, 2010.

[3] Wie die Herausgeber in ihrem Vorwort (S. V) betonen; vgl. auch den Klappentext.

[4] D. 1,1,10,1 = I. 1,1,3.

[5] Siehe *Hattenhauer*, Die Ehen des Monsieur d'Onneau? Eine biographische Anmerkung zu Hugo Donellus, ZRG RA 130 (2013), S. 502.

[6] Vgl. auch das sog. Lissabon-Urteil des BVerfG v. 30.6.2009, BVerfGE 123, 267, 345 ff; dazu etwa *Müller-Graff*, Das Lissabon-Urteil: Implikationen für die Europapolitik, APuZ 2010, S. 22.

[7] *Von Bar/Clive* (Hrsg.), Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) – Full edition, 2009.

[8] Dazu bereits *Ebke*, Unternehmensrechtsangleichung in der Europäischen Union: Brauchen wir ein European Law Institute?, in: FS Großfeld, 1999, S. 189, 212 ff.

Burkhard Hess begibt sich in „Carl Josef Anton Mittermaier – Zivilprozessrecht in Europa: vom 19. Jahrhundert bis in die Gegenwart“ (S. 143–159), nach kurzen biographischen Notizen (S. 144 f.),[9] auf die Spur der methodischen Weichenstellungen für das Zivilprozessrecht, die von dem 1821 nach Heidelberg berufenen Rechtsgelehrten ausgegangen sind. Dessen Interesse galt vor allem praktischen Einzelfragen des Prozesses, wofür er die Lösungen der verschiedenen Partikularrechte sowie ausländischer Prozessrechte schon damals vergleichend und unter Einbeziehung der Rechtswirklichkeit untersuchte und dabei bereits die wesentlichen Fragestellungen des Internationalen Zivilprozessrechts aufgriff (S. 153 f., 159.).

Stefan J. Geibel widmet sich in seinem mit „Windscheids Einfluss auf das BGB ausgehend von seinen Heidelberger Jahren“ betitelten Beitrag (S. 161–178) einer der berühmtesten Juristenpersönlichkeiten des 19. Jhd., die weit über ihr Pandektenlehrbuch hinaus gewirkt hat. Ausgebildet von Savigny wurde Windscheid auf den vormals von Thibaut bekleideten Pandektenlehrstuhl Heidelbergs berufen und schließlich von der badischen Regierung zum Mitglied der Kommission zur Ausarbeitung des Ersten Entwurfs eines Bürgerlichen Gesetzbuches bestellt. Der Autor beschreibt ihn treffend als „Brückenbauer zwischen den beiden Polen des Kodifikationsstreits“ (S. 178).

Thomas Lobinger beschäftigt sich in „Otto von Gierke, Hugo Sinzheimer und der Tarifvertrag im deutschen Arbeitsrecht“ (S. 179–206) zum einen mit dem 1898 in Heidelberg promovierten (S. 186) Rechtsdenker Sinzheimer, dem geistigen Vater der normativen Wirkung von Tarifverträgen (S. 185 ff.). Zum anderen arbeitet er heraus, dass Sinzheimer die dafür notwendigen dogmatischen Grundanschauungen bei v.Gierke fand, der von 1884 an drei Jahre in Heidelberg lehrte (S. 198). Der Autor weist aber auch darauf hin, dass v.Gierkes arbeitsrechtliche Lehren erst durch Sinzheimer eine bleibende Wirkkraft entfalten konnten, dessen Konzeptionen, jedenfalls in der konkreten dogmatischen Arbeit, auch heute noch höchst lebendig sind (S. 202).

Christian Baldus begibt sich in „Die Auslegung nach dem Willen: und eine Heidelberger These von Otto Gradenwitz“ (S. 207–225) auf die Spur eines Wissenschaftlers, der – 1909 als Professor nach Heidelberg berufen – das Römische und das bürgerliche Recht pflegte (S. 208, 212), der jedoch vor allem für die philologische Orientierung der Rechtswissenschaft seiner Zeit steht (S. 207). Gradenwitz widmete sich der Erforschung möglicher Veränderungen und Verfälschungen (Interpolationen) klassischer Texte durch Justinian oder bereits in der Nachklassik (S. 213) und schuf dabei bis heute wirkende Grundlagenwerke (S. 224). Insbesondere gibt die vorliegende Untersuchung („Werkstattbericht“, S. 208), ausgehend von Gradenwitz’ gescheitertem Heidelberger Habilitationsversuch (S. 223), jedoch auch den Anstoß zu weitergehender Forschung (Fn. 2, Fn. 43) auf der Suche nach der zeittypischen Willensorientierung in seinen Schriften (S. 219).

Der leider viel zu früh verstorbene[10] *Winfried Brugger* würdigt in „Georg Jellineks Statuslehre“ (S. 227–253)[11] einen der berühmtesten Lehrer des Staatsrechts und der Staatslehre, der von 1890 bis 1911 in Heidelberg wirkte. Der Autor geht insbesondere auf Jellineks „Statuslehre“[12] ein (S. 228) und zeigt auf, dass diese mit Blick auf Europa nach wie vor einen „fruchtbaren juristischen Analyse- und rechtsethischen Bewertungsrahmen“ bietet (S. 253).

Klaus-Peter Schröder widmet sich in „Hans Fehr (1874–1961) – Wegbereiter der Rechtsikonographie“ (S. 255–266) dem 1917 nach Heidelberg berufenen Rechtshistoriker, der dem Motto „Kunst und Recht“ nachspürte und zu einem Pionier der rechtlichen Bildkunde wurde (S. 265).

Peter Axer beschäftigt sich in „Otto Mayer, Walter Jellinek, Ernst Forsthoff und das Recht der öffentlichen Sachen“ (S. 267–285) mit der vieldiskutierten rechtlichen Einordnung von einem öffentlichen Zweck dienenden Vermögensgegenständen, die aufgrund dieser Widmung eine besondere Rechtsstellung aufweisen (S. 271). Er veranschaulicht anhand des sog. Basler Schanzenstreits (S. 273 ff.),[13] des Konflikts um die Herausgabe des Hamburger Stadtsiegels (S. 268 f.)[14] sowie weiterer aktueller Streitfragen (S. 270), die fehlende durchgehende Systematik des bis heute nicht kodifizierten Rechts öffentlicher Sachen (S. 281) und verweist den Gesetzgeber auf die wegweisenden Überlegungen Mayers, Forsthoffs und Jellinks (S. 285).

Bernd Grzeszick widmet sich in „Hugo Preuß’ Bundesstaatstheorie: Ein früher Entwurf zu einer offenen Staatlichkeit?“ (S. 287–302) einem Wissenschaftler, der als von Friedrich Ebert berufener Staatssekretär die Weimarer Reichsverfassung entworfen hat (S. 291). Nachdem Preuß’ Überlegungen zum föderalen Charakter des Bismarckreiches eine inhaltlichen Nähe zur aktuellen Debatte über die verfassungsrechtlichen Grenzen der europäischen Integration aufweisen, untersucht der Autor inwieweit diese Gedanken heute noch fruchtbar gemacht werden können (S. 298 ff.).

Ute Mager würdigt in „Max Weber: Thesen zu Verfassungsrechtspolitik, Recht und Rechtswissenschaft“ (S. 303–321) diese große Persönlichkeit, die juristischen Sachverstand mit kultur- und gesellschaftwissenschaftlichen Überzeugungen sowie politischen Anliegen verband, für die es jedoch auch zum Wesen wissenschaftlicher Erkenntnis gehörte, dass diese mit der Zeit überholt wird (S. 320). Noch heute können uns aber insbesondere seine soziologischen Erkenntnisse zum Zusammenhang von Ökonomie und Bürokratie eine Warnung, sein Wissenschaftsethos ein Vorbild sein (S. 321).

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[9] Weitergehend dazu etwa *Borrmann*, Gemeines deutsches Privatrecht bei Carl Joseph Anton Mittermaier, 2009, S. 58 ff.

[10] Ein Nachruf von *Anderheiden* findet sich unter http://www.jura.uni-heidelberg.de/borowski/brugger/ (Stand 31.3.2014).

[11] Siehe weitergehend auch *Brugger*, Georg Jellineks Statuslehre: national und international. Eine Würdigung und Aktualisierung anlässlich seines 100. Todestages im Jahr 2011, AöR 136 (2011), S. 1 ff.

[12] *Jellinek*, Das System der subjektiven öffentlichen Rechte, 1892.

[13] Dazu m.w.N. *Axer*, Die Widmung als Schlüsselbegriff des Rechts der öffentlichen Sachen, 1994, S. 36 ff.

[14] BGH v. 5.10.1989, NJW 1990, S. 899 ff.; BVerwG v. 12.8.1993, NJW 1994, S. 144 f.

Michael Anderheiden beschäftigt sich in „Gerhard Anschütz als Wegbereiter des heutigen Positivismus“ (S. 323–343) mit einem großen Staatsrechtslehrer, der in Reaktion auf den Reichstagsbrand und die nachfolgenden NS-Gesetze um Emeritierung nachsuchte, weil er die für einen Dozenten notwendige innerliche Verbundenheit mit der Staatsordnung nicht mehr aufbringen konnte. Als bis heute meinungsbildend beschreibt der Autor Anschütz' methodischen Ansatz, wonach – im Sinne eines „osmotischen Rechtspositivismus“ (S. 326, 336) – außerrechtliche Gegebenheiten in das Recht einfließen, die rechtliche Interpretation aber nicht leiten dürfen (S. 343).

Wolfgang Kahl würdigt in „Walter Jellinek und die schlichte Hoheitsverwaltung“ (S. 345–374) den 1929 nach Heidelberg berufenen Staatsrechtler, der bereits zu einem sehr frühen Zeitpunkt über Effektivität und Akzeptanz von Verwaltungshandeln nachdachte (S. 351) und als „Entdecker“ der als „schlichte Hoheitsverwaltung“ bezeichneten speziellen Verwaltungsform als rechtlich relevantes Gebiet gilt (S. 353).

Stephan Kirste fragt in „Zeitgerechtigkeit. Heidelberger Beiträge zur Zeit des Rechts“ (S. 375–399), ob es dem Recht tatsächlich gelingt, eine autonome zeitliche Ordnung mit einer eigenen Gerechtigkeit zu errichten (S. 376). Dabei soll ein zeitgerechtes Recht es dem Menschen ermöglichen, sich selbst die Gegenwart zu geben, die seiner Einstellung zu seinem Herkommen und Fortkommen entspricht (S. 399).

Darauf würdigen zwei Beiträge den großen Gustav Radbruch. Zunächst fragt *Thomas Hillenkamp* in „Gustav Radbruch – Eine Suche nach Alternativen zum Strafrecht“ (S. 401–419) nach dem Sinn und Gehalt der rechtspolitischen Zukunftsvision Radbruchs, nach der er – verkürzt formuliert – nicht das Strafrecht verbessern, sondern dieses durch etwas Besseres ersetzen wollte,[15] womit er, wie der Autor herausarbeitet (S. 416 ff.), die Richtung für ein – aufgrund der Tendenz des Maßregelrechts zur Maßlosigkeit jedoch nicht erstrebenswertes (S. 418)[16] – „Strafgesetzbuch ohne Strafen“ angegeben hatte. Sodann würdigt *Gerhard Dannecker* in „Die Radbruchsche Formel und ihre Rezeption durch die Rechtsprechung“ (S. 421–442) den Rechtsphilosophen Radbruch, dessen berühmte Textpassage[17] in die rechtsphilosophische Ideengeschichte eingegangen ist (S. 422), bleibende Spuren in der Rechtsprechung sowohl des Bundesverfassungsgerichts als auch des Bundesgerichtshofs hinterlassen hat (S. 436 ff.) und etwa für die Arbeiten an einem Allgemeinen Teil des Völkerstrafrechts auch heute noch aktuell ist (S. 442).

Dieter Dölling widmet seinen Beitrag mit dem Titel „Rechtsstaatlich-soziale Strafrechtspflege. Zum Werk von Eberhard Schmidt“ (S. 443–461) einem der bedeutendsten deutschen Strafrechtler des 20. Jhd., der 1948 als Nachfolger Radbruchs nach Heidelberg berufen wurde (S. 444) und eine nach wie vor aktuelle rechtsstaatlich-soziale Konzeption der Strafrechtspflege vertrat (S. 448, 461).

Zum Abschluss widmet *Herbert Kronke* seinen mit „Max Gutzwiller: Universalgelehrter des Privatrechts und moralische Instanz“ (S. 463–484) betitelten Beitrag einer großen Wissenschaftlerpersönlichkeit. Gutzwiller lehrte zunächst von 1926 bis 1935 in Heidelberg, wurde dann allerdings aufgrund der jüdischen Abstammung seiner Frau und seiner klaren Standpunkte vertrieben, worauf er nach Freiburg i.Ü. zurückkehrte. In Heidelberg wurde er 1950 emeritiert, also symbolisch wieder in die Fakultät aufgenommen und in seine Rechte eingesetzt (S. 465). Anlässlich seiner 1927 gehaltenen Antrittsvorlesung in Heidelberg erstaunte und begeisterte der Gelehrte die Fachwelt mit scharfer Kritik am herrschenden Positivismus und forderte eine neue transnationale, universalistische Richtung (S. 466 ff.). Aus Gutzwillers umfangreichem Werk greift der Autor verschiedene internationalprivatrechtliche Arbeiten heraus und stellt bedeutende „Heidelberger“ Thesen zum Verhältnis von IPR und Völkerrecht, zum transnationalen Privatrecht, zu ordre public und Eingriffsnormen und zur Parteiautonomie im Vertragskollisionsrecht daraus vor (S. 469 ff.).

Dem hier vorgestellten Band gelingt damit nicht nur die Zusammenführung einer ganzen Reihe von großen Vordenkern aus unterschiedlichen Epochen sowie von deren Thesen aus den verschiedensten Gebieten der Rechtswissenschaft unter das gewählte Generalthema, sondern auch ein eindrucksvoller Blick auf die Vielgestaltigkeit der Forscherpersönlichkeiten und Erkenntnisinteressen. Damit ist sowohl Rückbesinnung als auch ein auf die Zukunft gerichteter Ausblick verbunden, wodurch zumeist auch zu aktuellen Debatten im jeweiligen Bereich etwas beigetragen werden kann. Besonders hervorzuheben ist schließlich, dass die Arbeiten an dem Band auch die Grundlage für weitergehende Forschung bildeten.[18] Dieser bemerkenswerte Band ist deshalb nicht nur für Heidelberg-affine Leser/innen absolut lesenswert.

Simon Laimer*

[15] Siehe *Radbruch*, Einführung in die Rechtswissenschaft, 7. und 8. Aufl. 1929, S. 115; *dens.*, Rechtsphilosophie, 3. Aufl. 1932, S. 166.
[16] *Hassemer*, Strafrecht. Sein Selbstverständnis, seine Welt, 2008, S. 155.
[17] *Radbruch*, Gesetzliches Unrecht und übergesetzliches Recht, SJZ 1946, S. 105 ff., 107.
[18] Siehe oben bei den Beiträgen von *Hattenhauer* und *Baldus*.

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Gábor Hamza

Origine e sviluppo degli ordinamenti giusprivatistici moderni in base alla tradizione del diritto romano

Santiago de Compostela: Andavira Editora, 2013, 714 p.

The new *opus* of Gábor Hamza, ordinary Member of the Hungarian Academy of Sciences and Professor of Roman Law (Faculty of Law of the Eötvös Loránd University [Budapest]), which was published in the fall of 2013 in Italian language, studies the formation and development of modern private law systems based on Roman law tradition.

As for antecedents of this work, several books written by the author are worth mentioning. The continuity i.e. subsequent fate of the Roman law tradition was already presented in the 9th chapter of the first edition of *A római jog története és institúciói* [History and Institutes of Roman law] Textbook, which was written together with Professor András Földi (Faculty of Law of the Eötvös Loránd University [Budapest]), and ran into its 18th edition in 2013. The continuity of the Roman law tradition was already presented in the 9th chapter of the first edition of *A római jog története és institúciói* [History and Institutes of Roman law] Textbook, which was written together with Professor András Földi, and ran into its 18th edition in 2013. In 1998, an autonomous book was published by Gábor Hamza and András Földi, treating the main trends on the development of private law in Europe (*Az európai magánjog fejlődésének főbb útjai*). Nevertheless Földi's research took another way after 1998 and his author's proportion in the texts on the subject in question being developed and enlarged after 1998 exclusively by Hamza decreased significantly. Therefore, in 2002, an imposing monograph under the title *Az európai magánjog fejlődése* [Trends of the Development of Private Law in Europe] could be rightly published solely under the name of Gábor Hamza. This book showed the external history of private law of the European countries and a number of countries outside Europe in an exhaustive way. Gábor Hamza's first German language work (*Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage, unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn*) was also published in the same year. The author's French monograph (*Le développement du droit privé européen. La rôle de la tradition romaniste dans la formation du droit privé moderne*) was published in 2005. After the above-mentioned books, another German language monograph was published in 2009 (*Entstehung und Entwicklung der modernen Privatrechtsordnungen und die römischrechtliche Tradition*) which studied the formation and development of modern legal systems based on Roman law tradition at a much larger scale than any of the author's former works had done.

Professor Hamza's new Italian language monograph is based on the so-called „external historical view", using the terminology of Gottfried Wilhelm Leibniz (*"jurisprudentia historica externa"*). However, although considered to be in many respects a new approach, internal historical commentaries can also be found in the book. In addition, Professor Hamza analyzes not only the development of European countries' private law based on Roman law tradition, but also reviews several legal systems (orders) outside Europe.

Regarding the structure of the book, a deep analysis follows the Forewords, which can be considered as an autonomous study dealing with the main problems of the harmonization of private law. Professor Hamza emphasizes his thesis that Roman law serves as basis for the harmonization of law in Europe.

In the first part of the book, Professor Hamza reviews the origins of the European private law, which led back mainly to Justinian Roman law. As for Justinian's codification, Professor Hamza explicitly refers to the well-known, albeit disputed opinion of Leibniz who considered Justinian's codification to be regarded as a compilation.

In the second part of the book, the development of European private law in the Middle Ages is dealt with. Professor Hamza examines the roles of Roman law in relation to the legal systems of the *Sacrum Romanum Imperium* (with special regard to the *Reichskammergerichtsordnung*), the Austrian hereditary provinces, the Low Countries, and Switzerland. The author deals also with some important aspects of the history of French private law, preserving its division to *pays de droit écrit* and *pays de droit coutumier* until the entry of force of the *Code Civil* in 1804. This part of the book takes a view on the development of private law in Spain, Portugal, Poland, Lithuania, Hungary, England, Wales, Scotland, Northern Europe, the Balkan States, the Danubian Principalities, and Russia.

In the third and largest part of the book, Gábor Hamza studies the development of private law in modern times, examining the structures and main features of civil codes while taking into account their theoretical and historical antecedents. The author also studies the so-called *Pandektensystem* ("Pandectist system") whereby he emphasizes the importance of the General Part (*Allgemeiner Teil*) which represents the high level of abstraction. This system – which was elaborated in the Pandectist legal science – is the basis

of several civil codes e.g. the German *Bürgerliches Gesetzbuch* (1900), the Portuguese *Código civil* of 1966, and the *Código civil* of Brazil (2002). Regarding their importance and effects, the French, the Austrian, and the Swiss legal development have been deeply analysed in Professor Hamza's book, too. Contrary to the German civil code, the French *Code civil* of 1804 and the Austrian *Allgemeines Bürgerliches Gesetzbuch* of 1811 – as "fruits" of the codifications based on natural law (*ius naturale* – follow the institutional system, which was modified by the representatives of the late school of natural law. In accordance with this circumstance, these civil codes do not contain a General Part. It is a well-known fact that the law of obligations including the commercial law was codified in Switzerland in 1881 (*Schweizerisches Obligationenrecht*). The Swiss civil code (*Zivilgesetzbuch*) itself came into force in 1912. Both codes played an important role in private law codifications in countries all over the world. Inter alia, the development of private law in Liechtenstein has been deeply investigated in this part of the book, too. In this respect it is worth mentioning that the *Allgemeines Deutsches Handelsgesetzbuch* of 1861 – which follows the objective system like the French *Code de commerce* of 1807 – is still in force today in Liechtenstein.

From time to time the reader may miss something since the book mainly deals with the history of legal science, codifications, and generally the "law in books". The extension of the research to the judge-made law ("law in action") could be the subject of investigations to be done in the future. Although the analysis of the "law in books" is based on an impressive source material and a rich literature apparatus, the author could not deal with all problems in an exhaustive way.

In the fourth part of the book, Professor Hamza studies the influence of the European private law tradition in several countries outside Europe. Gábor Hamza studies for example the less-known but considerable influence of Roman law on the legal development in a number of states in the United States, with special regard to the subsequent fate of Roman law in Louisiana and Puerto Rico. The legal development of Brazil has been deeply analyzed, too. The new Brazilian *Código civil* reflects the influence of the *Código civil português* of 1966 both in structure and in contents. Furthermore, Professor Hamza deals with the legal development of some Asian countries as well, with special regard to the role and importance of Roman law researches in China. In addition, the author deals accurately with the main aspects, development, and sources of the South-African law which can be considered as a mixed jurisdiction.

The work is supplemented by a list of abbreviations, a detailed list of the sources, names, titles, and subject, and a multilingual bibliography.

Finally we emphasize that this elegantly produced work can be regarded as an important contribution to the scholarship of Roman law, legal history, and comparative law. Gábor Hamza's first Italian language monograph rightly counts on the interest of the specialists of Roman law, history of private law and comparative law, historians and also all readers who want to become acquainted with the legal culture of numerous countries and the role that Roman law tradition played in the development of many legal orders in the world.

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Christian Baldus/Wojciech Dajczak (Hrsg.)

Der Allgemeine Teil des Privatrechts. Erfahrungen und Perspektiven zwischen Deutschland, Polen und den lusitanischen Rechten

Frankfurt am Main: Peter Lang, 2013, 556 p., ISBN 978-3-631-62831-7, EUR 92

It is a great pleasure to have in hand such a book as the present one edited by Christian Baldus and Wojciech Dajczak. It offers true satisfaction for different reasons. First, its content is based on lectures given in international conferences recently held in Poland and Germany. The scholarly collaboration among experts with such widely different background has proved to be exceptionally fruitful. Second, the concept of the book is to be welcome. Comparative law focuses today too often on "leading" or practically "important" legal orders, or on some special systems such as mixed jurisdictions. This oeuvre, on the contrary, offers a comparison of three very interesting and not often compared legal words, the German, the Polish, and the Lusitanian. It is clear, the German legal order plays the bridging function between the last two, in the sense that its influence is sensible in both. The great methodological innovation of the book is that it shows how different stories can unfold from the same source. Through this approach, the volume provides us with rare insights into an under-explored terrain of comparative legal science. The third reason is that the book has been published in a handsome, hard covered form thanks to the efforts of the Peter Lang publishing house.

The book is divided into four major parts each containing various number of contributions. The first part is about the philosophical and historical backgrounds of the general parts. The second one deals with the rationality of generalization of legal materials, the third addresses the difference between an ideal general part and its real, national counterparts. The last part concerns methodological questions.

In what follows, I shortly summarize each paper from the book, and, at the end, I conclude with my understanding of a quite abstract issue mentioned in the book, the problem of general clauses.

In his article, Tomasz Giaro claims that the general parts have their advantages and demonstrates their dogmatic fruitfulness on the example of the legal entities as they are regulated in the German and the Polnish legal order. However, he draws our attention to the dangers of the so-called decodification which may overshadow not only the positive aspects of the general parts but also of the civil law as a whole.

In the next chapter, Martin Avenarius argues that only the last two titles of the Digest (D. 50, 16 and 17) may only be considered to be a „general part" of the codex. Here Justinian's compilers managed to achieve a generalisation of the materials assembling certain definitions and legal rules. According to his view, the general parts are, therefore, not at all particular phenomena of modern legal codifications.

In the opening chapter of Part 2, Bernd Mertens offers an overview of the origins of the term 'generalis clausula'. After that he is focusing on the different functions that general clauses played from the 18th century onwards. He makes clear that the Prussian, Austrian and the German legislators employed a different conception for the use of general clauses. These different understandings may have influenced the way we think of the general clauses today.

In his article Christian Baldus puts forward the thesis that a single rule for the capacity to enter into legal transactions is to be preferred. At the moment there are three articles concerning legal capacity in the German Civil Code (BGB). The first is the capacity to enter into legal transactions (General Part), the second is the capacity to marry (Book 4), and the last is the capacity to make a will (Book 5). The first and the third rules are interpreted in a homogeneous way, although their wording is quite different. The capacity to marry seems to be a mere *renvoi* to the general rule but is understood more generously due to certain influences from the constitutional law. There is no convincing reason why this discrepancy should be maintained.

Followingly, Fryderyk Zoll tests the feasibility of the pandectistic structure for our modern times analyzing the norms regulating the conclusion of the contract in the Polish civil code. He argues that the traditional structure should be replaced by a „digital" code where the possibilities generated by the modern technology (e. g. hyperlinks) could be implemented in a more effective manner. It would make the code more easily accessible for the user and would allow the collection of a certain set of rules applicable to the particular affair.

In what follows, Wojciech Dajczak compares the conditions of validity of legal transactions in various (Polish, French and German) legal orders. His focus lies on the rule that a contract must comply with „the nature of the legal relationship". He thinks that there are some functional similarities in the interpretation of this clause in the legal orders in question. In all of these countries, for example, this norm constitutes a ground for the amendment of contracts in the interest of the legitimate expectations of the creditor and for the protection of contractual benefits. It may also enable to take into account the economic reasonableness of the contract.

Piotr Tereszkiewicz deals with the duty to provide adequate explanations as set out in Directive 2008/48/EC on credit agreements for consumers. Additionally, he compares the duty to provide explanations with the well-established duty to advise in the German insurance contract law. In his conclusion, he claims that the duty to provide explanations will pose a challenge to the traditionally sharp distinction between the duty to inform and the duty to provide.

Kamila Szutowska concentrates on the the legal nature of consent to participate in clinical trials of a given medical drug. She arrives at the conclusion that a consent to such a medical intervention cannot be viewed as a legal transaction, at least in the sense how Polish civil law understands legal transactions.

Isabel Mousinho de Figueiredo makes clear in her article that although the applicability of the general part is not limited to the law of obligations, most of its rules were created from and for the paradigm of contract. She claims, based on her researches on the doctrine of culpa in contrahendo, that the methodology of law is marked by paradigms. In her understanding it means that the worthiness of an abstraction is tested through self-evident paradigms and result in the general acceptance of a certain legal outcome, i. e. through „endoxal abduction".

Jan Dirk Harke demonstrates that the concept of legal transactions and illegal acts does not provide any clue for a proper systematization in the civil codes of Brazil, Germany, and Portugal, unless it is replaced by the distinction between the right to specific performance and the right to damages.

Ulrich Ernst provides an overview of the origins and structure of the general parts of the civil codes of Germany, Poland and Portugal. He finds that the two last codes provides similar solutions, which is interesting since there was hardly any contact between the legislators in eastern-block Poland and far-right Portugal after World War II. He urges for a stronger dialogue among the members of the „pandectistic branch" of the civil law family.

According to Jan Peter Schmidt, Brazilian legal culture offers valuable insights to European observers as it has to some extent developed its own conception of the general part. Both the old Brazilian Civil Code of 1916 and the new code of 2002 begin with a general part following the model of the Pandektensystem. The general part can be found in Brazilian private law as early as the

middle of the 19th century. However, it is not an original creation as it is sometimes hold in Brazilian legal scholarship, but had been taken over from German pandectistic literature.

Susanne Hähnchen's article addresses the general and equal capacity of natural persons in the German Civil Code of 1896 and the relevant 20th century developments, from the national socialist regime through the period of the German Democratic Republic till today.

Andrzej Gulczyński also deals with questions concerning legal entities. He argues that the modern development separated the classical dichotomous divisions of legal entities such as subjects and objects of law (personae – res) or natural and legal persons. In his opinion, there is an urgent need to take into consideration the deviations from these old divisions due to the new problems caused by the contested status of unborn children, the status and place of animals, and consumers and entrepreneurs.

Rafael Longhi focuses on a systematic analysis of different premises of the incapacity to enter into legal transactions in the general part of the Brazilian and the Portuguese Civil Code. These codes have common origins, both countries have adopted different legal solutions in their civilian codifications, however.

Jerzy Pisuliński presents the Polish evolution of regulations governing legal transactions and the submission of declarations of intent during the 20th century. He shows that until the mid1970s, both the subjective and objective concepts of a declaration of will were in use. In more recent literature, however, the objective depiction has started to prevail. His paper also indicates that the contemporary doctrine of legal transactions has moved away from identifying legal transactions with a declaration of intent.

According to Jan Dirk Harke, the integration of the right to rescind a legal transactions on grounds of the other party's fraud has resulted in a contradiction in the law of pre-contractual liability, which now also covers negligent misrepresentation, and has rendered the right of avoidance superfluous. He thinks that this antinomy has been concealed by the allocation of the right of avoidance in the general part of the civil code in Brazil, Germany, and Portugal.

Jerzy Pisuliński provides a comparison of the regulations on commercial representation and commercial powers of attorneys in the new polish civil code draft with the norms of the 1934 Polish code. He questions the broad scope of the authorization of a holder of a commercial power of attorney as it basically overlaps with the authorization of a commercial representative.

Wojciech Dajczak writes about things. His historical and comparative approach highlights the similarities and differences between the Polish and German notion of thing. The understanding of a thing as a material object is a result of a hasty oversimplification by the Polish post-war legislature. Dajczak argues that the concept "object of property rights" should be the central notion of the law of property. He draws on three major conclusions: first, a clear distinction between the objects of legal transactions and objects subject to legal monopoly is useful for systemic purposes. Second, the material concept of a thing should be replaced by a more flexible notion which covers both material and non-material objects. Third, the concept of an "object of legal monopoly" should be included in the law of property.

Andrzej Gulczyński describes the ongoing discussion whether a general part of the future Polish codification should include all areas of private law, including detailed issues such as where a parental authority starts in the context of the legal status of an embryo. The author is in favor of an alternative solution, which would create a separate part for personal law.

In the next chapter, Bernd Mertens takes on legal definitions in the BGB. He concludes that legal definitions can be either a blessing or a curse for a code, just like a general part as a whole. He demonstrates the value of his thesis on the case of legal definitions in the history of codification of the BGB. The editors of this code partly abstained from defining disputed terms, partly intentionally intervened by doing so. They were motivated by practicability instead of a consistent method.

Ulrich Ernst in his paper examines Polish court decisions, in which the judges explicitly relied on provisions from the general part. He concludes that general part seems to create a greater demand for reasoning about norm application, which might improve the legitimacy of the judgments.

Jan Peter Schmidt describes the extent to which the criticism that the doctrine of legal transactions (Rechtsgeschäftslehre) as the core element of the general part is not fulfilling its promise to provide a uniform and comprehensive regime for all situations in which persons exercise their private autonomy. He demonstrates that this criticism is partly justified on the examples of the general parts of the German BGB and the Portuguese Civil Code and their application in the law of succession.

In the last paper Vivianne Geraldes Ferreira tracks upon the foreign influences over Brazilian law. She states that, although the Portuguese law was the first source of law in Brazil, his influence practically disappeared after the declaration of independence and the foundation of the first law schools. At these law schools German legal theory, especially Savigny and the Pandectistic science prevailed. The new Civil Code of 2002, however, was strongly influenced by the Italian civil code and by the Italian interpretations.

As I promised at the beginning, I also like to contribute to the common efforts of the authors in the book with a short excurse on the general clauses.

The dogmatic difficulties related to general clauses derive predominantly from the fact that the concept and the content of this term unites two antagonistic approaches. Formally, assuming an external and formal system, general clauses suggest through the *genus-species* and the whole-part relationships that law can be cognitively approached whereas substantially, they seek to come over the flaws of the self-contained theoretical system by pointing to the internal characteristics of law. The legal order cannot reach complete self-containment, the realm of effectively operative norms is always open and fragmental [1] or at least it should remain so

[1] For a different opinion see René, David—Brierly, John E, *Major Legal Systems in the World Today*, London: 1985, p. 151.

if it attempts to adapt efficiently to the rapidly changing conditions of human coexistence.[2] Jurisprudence is a cognitive discipline (*verstehende Wissenschaft*) which ought to align itself with its subject and not with exact rules.[3]

This necessarily complex relationship exhibiting two-sided interactions is quite favourable from the viewpoint of the effectiveness of law, which is one of the ultimate aims of law itself.[4] One of the sources of the external stability of the legal order is provided by the fact that it can flexibly adapt to the social-legal environment.[5] General clauses are effective means of this flexibility because they secure that legal norms belong to the same species, even in the case of their alteration.[6] Thus, with the assistance of general clauses, law will be able to solve such problems which had not even emerged at the time of its genesis.[7] In accordance with the above-stated, general clauses may best secure the long-term stability of law by their flexibility[8], and also, they necessarily contribute its logical coherence.[9]

It is an important fact that the system-dependence of general clauses as described above is at least twofold. On the one hand, general clauses depend on the inner characteristics of the legal order or a branch of law but at the same time, on the other hand, they are immanent accessories of a bigger whole, of the social order as well.[10] By treating the legal order as a point of reference, the society functions as an external factor: not only legal but also moral norms govern the social order impacting upon the content of general clauses from an external perspective.[11]

The content of the general clause is in intensive interaction with the alteration of the constituent parts of the whole. For instance while the renewed ship as a whole remains identical with its original identity, in the case of a codex the paragraphs of which have been abolished or modified, the codex itself and, as a result of its natural function, the content of the general clauses included in it change as well.[12] Nevertheless, certain limitations are present: it depends on the logical coherence of the legal system which volitional acts of the legislator may become law and this logical coherence can be best captured with respect to general clauses by which a certain control is exercised as well.[13]

It can be concluded that general clauses are such general legal propositions which constitute an extensive but also isolated and autonomous structural part (*clausula*) within a given, same specied collective of norms. Their subject-matter is quite extensive and contrary to specific legal norms, they incorporate a relatively large number of states of affaires which are – as a result of some of their dominant characteristics – considered to be of the same genus *(generalis)*. From these aspects emerges an interpretational practice according to which the alteration of the specific legal norms impact upon the interpretation of general clauses and vice versa: through general clauses the alteration of a superior category may be conveyed to the more specific norms.[14]

Gergeli Deli *

[2] Vorländer, Karl, *Geschichte der Philosophie*, Berlin—Charlottenburg: 1932, pp. 403–404.

[3] *„Sollte den System allgemeiner Rechtsprinzipien ein korrespondierendes System von Rechtsbegriffen zugeordnet werden."* See Larenz, Karl—Canaris, Claus-Wilhelm, *Methodenlehre der Rechtswissenschaft*, Berlin—Heidelberg: 1995, 264–265.

[4] *„ […]Politische Wünsche pozitiv-rechtlich zu untermauern, und damit die bestehende Rechtsordnung nicht auf sie selbst zurückzuführenden Belastungen auszusetzen."* See Turegg, Kurt Egon von, *Gefährliche und gefährdete Generalklausel. Über die materiell-rechtlichen Grenzen der Verwaltunsklagen*, Berlin—Köln: 1956, p. 102. In general Hedemann, Justus Wilhelm, *Die Flucht in die Generalklauseln, Eine Gefahr für Recht und Staat*, Tübingen: 1933. The general clauses also make the critique of the judges easier. See Preusche, Reinhard, *Juristische Generalklausel und Argumentationspraxis. Die italienische Rechtssprechung zur Anwendbarkeit ausländischen Rechts (Ordre Public)*, Regensburg: 1978, p. 105. Földi, András, *A jóhiszeműség és tisztesség elve* [The Principle of Good Faith], Budapest: 2001, pp. 43sq. and 100sq; For both the negative and positive aspects of the general clauses see Zweigert, Konrad—Kötz, Hein, *Einführung in die Rechtsvergleichung*, Tübingen: 1996, p. 141.

[5] Samu Mihály—Szilágyi Péter, *Jogbölcselet* [Theory of Law], Budapest: 1998, p. 247. For the case *„Mark gleich Mark"* see Hedemann, *cit.* p. 12, and Zweigert, Konrad—Kötz, Hein, *Introduction to Comparative Law*, Oxford: 1994, p. 156. For further literature on 242.§ BGB see Börner, Fritjöf, *Die Bedeutung der Generalklauseln für die Umgestaltung der Rechtsordnung in der nationalsozialistischen Zeit*, Frankfurt: 1989, pp. 4–6.

[6] See Börner, Fritjöf, *Die Bedeutung der Generalklauseln für die Umgestaltung der Rechtsordnung in der nationalsozialistischen Zeit*, Frankfurt: 1989, p. 9.

[7] Varga Csaba: *Jogi hagyományok? Jogcsaládok és jogi kultúrák nyomában* [Legal Traditions? Following the Marks of Legal Families and Legal Cultures], JK 2/60 (2005), p. 472.

[8] Hedemann, *cit.* p. 209.

[9] Moór, Gyula, *A logikum a jogban* [The Logic in the Law], Budapest: 1928, p. 12.

[10] Varga, *cit.* p. 348.

[11] The normativ content of the general clauses is always in harmony with the social values. See Nowak, Carsten, *Die praktische Bedeutung der Generalklauseln und unbestimmten Rechtsbegriffen in den grossen Kodifikationen der Deutschen Demokratischen Republik*, Köln: 1993, p. 3.

[12] See Rebmann, Kurt—Säcker, Franz Jürgen (Hrsg.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, I, 2nd ed., München: 1993, p. 1140.

[13] Moór, *cit.* p. 7.

[14] The term 'general clause' was used in a wider sense by Pólay. See Pólay, Elemér, *Historische Interpretationen der Generalklauseln im römischen Recht*, Klio 67 (1985) p. 528.

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Karolina Adamová – Antonín Sýkora

Dědické zemské právo v české historii
(Inheritance Law within Landrecht in Czech History)

Ostrava: KEY Publishing, 2013, 127 p., ISBN 978-80-7418-196-2

Karolina Adamová and Antonín Sýkora enriched the book market, after many years, by publication in the field of medieval legal history. The book was published by the reputable Ostrava – Brno publisher KEY Publishing in co-edition with The European Society for History of Law.

History of the Inheritance law belongs to the branch of private law which is not understood well. For this reason any step in this direction is very welcome. Therefore the authors tried to fill this gap and using all the historical sources they show the picture of the Inheritance law in changes from the beginning of its legislation until 17th century or more precisely until amendments of Landesordnung in the middle of the 17th century.

The authors focused their research only towards the nobility Landrecht. They deliberately neglected the City rights and justified it by excessive thematic range. It goes to the detriment of the book. This publication is only so comprehensive view of the development of the Czech Landrecht Inheritance law from the 12th century or Statutes of Konrád until the release of Amendments and Deklaratoria to the Landesordnung.

The book is divided into ten chapters in which in addition to an introduction and overview of sources and literature, the authors deal gradually with each epoch. First they analyze sources until 1497 it continues with the interpretation until 1627. The authors set aside the issue of the rights of Testament in practice of 16th and 17th century. It is followed by a detailed analysis of inheritance rights established in Landesordnung. Very interesting is even just the interpretation of the special Inheritance rights for women.

The book is based on a critical study of legal sources and the authors search for answers according to the scheme: the testator, the manifestation of the will, the object of succession, the limitation of the will by the testator (compulsory part) and finally the testamentary order.

If we look into the content of the work we find that the authors gradually paying attention to the Privilege of Vladislav II. Jagelonsky, to the reflection of testamentary practice before the establishment of Vladislavsche Landesordnung in the work of Všehrd and finally also to the establishment of Verneuerte Landesordnung as Amendments and Deklaratoria that bring elements of Roman Law and thus represent a major milestone in the development of this branch of the law. Finally an Epilogue is attached to the text that pays attention to adjustment of Inheritance rights by the Austrian General Civil Code (ABGB) in 1811 and subsequent regulations. In fact they tried to outline the development up to now in abbreviated form. They also pointed to the fact that there is complete lack of a more comprehensive view of the development of Inheritance law not only in the Middle Ages but even after the ABGB. The filling of this gap would be needed due to the new Civil Code which is in many ways returning to modify the 1811.

Unfortunately the authors limited their research not only in terms of the medieval legal particularism to the law of nobility – thus completely ignoring the City rights but the book is fundamentally oriented just towards the substantive law. They do not pay any attention to the procedural law which remains not recognized.

It is necessary to appreciate the style of the book which is elaborated by the authors in a way to bring the issue to the widest possible range of readers. They try to achieve that by intercuts into the text with extracts from the sources. Also the additional complements are very positive such as the image attachment and graphical representations of succession in various stages of development.

As we have mentioned above it is the extraordinary work of highly educated authors. It is shown by an extensive amount of literature sources that are constantly cited as well as incorporated into a comprehensive list of bibliography at the end of the publication. But especially the ability of the authors to work with sources.

This is a very interesting legal and historical work that attracts not only the legal historians who are interested in the older history. For this reason it is necessary to recommend the book to all those who have an interest in legal history.

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Karolina Adamová – Antonín Lojek

Právníci doby rudolfínské
(Lawyers of the Era of Rudolph II.)

Praha: Ústav státu a práva AV ČR, 2013. 120 p., ISBN 978-80-87439-10-4

The volume by Karolína Adamová and Antonín Lojek, which was published with the support for long-term conceptual development of a research organization provided by the Institute of State and Law of the Academy of Sciences of the Czech Republic based in Prague in 2013, brings a remarkable look at the Rudolph II's reign in the history of the Lands of the Bohemian Crown.

From the spiritual perspective, the period of Rudolph II is undoubtedly a significant part of the development of two Europe-wide ideological approaches. The Age of Reformation and Renaissance preceded the period of new, economic, social and political situation of society.

The Reformation in Bohemia which was represented by a people's movement for religious reform (Hussites movement) moved further in Europe about one hundred years later. The authors quote establishment of numerous new churches that looked at themselves as the announcers of new Gospel, restoration of true religion and return *ad fontes* to the pure sources of the biblical Christianity free of the sediment of age and clerical load.

According to the authors, Renaissance helped advance the new trends in thought about nature, man, society, morals, law and political order, including religion, art, literature and music. Aside from that it also expressed the process of disintegration of relations and growing of the further economic, political and culturally ideological presumptions of the future society.

Humanism, which influenced both the Age of Reformation and the era of Renaissance, emphasized the essential position of man, its dignity, welfare, its needs and interests. In the Czech lands, Humanism – including legal humanism – necessarily met and of course also struggled with utraquism, i.e. the Czech Calixtines and with Catholicism. Only after some time, toleration of religion was achieved in the Sixteenth century. It resulted in acceptance on new concepts of thought. The authors claim that this stream of plurality of ideas terminated the clash of the Catholic-Roman world with the Protestant-German world in the territory of Czech lands, which happened in the second through fourth decade of the Seventeenth century.

The authors of the volume distinguish between the inner and outer area of the traditional way of dividing the influence of humanism on the development of legal thought in Czech lands. The concept of outer area is understood as installing humanists in occupations that create legal practice, i.e. especially higher municipal and manorial clerks. It was necessary, although not in a formal way, that such clerks have certain qualification. Once the humanistic erudition outweighed, persons with this education started to hold positions in which they were in direct contact with legal practice, and they also participated in creation thereof. The inner impact of humanism was later manifested directly in legislative acts.

The period of Rudolph II's reign was aptly characterized by the authors as "a period which, due to its political, confessional and economically developed orientation, required among others that that there were numerous well educated persons for carrying out municipal and patrimonial administration, and these persons had to have vast range of knowledge which exceeded the amount of knowledge that could be attained at the particular municipal schools or gained from the private teaches of nobility." The authors explain that it was the extent of education that distinguished the elites from the other ordinary folks, and it opened door for social rise.

In the late 1500s, a significant change in the lifestyle of nobility took place. The fundamental, social requirement for nobles was to have proper education. The more important families had private preceptors some of whom were prominent scholars. A university degree in law was a necessity.

In the third chapter, the authors focused on the system of courts during the era of Rudolph II as it was there where the jurists employed their expertise and knowledge. The volume is further aimed at particular personalities of the second half and beginning of the Seventeenth century who were educated in law. Such views at the "lawyers" of the past are very inspiring.

In my opinion, also the final part of the volume is very interesting as the authors provide there "a brief characteristic" of other lawyers of the era of Rudolph II,

I am very pleased to have had the opportunity to read such an interesting book.

Renata Veselá*

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Bericht zu dem Symposium und Podiumsdiskussion:

Andrássy, Deák und die Schaffung des Dualismus aus ungarischer und österreichischer Perspektive von 5. November 2013

Die Geburtsdaten zweier ungarischer Staatsmänner, dem 1803 geborenen Franz Deák und dem 1823 geborenen Graf Julius Andrássy, boten der Andrássy Universität den Anlass, eine Jubiläumsveranstaltung zu organisieren. Beide Staatsmänner waren maßgeblich an den Verhandlungen zum Ausgleich zwischen Österreich und Ungarn beteiligt, der 1867 von beiden Parlamenten angenommen wurde. Weiterhin steuerten sie von ungarischer Seite her maßgeblich den Ausbau des Staatensystems der Doppelmonarchie.

Das Ziel des Symposiums und der darauffolgenden Podiumsdiskussion war es, den Stand der österreichischen und ungarischen Forschung festzustellen, die unterschiedlichen Perspektiven zusammenzuführen und somit auch die eigenen nationalen Erinnerungen zu hinterfragen. Im Rahmen des Anlasses referierten und diskutierten namhafte ForscherInnen unter anderem der Österreichischen Akademie der Wissenschaften sowie der Ungarischen Akademie der Wissenschaften. Die Veranstaltung wurde in Zusammenarbeit von Mitarbeitern des Donauinstituts und der Fakultät für Mitteleuropäische Studien in Kooperation mit der Ungarischen Akademie der Wissenschaften und dem Österreichischen Kulturforum umgesetzt.

Den Auftakt des Symposiums gab der *Keynote-Speech* von **Univ. Prof. Dr. Arnold Suppan** (ÖAW/AUB-MES) zum Thema: *„War der österreichisch-ungarische Ausgleich reformierbar – oder war die Habsburgermonarchie zum Untergang verdammt?“* Ziel des Vortrags war es, ein objektives Bild der Doppelmonarchie zu zeichnen und keine Spekulationen über ein „was wäre wenn“ aufkommen zu lassen. Somit begann Suppan mit einer Beschreibung der territorialen Aufteilung zwischen Cisleithanien und Transleithanien, die auch die territoriale Erweiterung von 1878 und 1908 mit der Annexion Bosnien-Herzegowina berücksichtigte. Die beiden Städte Wien und Budapest lagen an den geografischen Schlüsselpunkten der Monarchie, die sozial, kulturell und geistig einen offenen Durchgangsraum darstellte, der sich auch in der Modernisierung und technischen Entwicklung zeigte. Die Städte wuchsen an, die Arbeitsmärkte waren gut entwickelt und die Infra- und Kommunikationsstruktur wurden ausgebaut. 1910 gab es in der Monarchie 51,4 Millionen Einwohner, davon waren 45% Ungarn. Ab dem Anfang des 20. Jahrhunderts machte sich in der Monarchie eine doppelte Scherenbewegung bemerkbar: eine abnehmende Geburtenrate sowie eine abnehmende Sterberate. Weiters verzeichneten die Städte Zuwanderungsraten und die ländlichen, peripheren Gebiete eine Abwanderungsrate. Suppan untermauerte diese Aussagen mit einer Reihe von Zensusdaten zur damaligen Bevölkerungsentwicklung aus beiden Teilen der Monarchie. Die Sprengkraft, die der Monarchie ein Ende bescherte, war durch historisch und ethnisch motivierte Entwicklungen, so unter anderen durch den Pan-Slawismus entstanden. Befürworter der Monarchie waren unter Berücksichtigung der Konfessionen hauptsächlich die Katholiken, die Protestanten und die assimilierten Juden, wobei die Katholiken in beiden Landesteilen die Mehrheit stellten und insgesamt 33 Millionen betrugen. Die 3,2 Millionen Juden waren in beiden Landesteilen gleichmäßig verteilt. Nach Suppan traf der von Samuel Huntington proklamierte „Clash of Civilisations“ für die Monarchie im 20 Jh. nicht ein, die Islamische Glaubensgemeinschaft wurde 1912 offiziell u. a. in Bosnien-Herzegowina anerkannt.

Die k.u.k. Monarchie war ein Reich mit zwei Teilstaaten, wobei es einen Monarchen gab, einen gemeinsamen Ministerrat, eine gemeinsame Armee, eine gemeinsame Zollpolitik, eine Zentralbank und eine Währung, jedoch zwei Regierungen und zwei Parlamente. Unterschiede gab es jedoch bei den politischen Rechten, z.B. wurde in Cisleithanien 1861 das Kurienwahlrecht erweitert und ab 1906 das allgemeine Männerwahlrecht über 24 Jahre eingeführt. In der transleithanischen Reichshälfte war das Wahlrecht weiterhin eher eingeschränkt. Ein weiterer Unterschied zeigte sich im 1867 erlassenen Minderheitenrecht in der österreichischen Reichshälfte, das den Minderheitsgruppen Gleichberechtigung einräumte. In Ungarn gab es kein vergleichbares Gesetz.

Die Monarchie konnte von 1900 bis 1910 eine positive wirtschaftliche Entwicklung verzeichnen. In den städtischen Zentren betrug die Arbeitslosigkeit nur 3%, doch in den Peripherien gab es Entwicklungsrückstände, die zur Emigration der lokalen Bevölkerung führte. Die gesellschaftliche Trennung zwischen den Eliten und der übrigen Bevölkerung war besonders in Ungarn stärker ausgeprägt, als in Cisleithanien.

Das Bildungswesen war laut Suppan im Vergleich zu anderen Imperien angemessen, das Hochschulwesen jedoch in Cisleithanien besser ausgebaut als in Ungarn. Die höhere Bildung ermöglichte die soziale Mobilität. Der Slowene Franci Zwitter war der Meinung, dass es einen Konsens unter den Nationalitäten der Monarchie gab, der das Imperium legitimierte und somit dessen Bestand sicherte. Auf Robert A. Kann verweisend, meinte Suppan, dass die Bedeutung der Monarchie dahin interpretiert werden könne, dass sie ein einmaliges Gebiet, eine Vereinigung von Ungleichheiten und ein Schmelztiegel war.

Die Doppelmonarchie hatte die Entwicklung eines Rechtsstaats sowie die Demokratisierung gefördert, jedoch notwendige Reformen waren in Friedenszeiten nicht umgesetzt worden und konnten in Kriegszeiten nicht mehr umgesetzt werden.

Forschungsprofessorin Dr. Éva Somogyi (MTA-BTK-TTI), die zweite Vortragende des Symposiums, befasste sich in ihrem Vortrag *„Andrássy-Vertraute bei Wiener Amtsstellen"* mit der Besetzung der Ämter im gemeinsamen Außenministerium durch ungarische Vertrauensleute Andrássys. Thema war somit auch die Umgestaltung der Strukturen in den gemeinsamen politischen Institutionenen der Doppelmonarchie, d.h. dem Außenministerium, Finanzministerium und dem gemeinsamen Ministerrat. Aufgrund dieser konstitutionellen Umgestaltung der Monarchie wurde festgelegt, dass die Außenpolitik der Monarchie im Einverständnis beider Teilstaaten zu erfolgen hatte. Andrássy verfolgte das Ziel, mehr ungarische und loyale Beamte in das Außenministerium in Wien zu setzen. Auch beim gemeinsamen Finanzministerium versuchte Andrássy bei der Organisation des Ministeriums mitzuwirken. Bei einer Rede im Ministerrat hatte er festgehalten, dass ungarische Staatssekretäre und Minister in die höhere Staatsverwaltung berufen werden sollten. Andrássy war also davon überzeugt, dass eine neue ungarische Führungselite auch für das Gesamtreich erzogen werden müsse, insbesondere für den diplomatischen Dienst. Doch die ungarischen Beamten, die ihre Stellung in Wien einnahmen, mussten mit den Widerwillen der österreichischen Kollegen umgehen lernen. Es gab trotzdem eine Zunahme an ungarischen Beamten in den gemeinsamen k.u.k-Ministerien.

Dr. Anatol Schmied-Kowarzik (ÖAW) referierte über *„Die Krise des Dualismus nach 1897. Instrumentalisierung der Wirtschaftsgemeinschaft für nationale Partikularinteressen"*. Schmied-Kowarzik analysierte anhand von Dokumenten die Krise der Doppelmonarchie im Zeitraum von 1897 bis 1907. Er argumentierte, dass die rechtliche Ausgangsituation, die eine Einigung beider Teile der Monarchie in den Bereichen Außenpolitik, Militär und Finanzen voraussetzte, zur Krise führte. Da alle drei genannten Bereiche nicht auf finanzielle Einnahmen zurückgreifen konnten, sondern ihre Ausgaben über andere Bereiche zu finanzieren hatten, musste eine Quote zwischen Trans- und Cisleithanien für die Finanzierung dieser Bereiche festgelegt werden, die alle zehn Jahre neu verhandelt wurde. Diese Verhandlungen nun wurden aufgrund anderer Probleme, z.B. Verzehrungssteuer, Nationalbank, Schulden, Aufteilung der Bankgewinne, Handelsverträge und schließlich die Badenische Sprachverordnung zum Scheitern gebracht. Noch 1867 hatten sich beide Regierungen auf eine Quote von 70/30 geeinigt. Im Rahmen von wirtschaftlichen Verhandlungen 1878, die die Frage der Nationalbank, Handels- und Zollabkommen beinhalteten, wurde die Quote für weitere zehn Jahre festgelegt. Im Jahr 1887 konnte der Wirtschaftsausgleich nur noch durch ein Provisorium geregelt werden. 1895 wurde erneut die Quote verhandelt, wobei sich die Verhandlungen aufgrund verschiedenster Anliegen erschwerten. Neben den bereits angesprochenen wirtschaftlichen Punkten führte die Badenische Sprachverordnung zur Blockade des Reichsrats durch die deutschen Abgeordneten. Zwar wurde in Bad Ischl ein Kompromiss gefunden, doch dann begannen die tschechischen Abgeordneten die Obstruktionspolitik der deutschen Kollegen zu übernehmen. Bei den Verhandlungen setzten sich die Ungarn schließlich durch. Schmied-Kowarzik bemerkte, dass der relative Vorteil, den Ungarn in den Verhandlungen erhielt, sich im Allgemeinen zum Nachteil der Monarchie entwickelte, weil Cisleithanien dadurch geschwächt wurde.

Dr. Imre Ress (MTA-BTK-TTI) referierte im zweiten Vortragspanel des Symposiums mit dem Titel *„Nationale Aspekte und Reichsinteressen in der Amtsführung von Außenminister Gyula Andrássy"*. Er betonte, dass die gesetzlichen Bestimmungen versäumt hätten, die organisatorischen Formen der gemeinsamen Ministerien zu regeln. In seiner Doppelfunktion als ungarischer Ministerpräsident und gemeinsamer Außenminister musste Andrássy gleichzeitig die ungarischen und die gemeinsamen Interessen der Monarchie vertreten. Nach Erörterungen über die gemeinsame Außenpolitik und die konstitutionelle Kontrolle des ungarischen Ministerpräsidenten sprach der Vortragende über die asymmetrische Parität in der Außenpolitik und wies darauf hin, dass die österreichische Seite keine eindeutige Position hatte. Aus österreichischer Sicht schien es nicht nötig, partikuläre Interessen zu formulieren, die Interessen der Monarchie waren in dieser Auffassung mit den eigenen identisch. Ress fokussierte die Rolle von Andrássy auch im gemeinsamen Ministerrat. Zuletzt wies der Referent auf die Schattenseiten der Entwicklungen während Andrássys Amtszeit hin, auf die wachsende Bürokratie und die Neigung zur Militarisierung.

Prof. Dr. Gerhard Seewann (PTE-BTK) referierte mit dem Titel *„Ferenc Deák, Anwalt der „gemeinsamen Angelegenheiten"*. Der Vortrag gliederte sich in fünf Teile. Erstens wurde die Laufbahn von Deák bis 1860 geschildert. Seewann betonte, dass Deák in der Kontroverse zwischen Kossuth und Széchenyi zu Kossuth geneigt habe, ohne seine freundschaftliche Beziehung zu Széchenyi aufzugeben. Zweitens fragte der Referent nach der politischen Beurteilung der ungarischen Position in Europa und unterstrich, dass sich Deák der Ansicht von Miklós Wesselényi angeschlossen habe, der in den slawischen Völkern Gefahr für Ungarn identifizierte. Für Deák war die Monarchie eine Notwendigkeit für die weitere Entwicklung der ungarischen Staatlichkeit. Drittens ging Seewann auf die österreichisch-ungarischen Beziehungen ein und wies auf die Divergenz zwischen „kiegyenlítés" (Ausgleich im technischen Sinn) bzw. „kiegyezés" (Ausgleich im ethisch-politischen Sinn) hin. Er unterstrich, Deák habe das erstere favorisiert und die Verfassungsmäßigkeit betont. Neben der Würdigung des Staatsmannes, der „grauen Eminenz der ungarischen Regierung", ging der Vortrag auch auf die langwierigen Ausgleichsverhandlungen und die darin zentrale Rolle von Deák ein.

Prof. Dr. Gábor Hamza (ELTE-ÁJK), der Initiator der Jubiläumsveranstaltung, referierte mit dem Titel *„Der Ausgleich von 1867 in der deutschen staats- und völkerrechtlichen Literatur"*. Sein Vortrag hatte zwei Schwerpunkte. Zuerst sprach er über József Eötvös bzw. seine rege Korrespondenz (1862) mit dem Völkerrechtler Karl Theodor Welker, der Mitglied der Frank-

furter Nationalversammlung und der Verfassungskommission für Deutschland war. Hamza hob hervor, dass die Idee von Delegationen schon in diesen Briefen aufgekommen sei. Im zweiten Teil des Vortrags stand das Standardwerk von Heinrich Trippel (1938) im Fokus, indem der Autor zwischen Führung und Herrschaft unterschied. In dieser Auffassung hätte Ungarn, wenn die Doppelmonarchie überlebt hätte, eine hegemonische Stellung gehabt, weil es hier im Gegensatz zu Österreich viele charismatische, führende Persönlichkeiten gab (Kossuth, Tisza, Bánffy, Széll). Abschließend betonte Hamza, dass heute in Deutschland aus juristischer Perspektive über ein reges Interesse für den Ausgleich gesprochen werden könne (Minderheitenschutz, Staat mit föderaler Struktur).

Podiumsdiskussion

Nach den Vorträgen wurde die halbtägige Jubiläumsveranstaltung mit einer einstündigen Podiumsdiskussion fortgesetzt und vollendet. Das Ziel des Gesprächs war es, die heute aktuellen Bilder über den Ausgleich dies- und jenseits der Leitha zur Sprache zu bringen und dadurch der Frage dialogisch nachzugehen, wie weit die Bewertung des Ausgleichs und seiner Folgen die jeweiligen nationalen historischen Erinnerungen bestimmen. Die Podiumsdiskussion wurde von **Prof. Dr. Andreas Oplatka** (AUB) geleitet, es diskutierten zwei ExpertInnen von österreichischer Seite, **Dr. Stefan Malfčr** (ÖAW)und **Dr. Thomas Kletečka** (ÖAW), sowie von ungarischer Seite **Dr. Zoltán Fónagy** (MTA-BTK-TTI), der bei der Konzipierung der Veranstaltung maßgeblich mitgewirkt hatte, und **Doz. Dr. Ágnes Deák** (SZTE-BTK).

Der Diskussionsleiter veranlasste eine offene Diskussion und ließ zuerst die Diskutanten stichwortmäßig ihre Assoziationen zum Thema zur Sprache bringen. Diese mussten dann im Laufe des Gesprächs begründet und gegenseitig diskutiert werden. Dabei wurde von Ágnes Deák ein kollektives 'Vergessen' in der Öffentlichkeit parallel mit einem erneuten Interesse der Fachwelt diagnostiziert. In der ungarischen Fachwelt spricht man auch von einem gewissen Konsens in Bezug auf Ausgleich und Dualismus; dabei wird immer wieder Péter Hanáks (einer der wichtigsten Historiker der ungarischen Monarchie-Forschung) Meinung zitiert, der den Ausgleich Österreich-Ungarns als einen realen Kompromiss zu bezeichnet. Zoltán Fónagy wies auf die professionalisierte Erinnerung hin und brachte Aspekte der betrachteten Erinnerung wie doppelseitige Selbstlüge, Ausfärbung der Realitätswahrnehmung der ungarischen politischen Elite sowie Modelle einer realpolitischen, tragischen oder verräterischen Handlung des Geschehens in die Diskussion ein. Stefan Malfčr und Thomas Kletečka betonten, dass auch von österreichischer Seite immer weniger an den Ausgleich erinnert wird. Kletečka fragte sich, inwiefern auf österreichischer Seite der Ausgleich mit dem künstlich gefestigten nationalen Bewusstsein zusammenhänge. Zu Aspekten der Erinnerung wurden von Stefan Malfčr unter anderem die Fragen gestellt: Was wird erinnert, wenn überhaupt? Wo – also in welchen Bereichen der Gesellschaft – existieren Erinnerungen? So brachte er die Mittel der Erinnerung zur Sprache und wies dabei neben dem Schulunterricht auf das Ausstellungs- und Museumswesen sowie auf die große Rolle der Medien hin, wo z.B. die 'Sissy-Filme' und neulich besonders Musicals die Erinnerung der Gesellschaft enorm beeinflussen und prägen. Wobei der Ausgleich in den Schulbüchern wenig Platz bekommt und von den erschütternden Ereignissen des 20. Jahrhunderts eher verdrängt wird. Dagegen werden die Aspekte der dualistischen Staatsorganisation hervorgehoben.

Der Diskussionsleiter stellte nun die Frage, ob eine Nostalgie zu Recht bestehe? Gibt es eine allgemeine Nostalgiebereitschaft oder wurde eine solche von Historikern durch die Geschichtsschreibung etabliert?

In Ungarn wird die Zeit der Doppelmonarchie durch tragische nationale Erinnerungspunkte wie 1848/49 oder 1919 unterdrückt. Eine Nostalgie gegenüber dem Reich der Stabilität und dem jahrzehntelangen Frieden scheint im Nachhinein aus der Sicht der tragischen Ereignisse gerechtfertigt zu sein. Von österreichischer Seite sind Malfčr und Kletečka der Meinung, dass Filme einerseits durch Lebensgeschichten wirken, nicht durch die dahinterliegenden historischen Ereignisse, andererseits zerstören sie die Nostalgie, wie z.B. der ‚Radetzkymarsch' gezeigt hat. ‚Historische Nostalgie' ist ein Verlegenheitsausdruck, da sie eine Gegensituation der Unzufriedenheit braucht. Bei der Nostalgie auf ungarischer Seite muss die Frage gestellt werden, ob sie sich auf das historische Ungarn oder auf die Monarchie bezieht. Der auch von den Wirtschaftshistorikern untermauerte wirtschaftliche Aufschwung der zweiten Hälfte des 19. Jahrhundert besonders in Ungarn und im Fall von Budapest begründet eine gewisse Nostalgie, die sonst eher an Personen festgemacht wird.

Es wurde von den Experten abschließend festgestellt, dass die gegenseitigen Schuldzuweisungen und Sündenbocksuchen der Intellektuellen der Zwischenkriegszeit sowohl in der österreichischen als auch in der ungarischen Geschichtsschreibung überholt sind.

Das Publikum kam beim Gespräch auch hin und wieder zum Wort und wurde durch ein aktuell in NZZ veröffentlichten Artikel die Frage nachgegangen, inwieweit kann eine Zusammenhang zwischen der Europäischen Union und der Monarchie gezogen werden. War die Monarchie für ihre Völker in der Mitte Europas ein ‚Völkersanatorium', nach deren Verschwinden die Staaten zu leichten Beute der beiden Diktaturen geworden sind, oder eher ein ‚Völkerkerker'? Diese Frage des historischen Lehrens ist also auch heute aktuell.

Christina Griessler,[*] Enikő Dácz,[**] Henriett Kovács[***]

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Address of the author/s, including the code of the country before the postal code (for example CZ). Afterwards write down your email address.
2. **Abstract.** Summarizes the content of the work. Usually up to 10 rows. It should describe clearly the main question of the research, solution, sources and methodology (according to the type of research).
3. **Key words.** Several terms (not more than 20 words) that characterize the work. Words from the title can be repeated.
4. **Division of the proper text.** For better orientation in the text, it should contain headings. The headings should be numbered.

Quotation from publications in German language – write down in the underlined comments in such a way:
WAGNER, Alfred, *Kirchenrecht*, Wien, 2005, S. 151–152.

Quotation from publications in English language – write down in the underlined comments in such a way:
WAGNER, Alfred, *Kirchenrecht*, Wien, 2005, p. 151–152.