Vol. 7 / 2016 No. 1

Journal on European History of Law

9 772042 640001 01

STS Science Centre

The European Society for History of Law

VOL. 7 / 2016 NO. 1

Editorial staff JOURNAL ON EUROPEAN HISTORY OF LAW:

JUDr. PhDr. Stanislav Balík
Attorney at Law, Prague, Czech Republic
Prof. Dr. Barna Mezey
Faculty of Law, Eötvös-Loránd-University Budapest, Hungary
Prof. JUDr. Jozef Beňa, CSc.
Faculty of Law, Comenius University in Bratislava, Slovak Republic
Doc. JUDr. PhDr. Jiří Bílý, CSc.
Metropolite – University Prague, Czech Republic
Dr. Piotr Fiedorczyk
Faculty of Law, University of Białystok, Poland
Alberto Iglesias Garzón, Ph.D.
Charles III University of Madrid, Spain
Prof. Dr.iur. Dr.phil. Thomas Gergen, MA
European University for Economics and Management, Luxembourg
Prof. Dr. Gábor Hamza
Faculty of Law, Eötvös-Loránd-University Budapest, Hungary
Prof. JUDr. Ignác Antonín Hrdina, DrSc.
Faculty of Law, Westbohemia University, Plzeň, Czech Republic
JUDr. Vilém Knoll, Ph.D.
Faculty of Law, Westbohemia University, Plzeň, Czech Republic
Doc. dr. sc. Mirela Kresic
Faculty of Law, University of Zagreb, Croatia
Prof. zw. dr hab. Adam Lityński
Faculty of Law, University of Silesia, Katowice, Poland
Doc. Dr. Olga Lysenko
Faculty of Law, Lomonosov Moscow State University, Russia
Tony Murphy
Department of Law & Criminology, Sheffield Hallam University, UK
ao. Univ. Prof. Dr.jur. Christian Neschwara
Faculty of Law, University of Vienna, Austria
Doc. Dr. Dmitry Poldnikov
Faculty of Law, National Research University, Higher School of Economics, Moscow, Russia
Doc. JUDr. Karel Schelle, CSc.
Faculty of Law, Masaryk University, Brno, Czech Republic
Dr. Gábor Schweitzer, Ph.D.
Institute for Legal Studies of the Hungarian Academy of Sciences, Hungary
Adw. Ewa Stawicka
Attorney at Law, Warsaw, Poland
Dr. Magdolna Szűcs, Ph.D.
Faculty of Law, University of Novi Sad, Serbia
JUDr. Bc. Jaromír Tauchen, Ph.D., LL.M.
Faculty of Law, Masaryk University, Brno, Czech Republic
Prof. Dr. Wulf Eckart Voß
Faculty of Law, University of Osnabrück, Germany

TABLE OF CONTENTS

Diemut Majer: Peter Saladin (1935–1997) 2
Christoph Schmetterer: Der strafrechtliche Schutz von Kaiser und Kaiserhaus in Österreich von 1848–1918 12
Astrid Lorenz: Parties and Rules. Constitution-making in the East German Länder after 1990 28
Andrew Watson: Victorian Jury Court Advocacy and Signs of Fundamental Change 36
Patrizia Resta: The Revenge of Soghomon Tehlirian 45
Javier Belda Iniesta: The Pleasure of Privacy: Confession and Inquisition as Means to Cause the Correction of Sinful Consciences around the IV Lateran Council 54
Rudransh Sharma: History of Legal Profession in India 60
János Jusztinger: Dogmatics of Criminal Law and the Roman Jurisprudence 73
József Benke: The Remembrance of 'Praetor Paulus' in Mid-Tudor England 79
Csaba Cservák: Development Span of the Hungarian Governmental Forms (in an International Comparison) 85
Ibolya Katalin Koncz: Divorce and Undeserving of Permanent Alimony according to the Practices of the Hungarian Royal Curia 91
Iván Halász: The Development of Czechoslovak, Polish and Hungarian Foreign Affairs Administration between the Two World Wars (1918–1939) 96
Dávid Klemm: An Attempt to Establish the European Army: The Pleven Plan 105
Przemysław Dąbrowski: The Structure and Powers of the Councils of State in the Kingdom of Poland between 1815 and 1867 110
Maria Lewandowicz: On the Universalist Heritage in the Codification of Private Law in Poland and Switzerland in the 19th and 20th Century 115
Lenka Šmídová Malárová: „Causa legittimae absentiae" in Legal Praxis of the Medieval Town Law in Moravia 125
František Emmert: The Expansion of so-called Reich Citizenship in the Czech Territories during the War Years and its Post-war Consequences 130
Johan Schweigl: The Fundamental Events within the Development of Central Banking in the Czech Lands 135
Miriam Laclavíková, Andrea Olšovská: Besondere Arbeitsbedingungen von Frauen im Hinblick auf den Schutz vom Wert der Mutterschaft auf dem Gebiet der Slowakei – Vergangenheit vs. Gegenwart 140
József Szalma: Einfluss der deutschen Willens- und Erklärungstheorie auf europäische zivilrechtliche Kodifikationen und Theorie über die Willensgeschäfte - mit besonderer Berücksichtigung des serbischen Privatrechts 146
Dunja Pastović: "Defect of Sex": Exclusion of Women from Jury Service in Istria 1873–1918 155
Arijana Kolak Bošnjak: The Flip Side of Freedom. The Attitude towards Pro-Hungarians in Banal Croatia in 1848/49 172
Engjëll Likmeta: Some Reflections on the Delicts of the First Criminal Code of the Republic of Albania 178
Marina A. Baratova: The Evolution of Russian Housing Law during the 20th Century 186
Oleksandr Gavrylenko, Oksana Skryl: Legal Regulation of Civil Contracts in Ancient City-States of the Black Sea Northern Coast 190

READERS REACT

Gedanken zum „Recht auf die Heimat" 201

BOOK REVIEWS

Allerlei Rechtsgeschichten - von Hammurabi bis zum Code civil. Ein Blick auf die Schriftenreihe des Rechtshistorischen Museums Karlsruhe 204
Das ABGB im Spiegel der rechtshistorischen Literatur 207
Guy Burak: The Second Formation of Islamic Law. The Hanafi School in the Early Modern Ottoman Empire 210
Wilfried Hartman, Kenneth Pennington: The History of Byzantine and Eastern Canon Law to 1500 216
Julian Lubini: Die Verwaltungsgerichtbarkeit in den Ländern der SBZ/DDR 1945–1952 217
Gerhard Strejcek: Erlerntes Recht. Zur Ausbildung von Juristinnen und Juristen an der Wiener Universität 1365–2015 219
Guidelines for authors 220

JOURNAL ON EUROPEAN HISTORY OF LAW

© 2016 STS Science Centre Ltd.

All rights reserved. Neither this publication nor any part of it may be reproduced, stored in a retreival system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of STS Science Centre Ltd.. Published semiannually by STS Science Centre Ltd. „Journal on European History of Law" is a registered trademark of STS Science Centre Ltd.

Issued twice a year.

Printed in the EU.

ISSN 2042-6402

Peter Saladin (1935 – 1997)*

*Diemut Majer***

Abstract

Peter Saladin (1935-1997) is one of the outstanding scientists in the field of public law at the end of the 20th century. As a professor for constitutional and ecclesiastical law in Bern (Switzerland), he founded a new understanding of the individual rights. Up to the 1970th they were considered having only a programmatic function (without obligation of the state). Saladin required that the legislation be bound by these rights and obliged to realize them through appropriate laws.

The second field of Saladins activities was the protection of the environment, for which he engaged since the 1980th. He required independent rights for "the nature" (animals) and created the declaration for the rights of the future generations (analogue to the declaration of rights of the French Revolution 1789), which is up to our days a main – or the main task for the state and the individual. Saladin is one of the pioneers in the environmental protection for which he dedicated his whole life. In the present dissipated views of scientists in very specialist fields, he kept the overlook over the whole system of the environmental problem. This pioneer should serve as a guiding figure for the younger generations in all countries.

Key words: *Peter Saladin; protection of the environment; environmental law; environmental science; ethical princips of the protection of the environment; rights of nature and rights of the future generations on the field of environmental protection.*

I. Leben

Peter Saladin wurde am 04. Februar 1935 in Basel geboren. Sein Vater war Berufsoffizier. Nach dem Studium der Rechtswissenschaften in Basel promovierte er 1960 bei Max Imboden, anschließend war er dessen Assistent in Basel. Während dieser Zeit verbrachte er ein Forschungssemester an der FU Berlin. 1962/63 absolvierte er ein postgraduate Studium an der Michigan-Law School, mit einem Master of Comperative Law (MCL) als Abschluss. Er hatte zwei Kinder, eine Tochter Anne und einen Sohn David, der 1988 bei einem Verkehrsunfall ums Leben kam.

Peter Saladin zog es nach den universitären Aufenthalten in die Praxis. Er trat 1963 bei der Bundesverwaltung in die Justizabteilung des eidgenössischen Justiz- und Polizeidepartments ein (heutiges Bundesamt für Justiz). 1966 bis 1972 amtierte er als Sekretär des Schweizer Wissenschaftsrats. In dieser Zeit wurde er für sieben Monate beurlaubt, um seine Habilitationsschrift anzufertigen, die er 1969 mit dem Titel „Grundrechte im Wandel" (Bern 1970) vorlegte. 1972 wurde er nach Basel als Nachfolger von Max Imboden, dann 1976 nach Bern als Professor für öffentliches Recht und Kirchenrecht berufen. 1991 verlieh ihm die juristische Fakultät der Universität Genf den Doktortitel honoris causa.

Neben seiner Professur war Peter Saladin als Gutachter und Berater vor allem für den Kanton Bern und für den Bund tätig. Er wirkte in zahlreichen wissenschaftlichen Gremien mit, so im Wissenschaftsrat, in der Expertenkommission für die Totalrevision der BV, der Expertenkommission für Personenrecht, der Expertenkommission für ein neues Atomenergiegesetz, der Kommission zur Revision des Berner Beamtenrechts. Ferner übte er das Amt des Präsidenten der Expertenkommission für die Revision des Sprachenartikels (116 Bundesverfassung 2000) aus. Von 1971 bis 1994 war er Mitherausgeber der Zeitschrift für Schweizerisches Recht (ZSR). Hinzu traten eine rege Vortragstätigkeit und die Mitwirkung in zahlreichen internationalen Gremien. Sie verschafften ihm und seinem Werk europaweite Anerkennung.

Zwangsläufig stand Peter Saladin mit dieser Funktion mit der Verfassungspolitik in enger Verbindung, behielt aber stets seine wissenschaftliche Distanz. In der auch in der Schweiz seit den 1990er Jahren zunehmenden Europadebatte um einen Beitritt der Schweiz zum damaligen EWR (Europäischer Wirtschaftsraum) vertrat er die Auffassung, dass die Schweiz eine starke Position habe und selbstbewusst auftreten müsse. Solange die Schweiz im Besitz der Alpenpässe sei, müsse sie sich keine Sorgen machen.

* Der folgende Text beruht auf den biographischen Hinweisen in W. Kälin u. a. (Hg.): Die Kunst der Verfassungserneuerung, Bern 1998, sowie auf den Auskünften des ehemaligen Mitarbeiters von Peter Saladin, Dr. Petros Evangelides (2011). Ich bin Herrn Dr. phil. Wolfgang Höhne zu großem Dank verpflichtet, der die Textbearbeitung übernommen hat.

** Prof. Dr. Diemut Majer. Die Verfasserin ist emeritierte Universitätsprofessorin. Sie ist Rechtsanwältin in Karlsruhe und Lehrbeauftragte für Europarecht und Umweltrecht an der dortigen Universität.

Saladin war religiös sehr engagiert und in vielfacher Weise als Ratgeber für seine Kirchengemeinde in Bern tätig. In späteren Jahren ging er über die dogmatischen Grenzen des evangelisch-reformierten Bekenntnisses hinaus, indem er sein Engagement für die Bewahrung der Schöpfung, wie später zu zeigen ist, unter dem Dach des Christlichen allgemein (der Bund Gottes mit den Menschen und dessen Verantwortung) ansiedelte. Die Natur war für ihn als Lebensgrundlage des Menschen im Prinzip unangreifbar. Auch im Alltag waren er wie seine Frau Theresia sehr naturverbunden, liebten Tiere und Pflanzen. Peter Saladin sagte, dass alles, was die Natur biete, schützenswert sei und Baubelange notfalls zurückstehen müssten. Er war Baubewilligungen (auf die normalerweise ein Rechtsanspruch besteht) nur nach Ermessen der Verwaltung (die also auch die Bewilligung ablehnen konnte) nicht abgeneigt, wenn Naturschutzbelange Vorrang hätten.

Peter Saladins Hobby war die Musik. Er war ein ausgezeichneter Klavierspieler. In seiner Wohnung versammelten sich Freunde und Kollegen zu Hauskonzerten, bei denen auch seine Frau, eine ausgebildete Geigerin, und sein langjähriger Mitarbeiter Petros Evangelides, im „Nebenberuf" Tenorsänger, mitwirkten. Universität und Privates gingen ineinander über, ein „Biotop", wie es heute kaum mehr anzutreffen ist. Mit seinen Kollegen verstand sich Peter Saladin sehr gut, insbesondere mit Alt-Nationalrat Richard Bäumlin und mit Jörg Paul Müller.

Den verschiedenen Reformwellen, die die Universitäten in den letzten Jahrzehnten bewältigen mussten, stand er skeptisch gegenüber; dies war, wie zu zeigen ist, schon in den 70er Jahren so, als die Folgewirkungen der 1968er Jahre in die Schweiz „überschwappten". „Ent-Geschichtlichung" des Rechts, neue Studienstruktur, sog. Demokratisierung der Universität (Mitbestimmung), neue Gremien, vermehrte Bürokratie, erhöhte Hektik – all dies führte bei vielen Professoren, auch bei Peter Saladin, zu Verdruss und Frustration. Er war kein Konservativer, war aber besorgt, ob angesichts der neuen Hektik für Forschung und Lehre noch genügend Freiräume bleiben würden. Die zweite Reformwelle, die seit den Neunzigerjahren auf die Universitäten zurollte, kündigte neue Umwälzungen an: Reglementierung des Studiums, weitere Bürokratisierung, Strukturreformen und neue Lehreinheiten[1], ferner sog Effizienzkontrolle der Fakultäten – all diesen Vorwirkungen der Bologna-Reform stand Saladin ebenfalls distanziert und skeptisch gegenüber. In diesen Jahren äußerte er einmal resigniert: „Ich hätte heute wohl keine Chance mehr, nach Bern berufen zu werden".

Peter Saladin starb nach langer schwerer Krankheit am 25. Mai 1997 im Alter von 62 Jahren, vielbetrauert von Kollegen[2] und von der Öffentlichkeit.

II. Werk[3]

Peter Saladin hat ein vielseitiges Werk hinterlassen. Er vertrat die gesamte Breite des öffentlichen Rechts[4]. Die bekanntesten Werke sind seine Habilitationsschrift „Grundrechte im Wandel" (1970)[5], seine Schrift „Rechte künftiger Generationen" (1988)[6], sowie: „Wozu noch Staaten?" (1995). Die nach seinem Tod von seinen Fakultätskollegen herausgegebene Schrift „Die Kunst der Verfassungserneuerung"[7] nennt neben weiteren Werken Aufsätze aus den Bereichen Verfassungsreform, Staatsrecht, Umweltschutz, Recht und Wirtschaft, Föderalismus, Völkerrecht und Landesrecht, von denen die wichtigsten in dem genannten Werk abgedruckt sind[8]. Hinzu treten zahlreiche Gutachten und Memoranden für Behörden des Bundes und der Kantone, für die evangelisch reformierte Kirche, für Umweltverbände, etc., die heute im Staatsarchiv Bern verwahrt werden[9].

Peter Saladin war kein Anhänger dickleibiger Lehrbücher. Seine Monographien, die nach seiner 1970 erschienen Habilitationsschrift herauskamen, habeneinen geringeren Umfang und bestechen durch ihre Übersichtlichkeit und Klarheit. Am „neuen Lehrbüchermarkt" für Professoren beteiligte er sich nicht. Peter Saladins Schwerpunkte lagen in den 1970er Jahren auf Fragen der Verfassungsreform und der Grundrechte. Er hat den Prozess der Reform der Bundesverfassung während dreißig Jahren mitgestaltet und kritisch mitverfolgt. Er war Mitglied der „Furgler-Kommission" und der „Wahlen-Kommission" zur Totalrevision der Bundesverfassung, die seit 1967 im Gespräch war. Saladin verfolgte zwei Zielsetzungen: Die Bundesverfassung müsse die Grundrechte „positivieren", die bis dahin nur in ungeschriebenen Rechtsgrundsätzen des Bundesgerichts anerkannt waren. Die Verfassung müsse darüber hinaus die Grundrechte in „praktischer Konkordanz" (in der Wirklichkeit), also in der Gesetzgebung ausgestalten (Meinungs-, Versammlungs-, Pressefreiheit, Religionsfreiheit etc.). Mit der Forderung nach der Institutionalisierung von Grundrechten und deren Konkordanz befand er sich in Übereinstimmung mit seinem Fakultätskollegen Richard

1 Übergang in die sog. Departmentstruktur, unter deren Dach dann die früheren Institute versammelt wurden.

2 Walter Kälin: Recht und Menschlichkeit. Zum Tode von Peter Saladin, in: NZZ Nr. 123, 31.5.1997, S. 14; Zum Gedenken an Peter Saladin, mit einer Biographie und Bibliographie, in: ZSR (1997) I. S. 181 ff.; Ueli Friedrich, Nachruf auf Professor Peter Saladin, in: Schweiz. Jahrbuch für Kirchenrecht 2 (1997) S. 133 ff.; Jean Nicholas Durey, Jörg Paul Müller: Zum Tod von Prof. Peter Saladin, in: Unipress intern., Bern 1997, Juni S. 10; Liz Fischli Giesser. Nachruf auf Peter Saladin, in: Reformatio, Zeitschrift für Kultur, Politik, Kirche 1998 Nr. 1 S. 37 f.; Jörg Paul Müller: Zum Tod von Peter Saladin, in: AöR 1998, S. 129 ff.; Kunz, S. 259 ff. (zitiert nach A. Kley, Geschichte des öffentlichen Rechts der Schweiz, Zürich 2011, S. 525 f.)

3 Die folgenden Ausführungen beruhen, neben den Ausführungen von P. Saladin selbst und den eigenen Wahrnehmungen d. V. (1984 bis 2004 PD und, seit 1993, Tit. prof. an der rechts- und wirtschaftswissenschaftlichen Fakultät der Universität Bern), auf A. Kley: Geschichte des öffentlichen Rechts der Schweiz, Zürich 2011 (im folg.: Kley), sowie auf den mündlichen Auskünften von A. Kley.

4 Seine Dissertation betraf das Verwaltungsrecht: Der Widerruf von Verwaltungsakten, Bern 1960.

5 Grundrechte im Wandel. Die Rechtsprechung des Schweizerischen Bundesgerichts zu den Grundrechten in einer sich ändernden Umwelt. Bern 1970, 3. Auflage 1982.

6 Zusammen mit Chr. A. Zenger, Basel/Frankfurt 1988.

7 W. Kälin, J. P. Müller, A. Kley, P. Tschannen, U. Zimmerli (Hg.): Die Kunst der Verfassungserneuerung, Basel 1988.

8 Siehe das Schriftenverzeichnis am Ende von Teil B.

9 Die Sichtung und Ordnung des Nachlasses besorgte der langjährige Mitarbeiter von Peter Saladin, Herr Dr. Petros Evangelides.

Bäumlin, nach dem die Rechtswissenschaft ihre Maßstäbe (zum Grundrechtsverständnis) beim Vollzug zu praktischer „Konsonanz“ (später Konkordanz) bringen müsse[10].

Auch außerhalb des eigentlichen Reformprozesses war es ihm ein Anliegen, verfassungsrechtliche Normen und Konzepte in ihrem Wandel und in ihrer Tragfähigkeit für die Herausforderungen der Zeit zu untersuchen und zu hinterfragen. Von diesem Bemühen um die Reform des Verfassungsrechts im weitesten Sinne zeugen viele seiner Schriften.

Diesen Bemühungen lag eine Grundrechtslehre zu Grunde, mit der er eine „kopernikanische Wende“ des Grundrechtsverständnisses einläutete. Waren diese bisher im Sinne des Liberalismus des 19. Jahrhunderts reine Abwehrrechte gegen staatliche Unrechtsakte gewesen, verstand er (und sein Mitstreiter Jörg Paul Müller) sie als verfassungsimmanente Verpflichtung und Aufgabe des Staates, für die Verwirklichung der Grundrechte Sorge zu tragen (Verfassungsrecht als Aufgabe)[11] und ihren Schutz gegen jedermann, auch und vor allem gegen privatrechtlich handelnde Akteure, durchzusetzen. Im Berner „Drittwirkungsstreit“[12] nahm er eine entschiedene Position ein: Die Grundrechte wirkten horizontal; auch wenn der Staat als Privatrechtssubjekt zur Erfüllung öffentlicher Aufgaben handele, sei er an die Grundrechte gebunden (z. B. an den Gleichheitssatz: *Keine Flucht ins Privatrecht)*[13]. Dies gelte auch, wenn die Akteure als reine Privatrechtssubjekte aufträten: Immer müssten sie die Grundregeln eines gedeihlichen Zusammenwirkens beachten, z. B. im Arbeitsrecht[14]. Das gelte auch für den einzelnen Bürger. Er müsse die Rechte anderer beachten, dies sei eine Grundpflicht. Allerdings, so Saladin, wirkten die Grundrechte nicht unmittelbar[15], sondern mittelbar. Der Gesetzgeber müsse die Grundrechte im Wege der (einfachen) Gesetzgebung konkretisieren.

Auch die soziale Seite der Grundrechte hob Saladin hervor: Er leitete sie aus den Freiheitsrechten ab: Sie sind Bedingungen der Freiheit, z. B. das Recht auf Existenzsicherung, auf eine Grundausbildung, auf Arbeit, für deren Rahmenbedingungen der Staat sorgen muss.

Der tiefere Grund für Saladins Engagement für die Grundrechte lag in den Erfahrungen des 20. Jahrhunderts, die ihn zu einer Abkehr vom Optimismus der liberalen Freiheitsrechte bewegt hatten. Er dachte historisch und in großen Zeiträumen. Seine tieferen Wurzeln hatte sein Grundrechtverständnis jedoch in seiner religiösen Überzeugung. „Der letztliche Geltungsgrund der Grundrechte, ihre einzige Legitimation ist – im Gegensatz zum naturrechtlichen Pathos – umso herrlicher und triumphaler: Die Rechtfertigung durch Jesu Christi Tod und Auferstehung. Im Glanz dieser Ereignisse ist es auch allein möglich, das Sein und Sollen miteinander zu verschmelzen“[16].

Damit war Peter Saladin in gewisser Weise unangreifbar geworden. Dies galt auch für sein später zu erörterndes Bekenntnis zur Bewahrung der Schöpfung und der „Würde der Kreatur“ (Tiere), die Gott den Menschen anvertraut habe. Das Schweizer Volk habe sich eine Verfassung „im Namen des Allmächtigen“ (Präambel)[17] gegeben, der die Schöpfung in die Verantwortung des Menschen gelegt habe. Wer hätte diesem Bekenntnis mit welchem Argument widersprechen können? Die Rezensenten und Kollegen Saladins übergingen dieses allerdings meist stillschweigend, wie wenn er das nie geschrieben hätte, obwohl er auch vorsichtige Zustimmung erhielt, wie z. B. von Richard Bäumlin[18], und Werner Kägi. Peter Saladin hat sich aber nicht nur um das Staatsrecht, sondern auch um das Verfassungsrecht gekümmert. Er schrieb ein ausgezeichnetes Lehrbuch zum Verwaltungsverfahrensrecht des Bundes (Basel 1979). Seit Mitte der 1980er Jahre befasste sich Peter Saladin

[10] Kley, S. 215. In der Tat hat der schweizerische Gesetzgeber viele aktuelle Probleme des Umwelt- und Lebensschutzes in die „alte“ BV (vor 2000) aufgenommen; so Regelungen über die Fortpflanzungs- und Gentechnologie (Art. 24 novies), über die Transplantation von Organen (Art. 24 decies), Erhaltung der natürlichen Lebensgrundlage (Art. 31 octies) – alle Maßnahmen auf diesen Gebieten, so Saladin, müssen den „Schutz der Menschenwürde und der Persönlichkeitsrechte“ beachten.

[11] Ähnlich K. Hesse: Grundlagen des Verfassungsrechts, Heidelberg 1967.

[12] Die Drittwirkungsdebatte begann 1988 an der Berner rechts- und wirtschaftswissenschaftlichen Fakultät und setzte sich in der Literatur bis 1989-’90 fort. Hintergrund des Streits, der bis an die Grenze persönlicher Zerwürfnisse führte, war, dass damals das Zivilrecht als die „Krone“ der Rechtswissenschaft galt und dort eine Einschränkung befürchtet wurde, wenn die Grundrechte in alle Lebensbereiche vordringen sollten. J. P. Müller deutete den bisherigen Zustand an, als er äußerte, man übernehme mit fremdem Recht auch etliches des damaligen Zeitgeists – z. B. imperiales Denken. Die Gewohnheit, das Menschen- und Gesellschaftsbild zu hinterfragen, sei leider immer noch viel zu wenig verbreitet. Peter Saladin führte in der Schweizer Juristenzeitung (SJZ 84/85, S. 373 ff. zit. n. Kley, S. 325) aus, dass Grundrechte von Anfang an horizontale Wirkung gehabt hätten, denn die Verfassungen verlangten von den Bürgern (durch Gesetz), ihre Grundrechte gegenseitig zu respektieren. Das sei gesetzliche Pflicht, mittelbar aber Grundrechtspflicht. Der Berner Drittwirkungsstreit wurde schließlich mit Hilfe des damaligen Rektors Pio Caroni und Peter Saladin beigelegt, die zur Versöhnung von Privatrecht und öffentlichem Recht aufriefen (wenngleich nie endgültig entschieden, Kley S. 326 ff.). In Deutschland wirken Grundrechte über die Generalklauseln des § 626 BGB (Diskriminierungsverbot), und der §§ 823, 826 (unerlaubte Handlungen und sittenwidrige Schädigung) auf das Privatrecht ein (Anm. d.V.).

[13] So ein Diktum aus dem deutschen Verwaltungsrecht für die Daseinsvorsorgetätigkeit der Verwaltung in den Formen des Privatrechts (z. B. öffentlicher Nahverkehr u. a.).

[14] Unter dem „Recht auf Arbeit“, verstand Peter Saladin die Freiheit, nach eigenem Gutdünken zu arbeiten (historisch: Befreiung von Leibeigenschaft). In der Verfassungsreformdebatte der 70er Jahre wurde dieses Recht dahingehend konkretisiert, dass der Staat verpflichtet ist, Vorkehrungen zu treffen, damit jedermann seinen Unterhalt durch Arbeit bestreiten kann. Im Völkerrecht ist ein solches Recht anerkannt: In der Europäischen Sozialcharta 1961 und in der UNO-Konvention 1966 über wirtschaftliche Rechte (Art. 6).

[15] Art. 1 Abs. 3 des deutschen GG schreibt die unmittelbare Bindung des Staates an die Grundrechte ausdrücklich fest. Das bedeutet, dass, wenn gesetzliche Regeln fehlen, die Grundrechte unmittelbar Anwendung finden müssen. Zu der Thematik näher P. Saladin in: Die Kunst der Verfassungserneuerung, S. 1 ff. (Verfassungserneuerung) und S. 45 ff. (Grundrechte).

[16] Zit. nach Kley, S. 423.

[17] Saladin hatte sich sehr für die Beibehaltung des Gottesbezugs in der neuen Bundesverfassung 2000 eingesetzt.

[18] der selber Pfarrerssohn war (Kley, a. a. O.).

mehr und mehr mit Themen der Umwelt, der Natur und deren Schutz. Er begrüßte zwar das Umweltschutzgesetz (USG) von 1985, appellierte aber an den Gesetzgeber, seine Schutzfunktion gegenüber Missbräuchen, insbesondere in der Fortpflanzungs- und Gentechnologie[19] (Art. 24 novies alte BV) ernst zu nehmen und über diese Bestimmung hinaus verschärfte Reglements zu erlassen.

Saladin kritisierte auch einige grundsätzliche Dinge im Umweltrecht. Er lehnte stets Atomkraftwerke ab, die Stromversorgung könne auch ohne sie gewährleistet werden. Ferner wandte er sich gegen den Begriff der „Sache" des Schweizer (und deutschen) Rechts, nach dem auch Tiere als Sachen galten. In beiden Gesetzgebungen ist dies mit der Zeit geändert worden: „Tiere sind keine Sachen"[20]. Er warb für die Rechtsfähigkeit der Tiere, ja der Natur insgesamt. Eine Patentierung von Tieren lehnte er ab. Diese Überlegungen einer Rechtssubjektivität der Natur hatte sein Doktorand Jörg Leimbacher vertieft, der die bahnbrechende Studie *Die Rechte der Natur* (Frankfurt/Basel 1988) verfasst hatte. Diese Gedanken fanden auch in Deutschland ein großes Echo (Mayer-Tasch, Meyer-Abich), wo im Zusammenhang mit dem Robbensterben in der Nordsee ähnliche Fragen diskutiert worden waren.

Die Idee der Rechtssubjektivität in Gestalt eines „Fürsprechers" der Natur erreichte in der Schweiz tatsächlich seine Verwirklichung; im Kanton Zürich war von 1992 bis 2010 die Institution eines „Tieranwalts" eingerichtet worden, der Misshandlungen von Tieren den Behörden zur Anzeige brachte und großen Erfolg hatte. So wurden pro Jahr ca. 190 Strafsachen wegen Tierquälerei (meist durch die Tierhalter selbst) verhandelt und diese zu Geldbußen verurteilt. Das Amt wurde von einem Rechtsanwalt wahrgenommen. 2010 endete das Amt des Tieranwalts, weil es angeblich gegen Bundesrecht verstoße. Die Aufspürung von Misshandlungen von Tieren obliegt nunmehr den kantonalen Veterinärämtern.

Saladins Engagement für Natur und Schöpfung gründete, wie sein Grundrechtsverständnis, auf einer ebenfalls metaphysischen, religiösen Auffassung vom Schutz der Natur. Diesen leitete er aus der von Gott gegebenen Schöpfung her. Gott habe mit den Menschen einen Bund geschlossen und ihnen in diesem Bund die Schöpfung anvertraut. Diese müsse pfleglich behandelt und geschützt werden.

Saladin stützte sich dabei auf das Prinzip der Verantwortung (H. Jonas). Gott habe den Menschen umfassende Verantwortung aufgetragen. Sieht man genauer hin, verstärkt sich diese Verantwortung, denn die Natur ist nicht nur „Schutzobjekt" Gottes, sondern zugleich „Vertragsperson". Gott schließt nicht nur einen Bund mit den Menschen, sondern *auch* mit der Natur:

> „Siehe, ich richte mit Euch (den Menschen) einen Bund auf (…) und mit allem lebenden Getier bei Euch, an Vögeln, an Vieh und an allen Tieren des Feldes bei Euch, von allem, was aus der Arche gegangen ist." (1. Mose 9, V.8)

Saladin argumentierte darüber hinaus auch christologisch: Die christliche Nächstenliebe des Neuen Testaments umfasse auch die Liebe zur Natur.

Peter Saladin war auch gegen Großprojekte jedweder Art skeptisch. Mit Sympathie verfolgte er die Bemühungen schweizerischer Naturschutzverbände, mit den Betreibern (meist Gemeinden und Kantone) umweltschädlicher Großanlagen (Kraftwerke) ins Gespräch zu kommen – damals noch vergeblich. Verbände waren unwillkommene „Störer", die nur Zeit kosteten und die Verfahren verzögerten. Es ging vor allem um die Großprojekte Val Curciusa, bei dem ein ganzes Tal für ein neues Kraftwerk hätte geflutet werden müssen und um das Grimselprojekt, das an dem Pass einen 110 m hohen Staudamm vorsah (und das bis Ende der 1990er Jahre aktuell war). Auch bei geplanten Erweiterungen von Kraftwerken durch Erhöhung der Staumauern erhoben die Verbände ihre Stimme. Im August leuchteten nachts die Höhenfeuer rund um das Val Curciusa und zeigten der Öffentlichkeit, dass das Projekt immer noch die Alpenlandschaft bedrohte[21].

Im Rahmen seiner Thesen für einen verantwortungsbewussten Umgang mit der Schöpfung galt Peter Saladins besonderes Augenmerk den Rechten zukünftiger Generationen. Seine Schrift Rechte zukünftiger Generationen (zus. m. A. Zenger, 1988), das Ergebnis eines interdisziplinären Seminars an der Universität Bern, ist noch heute grundlegend. Er entwarf eine Charta von 10 Punkten, die man, so Saladin, wie die Menschenrechtserklärung von 1789 betrachten solle. Sie lauten:

1. Künftige Generationen haben ein Recht auf Leben.
2. Künftige Generationen haben ein Recht auf nicht manipuliertes, d. h. nicht durch Menschenhand künstlich verändertes menschliches Erbgut.
3. Künftige Generationen haben ein Recht auf eine vielfältige Pflanzen- und Tierwelt, damit auf Leben in einer reichen Natur und auf Wahrung vielfältiger genetischer Ressourcen.
4. Künftige Generationen haben ein Recht auf gesunde Luft, auf eine intakte Ozonschicht und auf hinreichenden Wärmeaustausch zwischen Erde und Weltraum.
5. Künftige Generationen haben ein Recht auf gesunde und hinreichende Gewässer, besonders auf gesundes und hinreichendes Trinkwasser.
6. Künftige Generationen haben ein Recht auf einen gesunden und fruchtbaren Boden und auf einen gesunden Wald.
7. Künftige Generationen haben ein Recht auf erhebliche Vorräte an nicht (oder nur sehr langsam) erneuerbaren Rohstoffen und Energieträgern.
8. Künftige Generationen haben das Recht, keine Erzeugnisse und Abfälle früherer Generationen vorfinden zu müssen, welche ihre Gesundheit bedrohen oder einen übermäßigen Bewachungs- und Bewirtschaftungsaufwand erfordern.

---

[19] Siehe auch D. Majer: Gentechnik und Lebensmittel. Hommage an Peter Saladin, in: Reformatio -Zeitschrift für Kultur, Politik und Kirche, 47/1988, S. 39 ff.

[20] Art. 641 a ZGB. Vergl. in Deutschland § 20a GG und § 90a BGB, die seit 1993 die Tiere als schützenswerte Lebewesen nennen.

[21] Später wurde das Projekt fallen gelassen, weil „kein Bedarf mehr bestehe" (Anm. d. V.).

9. Künftige Generationen haben ein Recht auf „kulturelle Erbschaft“, d. h. auf Begegnung mit der von früheren Generationen geschaffenen Kultur.
10. Künftige Generationen haben allgemein ein Recht auf physische Lebensbedingungen, die ihnen eine menschenwürdige Existenz erlauben. Insbesondere haben sie ein Recht, keine von ihren Vorfahren bewusst herbeigeführten physischen Gegebenheiten hinnehmen zu müssen, die ihre individuelle und gesellschaftliche Selbstbestimmung in kultureller, wirtschaftlicher, politischer oder sozialer Hinsicht übermäßig einschränken.

Peter Saladin beschwor diese Rechte als „Gemeinschaftsaufgaben“ ersten Ranges[22] und fragte, ob dieser Gedanke bisher auseichend ernst genommen worden sei[23]. Welchen Auftrag vermitteln die Rechte künftiger Generationen dem Recht? Die materialen Gehalte innerhalb des Bestehenden auch zur Geltung zu bringen, oder das Bestehende daraufhin zu überprüfen, ob es diese Gehalte weitestgehend verwirklichen kann?

Diese Erklärung der Rechte künftiger Generationen will deren Rechte auf Leben, gesunde Natur, Luft und Gewässer, auf fruchtbaren Boden und gesunden Wald, auf ausreichende Rohstoffe, auf Befreiung vom Abfall früherer Generationen, auf „kulturelle Erbschaft“, und „menschenwürdige Lebensbedingungen“ sichern. Viele dieser Gedanken sind in die Verfassung eingeflossen (Art. 90 BV 2000 [Tierschutz]; Art. 119, 199a und 120 BV 2000 [Fortpflanzung, Medizin, Gentechnik, „Die Würde der Kreatur“]).

Besonderes Augenmerk richtete Peter Saladin auch auf die Gentechnologie: Nach ihm war nicht nur der unmittelbare Eingriff verboten, sondern auch der mittelbare, sobald wahrscheinlich sei, dass er die Erbsubstanz nachteilig verändere, anders gesagt: Verbot, solange das Mittel nicht unschädlich ist (z. B. Verwendung chemischer Substanzen für eine Therapie). Auch beklagte er oft das Artensterben (bisher 50 %, der Verlust schreite voran), das die Natur unheilbar schädige.

Peter Saladin war aber kein Träumer. Er suchte und fand im positiven Recht stets Anhaltspunkte für seine Grundanschauungen, vom intentionalen Recht bis hin zum kantonalen Recht. So wies er in Vorträgen auf die Präambel der amerikanischen *Bill of Rights* von 1776 hin, in der Vertreter des „guten Volkes“ von Virginia eine Erklärung der Rechte abgeben, die ihnen und ihrer Nachkommenschaft zukommt. In der Präambel der neuen Bundesverfassung (2000) heißt es ähnlich:

> „Im Namen Gottes des Allmächtigen! Das Schweizer Volk und die Kantone (…) in der Verantwortung gegenüber der Schöpfung, im Bewusstsein (…) der Verantwortung gegen die künftigen Generationen (…) geben sich folgende Verfassung …“

Peter Saladin fragte aber auch ganz *konkret*, wo die heutige Generation die Rechte künftiger Generationen verwirklichen könnte (S. 87 ff.). So zunächst in völkerrechtlichen Verträgen und Resolutionen internationaler Organisationen. Sie müssten aber auch als Grundrechte in der Verfassung verankert werden: „Rechte künftiger Generationen sind … Menschenrechte, und zwar sowohl Rechte der kommenden Generationen insgesamt als auch Rechte der künftigen Einzel-Menschen. Sie sind prägnanter Ausdruck und elementare Konkretisierung der Würde künftiger Menschen. Sie sollen unsere Nachfahren um ihrer kategorialen und um ihrer individuellen Wertigkeit schützen …“

Die Rechte künftiger Generationen sollten auch in Staatszielbestimmungen und Gesetzgebungsaufträgen, ferner in konkreten Gerichts- und Verwaltungsentscheidungen Eingang finden; ihre Geltendmachung soll durch „Treuhändler“, „Vertreter“, „Beistände“, „Pfleger“ erfolgen. Dazu machte er zahlreiche praktische Vorschläge.

> „Die Verfassungen der Schweiz und Deutschlands verpflichten den Staat auf die Wahrung und Sicherung menschlicher Würde. Diese Verpflichtung ist, so haben wir gesehen, in der Zeit unbeschränkt; sie gilt der Würde Künftiger ebenso wie der unsrigen. Dieser Ausgangspunkt hat uns veranlasst zu fragen, ob die Rechte künftiger Generationen als Grundrechte in der Verfassung bereits heute (implizit) gewährleistet, und ferner, ob sie, gewährleistet oder nicht, in der Verfassung explizit zu statuieren seien. Wir haben im vorangehenden Abschnitt den Sinn und die Problematik einer solchen Verankerung von Rechten als Rechte erörtert. Es bleibt zu bedenken, ob wir der Sache des Nachfahrenschutzes nicht besser dienten, wenn wir den Auftrag des Staates zu wirksamem Nachfahrenschutz als Auftrag in die Verfassung „einbauten“ als Staatszielbestimmung und (oder) als Gesetzgebungsaufträge. In einer Staatszielbestimmung und in Gesetzgebungsaufträgen ließen sich die staatliche Verantwortlichkeit für die Rechte künftiger Generationen und Hinweise auf deren Inhalt verfassungsrechtlich verfassen, ohne dass die schwierigen dogmatischen Probleme zu lösen wären, die die verfassungsrechtliche Anerkennung von Grundrechten künftiger Aufwürfe.“
>
> Eine derartige Staatszielbestimmung könnte etwa wie folgt lauten: „Bund und Kantone (Länder) sichern die Rechte künftiger Generationen. Sie unterlassen alles, was das Überleben der Menschen oder einzelner Gruppen gefährdet. Sie sorgen dafür, dass künstliche Mutationen der menschlichen Genstruktur unterbleiben und dass die natürlichen Lebensgrundlagenwie auch die lebenswichtigen Ressourcen in hinreichender Quantität und Qualität erhalten bleiben. Bund und Kantone (Länder) wirken darauf hin, dass künftige Generationen nicht mit übermäßigen Mengen an gefährlichen oder lästigen Abfällen belastet, noch in ihrer Handlungsfähigkeit durch gegenwärtige zivilisatorische Entwicklungen übermäßig eingeschränkt werden“[24].

Bei all diesen Überlegungen war Saladin stets auch pflichtenorientiert. Er sah das Individuum keineswegs als Subjekt uferloser Ansprüche, sondern stets eingebunden in das Gemeinwesen: Die Rechte künftiger Generationen müssten sich auch in den Pflichten der heutigen Bürger niederschlagen. Schließ-

[22] a. a. O., Saladin-Zenger, S. 143.
[23] Dies muss man sich auch heute fragen (Anm. d. V.).
[24] Rechte künftiger Generationen, S. 117 ff.

lich forderte Saladin, dass die Rechte künftiger Generationen sowohl vom Verfassungsgeber wie vom „einfachen" Gesetzgeber verwirklicht werden müssten[25] und dabei auch den Pflichtenkatalog der Verfassung für die *heutigen* Bürger nicht vergessen werden dürfe. All dies erfordere ein „tieferes Überdenken bestehender rechtlicher und sozialer Strukturen"[26].

Peter Saladins letztes Werk war „Wozu noch Staaten" (1995), in dem er in einer zunehmend international werdenden Welt die Staaten als Vermittler politischer Kultur erhalten will (Schutz und Erhaltung der Grundlagen des Gemeinwesens, der Kultur der Zivilgesellschaft, insbesondere des Demokratieprinzips und des Minderheitenschutzes etc.).

Saladins Thesen haben heute in vielen Punkten an Bedeutung gewonnen, denn vieles, was er in diesen Bereichen zukunftsschauend forderte, ist erst in den letzten Jahren ins öffentliche Bewusstsein gerückt: Schutz des Kulturerbes, Nachhaltigkeit des Umweltschutzes, Klimawandel, alternative Energien etc. Seine Aufrufe zum Schutz der Natur, zur Abstandnahme von Großprojekten und Großsystemen sind aktueller denn je, wenn man an die heutigen Katastrophen denkt: Fukushima 2011, Erdbeben, Boden- und Wasserverunreinigung, das Abschmelzen der Polkappen, die Abholzung der Wälder, der Klimawandel … Saladin fragt: Welche Erde sollen unsere Nachkommen vorfinden? Er verfällt dabei weder in ökologische Theorien oder Wunschvorstellungen, sondern prüft (mit konkreten Vorschlägen) die Verwirklichungschancen im nationalen wie internationalem Recht. Gerade diese Verbindung von Visionen, konkretisiert mit verfassungspraktischem Feingefühl, fordert dazu auf, Peter Saladins Aufrufe zur Verantwortung heute als dringlicher denn je zu betrachten.

Sein Werk enthält folgende Monographien

Der Widerruf von Verwaltungsakten, Basel 1960 (Dissertation)

Der Staat als Aufgabe. Gedenkschrift für Max Imboden (mit Luzius Wildhaber), Basel 1972

Berner Festgabe zum Schweizerischen Juristentag 1979 (mit Eugen Bucher Hg.), Bern 1979

Das Verwaltungsverfahrensrecht des Bundes, Basel 1979

Das Bundesgesetz über die Raumplanung (mit Rudolf Stüdeli), Bern 1980

Grundrechte im Wandel, Bern 1981 (Habilitationsschrift)

Beiträge zum Arbeits- und Sozialrecht, Festschrift für F. Tschudi (mit Frank Vischer), Bern 1983

Bund und Kantone, Basel 1984

Verantwortung als Staatsprinzip, Bern 1984

Rechte künftiger Generationen (mit Christoph Zenger), Basel/Frankfurt 1988

Widerstand im Rechtsstaat? Hrsg. für die Schweizerische Akademie des Geisteswissenschaften

(mit Beate Sitter), Freiburg i. Ue. 1988

Widerstand? Verfasst im Auftrag des Schweizerischen Evangelischen Kirchenbundes, Bern 1988

Medizin für die Medizin? Festschrift für Hannes Pauli (mit Hansjörg Schaufelberger und Peter Schläppi), Basel 1989

Zustand und Zukunft der viersprachigen Schweiz. Verfasst im Auftrag des Eidgenössischen Departments des Inneren, Bern 1989

Wozu noch Staaten? Zu den Funktionen eines modernen demokratischen Rechtsstaates in einer zunehmend überstaatlichen Welt. Bern/München/Wien 1985

Hinzu kommen sechs Werke in Mitherausgeberschaft zwischen 1972 und 1989, sowie die im Berner Staatsarchiv gesammelten Materialien (Gutachten, Vorträge, Vorlesungsscripten)

Die Kunst der Verfassungserneuerung (1998): Dort sind 94 Aufsätze zu Fragen des Staats- und Verwaltungsrechts, Völkerrechts, Umweltschutzes etc. aufgelistet.

III. Wirkung[27]

Peter Saladin hatte ein gewinnendes Äußeres. Das in „Die Kunst der Verfassungserneuerung" 1998 abgedruckte Bild zeigt ein schmales Gesicht, eine hohe Stirn, umgeben von widerspen-

[25] „…Wir sind davon ausgegangen, dass die Grundrechte der persönlichen Freiheit in der Schweiz und der Menschenwürde (Art. 1 Abs. l GG) in der Bundesrepublik Deutschland die physischen und die psychischen Voraussetzungen menschlicher Autonomie gewährleisten, und dass sie als objektive Gebote den Rechtsstaat dazu verpflichten, die Möglichkeit menschenwürdiger Existenz zu sichern, wo und wann immer sie gefährdet erscheint. Wir haben aber auch gezeigt, dass gute Gründe dafür sprechen, die existentiellen Rechte Künftiger ausdrücklich in die Verfassung aufzunehmen, sie ausdrücklich als Grund-Rechte zu anerkennen und zu gewährleisten, in verschiedenen ‚juristischen Gewändern'. So oder so – die Rechte Künftiger bedürfen, wenn sie Wirklichkeit werden sollen, komplexer rechtlicher Umsetzung: Sie müssen durch die Gesetzgebung konkretisiert und durch Verwaltung und Gerichte in der Lösung konkreter Probleme honoriert werden. Was das im einzelnen bedeutet, muss durch intensive Bearbeitung verschiedenster Rechtsgebiete ermittelt werden" (a.a.O. S. 141). „Nochmals: die skizzierten Probleme können im Rahmen unserer Studie nicht gelöst werden. Darum muss die Frage offen bleiben, ob wir den Gedanken der Rechte künftiger Generationen letztlich ernst genug genommen haben. Genügt es, diese Rechte in das Gebäude unserer rechtlichen und gesellschaftlichen Institutionen einzubauen, sie überdies mit dem Apparat vertrauten juristischen Denkens zu bearbeiten? Oder wird der Gedanke von Rechten Künftiger dadurch gerade entschärft, domestiziert, unanstößig gemacht? Müsste dieser Gedanke Anlass weniger für die vertraute reformierende Kritik bestehenden Rechts im Namen von Verfassungsprinzipien sein, sondern vorab für ein viel tieferes Überdenken bestehender rechtlicher und sozialer Strukturen und des Selbstverständnisses der Jurisprudenz? Welchen Auftrag vermitteln die Rechte künftiger Generationen dem Recht in erster Linie: die entsprechenden materialen Gehalte innerhalb des Bestehenden auch zur Geltung zu bringen oder das Bestehende auf seine Eignung hin zu überprüfen, diese Gehalte weitestgehend zu verwirklichen?"

[26] „Gleichgültig, ob die Rechte künftiger Generationen in Form von Grundrechten, Staatszielbestimmungen oder Gesetzgebungsaufträgen verfasst werden, ihre Verwirklichung bleibt im demokratischen Staat immer zur Hauptsache und in erster Linie dem Gesetzgeber aufgetragen. Bedingung für ihre Verwirklichung ist damit die Bereitschaft von politischen Behörden und (unmittelbar oder mittelbar) der Stimmbürgerschaft, den Schutzbedürfnissen Künftiger Rechnung zu tragen" (a. a. O. S. 124). Die Verantwortung Privater sei so zentral, dass sie als Grundpflichten in die Verfassung aufgenommen werden müssten (a. a. O. S. 136).

[27] Der folgende Text beruht auf Auskünften ehemaliger Studierender und Kollegen von Peter Saladin, den Hinweisen in Kley, *Geschichte des Öffentlichen Rechts der Schweiz* (Zürich 2011) sowie den eigenen Wahrnehmungen d. V. an der rechts- und wirtschaftswissenschaftlichen Fakultät Bern (PD und Tit. prof. 1984–2004).

stigen weißen Löckchen. Hinter einer großen Brille blickten seine Augen den Besucher freundlich forschend an. Sein ganzes Wesen strahlte Gelassenheit und innere Harmonie aus, eine in sich ruhende Persönlichkeit, die sich auf den ersten Blick manifestierte.

1. Peter Saladin und die Universität

In der Universität war Peter Saladin sehr beliebt, autoritäres Gehabe war ihm fremd. Er gehörte zu den ersten, die Fragen der Studierenden in den Vorlesungen zuließen; das war damals sehr ungewöhnlich, da in den 1970er, 1980er Jahren noch ein streng hierarchisches Verhältnis zwischen Studierenden und Professoren bestand. In Saladins Vorlesungen und Übungen herrschte eine Art familiärer Atmosphäre. Fragen der Zuhörer begegnete er mit Geduld und Aufmerksamkeit. Damit war er seiner Zeit weit voraus. Nach Bekundungen ehemaliger Studierender wurden seine Vorlesungen als sehr fundiert und praxisnah erlebt. Seine zu den Vorlesungen verfassten Skripten waren übersichtlich gegliedert und der Stoff wurde anhand vieler Bundesgerichtsurteile eingehend erläutert. Durch die (damals noch nicht allgemein übliche) Methode, mit konkreten Beispielen zu arbeiten, machte Peter Saladin den Lehrstoff lebendig und anschaulich und weckte damit in vielen Studierenden die Begeisterung für das öffentliche Recht. Saladin beeindruckte die Studierenden auch durch seine weite Sicht der Dinge. Während einer Vorlesung an einem schönen Sommertag sah er, wie einige von ihnen zum Fenster hinausschauten. Er meinte, dass sie dies nur tun sollten, denn das Leben sei so vielseitig. Für manche seiner damaligen Studierenden wurde er mit seinem stets dialogbereiten Verhalten zum juristischen und menschlichen Vorbild. Die Freundlichkeit Peter Saladins machte sich auch im Institutsalltag bemerkbar, dessen ruhender Pol er war. Es fehlte jede Hektik. Besucher im Institut für öffentliches Recht in der Neuengasse 30 in Bern empfanden die Ruhe und die von dem allgemeinen Universitätsbetrieb abgeschirmte Welt seit den 1970er Jahren als eine Art Refugium, in dem er mit seinen Kollegen Jörg Paul Müller und Fritz Gygi (†) residierte. Dann kam 1992 der große Umzug in den vierten und fünften Stock des (direkt über dem Hauptbahnhof auf der „Schanze" gelegenen) Universitätshauptgebäudes (eines „richtigen" Universitätsgebäudes mit Säulen, geschwungenen Treppenhäusern, Jugendstilfresken und lateinischen Inschriften), mit dem zwar alle juristischen Institute unter einem Dach vereint waren, die Öffentlichrechtler sich jedoch gleichwohl eine Art „Eigenständigkeit" gegenüber dem im Erdgeschoss angesiedelten Dekanat – in Form der Distanz von drei Stockwerke – „bewahrten". Es war eine eigene Welt mit den nachmittäglichen Kaffeepausen, Diskussionsrunden und den „neuesten Nachrichten", in denen sich ein harmonisches Institutsleben entfaltete.

Das Institut vergrößerte sich bald: Völkerrecht und Europarecht traten hinzu. Alles wurde jetzt hektischer – im Hinblick auf die damals aktuellen Sparmaßnahmen, der Umstellung der Studienpläne zu einem Pflicht- und Wahlpflichtkatalog, den Vorboten der kommenden Bolognareform. Das von Peter Saladin mitinitiierte Umweltrecht gehörte nach dem Inkrafttreten des Umweltschutzgesetztes von 1985 (USG) zu den (Wahl-) Pflichtfächern und führte in den 1990er Jahren in einer „ersten Welle" zu einem neuen Umweltbewusstseins an den Universitäten und zu einem großen Andrang der Studierenden zu den entsprechenden Veranstaltungen. Schon vorher hatte ein interdisziplinärer Arbeitskreis unter Leitung des Geographen Bruno Messerli und des Fürsprechers Hans Ulrich Liniger den Boden dafür bereitet (später wurde daraus die Interfakultative Koordinationsstelle für Allgemeine Ökologie [IKAÖ] unter Ruth Kaufmann-Hayoz [bis 2010], Anm. d. V.). Angesichts der vielen Änderungen im Studium zeigte sich bald, dass Peter Saladin „an sich" ein entschiedener Anhänger der (bisher) freien Wahl der Studienfächer war. Der seit Anfang der 1990er Jahren überbordenden Bürokratie, die diese Freiheit unter dem Gesichtspunkt einer „Neustrukturierung der Studiengänge" beschränkte, stand er höchst reserviert gegenüber, ebenso wie er die neuen „Auffächerungen" und Spezialisierungen des öffentlichen Rechts kritisch betrachtete, da sie den Blick auf das große Ganze verstellten.

Peter Saladin hatte schon in den 1970er Jahren, als die Folgewirkungen der Umbrüche der 68er auch in die Schweiz „überschwappten", seine Skepsis gegenüber zu viel Betriebsamkeit an den Universitäten kundgetan; in diesen Jahren, als immer neue Fächer aus dem Boden sprossen – zu Lasten der Rechtsgeschichte[28] und der Rechtsphilosophie –, in dieser Zeit, als die „Demokratisierung" der Universitäten und der Anstieg der Studentenzahlen immer neue Ausschüsse, Kommissionen und Arbeitsgruppen hervorbrachte, hatte dies zu viel Frustration und Ärger bei den Professoren gesorgt. Denn sie hatten nun vermehrte Gremienarbeit und erhöhte Prüfungsverpflichtungen etc. wahrzunehmen. Richard Bäumlin verglich die Gesellschaft mit einem „Warenhaus", Peter Saladin hatte eine Persiflage des modernen Don Juan konzipiert, der nicht mehr den Frauen nachjagt, sondern nur noch von Sitzung zu Sitzung, von Medienauftritt zu Medienauftritt eilt. Das damals in Universitätskreisen kursierende „Ideal" in Gestalt von Jean-François Aubert, der in den Weinbergen von Neuenburg mit drei Studenten wandelt und ihnen die Grundlagen des öffentlichen Rechts erklärt, rückte schon damals in weite Ferne. Als die bereits oben genannten „zweite Reformphase" seit Anfang der 1990er Jahre hinzutrat und den Universitäten die neuesten Management-Verfahren (Controlling, Evaluierung) bescherte und sich alle Vorzeichen der Gewitterwolken der kommenden Bolognareform über den Universitäten zusammenbrauten, zog er sich mehr und mehr von der Gremienarbeit zurück. Die Möglichkeiten, seine Thesen auch zukünftig in voller Breite und Tiefe zu vertreten, sah er skeptisch.

2. Peter Saladin und die Grundrechte

Saladin war einer der wenigen Staatsrechtlehrer, die aus historischer Erkenntnis schon früh für eine erhöhte Geltung der Grundrechte eintraten, die in der Vergangenheit auf schlimmste Weise missbraucht worden seien. Er hatte, wie oben ausgeführt,

[28] Die seitdem in der Schweiz viel von ihrer früheren Bedeutung verloren hat – wie auch in Deutschland, wo diese Fächer in einen Korb von Wahlpflichtfachgruppen gepackt und nur noch „am Rande" geprüft werden.

die zunächst nur als liberale Abwehrrechte gegen rechtswidrige Eingriffe des Staates konzipierten Freiheitsrechte in die Verfassung integriert und sie als „Pflichtenheft" des Staates definiert, Ausbau und Fortführung des Grundrechtsbereichs voranzutreiben bis hin zu Ansprüchen des Einzelnen aus sozialstaatlicher Sicht, z. B. auf die Schaffung von Rahmenbedingungen für eine auskömmliche Erwerbstätigkeit.

Bedeutsam in dieser von ihm maßgeblich mitbestimmten Grundrechtsdiskussion ist die starke Betonung der Pflichtenseite, die z. B. in den entsprechenden Debatten in Deutschland fast völlig fehlte. Zwar sprach die von Konrad Hesse und Peter Häberle entwickelte Verfassungstheorie von der „Aufgabe" des Staates, die Verfassung zu verwirklichen, aber der Begriff Aufgabe ist bzw. wirkt weit schwächer, als Peter Saladins Pflichtenbegriff, der das Verbindliche und Dringliche der Grundrechtsverwirklichung (durch die Gesetzgebung) deutlich macht. Das Element der Pflicht spielte auch im oben erläuterten sog. Berner Drittwirkungsstreit 1988 eine Rolle, als Peter Saladin, wie ausgeführt, argumentierte, dass die Grundrechte quer durch alle Rechtsgebiete zur Wirkung kommen müssten. Dies gelte auch für private Akteure, die die (Grund-)Rechte anderer achten müssten (Grundpflichten). Zwar wirkte er zusammen mit dem damaligen Rektor Pio Caroni mäßigend auf die Diskussion ein, so dass der Streit mit den Zivilrechtlern beendet (aber nicht entschieden) wurde, hielt aber stets an seiner Auffassung fest. Seine „Mitstreiter" waren sein nur wenige Jahre jüngerer Kollege Jörg Paul Müller, sowie Alt-Nationalrat Richard Bäumlin; dieses Dreigestirn beherrschte viele Jahre die Staatsrechtslehre an der Berner Fakultät.

Peter Saladin war auch privat ein Pflichtenmensch, der seine staatsbürgerlichen Pflichten ernst nahm. Gerne erzählte er von den Wehrübungen, an denen er als Reserveoffizier im Bunker tief unter den Bergen teilgenommen hatte. Mit Strategieplänen beschäftigt, seien das gute Zeiten gewesen, da man dort, vom Alltag abgeschirmt, immer lange und interessante Diskussionen mit den Kameraden habe führen können.

Betrachtet man die Entwicklung der Grundrechtsdiskussion in größerem Zusammenhang, hatte Peter Saladin, damals in den 70er Jahren, ein noch „unbeackertes Feld" vor sich. Galt es damals doch, die Grundrechte unter den gewandelten Verhältnissen neu zu „entdecken", ihre Bedeutung zu erkennen und sie als „Pflichtenheft" des Staates in die Verfassung „einzubringen". Dies wurde damals in der Schweiz als Institutionalisierung der Grundrechte, als „kopernikanische Wende" des Grundrechtsverständnisses bezeichnet. Peter Saladin verstand die Grundrechte als stetige Verpflichtung des Staates und nicht so sehr, wie in der Diskussion in Deutschland, als Kette subjektiver Rechte des Bürgers gegen die öffentliche Hand (Grundrechte „im Staat" und nicht nur „Grundrechte gegen den Staat", während die „Brosamen" der Detailausarbeitung der Grundrechte der heutigen Lehre vorbehalten sind)[29]. Dieses Grundrechtsverständnis als Pflicht des Staates stellt wohl den entscheidenden Unterschied zwischen der Schweizerischen und deutschen Lehre dar, da letztere das Heil zur Grundrechtsrealisierung am ehesten in der Judikative sah[30]. Die Schweiz hingegen hatte den Missbrauch der Institutionen nicht so stark erlebt wie Deutschland, so vertraute man diesen eher. Eine Verfassungsgerichtsbarkeit auf Bundesebene gab es in der Schweiz bisher nicht und wird erst in jüngster Zeit in begrenztem Umfang zugelassen, seit am 5. Dezember 2011 der neugewählte Nationalrat eine Änderung beschlossen hat, die eine eingeschränkte Nachprüfung von Bundeserlassen durch das Bundesgericht vorsieht[31]. Zudem sind die Wege in der Schweiz zur politischen Entscheidung kurz, die Lehre konnte wohl davon ausgehen, dass tendenziell dringliche Fragen durch die politischen Instanzen in absehbarer Zeit aufgegriffen werden würden[32].

3. Peter Saladin und die Gerechtigkeit

Saladin hatte einen wachen Sinn für Gerechtigkeit und hatte sich zusammen mit anderen seit je für Betroffene eingesetzt. So z. B. im Fall des Freiburger (Fribourger) Theologen und Angehörigen des Dominikanerordens Stephan Pfürtner, der 1971 durch einen Vortrag „Moral – was gilt heute noch" an der Universität Bern eine jahrelange Diskussion über die Wissenschaftsfreiheit in Fragen der Sexualmoral an der (katholischen) theologischen Fakultät Fribourg ausgelöst hatte[33]. Alle kirchlichen Stellen beurteilten die Thesen kontrovers, verwarfen sie also nicht von vornherein. Ein juristisches Gutachten von Luzius Wildhuber urteilte, die Thesen Pfürtners hielten sich im Rahmen der Lehrfreiheit; Entlassungsgründe seien nicht gegeben. Weitere Gelehrte äußerten sich ähnlich[34], unter ihnen auch Peter Saladin und Jörg Paul Müller. Pfürtner schied von sich aus 1974 aus der Fakultät und aus dem Dominikanerorden aus und kehrte nach Deutschland zurück. Die Mahnung von Luzius Wildhuber „die Universitäten sollen als Hort der intellektuellen und akademi-

[29] Kley, S. 523 f.

[30] Dieses Vertrauen in die Justiz ist ein „typisch deutsches" Phänomen. Es reicht bis in das 16.Jh. zurück (Reichskammergericht) und kommt auch in der Paulskirchenverfassung von 1849 (ein Reichsgericht als Verfassungsgericht) sehr deutlich zum Ausdruck. Allerdings ist dieser Trend zu einer starken Judikative wissenschaftlich noch längst nicht erforscht. Näher D. Majer: Gerichtliche Kontrolle und politische Macht – Von der Paulskirche zum Bundesverfassungsgericht, in: Jahrbuch für Deutsche Geschichte, Bd. XVI/1985 S. 135 ff.

[31] Lediglich kantonale Erlasse (Rechtsakte) konnten bisher auf ihre Verfassungsmäßigkeit überprüft werden. Nunmehr sollen Bundeserlasse vom Bundesgericht mit Wirkung inter partes überprüft werden können (Aufhebung Art. 190 BV 2000). Eine Allgemeinverbindlichkeit wird aber abgelehnt, dies ausdrücklich mit dem Hinweis auf die deutsche Verfassungsgerichtsbarkeit. Gegen die Verfassungsgerichtsbarkeit wird nämlich in der Schweiz immer wieder die Befürchtung ins Feld geführt, dass das Bundesgericht dadurch zur politischen Instanz werden könnte. Als warnendes Beispiel gilt das deutsche Bundesverfassungsgericht, das regelmäßig Erlasse des Parlaments wegen Unvereinbarkeit mit dem Grundgesetz aufhebe. Zu den Änderungen vgl. NZZ 6.12.2011 betreffend „Einführung einer Verfassungsgerichtsbarkeit" für die Schweiz.

[32] In der Tat hat der Verfassungsgeber, wie oben ausgeführt, dringliche Fragen schon in die alte Bundesverfassung (1874) aufgenommen (Art. 24 novies, 24 decies, 31 octies) und in der neuen Bundesverfassung (2000) verfestigt und konkretisiert (Art. 35, 80, 119, 119a, 120).

[33] Näher Kley, S. 380 f.

[34] Dies waren Thomas Fleiner, Walter Haller, Johannes Fuchs (Kley S. 381 m. w. N.).

schen Freiheit betrachtet werden …“ bedeutete, dass die Wissenschaftsfreiheit in diesem Fall nicht gewährleistet war[35].

4. Die Universität Bern als wissenschaftliches Asyl

In dem anderweitig geschilderten Fall[36] einer Habilitationsschrift (d. V.), die eine Verfassungstheorie des NS-Staats vorgelegt hatte[37], hatte sich Peter Saladin ebenfalls engagiert. Die Arbeit, die vom Fachbereich Rechtswissenschaft der FU Berlin zunächst abgelehnt worden war[38] und viel öffentliches Aufsehen erregt hatte (die Ablehnung musste später nach verwaltungsgerichtlicher Intervention aufgehoben werden), wurde auf sein Betreiben, unterstützt von Richard Bäumlin, und Jörg Paul Müller, zusammen mit einer weiteren Schrift[39] von der Rechts- und Wirtschaftswissenschaftlichen Fakultät 1984 als Habilitationsschrift im öffentlichen Recht anerkannt (allerdings nicht ohne Widerstand). Peter Saladin spielte die Hauptrolle bei der Vorbereitung und beim Gelingen des Verfahrens[40]. Er hatte damit den Kollegen in Deutschland „eine Lektion in Gerechtigkeit“ erteilt, wie er sagte. Die Vorgeschichte erklärt dies[41].

Peter Saladin spielte auch eine entscheidende Rolle, als er 1985, zusammen mit Fritz Gygi, Jörg Paul Müller und den Öffentlichrechtlichern der Universität Innsbruck, den Antrag zur Aufnahme d. V. in die deutsche Staatsrechtlehrervereinigung gestellt hatte. Diese hielt ihre Jahrestagung damals in Fribourg ab, auf der der Antrag eine lange Debatte entfesselt hatte[42], die nicht gerade von Taktgefühl gegenüber dem Gastgeber geprägt war[43].

5. Peter Saladin und die Natur

Wie oben beschrieben, engagierte sich Peter Saladin für den Schutz der Natur, für die Bewahrung der Schöpfung, für die Rechtssubjektivität der Tiere und die Würde der Kreatur, für eine strenge Gesetzgebung im Bereich der Fortpflanzungs- und Gentechnologie. Damals, in den 70er und 80er Jahren, war das etwas völlig Neues; erst Anfang der 70er (Club of Rome 1973) kam in der öffentlichen Diskussion überhaupt der Gedanke des Umweltschutzes zum Tragen – Umweltschutz als öffentliche Aufgabe. Die ersten Erlasse (Gesetze) zum Umweltschutz waren in Vorbereitung, sie mussten erst einmal die Grundlagen schaffen[44]. Die Schweizer Umweltgesetzgebung der späteren Jahre wurden wegen der klaren Entscheidungen des Gesetzgebers und der verständlichen Sprache der Regelwerke in vielen anderen Ländern zum Vorbild. Peter Saladins Engagement für die „Würde der Kreatur“ und für die Rechte künftiger Generationen musste auf diesem Hintergrund als Visionen wirken, die vielleicht in ferner Zukunft verwirklicht werden würden. Die Entwicklung des Umweltschutzes und die zunehmenden Probleme zwischen Umweltschutz und ökonomischen Interessen, verstärkt durch Internationalisierung und Globalisierung, haben ihm Recht gegeben.

Peter Saladins Engagement ging freilich über das wissenschaftliche Engagement weit hinaus: Die Bewahrung der Schöpfung war ihm ein Herzensanliegen, das er mit Leidenschaft verfolgte; er sah den Raum für den Umweltschutz in der Ära rücksichtsloser Ausbeutung der Natur immer kleiner, die Gefahren einer nur am wirtschaftlichen Erfolg orientierten Gentechnologie immer größer werden. Er sah wohl, das zeigen seine späteren Veröffentlichungen, den Schutz der Natur als wichtigste öffentliche Aufgabe. Raum, Fauna, Flora können nicht wie Industriewaren vervielfältigt werden. Sie sind einmalig und brauchen ein besonderes Schutzstatut.

Vor allem sein Engagement für die Rechte künftiger Generationen beruht auf der Sorge vor übergroßer Nutzung der Naturgüter durch die jetzt lebenden Generationen, leidenschaftlich setzte er sich, wie ausgeführt, für eine Charta über die Rechte künftiger Generationen ein. Unermüdlich drängte er die Politik, in diesem Sinne zu handeln. Sein christologisches Fundament verlieh seinen Argumenten ein besonderes Gewicht. Er stellte stets das Prinzip Verantwortung (H. Jonas) in den Mittelpunkt: Gott habe dem Menschen die Natur anvertraut: der Schutz der Schöpfung sei seine Aufgabe.

6. Peter Saladin und das Einhorn

Saladins letzte Jahre waren trotz seines schweren Leidens von einem gewissen Zauber umgeben. Seine letzte Aufzeichnung war „Die Wirklichkeit des Einhorns“ die nach seinem

---

35 Kley, S. 381.

36 Majer, Frauen – Revolution – Recht, Zürich 2008, Vorwort, Anmerkungen 79, 80, 83, ferner dies., Commentationes Historiae Juris Hellveticae IV, 2009, S. 145; Kley S. 260 f.

37 Diemut Majer, Fremdvölkische im Dritten Reich. Ein Beitrag zur nationalsozialistischen Rechtssetzung und Rechtspraxis in Verwaltung und Justiz unter besonderer Berücksichtigung der eingegliederten Ostgebiete und des Generalgouvernements, Boppard 1981 (unveränderte Neuauflage München 1993) (Schriftenreihe des Bundesarchiv Koblenz Nr. 28).

38 Nach Kollegenaussagen aus „politischen Gründen“, die die Unerwünschtheit von Zitaten von Rechtsgelehrten vor 1945, insbesondere von solchen, die auch noch nach 1945 an Universitäten lehrten, andeuten sollten. Anm. d. V.

39 Verfassungsgerichtsbarkeit und Bund-Länderkonflikte, Berlin 1981.

40 Am Vorabend des Habilitationsvortrag am 1.11.1984 hatten Peter Saladin und Jörg Paul Müller die mit Zittern und Zagen angereiste Vf. am Bahnhof in Bern abgeholt und sie mit dem Verfahren des Vortrags vertraut gemacht – eine große Geste des Beistandes.

41 Die Arbeit wurde nach über sechsjähriger Verfahrensdauer im Dezember 1980 abgelehnt. Es erfolgten anschließend zahlreiche Interventionen (der FU-Forschungskommission und des FUPräsidenten persönlich), sowie, höchst ungewöhnlich, der Einspruch des polnischen Wissenschaftsministers und auch ein großes Presseecho – dies alles jedoch erfolglos. Der Erstgutachter hatte vor der Ablehnungsentscheidung sein Gutachten de facto widerrufen. Ein Angebot zur Habilitation der Universität Posen konnte unter den damaligen Verhältnissen des Kalten Krieges nicht wahrgenommen werden.

42 Die Öffentlich-Rechtlicher der FU hatten Einspruch eingelegt und mit Austritt gedroht, falls positiv entschieden würde.

43 Die Debatte wurde schließlich von Otto Bachof (†) beendet, der (sinngemäß) fragte, wie lange man diese peinliche Debatte noch weiterführen wolle, ob man etwa gewillt sei, einen Schweizer Antrag auf Schweizer Boden abzulehnen, und beantragte Schluss der Debatte und Abstimmung. Im Vorfeld hatte der Vorstand versucht, den Schweizer Antrag zu verhindern. Die Innsbrucker Öffentlichrechtler prognostizierten das Ende der Staatsrechtslehrervereinigung, falls der Antrag abgelehnt würde und beharrten, wie auch die Berner Antragsteller, auf der Entscheidung in Fribourg (Anm. d. V.).

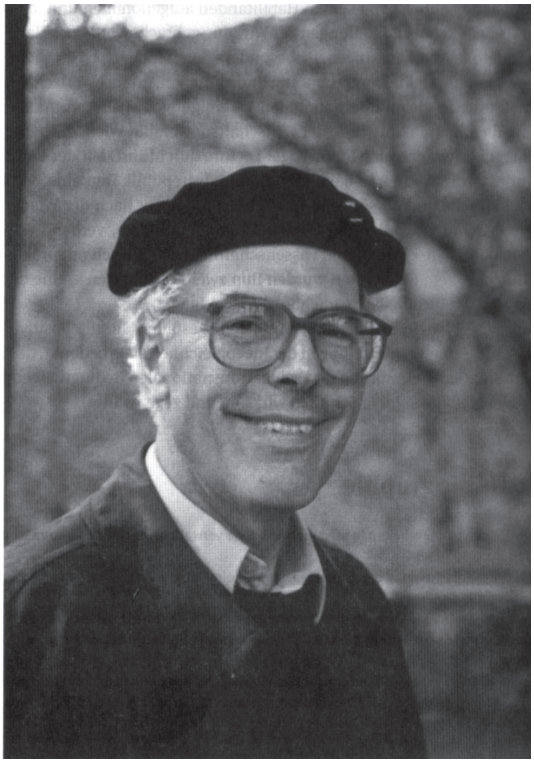
44 Ausnahme: Das eidgenössische Natur- und Heimatschutzgesetz (1966).

Tod vom Stämpfli-Verlag in begrenzter Auflage 1997 in Bern gedruckt wurde und an Freunde und Kollegen verteilt wurde. Unterhalb des Fotos von Peter Saladin heißt es: Es seien die Geschichten, die er in den letzten zwei Jahren seiner Krankheit geschrieben habe, die ihm „zugefallen" seien. Er äußerte einmal: „Ich weiß nicht, wohin ich geführt werde, wenn ich zu schreiben beginne, es ist richtig spannend." Die Schrift umfasst 180 Seiten und enthält Themen, die in der Staatsrechtslehre bisher nicht präsent waren („Schönheit und Recht", „Zeit und Ebbe", „Die Hausamsel", „Die Einhornschule", etc.). In den Geschichten ziehen das Leben und die Weggefährten Peter Saladins in farbigen Bildern, geleitet vom Einhorn, an ihm vorüber; Tagungen, Sitzungen, Diskussionen werden geschildert.

Für Juristen ist besonders der erste Abschnitt „Schönheit und Recht" (S. 11 ff.) von Interesse. Saladin beschreibt darin die Idee des Einhorns, dass die Schönheit als Staatsziel aufgenommen werden solle („Der Staat erfüllt seine Aufgaben so, dass Schönes nach Möglichkeit erhalten bleibt und neu geschaffen wird …"). Dies in Anlehnung an Platon, nach dem Schönheit das Ziel aller Erziehung ist (S. 25). Das Einhorn, ein mystisches Fabelwesen[45], das die Reinheit und Wahrheit verkörpert, ist ein scharfer Beobachter der juristischen Welt. So mahnt es auch eine schönere Sprache bei Juristen an, die sehr selten sei, und lässt nur wenige Ausnahmen gelten (z. B. den von Peter Saladin in Zwiegespräch genannten Jean François Aubert)[46]. Das Einhorn vermittelt ferner die Botschaft, dass nicht nur die Schönheit, sondern die Wahrnehmungsfähigkeit des Menschen von Schönheit als Teil der Gottesebenbildlichkeit des Menschen verstanden werden muss. Auch an anderer Stelle steht die Schönheit in engem Zusammenhang mit dem Einhorn. Denn das Einhorn verficht nicht nur die Schönheit als Teil der menschlichen Existenz, es verkörpert sie selbst: Das Einhorn *ist* ein Meister der Schönheit[47].

Peter Saladin gehört neben Namen wie Zaccaria Giacometti, Werner Kägi, Fritz Fleiner, Dietrich Schindler, Max Imboden, Richard Bäumlin, Alfred Kölz, Max Huber, Jean-François Aubert, Jörg Paul Müller u. ä. zu den großen Namen der Schweizer Staatsrechtslehre. Er war und blieb eine Ausnahmeerscheinung, auch in persönlicher Hinsicht. Er hat die Probleme der Zeit erkannt, er hat die Grundrechte in die Verfassungstexte eingebracht und die Schöpfung als wichtigstes Gut der Menschheit „entdeckt". Niemand vermochte wie er in die Zukunft zu blikken und die Rechte künftiger Generationen und den Schutz der Natur von der jetzt lebenden Generation einzufordern. Seine Wurzeln in der Verantwortung des Christen hat er niemals aufgegeben; sie verliehen ihm Kraft und Geduld, stets an diesen Grundlagen festzuhalten. Sein viel zu früher Tod im Mai 1997 hinterließ eine große Lücke. Pfarrer Lukas Schwyn und Jörg Paul Müller hielten die Trauerreden, die vielen noch heute im Gedächtnis sind. Mögen sich auch die Grundrechtsdebatten immer weiter „auffächern", die von ihm gelegten Grundlagen bleiben bestehen, ebenso sein Appell an die heute (vielfach vergessenen) Grundpflichten der Bürger.

Seine Ideen zum Schutz der Schöpfung fassen in der Praxis Fuß – aber viel zu langsam. Bodenverseuchung und Wasserverunreinigung durch Überdüngung (bis in 10–15 m Tiefe) nehmen zu, Dürre und Trockenheit machen sich (wie im Herbst 2011) immer heftiger bemerkbar, die Abholzung der tropischen Wälder schädigt Klima und Natur irreparabel. Der Flächenverbrauch durch Straßen und Industrieanlagen zerstört die Natur. Der wirtschaftliche Fortschritt, besonders in den Staaten der Dritten Welt, droht die Wirkung der erreichten Umweltschutzstandards aufzuzehren. Die Verwirklichung der Forderungen Peter Saladins wird immer drängender; seine Botschaften sind wichtiger denn je.



Peter Saladin (1935–1997)

[45] Es war zugleich das Wappentier der französischen Könige.

[46] Die Geschichte „Schönheit und Recht – Gespräch mit einem Einhorn" ist auch veröffentlicht in: Études en l'honneur de Jean-François Aubert, Basel/Frankfurt 1996, S. 181 ff.

[47] „Das Einhorn glühte in der Vielfalt seiner Farben. Und plötzlich wurde mir klar: Du bist mir Meister. Ich brauche und finde dich als Meister wegen Deiner Schönheit. Wegen des Schimmers, des Glanzes, der einhüllenden und ausweitenden Kraft Deiner Schönheit. Offenbar soll mich mein Weg zu viel umfassenderem Wahrnehmen und Gestalten von Schönheit führen. Und auf diesem Weg brauche ich Dich als Meister!". Aus *Meister*, in: Peter Saladin *Die Wirklichkeit des Einhorns*, Bern 1997, S. 171.

Der strafrechtliche Schutz von Kaiser und Kaiserhaus in Österreich von 1848–1918

(The Criminal Protection of the Emperor and the Imperial Family in Austria 1848–1918)

Christoph Schmetterer *

Abstract

In 1848 censorship was abolished in Austria. Due to the new freedom of the press it became possible to insult the emperor in the press. Thus the criminal law had to be adapted to the new situation. Three press acts were enacted in 1848/49 including new rules on lese-majesty. In 1852 the criminal code of 1803 was reformed. The reform changed the crimes of high treason and lese-majesty and introduced a new crime: insulting the Imperial family. This article analyses these crimes in detail.

Key words: *Criminal Code of 1852; Criminal Law; Emperor; High treason; Imperial Family; Lese-majesty.*

I. Die Presserechtlichen Vorschriften von 1848/49

Eine der wichtigsten Forderungen der Revolution 1848 war die Pressefreiheit. Wie zentral dieses Anliegen war, wurde nicht zuletzt daran deutlich, dass Kaiser Ferdinand schon einen Tag nach dem Ausbruch der Märzrevolution in Wien die Aufhebung der Zensur ankündigte.[1] Das Ende der Zensur brachte auch für Angriffe auf die Ehre des Kaisers und des Kaiserhauses eine neue Dimension:

Bis zur Revolution 1848 war es nämlich praktisch ausgeschlossen, dass Straftaten wie insbesondere Ruhestörung oder Lästerung des Landesfürsten in (inländischen) Druckschriften begangen wurden, weil diese durchgehend der Vorzensur unterlagen.[2] Mit der Aufhebung der Zensur stellte sich die Frage, wie Straftaten in Druckschriften zu behandeln seien. Es bestand Übereinstimmung, dass die bestehenden Regelungen des StG 1803 dafür nicht geeignet waren. Aus Zeitgründen wurde (vorerst) von einer Gesamtüberarbeitung des StG abgesehen; stattdessen wurden eigene strafrechtliche Bestimmungen in die die presserechtlichen Vorschriften aufgenommen. Insgesamt ergingen 1848/49 drei Regelungswerke zum Pressewesen, bevor 1852 de facto die Zensur wieder eingeführt wurde. Das provisorische Preßgesetz vom 31. März 1848 (ProvPreßG),[3] die Provisorische Verordnung gegen den Missbrauch der Presse vom 18. Mai 1848 (PreßVO)[4] und das Gesetz gegen den Missbrauch der Presse vom 13. März 1849 (PreßG).[5]

1. Das ProvPreßG 1848

Ob das ProvPreßG 1848 überhaupt in Kraft trat, ist zweifelhaft, jedenfalls wurde es nicht tatsächlich umgesetzt.[6] Das Grundkonzept dieses Gesetzes für Straftaten in Druckwerken wurde aber von der PreßVO 1848 und dem PressG 1849 übernommen. Grundsätzlich sollten auch auf Straftaten, die in Druckwerken begangen wurden, die allgemeinen Vorschriften des StG 1803 angewendet werden.[7] Für einzelne Delikte enthielt das ProvPreßG allerdings Sonderbestimmungen,[8] die bei der Begehung in Druckschriften an die Stelle der allgemeinen Strafbestimmungen traten[9] oder überhaupt neue Delikte einführten.[10]

Die Majestätsbeleidigung in Druckschriften wurde in § 17 wie folgt geregelt:

„Die vorsätzliche Beleidigung des Landesfürsten durch Lästerungen Schmähungen oder verhöhnende Darstellungen in Druckschriften oder den Druckschriften gleichgestellten Bildwerken ist als Verbrechen mit schwerem Kerker von einem bis zu fünf Jahren zu bestrafen."

* DDr. Christoph Schmetterer, Institut für Rechts- und Verfassungsgeschichte, Abteilung KRGÖ der Universität Wien, Österreich.

1 OLECHOWSKI, Preßrecht 207–208.

2 OLECHOWSKI, Preßrecht 289.

3 Amtsblatt zur Wiener Zeitung vom 1. 4. 1848, 243–244.

4 PGS LXXVI/66.

5 RGBl. 161/1849.

6 OLECHOWSKI, Preßrecht 223–224.

7 Zu Hochverrat und Majestätsbeleidigung im StG 1803 siehe: SCHMETTERER, Schutz des Kaiser 1803; § 16 ProvPreßG 1848.

8 §§ 17–20 ProvPreßG 1848.

9 § 21 ProvPreßG 1848.

10 Wie etwa die Beleidigung der Verfassung in § 19 ProvPreßG 1848.

Im Vergleich zur allgemeinen Vorschrift über Lästerungen des Landesfürsten in § 58 StG 1803[11] war die Lästerung des Landesfürsten im ProvPreßG nicht mehr als Sonderfall der Ruhestörung, sondern als eigenständiges Delikt konstruiert.[12] Die spezielle Strafdrohung für Majestätsbeleidigungen in Druckwerken nach dem ProvPreßG entsprach mit schwerem Kerker von einem bis fünf Jahren aber der allgemeinen Strafdrohung in § 59 StG.

Neben diesen Änderungen in Konstruktion und Formulierung der Majestätsbeleidigung würde durch § 18 des ProvPreßG ein völlig neues Delikt eingeführt:

„Wenn die Beleidigungen der angeführten Art gegen ein Mitglied der Familie des Landesfürsten gerichtet sind, so sollen dieselben mit schwerem Kerker von sechs Monathen bis zu einem Jahre bestraft werden."

Nach dem StG 1803 war nur die Ehre des Kaisers selbst besonders geschützt, jene der anderen Mitglieder des Kaiserhauses aber nicht. Durch das ProvPreßG wurden nun auch Beleidigungen von nicht-regierenden Mitgliedern des Herrscherhauses pönalisiert, wobei die Strafdrohung mit schwerem Kerker von sechs Monaten bis zu einem Jahr deutlich milder war.

2. Die PreßVO 1848

Auch die PreßVO 1848 verwies bezüglich Straftaten, die in einer Druckschrift begangen wurden, grundsätzlich auf das StG 1803, enthielt für einzelne Delikte aber Sondervorschriften. Das betraf wie schon im ProvPreßG Lästerungen des Kaisers, aber auch den Hochverrat (und zwar in der gegen den Kaiser gerichteten Form).[13]

Das Verbrechen des Hochverrats selbst konnte bloß durch Ausführungen in einer Druckschrift zwar nicht begangen werden. Hingegen war es sehr wohl möglich, in gedruckter Form zum Hochverrat aufzurufen. Das wurde in § 10 der PreßVO pönalisiert, wobei die Strafe wesentlich niedriger war als die Todesstrafe, mit der der Hochverrat selbst bedroht war:

„Wer mittelst der Presse zu einem Angriffe auf die Person des Landesfürsten […] auffordert, wird mit schwerem Kerker bis zu zehn Jahren bestraft."

Auch für Lästerungen des Kaisers enthielt die PreßVO in § 11 Sonderbestimmungen für die Begehung in Druckschriften:

„Lästerungen und alle Arten von böswilligen Verletzungen der schuldigen Ehrfurcht des Landesfürsten, welche durch Druckschriften erfolgen, sind als Verbrechen, und zwar dann, wenn sie in der Absicht geschehen, um Abneigung oder Verachtung gegen Staatsoberhaupt zu erwecken, mit ein- bis fünfjährigem schweren Kerker, wenn aber diese Absicht nicht erweislich ist, mit Kerker von sechs Monaten bis zu einem Jahre zu bestrafen."

Auch hier wurde die Lästerung des Landesfürsten – im Gegensatz zu § 58 StG 1803 – nicht mehr als Sonderfall der Ruhestörung, sondern als eigenständiges Delikt konstruiert. Außerdem war der Tatbestand des § 11 der PreßVO weiter als der des § 58 StG 1803. In der Presse sollten nicht nur Lästerungen, sondern überhaupt alle Ehrfurchtsverletzungen gegenüber dem Kaiser strafbar sein. Nach dem StG 1803 waren außerdem Lästerungen nur dann strafbar, wenn sie geeignet waren, Abneigung gegen den Kaiser zu erzeugen. Die Formulierung der PreßVO stellte hingegen nicht auf dieses objektive Kriterium ab. Das Erwecken von Abneigung gegen den Kaiser spielte auch nach der PreßVO eine Rolle, hier aber auf der subjektiven Ebene des Vorsatzes: Wenn der Täter in der Absicht handelte, Abneigung oder Verachtung gegen den Kaiser zu erwekken, war die Strafe deutlich höher, aber auch Lästerungen oder Ehrfurchtsverletzungen ohne diese Absicht blieben strafbar. In diesem Fall war die Strafe jedoch wesentlich niedriger, sowohl in der Intensität (einfacher statt schwerem Kerker) als auch in der Dauer (sechs Monate bis zu einem Jahr statt ein bis fünf Jahre). Auch wenn die Formulierung des StG auf ein objektives Kriterium abstellte, jene der PreßVO hingegen auf ein subjektives, mag es durchaus so gewesen sein, dass beide Vorschriften im Wesentlichen dasselbe meinten. In jedem Fall bedeutete die PreßVO durch die Erweiterung des Tatbestands eine Verschärfung gegenüber dem StG 1803, auch wenn die Strafdrohung grundsätzlich gleich blieb.

3. Das PreßG 1849

Auch das PreßG 1849[14] verwies für Straftaten, die in Druckschriften begangen wurden, grundsätzlich auf das StG 1803,[15] enthielt aber einige Sonderbestimmungen, die jenen des StG 1803 derogierten darunter auch solche über Straftaten gegen den Kaiser.

In § 23 wurde unter anderem die Aufforderung zu Angriffen auf den Kaiser unter Strafe gestellt:

„Wer durch Druckschriften andere zu Handlungen auffordert, aneifert oder zu verleiten sucht, durch welche […]
c) eine gewaltsame Verletzung oder gefährliche Bedrohung der Person des Staats-Oberhauptes an Körper, Gesundheit oder Freiheit, oder eine Hinderung der Ausübung seiner Regierungsrechte bewirkt […] wird mit schwerem Kerker von zwei bis zehn Jahren bestraft."

Diese Bestimmung bedeutete gegenüber § 52 des StG 1803 eine Präzisierung und eine deutliche Erweiterung der Strafbar-

[11] § 57 StG 1803 „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.";
§ 58 StG 1803„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."

[12] Die Ruhestörung in Druckwerken war – ebenfalls als eigenständiges Delikt – in § 20 ProvPreßG geregelt.

[13] § 9 PreßVO; nach dem Wortlaut dieser Bestimmung wurden die §§ 52–58 des StG 1803 außer Kraft gesetzt und durch die speziellen Bestimmungen der PreßVO ersetzt. Dabei muss es sich wohl um ein Redaktionsversehen oder einen Druckfehler handeln. Gerade gegenüber § 59 StG 1803 enthielt nämlich § 11 PreßVO eine andere (mildere) Strafdrohung.

[14] Dazu HARUM, Preßgesetz.

[15] § 21 PressG.

keit – allerdings mit wesentlich niedrigeren Strafen. Der allgemeine Begriff der persönlichen Sicherheit des Staatsoberhaupts wurde durch die konkreten Schutzgüter Körper, Gesundheit und Freiheit ersetzt. Die Strafbarkeit umfasste neben der Aufforderung zu Angriffen auf diese Schutzgüter auch die Aufforderung zu deren Gefährdung. Völlig neu war der Schutz der Regierungsrechte des Kaisers.

Das PreßG nahm damit grundsätzlich die Systematik des (gegen den Kaiser gerichteten) Hochverrats im StG 1852 vorweg.[16] Die detaillierte dogmatische Behandlung erfolgt daher in diesem Zusammenhang.

Die Strafdrohung änderte sich gegenüber der PreßVO 1848 nur unwesentlich. Die Strafobergrenze blieb bei zehn Jahren, aber eine Untergrenze von zwei Jahren wurde neu eingeführt.

Ganz neu war im PreßG 1849 war die Bestimmung des § 24:

„Wer in Druckschriften den Tadel oder die Verantwortlichkeit für die Maßregeln der Regierung auf die Person des Staats-Oberhauptes auszudehnen versucht, wird mit Kerker bis zu zwei Jahren bestraft."

Diese Bestimmung stellt einen besonderen strafrechtlichen Schutz der Unverantwortlichkeit des Kaisers dar. Sie war gewissermaßen das strafrechtliche Pendant zu § 14 der Oktroyierten Märzverfassung.[17]

Lästerungen des Kaisers wurden schließlich in § 25 pönalisiert:

„Für Lästerungen oder andere Verletzungen der schuldigen Ehrfurcht gegen das Staats-Oberhaupt, wodurch dessen Person der Geringschätzung preisgegeben wird, verfällt der Schuldige in eine Strafe des schweren Kerkers bis zu drei Jahren."

Wie schon in der PreßVO 1848 wurden hier nicht nur Lästerungen, sondern auch sonstige Ehrfurchtsverletzungen dem Kaiser gegenüber unter Strafe gestellt. Dass Erfordernis, den Kaiser der Geringschätzung preiszugeben, entsprach wohl im Wesentlichen dem Erwecken von Abneigung nach dem StG 1803. Anders als in der PreßVO 1848 war dieses Kriterium wieder (wie im StG 1803) objektiv formuliert. Die bedeutendste Änderung durch das PressG war die Herabsetzung der Strafdrohung auf maximal drei Jahre schweren Kerker.

Das Nebeneinander von § 58 StG 1803 für allgemeine Lästerungen des Kaisers und von § 25 PreßVO für solche in Druckschriften hatte gewisse Inkongruenzen zur Folge: Eine Lästerung des Kaisers, die nicht in einer Druckschrift erfolgte, konnte strenger bestraft werden, als eine in einer Druckschrift – obwohl die potentielle Publizität von Äußerungen in Druckschriften wesentlich höher war.[18]

II. Das StG 1852

Das StG 1852 war kein völlig neues Gesetzbuch, sondern insgesamt eine Art Wiederverlautbarung der materiell rechtlichen Bestimmungen des StG 1803, wobei die Veränderungen und Ergänzungen, die es seit 1803 außerhalb des StG gegeben hatte, in den Gesetzestext selbst aufgenommen wurden.[19] Das siebente Hauptstück über Hochverrat, Majestätsbeleidigung etc. wurde 1852 aber grundlegend neu gestaltet: Strafdrohungen wurden teilweise geändert, und Formulierungen präzisiert. Die Majestätsbeleidigung war nunmehr – wie schon in den presserechtlichen Vorschriften von 1848/49 – ein eigenes Delikt und nicht mehr ein Unterfall der Störung der innerlichen Ruhe des Staates. Außerdem wurde aus dem ProvPreßG 1848 ein neues Delikt übernommen: die Beleidigung der Mitglieder des kaiserlichen Hauses.[20]

1. Hochverrat

Der Hochverrat war ab 1852 in § 58 geregelt, der nunmehr lautete:

„Das Verbrechen des Hochverrates begeht: wer etwas unternimmt,

a) wodurch die Person des Kaisers an Körper, Gesundheit oder Freiheit verletzt oder gefährdet oder eine Verhinderung der Ausübung seiner Regierungsrechte bewirkt werden soll;"

Aus lit. a ergaben sich zwei grundlegende Begehungsformen des Hochverrats gegen den Kaiser: Einerseits seine Verletzung/Gefährdung an Körper, Gesundheit oder Freiheit und andererseits die Hinderung an der Ausübung seiner Regierungsrechte.

Der erste Fall von lit. a war primär eine Neuformulierung und Präzisierung der Vorgängerbestimmung im StG 1803,[21] der zweite hingegen neu.[22] Das StG 1803 hatte die „persönliche Sicherheit des Kaisers" geschützt. Dieser Begriff umfasste nach Jenull konkret das Leben, die Gesundheit und die Freiheit des Kaisers.[23] Im StG 1852 wurde dann der Begriff der persönlichen Sicherheit des Kaisers gleich im Gesetzestext selbst in einer sehr ähnlichen Weise aufgeschlüsselt, nämlich die Unversehrtheit von Körper, Gesundheit und Freiheit. Insofern war das StG 1852 nur eine Präzisierung des Vorgängergesetzes von 1803. Gleichzeitig wurde die Strafbarkeit auch erweitert: Während das StG 1803 nur die Verletzung der persönlichen Sicherheit pönalisiert hatte, war ab 1852 nicht nur die Verletzung, sondern auch schon die Gefährdung seiner Sicherheit strafbar.

Im Einzelnen bedeutete der Schutz des Körpers des Kaisers nach Hye „die Integrität und Unverletzlichkeit des Leibes im Allgemeinen und in Beziehung auf alle einzelnen Körpertheile".[24]

---

[16] Allerdings wurde in § 63 lit. a 2. Fall gerade nicht nur die gewalttätige Hinderung an der Ausübung der Regierungsrechte pönalisiert, sondern vielmehr die Hinderung durch List etc.

[17] „Der Kaiser ist geheiligt, unverletzlich und unverantwortlich."

[18] OLECHOWSKI, Preßrecht 290–291.

[19] HOEGEL, Geschichte 96–97; OLECHOWSKI, Entwicklung des Strafgesetzes 336–339.

[20] Da das ProvPreßG 1848 aber nicht tatsächlich umgesetzt wurde, wurde dieser neue Tatbestand durch das StG 1852 effektiv eingeführt.

[21] § 52 StG 1803 „Das Verbrechen des Hochverrats begeht: a) Der die persönliche Sicherheit des Oberhauptes des Staates verletzet."

[22] Nur für die Begehung in Druckwerken hatte § 23 des PreßG 1849 schon eine Vorgängerregelung enthalten.

[23] JENULL, Criminalrecht, 13.

[24] HYE, Strafgesetz 681.

Die Gesundheit des Kaisers verstand Hye in einem relativen Sinn. Eine Verletzung der Gesundheit war für ihn jegliche Verschlechterung eines bestehenden Zustandes. Daraus ergab sich, dass die Gesundheit des Kaisers grundsätzlich auch dann verletzt werden konnte, wenn der Kaiser schon krank war. Auch bei der Freiheit im Sinne der physischen (Bewegungs-)freiheit meinte Hye, dass auch eine relative Beschränkung die Freiheit des Kaisers verletze – wenn also die bereits beschränkte Freiheit des Kaisers weiter eingeschränkt wurde.[25]

Bezüglich des Kaisers waren die Verletzung seines Körpers und die Schädigung seiner Gesundheit also völlig gleichgestellt. Das war ein wesentlicher Unterschied zu den allgemeinen Regeln des StG 1852. Bezüglich anderer Personen war nämlich nur eine körperliche Beschädigung strafbar, die „sichtbare Merkmale und Folgen nach sich zog".[26] Das bloße Zufügen von Schmerzen ohne äußerlich erkennbaren Aspekt war grundsätzlich nicht gerichtlich strafbar. Beim Kaiser war dies hingegen sehr wohl als Hochverrat durch Verletzung seiner Gesundheit strafbar.

Die Beschränkung der persönlichen Freiheit war hingegen auch bei anderen Personen grundsätzlich in jeder Form strafbar – wenn auch mit wesentlich milderer Strafdrohung als beim Kaiser.[27]

Insgesamt bleibt also festzuhalten, dass ausnahmslos jegliche Verletzung Körper, Gesundheit und Freiheit des Kaisers strafbar war – ganz unabhängig vom Grad der Verletzung. Das ergab sich schon daraus, dass nicht nur die tatsächliche Verletzung strafbar war, sondern auch schon die Gefährdung. Auch bei der Gefährdung ergab sich aus dem Gesetzestext keine Einschränkung, sodass jegliche Gefährdung von Körper, Gesundheit und Freiheit strafbar war. Somit war der Tatbestand des Hochverrats nach § 58 lit. a 1. Fall extrem weit gefasst. Wie ungeheuer weitgehend die Strafbarkeit nach dieser Bestimmung war, macht folgende Überlegung deutlich: Alle kranken Personen, die sich dem Kaiser soweit näherten, dass eine Ansteckung möglich war, gefährdeten seine Gesundheit. Soweit diesbezüglich zumindest Eventualvorsatz bestand, war damit nach dem Wortlaut des Gesetzes das Verbrechen des Hochverrats verwirklicht, und zwar ganz unabhängig von der Schwere der Krankheit – wäre es die Cholera oder bloß ein Schnupfen gewesen. Es hätte auch keine Rolle gespielt, ob der Kaiser tatsächlich angesteckt wurde oder nur die Möglichkeit der Ansteckung bestand, weil ja schon die bloße Gefährdung den Tatbestand erfüllte. In dieser extremen Konsequenz wurde der Tatbestand des § 58 lit. a 1. Fall StG von der zeitgenössischen Lehre nicht zu Ende gedacht, obwohl die Weite des Tatbestands immer wieder kritisiert wurde.[28] Auch in der Judikatur dürfte es keine Verurteilungen gegeben haben, die den Wortlaut in dieser Weise ausreizten. Dennoch scheint es wichtig, aufzuzeigen, wie ungeheuer weitgehend die Strafbarkeit zumindest theoretisch war.

Die Verletzung oder Gefährdung von Körper, Gesundheit und Freiheit des Kaisers nach § 58 lit. a 1. Fall war freilich nur dann strafbar, wenn sie vorsätzlich geschah – also zumindest mit Eventualvorsatz. Fahrlässige Verletzungen oder Gefährdungen waren auch bezüglich des Kaisers „nur" nach den allgemeinen Vorschriften strafbar. Auch Angriffe auf den oder Gefährdungen des Kaisers, bei denen der Täter nicht erkannte, wen er angriff oder gefährdete, waren nur nach den allgemeinen Vorschriften strafbar.[29]

Andere persönliche Rechtsgüter des Kaisers als Körper, Gesundheit und Freiheit waren im Verbrechen des Hochverrats nicht geschützt – das galt insbesondere für sein Vermögen und seine Ehre. Die Ehre des Kaisers war im Delikt der Majestätsbeleidigung eigens geschützt, sein Vermögen hingegen war strafrechtlich nicht anders geschützt als das Anderer.

Der 2. Fall des § 58 lit. a StG war 1852 vollkommen neu eingeführt worden. Durch diese Bestimmung wurden keine persönlichen Rechtsgüter des Kaisers, sondern seine Regierungsrechte geschützt.[30] Der Umfang der Regierungsrechte des Kaisers änderte sich natürlich durch die Änderungen der Verfassung. 1852, am Beginn des Neoabsolutismus, waren sie allumfassend, sodass eine abschließende Aufzählung wohl kaum möglich war.[31] Durch die Rückkehr zum Konstitutionalismus (zögerlich 1860/61, endgültig 1867) wurden die Regierungsrechte des Kaisers eingeschränkt bzw. wurde er in deren freier Ausübung (durch das System von Gegenzeichnung und Ministerverantwortlichkeit) eingeschränkt. Daher bedeuteten die Änderungen der Verfassung auch eine Änderung des Tatbestands des § 58 lit. a 2. Fall – und zwar ohne dass sich der Wortlaut geändert hätte.

Für die Zeit nach 1867 gab Finger folgende Aufstellung der Regierungsrechte des Kaisers:

„1. das Recht des Kaisers, den Staat in völkerrechtlicher Beziehung nach außen, in privatrechtlicher Beziehung zu dritten Personen zu vertreten; die Repräsentation des Gesamtstaates (der österreichisch-ungarischen Monarchie) zu den im Reichsrate vertretenen Königreichen und Ländern und zu den Ländern der ungarischen Krone, sowie die Vertretung zwischen beiden;

2. die Ausübung der gesetzgebenden und Verwaltungsgewalt, bei deren Ausübung der Kaiser durch die Verfassung zum Teil an die Mitwirkung anderer Organe gebunden ist. Die richterliche Gewalt ist als Gewalt der Rechtsprechung auf die Gerichte übertragen […]; vom Monarchen wird nur die Justizverwaltungsgewalt und das Begnadigungsrecht ausgeübt; die Führung des Oberbefehls über die bewaffnete Macht; Erklärung des Krieges,

---

25 Ebd.

26 LAMMASCH, Grundriß 75. § 411.

27 § 93 StG; Nach § 94 betrug die Strafdrohung für Freiheitsentziehungen sechs Monate bis zu einem Jahr Kerker, bei qualifizierten Freiheitsentziehungen ein bis fünf Jahre schweren Kerker.

28 FINGER, Strafrecht 502.

29 FRÜHWALD, Handbuch 87.

30 FINGER, Strafrecht 503 bezeichnete diese Form des Hochverrats daher als „Hochverrat gegen den Kaiser als Staatsoberhaupt"; diese Formulierung ist allerdings insofern etwas ungenau als auch der Schutz von Körper, Gesundheit und Freiheit des Kaisers untrennbar mit dessen Stellung als Staatsoberhaupt verbunden war.

31 Eine eindeutig nur demonstrative Aufzählung gibt HYE, Strafgesetz 683.

der Friedensschluss; die Verleihung von Titel, Orden, Ehrenzeichen. Zur Ausübung der Regierungsgewalt gehören alle Willensäußerungen in den angegebenen Kompetenzgrenzen."[32]

Tathandlung nach dieser Bestimmung konnte alles sein, was den Kaiser an der Ausübung seiner Regierungsrechte hinderte. Eine Hinderung durch Gewalt erfüllte wohl in jedem Fall auch den Tatbestand des § 58 lit. a 1. Fall durch Verletzung der Freiheit des Kaisers. Somit blieb als eigenständiger Anwendungsbereich des zweiten Falls vor allem die Hinderung an der Ausübung der Regierungsrechte durch List oder Täuschung.[33] Das konnte etwa bedeuten, den Kaiser zur Unterschrift eines Dokuments zu bewegen, von dessen Inhalt man ihm eine unzutreffende Vorstellung vermittelt hatte. Genauso war es tatbestandsmäßig, bereits unterfertigte Anordnungen des Kaisers zu unterschlagen, zu vernichten oder zu verfälschen – allgemeiner formuliert also, unmittelbar die Ausführung kaiserlicher Anordnungen zu verhindern.

In diesem Zusammenhang stellte sich ab 1867 die Frage, wie es strafrechtlich zu beurteilen war, wenn ein Minister einer kaiserlichen Anordnung die Gegenzeichnung verweigerte. Vor 1867 hatte diese Frage keine Relevanz, weil Anordnungen des Kaisers auch ohne Gegenzeichnung gültig waren. Die Verweigerung der Gegenzeichnung hätte den Kaiser somit nicht an der Ausübung seiner Regierungsrechte gehindert. Außerdem waren die Minister seit den Augusterlässen 1851[34] ausschließlich dem Kaiser verantwortlich. Ab 1867 waren die Minister rechtlich hingegen dem Staatsgerichtshof verantwortlich. Außerdem ordnete § 1 des Gesetzes über die Ministerverantwortlichkeit an, dass alle Regierungsakte des Kaisers nur mit Gegenzeichnung eines Ministers gültig sein sollten.[35] Wenn ein Minister also die Gegenzeichnung verweigerte, machte er damit die Umsetzung der kaiserlichen Anordnung unmöglich. In dieser Konstellation war es aber gerade gesetzlich vorgesehen, dass der Kaiser in der Ausübung seiner Regierungsrechte an die Mitwirkung eines anderen Organs, nämlich an die Gegenzeichnung eines Ministers gebunden war. In seiner Entscheidung, ob er einen Regierungsakt des Kaisers gegenzeichnete oder nicht, war der Minister frei – gerade auch im Hinblick auf seine Verantwortlichkeit gegenüber dem Staatsgerichtshof. Freilich musste ein Minister, der einem Regierungsakt des Kaisers die Gegenzeichnung verweigerte, damit rechnen, entlassen zu werden.[36] Es wäre systemwidrig gewesen, wenn sich ein Minister durch ein Verhalten, das in der Dezemberverfassung ausdrücklich vorgesehen, war strafbar gemacht hätte.[37]

Da sich die Bestimmung des § 58 lit. a 2. Fall nur auf die Regierungsrechte des Kaisers bezog, konnte es keinen Hochverrat nach diesem 2. Fall darstellen, wenn der Kaiser an der Ausübung anderer (privater) Rechte gehindert wurde – wie etwa der Errichtung eines Testaments, dem Abschluss eines Kaufvertrags oder einer Schenkung. Wäre der Kaiser aber durch physische Einwirkung an einer privaten Rechtshandlung gehindert worden, hätte das eine Verletzung seiner Freiheit und damit Hochverrat nach § 58 lit. a 1. Fall bedeutet.

Ebenso wie die Gefährdung oder Verletzung von Körper, Gesundheit oder Freiheit des Kaisers war die Hinderung der Ausübung seiner Regierungsrechte nur dann als Hochverrat strafbar, wenn sie vorsätzlich erfolgte. Wenn beispielsweise eine Verfügung des Kaisers nicht unterschlagen, sondern irrtümlich nicht abgefertigt wurde, war das nicht strafbar.

Der Einleitungsformel des § 58 StG „wer etwas unternimmt" bezog sich auf alle Arten des Hochverrats. Damit wurde ausgedrückt, dass es sich bei diesem Verbrechen um ein Angriffsdelikt handelte.[38] Das bedeutet, dass schon durch jede zur Verwirklichung des Hochverrats begonnene Handlung unabhängig von deren konkreten Erfolg das Verbrechen des Hochverrats vollendet war. Dieses Delikt konnte somit nicht versucht werden, schon der versuchte Hochverrat, ja sogar jegliche Vorbereitungshandlung war bereits das vollendete Verbrechen.[39]

Dadurch wurde dasselbe Ergebnis erreicht wie durch den 2. Satz des § 53 im StG 1803[40] – nämlich, dass der Versuch genauso zu bestrafen war wie das vollendete Delikt. Die dahinterstehende Konstruktion war aber eine andere. Das hatte eine schwerwiegende Konsequenz. Da nach dem Gesetz von 1852 jede Vorbereitungshandlung zum Hochverrat schon das vollendete Verbrechen bedeutete, war ein strafbefreiender Rücktritt vom Versuch nicht möglich. Dies war nach dem StG 1803 schon möglich gewesen.[41] Insofern brachte das StG 1852 eine Verschärfung.

Ein Unternehmen war nur dann gegeben, wenn es zu irgendeiner äußeren Handlung, einer „Thätigkeit" wie Hye es formulierte, kam.[42] Durch eine bloße Äußerung konnte das Verbrechen des Hochverrats nicht begangen werden – denkbar wäre hingegen gewesen, dass entsprechende Äußerungen eine Majestätsbeleidigung darstellten.

---

[32] FINGER, Strafrecht 503.

[33] Ein strafrechtlicher Schutz der Regierungsrechte des Kaisers war erstmals in § 23 des PreßG 1849 enthalten gewesen, allerdings war hier – anders als im StG 1852 – ausdrücklich nur die gewalttätige Hinderung an der Ausübung der Regierungsrechtepönalisiert.

[34] RGBl. 194/1851.

[35] RGBl. 145/1867; Zur Ministerverantwortlichkeit siehe: HAUKE, Ministerverantwortlichkeit; HERBERGER, Ministerverantwortlichkeit; FRISCH, Verantwortlichkeit; LUCZ, Ministerverantwortlichkeit; POPP, Ministerverantwortlichkeit und Ministeranklage 9–44; SCHMETTERER, Sanktion und Gegenzeichnung österreichischen Gesetzgebung 40–43.

[36] In der Praxis versicherte sich der Kaiser wohl überhaupt noch bevor er eine Anordnung der erließ, dass der zuständige Minister diese auch gegenzeichnen würde.

[37] FINGER, Strafrecht 503; in einer bewusst anachronistischen Weise könnte man davon sprechen, dass das StG „verfassungskonform" zu interpretieren war.

[38] So die zeitgenössische Terminologie, die moderne Bezeichnung lautet Unternehmensdelikt.

[39] HYE, Strafgesetz 682, 684, Anm.; Denkbar war ein Versuch nur in der Konstellation, dass jemand den Kaiser angreifen wollte, tatsächlich aber jemand anderen angriff, FRÜHWALD, Handbuch 87.

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

[41] WAHLBERG, Grundriss 11–12.

[42] HYE, Strafgesetz 685.

Eine Kontroverse bzgl. des Hochverrats ist nur verständlich, weil dieses Verbrechen als Angriffsdelikt konstruiert war. Die Frage war, ob das Verbrechen des Hochverrats schon dadurch verwirklicht wurde, dass jemand den Kaiser zum Duell forderte. Lammasch bejahte das ohne nähere Begründung,[43] Finger lehnte diese Auffassung hingegen ab und meinte dazu:

„Eine Verletzung an Körper, Gesundheit, Freiheit liegt bei solcher Herausforderung nicht vor."[44]

Die Begründung von Finger erscheint durchaus einleuchtend. Da Lammasch seine Ansicht nicht begründete, bleibt zu überlegen, was dafür gesprochen hätte, dass es strafbar war, den Kaiser zum Duell zu fordern. Ein tatsächliches Duell mit dem Kaiser wäre unzweifelhaft ohne zumindest den Eventualvorsatz, den Kaiser zu verletzen oder zu töten, kaum möglich gewesen. Die bloße Forderung als solche bedeutete aber – wie Finger richtig anmerkte – noch keine Verletzung oder Gefährdung des Kaisers; dies umso mehr, als der Kaiser eine Forderung ja hätte annehmen müssen, damit es überhaupt zu einem Duell kommen konnte. Durch die besondere Konstruktion des Hochverrats als Angriffsdelikt wurden aber schon jegliche Vorbereitungshandlungen pönalisiert – und eine Forderung dient zweifellos der Vorbereitung eines Duells. Selbst dann hätte sich aber noch die Frage gestellt, ob die Forderung zum Duell eine (strafbare) Handlung oder bloß eine (allenfalls straflose) Äußerung war. Die praktische Bedeutung dieser Kontroverse war gering. Es ist wohl ausgeschlossen, dass der Kaiser zu einem Duell gefordert worden wäre.

Mit seiner Einschätzung als „abnorm weitgehender Strafdrohung" traf Finger den Charakter des § 58 lit. a StG durchaus. Es war nicht nur ausnahmslos jegliche vorsätzliche Verletzung des Kaisers an Körper, Gesundheit oder Freiheit strafbar, sondern auch jegliche Gefährdung dieser Rechtsgüter, doch damit nicht genug: schon jede Vorbereitungshandlung dazu war bereits als das vollendete Delikt strafbar. Wie ungeheuer weitgehend dieser Tatbestand war, wird in voller Konsequenz erst im Zusammenhang mit der Strafdrohung deutlich. Nach § 59 lit. a war jede Form des Hochverrats gegen den Kaiser mit dem Tod zu bestrafen. Die galt für seine Ermordung ebenso wie für eine minimale, erfolglos gebliebene Gefährdung seiner Gesundheit. Die Strafdrohung des § 59 lit. a nahm auf die Schwere oder den Erfolg des Angriffs keinerlei Rücksicht.

Bezüglich der anderen, nicht gegen den Kaiser gerichteten Formen des Hochverrats brachte das StG 1852 eine Milderung der Strafdrohung gegenüber dem StG 1803,[45] in dem es die Todesstrafe auf „Rädelsführer etc." beschränkte.[46]

Zum strikten Festhalten an der Todesstrafe bezüglich des Kaisers meinte Hye:

„Das gegenwärtige Gesetz war dadurch zugleich in die – gleichmäßig durch die Gerechtigkeit, gleichwie durch Klugheits-Rücksichten gerechtfertigte – Lage gesetzt, hierbei sachgemäß einerseits diejenige Unterart dieses Verbrechens, welche im monarchischen Staate relativ am strafwürdigsten erscheint, nemlich Angriffe auf die Person des Kaisers […] von den übrigen Arten desselben zu scheiden."[47]

Auch wenn die Strafdrohung unverändert bleib, brachte das StG 1852 bei den gegen den Kaiser gerichteten Formen des Hochverrats eine wesentliche Verschärfung, weil die Strafbarkeit erheblich erweitert wurde und somit bisher strafloses oder weniger drastisch bedrohtes Verhalten nunmehr mit der Todesstrafe bedroht war.

Die Bestimmungen über die Mitschuld am Hochverrat durch unterlassene Hinderung oder unterlassene anzeige übernahm das StG 1852 größtenteils unverändert vom Vorgängergesetz. Die bisher in den §§ 54 und 55[48] enthaltenen Regelungen fanden sich nunmehr in den §§ 60 und 61. Die alte Rechtslage wurde in zwei Punkten modifiziert: Das StG 1803 hatte nur dann keine Verhinderungs- oder Anzeigeverpflichtung vorgesehen, wenn dies mit Gefahr für den Verpflichteten selbst verbunden gewesen wäre. Dies wurde nun dahingehend erweitert, dass diese Verpflichtungen auch dann nicht bestanden, wenn sie mit Gefahr für Angehörige des Verpflichteten oder für unter seinem Schutz stehende Personen verbunden gewesen wäre. Der Begriff der Angehörigen war in § 216 legal definiert und umfasste alle Verwandten und Verschwägerten in gerader Linie, Ehegatten, Geschwister, Onkel und Tanten, Nichten und Neffen, Cousins und Cousinen, Geschwister des Ehegatten und Ehegatten der Geschwister. Die unter jemandes gesetzlichem Schutz stehenden Personen waren hingegen im Gesetz nicht definiert. Hye nannte Wahl- und Pflegekinder sowie Mündel und interessanterweise Geistliche und Ordenspersonen, die unter dem gesetzlichen Schutz ihrer Oberhirten bzw. ihrer Ordens-Vorsteher standen.[49]

Die zweite Veränderung durch das StG 1852 betraf die Strafdrohung. Hier brachte das neue Gesetz eine ganz erhebliche Milderung. Beide Formen der Mitschuld am Hochverrat waren nun nicht mehr mit lebenslangen Kerkerstrafen bedroht,

[43] LAMMASCH, Grundriß 123.
[44] FINGER, Strafrecht 502.
[45] § 53 StG 1803 hatte die Todesstrafe ausnahmslos für alle Formen des Hochverrats angeroht.
[46] § 59 lit. b.
[47] HYE, Strafgesetz 713.
[48] § 54 StG 1803 „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."
§ 55 StG 1803 „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."
[49] HYE, Strafgesetz 719–720.

sondern mit einer Strafe von fünf bis zehn Jahren. Die Strafdrohung war ab 1852 für beide Formen der Unterlassung vollkommen ident, weil in beiden Fällen schwerer Kerker vorgesehen war. Den schwersten Kerker gab es im StG 1852 nicht mehr.

In § 62 StG war eine Regelung über tätige Reue speziell im Zusammenhang mit dem Hochverrat enthalten. Schon das StG 1803[50] hatte für den Hochverrat die Möglichkeit der tätigen Reue vorgesehen; damals war jedoch der gegen die Person des Kaisers gerichtete Hochverrat ausdrücklich von dieser Regelung ausgenommen worden. Im Gesetz von 1852 bezog sie sich dann aber auf alle Formen des Hochverrats:

„Wer sich in eine auf Hochverrat abzielende Verbindung eingelassen, in der Folge aber, durch Reue bewogen, die Mitglieder derselben, ihre Satzungen, Absichten und Unternehmungen der Obrigkeit zu einer Zeit, da sie noch geheim waren, und der Schade verhindert werden konnte, entdeckt, dem wird die gänzliche Straflosigkeit und die Geheimhaltung der gemachten Anzeige zugesichert."

Diese Bestimmung sah also in bestimmten Fällen die völlige Straflosigkeit für am Hochverrat Beteiligte vor. Im Einzelnen mussten dafür folgende Voraussetzungen gegeben sein:

Erstens kam diese Form der tätigen Reue nur in Betracht, wenn mehrere Personen eine auf Hochverrat abzielende Verbindung eingegangen waren; auf Einzeltäter war sie nicht anwendbar.

Zweitens musste der Täter der Obrigkeit Informationen geben, die dieser noch unbekannt waren. Der Gesetzgeber nannte hier Mitglieder, Satzungen, Absichten und Unternehmungen der hochverräterischen Verbindung. Diese Aufzählung war nach einhelliger Ansicht eine demonstrative.[51] Der Informant konnte auch dadurch straflos werden, dass er der Behörde andere relevante Informationen über eine hochverräterische Verbindung lieferte. Voraussetzung für die Straflosigkeit war aber, dass der Informant alle ihm bekannten Informationen mitteilte. Diese Informationen mussten der Behörde außerdem noch unbekannt sein. Das war eine objektive Bedingung der Straflosigkeit. Wenn der Informant nur glaubte, dass die von ihm mitgeteilten Informationen noch geheim waren, die Behörde sie in Wirklichkeit aber schon kannte, führte das nicht zur Straflosigkeit.[52]

Drittens musste durch die Mitteilung des Informanten ein Schaden, also ein Erfolg der hochverräterischen Verbindung verhindert werden. Die Straflosigkeit war somit nur dann gegeben, wenn gerade die Mitteilung des Informanten kausal für die Verhinderung des Erfolgs war.[53]

Viertens schließlich musste der Täter aus Reue handeln. Das bedeutet praktisch, dass er freiwillig, aus eigenem Entschluss handeln musste. Das innere Motiv für diesen freien Entschluss (Reue, Angst vor Verfolgung etc.) war aber gleichgültig.[54]

Die tätige Reue nach § 62 hatte somit in etwa die Funktion, die der Rücktritt vom Versuch bei normalen Erfolgsdelikten hatte: Wer von sich aus den Erfolg abwendetet, sollte nicht bestraft werden.[55] Wegen der Konstruktion des Hochverrats als Angriffsdelikt waren die aus § 8 abgeleiteten allgemeinen Regeln über den strafbefreienden Rücktritt vom Versuch nicht anwendbar. Daher war die eigene Regelung des § 62 erforderlich. Vor diesem Hintergrund erklärt sich auch, warum die tätige Reue 1803 nicht auf den Hochverrat gegen den Kaiser anwendbar gewesen war. Der gegen die Person des Kaisers gerichtete Hochverrat war 1803 nämlich noch als Erfolgsdelikt konstruiert gewesen, somit war hier der strafbefreiende Rückstritt vom Versuch möglich gewesen. Die anderen Formen des Hochverrats waren hingegen schon 1803 Angriffsdelikte. Deshalb war die tätige Reue 1803 auf diese, nicht gegen den Kaiser persönlich gerichteten Formen des Hochverrats beschränkt gewesen.

2. Majestätsbeleidigung

a) Allgemeines

Im StG 1852 war die Lästerung des Landesherrn nicht mehr ein Unterfall der Ruhestörung, vielmehr enthielt § 63 nun das eigenständige Delikt der Majestätsbeleidigung. Die Majestätsbeleidigung war auch kein Sonderfall der allgemeinen Beleidigungsdelikte, sondern auch diesbezüglich ein eigenständiges Delikt. Das zeigt sich einerseits an der wesentlich umfassenderen Strafbarkeit, andererseits daran, dass die Majestätsbeleidigung im Gegensatz zu den anderen Beleidigungsdelikten ein Offizialdelikt war.[56] § 63 lautete:

„Wer die Ehrfurcht gegen den Kaiser verletzt, es geschehe dies durch persönliche Beleidigung, durch öffentlich oder vor mehreren Leuten vorgebrachte Schmähungen, Lästerungen oder Verspottungen, durch Druckwerke, Mittheilung oder Verbreitung von bildlichen Darstellungen oder Schriften, macht sich des Verbrechens der Majestäts-Beleidigung schuldig, und ist mit schwerem Kerker von einem bis zu fünf Jahren zu bestrafen."

Majestätsbeleidigung wurde als an sich durch eine Ehrfurchtsverletzung gegenüber dem Kaiser begangen. Das Gesetz nannte drei (Gruppen von) Begehungsformen, nämlich erstens direkte Beleidigungen des Kaisers, zweitens Schmähungen, Lästerungen oder Verspottungen, sofern sie öffentlich oder vor mehre-

[50] § 56 StG 1803.
[51] HYE, Strafgesetz 732–733; FINGER, Strafrecht 513.
[52] HYE, Strafgesetz 733.
[53] FINGER. Strafrecht 513.
[54] HYE, Strafgesetz 731–732.
[55] Diese Möglichkeit gab es nur bei einer Verbindung mehrerer Hochverräter.
[56] LAMMASCH, Grundriß 127; FINGER, Strafrecht 513.

ren Leuten erfolgten, und drittens Ehrfurchtsverletzungen in Druckwerken, bildlichen Darstellungen oder Schriften.[57]

Es war umstritten, ob diese Aufzählung der Begehungsformen demonstrativen oder taxativen Charakter hatte. Tatsächlich war der Wortlaut hier nicht eindeutig. Unbestritten war, dass Lästerungen, Schmähungen, Verspottungen nur strafbar sein sollten, wenn sie öffentlich oder vor mehreren erfolgten. Dass die Aufzählung dieser Publizitätserfordernisse eine taxative war, war also unbestritten.[58] Diskutiert wurde hingegen, ob es sich bei der Aufzählung von Lästerungen, Schmähungen, Verspottungen um eine abschließende oder um eine bloß beispielsweise handelte. Diese Frage hatte große praktische Bedeutung, weil von ihr abhing, ob Ehrverletzungen gegenüber dem Kaiser, die weder Lästerungen, Schmähungen noch Verspottungen waren, strafbar waren oder nicht.

Schon im Jahr nach dem Inkrafttreten des StG 1852 hielt Waser diese Aufzählung für eine demonstrative, und begründete diese mit der mangelnden logischen Trennschärfe der Begriffe Lästerung, Schmähung und Verspottung.[59] Auch Hye meinte kurz darauf, dass es sich bei den Begehungsformen Lästerungen, Schmähungen, Verspottungen um eine demonstrative Aufzählung handelte. Seiner Meinung nach war die Ehrfurchtsverletzung das Entscheidende, weshalb sie auch am Beginn des § 63 stand. Er verwies darauf, dass das StG auch in anderen Fällen, in denen unzweifelhaft demonstrative Aufzählungen gemeint waren, ganz ähnliche Formulierungen verwendete (§§ 491, 496).[60] Diese Auffassung von der demonstrativen Aufzählung teilten auch Janka[61] und Lammasch.[62]

Geyer hingegen hielt die Aufzählung der Ehrfurchtsverletzungen in § 63 für eine taxative.[63] Er begründete das damit, dass das StG in anderen Bestimmungen wesentlich deutlichere Formulierungen für bloß demonstrative Aufzählungen verwendete.[64] Diese Auffassung teilten auch Frühwald,[65] Stooß[66] und Finger.[67]

In der Praxis setzte sich die Auffassung von der demonstrativen Auffassung durch. Schon 1853 und 1855 erklärte das Justizministerium in Erlässen, dass nur diese Interpretation richtig sei.[68] Dementsprechend begnügten sich die österreichischen Gerichte in ihren Urteilen auch oft damit, eine Ehrfurchtsverletzung festzustellen, ohne diese konkret als Schmähung, Lästerung oder Verspottung zu qualifizieren.[69] Das lag wohl auch an der mangelnden Trennschärfe dieser Begriffe. Nicht zuletzt wegen dieser Interpretation war die Strafbarkeit der Majestätsbeleidigung in Österreich sehr weitgehend.[70]

b) Persönliche Beleidigungen

Die erste im Gesetz genannte Begehungsform waren direkte Beleidigungen des Kaisers.[71] Das umfasste jedenfalls Ehr-

[57] Diese Einteilung ist meines Erachtens diejenige, die sich aus dem Gesetzeswortlaut ergibt. Sie geht offenbar auf GEYER, Bemerkungen 390 zurück. Auch FINGER, Strafrecht 501–503 machte diese Einteilung. LAMMASCH, Grundriß 127 gab keine ausdrückliche Einteilung, aus dem Zusammenhang ergibt sich aber, dass er jener von Geyer folgte. Hye hingegen, der selbst unmittelbar an der Entstehung des StG 1852 beteiligt war (HOEGEL, Strafrecht 95–96), nahm eine andere Einteilung vor, die meiner Meinung nach deutlich weiter vom Gesetzeswortlaut entfernt ist. Nach HYE, Strafgesetz 743–750, gab es vier Begehungsformen, nämlich direkte Beleidigungen, Schmähungen. Lästerungen oder Verspottungen, wobei alle Begehungsformen außer der ersten nur dann strafbar sein sollten, wenn sie öffentlich, vor mehreren Leuten, in Druckschriften, bildlichen Darstelllungen oder sonstigen Schriften erfolgten. Auch FRÜHWALD, Handbuch 94 folgt dieser Einteilung. Meiner Meinung nach ist die Formulierung des § 63 grammatikalisch aber eindeutig so konstruiert, dass sich „öffentlich oder vor mehreren Leuten“ nur auf „Schmähungen, Lästerungen oder Verspottungen“ bezieht. Leider erklärt Hye nicht genau, woraus er seine Einteilung ableitet. Der wahrscheinlichste Grund dürfte § 58 des StG 1803 gewesen sein. In dieser Bestimmung war die Mitteilung von Schriften oder bildlichen Darstellungen ein Publizitätserfordernis für die Strafbarkeit einer Lästerung des Monarchen.

[58] Nach Hyes Einteilung des Deliktes gehörten auch Druckschriften, sonstige Schriften und bildliche Darstellungen zu dieser taxativen Auflistung von Publizitätserfordernissen. Insgesamt war die Frage der taxativen oder demonstrativen Aufzählung bezüglich schriftlicher oder bildlicher Majestätsbeleidigungen weniger bedeutsam. Schriftliche oder bildliche Ehrfurchtsverletzungen, die weder Lästerungen, Schmähungen noch Verspottungen waren, konnten allenfalls durch die Anordnung von Ausführungen geschehen: etwa indem eine Zeitung unmittelbar nach Ausführungen über die Erhöhung der Zivilliste des Kaisers darüber schrieb, dass es noch immer keine Altersversicherung für Arbeiter gab. (CZECH, Lump und Spitzbube 325, diesen Fällen lag freilich eine sehr weitgehende Auslegung des Begriffes der Ehrfurchtsverletzung zugrunde.) Im Ergebnis führten hier die gänzlich divergierenden Auffassungen von Hye und Geyer interessanterweise zum selben Ergebnis, nämlich, dass sie an sich strafbar waren. Für Hye waren (Druck-)Schriften oder Bilder Publizitätserfordernisse, die sich auf die Begehungsformen Lästerungen, Schmähungen, Verspottungen bezogen. Da diese Aufzählung seiner Meinung nach aber nur demonstrativ war, waren für ihn auch andere Ehrfurchtsverletzungen in (Druck-)Schriften oder Bildern strafbar. Nach Geyers Auffassung hingegen waren Ehrfurchtsverletzungen in (Druck-)Schriften oder Bildern ohnehin eine eigene von Lästerungen, Schmähungen und Verspottungen zu trennende Begehungsform. Diese Begehungsform war nach dieser Ansicht gerade nicht auf Lästerungen, Schmähungen und Verspottungen beschränkt; daher waren alle Ehrfurchtsverletzungen in (Druck-)Schriften oder Bildern jedenfalls strafbar.

[59] WASER, Majestätsbeleidigung.

[60] HYE, Strafgesetz 754–756.

[61] JANKA, Strafrecht 334.

[62] LAMMASCH, Grundriß 94.

[63] Diese Auffassung wurde schon vorher von Frühwald, Handbuch 94 vertreten, der allerdings keine Begründung für seine Meinung gab.

[64] GEYER, Bemerkungen.

[65] FRÜHWALD, Handbuch 94.

[66] STOOSS, Lehrbuch 481.

[67] FINGER, Strafrecht 515; als Beispiele für eindeutig demonstrative Aufzählungen verweist er auf die §§ 58 lit. c, 98 lit. b und 122 StG; übrigens war auch HYE, Strafgesetz 694 der Meinung, dass es sich bei der Aufzählung in § 58 lit. c um eine demonstrative handelte.

[68] Justiz-Ministerial-Erlässe vom 12. 12. 1853, Z. 18772, und vom 18. 6. 1855, Z. 12420; dazu FRÜHWALD, Fortbildung 15.

[69] CZECH, Lump und Spitzbub 70–71.

[70] DRDA, Entwicklung der Majestätsbeleidigung 111.

[71] Diese Begehungsform wurde nicht zuletzt deshalb ausdrücklich genannt, weil nach dem StG 1803 umstritten gewesen war, ob persönliche Beleidigungen des Kaisers unter § 58 subsumiert werden konnten; HYE, Strafgesetz 744, Anm.

furchtsverletzungen in persönlicher Anwesenheit des Kaisers. In diesem Zusammenhang wurde diskutiert, ob eine direkte Beleidigung nur dann vorlag, wenn der Kaiser selbst sie tatsächlich wahrnahm,[72] oder ob es schon reichte, dass er sie hätte wahrnehmen können.[73] Außerdem meinten manche Autoren an, dass auch Beschimpfungen in einem Brief, einem Bild oder einem Druckwerk, wenn er/es den Kaiser tatsächlich erreichte, als persönliche Beleidigung des Kaisers zu qualifizieren seien.[74] Tatsächlich hatten diese Überlegungen eher theoretischen Charakter. Persönliche Beleidigungen des Kaisers müssen, soweit sie überhaupt vorkamen, sehr selten gewesen sein.[75]

c) Schmähungen. Lästerungen, Verspottungen

Die zweite Gruppe von Begehungsformen umfasste drei ähnliche Begriffe, nämlich Schmähungen, Lästerungen und Verspottungen. Unter Schmähungen wurden allgemeine Beschimpfungen und der Vorwurf ehrenrühriger Handlungen verstanden. Lästerungen bestanden hingegen darin, dem Kaiser grob unsittliches Verhalten vorzuwerfen. Verspottungen schließlich lagen dann vor, wenn der Kaiser verächtlich oder lächerlich gemacht wurde.[76] Es bestand Einigkeit darüber, dass Schmähungen, Lästerungen und Verspottungen nur dann strafbar waren, wenn sie öffentlich oder vor mehreren erfolgten.

Das Erfordernis einer Äußerung vor mehreren trat an die Stelle der im StG 1803 genannten Äußerung in Gesellschaft. Jede Äußerung, die vor zumindest zwei Personen erfolgte, wurde als Äußerung vor mehreren angesehen. Nach der Judikatur des OGH war dieses Kriterium schon dann erfüllt, wenn die Äußerung auch nur von zumindest zwei Personen wahrgenommen werden konnte; es war nichterforderlich, dass die die Äußerung auch tatsächlich wahrnahmen. Die oberstgerichtliche Judikatur führte diesen Gedanken so weit, dass sie eine Ehrfurchtsverletzung vor mehreren Leuten auch dann bejahte, wenn die Äußerung vor Personen erfolgte, welche die Sprache der Äußerung gar nicht verstanden.[77]

Außerdem meinten sowohl Hye[78] als auch die Judikatur, dass das Gesetz nicht verlange, dass mehrere Personen gleichzeitig anwesend waren.

Das Landesgericht Salzburg nahm eine Äußerung vor mehreren auch bei einem Brief einer Gefangenen an, der Ehrfurchtsverletzungen gegenüber dem Kaiser enthielt. Dies wurde damit begründet, dass der Brief durch die Hände von zumindest zwei Gefängnisbediensteten ging, die damit die Gelegenheit hatten, die Ehrfurchtsverletzungen wahrzunehmen. In diesem Fall wäre wohl (auch) eine Ehrfurchtsverletzung durch Mitteilung oder Verbreitung einer Schrift vorgelegen, doch zog das Landesgericht Salzburg dies hier offenbar nicht in Betracht.[79] Es wird jedenfalls deutlich, dass die Judikatur eine sehr weitgehende Interpretation des Kriteriums „vor mehreren" vertrat.[80]

Ähnlich weit war auch die übliche Auslegung des Begriffs „öffentlich". Dieser wurde von der Judikatur in der Regel mit der Begehung an einem öffentlichen Ort gleichgesetzt.[81] An sich verstand der OGH unter einem öffentlichen Ort, einen Ort, „welcher für Jedermann zugänglich ist, und ohne Hindernis betreten werden kann."[82]

Das galt insbesondere für Straßen oder Plätze. Auch ein Feldweg, der nur gelegentlich benutzt wurde, wurde als öffentlicher Ort angesehen, genauso Gärten oder Hausflure.[83] Außerdem wurden auch Orte als öffentlich angesehen, die zwar nicht jedermann frei zugänglich waren, an denen aber eine größere Zahl von Menschen anwesend war – wie z.B. eine Gemeindeversammlung. Sogar Äußerungen in der eigenen Wohnung wurden, wenn sie auch auf der Straße oder im Hof gehört werden konnten, als öffentlich angesehen.[84] Insgesamt entsteht der Eindruck, dass im Zweifel nahezu immer ein öffentlicher Ort angenommen wurde.[85]

Der wesentliche Unterschied von öffentlichen Äußerungen zu solchen vor mehreren bestand darin, dass öffentliche Äußerungen auch dann strafbar waren, wenn sie nicht von mindestens zwei Personen wahrgenommen wurden. Sie mussten aber theoretisch wahrnehmbar sein – weshalb nur geflüsterte Aussagen selbst an einem öffentliche Ort nicht strafbar waren.[86]

Im Ergebnis bedeutete dies, dass der Unterschied zwischen öffentlichen Beleidigungen und solchen vor mehreren Leuten ziemlich gering war. In beiden Fällen bestand keine Strafbarkeit, wenn die Beleidigung so leise erfolgte, dass sie mit Sicherheit von niemandem außer dem Gesprächspartner des Gegners

[72] So FRÜHWALD, Strafgesetz 73.
[73] So HYE, Strafgesetz 734.
[74] HERBST, Strafrecht 203; GAMPP, Lehrbuch 22.
[75] Vgl. CZECH, Lump und Spitzbub 70.
[76] HYE, Strafgesetz 744.
[77] FLEISSNER, Crimen laesae maiestatis 259–260; obwohl Hye in der Regel für eine weitgehende Strafbarkeit eintrat, lehnte er diese Ansicht ausdrücklich ab, HYE, Strafgesetz 749, Anm.
[78] HYE, Strafgesetz 747.
[79] CZECH. Lump und Spitzbube 71–72.
[80] Zum StG 1803 hatte JENULL, Criminalrecht 48, Anm. f vertreten, dass Äußerungen vor engsten Angehörigen nicht strafbar sein sollten. HYE, Strafgesetz 748 lehnte diese Auffassung für das StG 1852 ausdrücklich ab. Dabei konnte er sich durchaus auf den geänderten Wortlaut stützen. Während die Formulierung „in Gesellschaft" des StG 1803 den engsten Familienkreis durchaus ausschließen mochte, ließ sich aus dem Kriterium „vor mehreren" des StG 1852 keine Ausnahme für Personen ableiten, die dem Täter besonders nahe standen.
[81] Kritisch HYE, Strafgesetz 744–745.
[82] HYE, Strafgesetz 746, Anm.
[83] CZECH, Lump und Spitzbube 74–75.
[84] Entscheidung des OGH vom 7. 3. 1855, FRÜHWALD, Fortbildung 15.
[85] CZECH, Lump und Spitzbube 74.
[86] HYE, Strafgesetz 745, Anm.

wahrgenommen werden konnte. In beiden Fällen war es aber auch keine Voraussetzung der Strafbarkeit, dass die Beleidigung tatsächlich auch von anderen gehört wurde. Das musste nur möglich sein – und in der Art dieser Möglichkeit bestand der Unterschied. Bei der Beleidigung vor mehreren musste die Möglichkeit konkret gegeben sein, es mussten also mehrere Leute in Hörweite gewesen sein; bei der öffentliche Beleidigung reichte hingegen schon die abstrakte Möglichkeit – unabhängig davon, ob konkret mehrere Leute in Hörweite waren.

d) Druckwerke, Schriften, Bilder

Ehrfurchtsverletzungen gegenüber dem Kaiser in Druckwerken wurden als besonders gefährlich empfunden. Die Gründe dafür waren offensichtlich: die Dauerhaftigkeit, die Möglichkeit schneller Vervielfältigung und leichter Verbreitung. Als Druckwerke wurde alles angesehen, was mechanisch vervielfältig wurde – und zwar sowohl Schriften (z.B. Bücher oder Zeitungen) als auch Bilder (Z.B. Drucke oder Fotos). Wegen der besonderen „Gefährlichkeit" von Druckwerken, war die Strafbarkeit von darin enthaltenen Ehrfurchtsverletzungen gemäß § 10 StG besonders weitgehend:

„Bei Verbrechen, die durch Druckschriften begangen werden, beginnt die Strafbarkeit der Handlung für den Verfasser, Uebersetzer, Herausgeber, Redacteur und Verleger (§. 7) mit der Uebergabe des zu vervielfältigenden Werkes zur Drucklegung; für die übrigen Schuldigen aber mit dem Anfange ihrer Mitwirkung."

Die Strafbarkeit begann hier schon vor der Drucklegung. Daraus ergab sich, dass weder der tatsächliche Druck noch die konkrete Verbreitung einer majestätsbeleidigenden Druckschrift eine Voraussetzung der Strafbarkeit war.[87]

Eine Besonderheit bei Strafdaten in Druckwerken bestand darin, dass seit dem Preßgesetz 1862[88] nicht nur ordentliche Strafverfahren gegen Verfasser etc. durchgeführt werden konnten. Daneben bestand auch die Möglichkeit des „objektiven Verfahrens", das lediglich darauf abzielte, eine Druckschrift zu konfiszieren ohne Personen zu verurteilen.[89]

Im Gegensatz zu Druckwerken waren mit (sonstigen) Schriften und bildlichen Darstellungen handschriftliche Aufzeichnungen und (nicht vervielfältigte) Originalbilder gemeint. Diese wurden vom Gesetzgeber des StG im Vergleich mit Druckwerken als weniger „gefährlich" eingeschätzt. Das zeigte sich daran, dass bei den nicht gedruckten Schriften und Bildern nicht schon deren Herstellung strafbar war. Hier wurde die Strafbarkeit erst durch die Mitteilung oder die Verbreitung begründet.

Nach Hyes Auffassung waren die Begriffe Mitteilung und Verbreitung als Synonyme zu verstehen und erfüllt, sobald ein Schriftstück oder ein Bild an eine andere Person weitergegeben wurde.[90] Das ergab sich für ihn daraus, dass – anders als bei den mündlichen Schmähungen, Lästerungen, Verspottungen – im Gesetz kein darüber hinausgehendes Erfordernis von Öffentlichkeit oder (möglicher) Kenntnisnahme durch mehrere genannt war. Die Strafbarkeit wurde durch die Weitergabe als solche begründet – unabhängig davon, ob der Adressat den ehrfurchtsverletzenden Inhalt auch tatsächlich zur Kenntnis nahm. Wenn der Adressat das nicht tat, lag aber nach Hyes Meinung nur ein Fall der versuchten Majestätsbeleidigung vor.[91]

e) Sonstige Ehrfurchtsverletzungen

Ob (öffentlich oder vor Mehreren erfolgte) Ehrfurchtsverletzungen, die keine Schmähungen, Lästerungen oder Verspottungen waren, strafbar waren, hing davon ab, ob diese Aufzählung taxativen oder demonstrativen Charakter hatte. Hye, der die Aufzählung für demonstrativ hielt, nannte als Beispiele für andere Formen von Ehrfuchtsverletzungen entehrende Handlungen an Statuen oder Bildern des Kaisers oder auch (vor dem Hintergrund des Libenyi-Attentats)[92] das Gutheißen eines Attentats. Nach seiner Auffassung sollte die Aufzählung des § 63 vor allem ein Maßstab dafür sein, welche Schwere eine Ehrfurchtsverletzung haben musste, um strafbar zu sein. Strafbar sollten jedenfalls persönliche Beleidigungen, Schmähungen, Lästerungen und Verspottungen sein – und andere Ehrfurchtsverletzungen dann, wenn sie zumindest genauso schwerwiegend waren.

Als Beispiel für weniger schwerwiegende Ehrfurchtsverletzungen nannte Hye vor allem Äußerungen, die in ihrer Wortwahl zwar die seiner Meinung erforderliche Ehrfurcht gegenüber dem Kaiser vermissen ließen, inhaltliche aber weder Kritik oder Beleidigungen enthielten. Bei diesen Beispielen ging Hye offenbar davon aus, dass sie gar nicht tatbestandsmäßig waren, sodass Überlegungen zum Vorsatz nicht mehr notwendig waren.

„Als in einer Wirthsstube unter schlichten, durch und durch loyalen und ihrem angestammten Herrn und Kaiser unerschütterlich-treuen Landleuten mehrere Züge von der ritterlichen Tapferkeit und Furchtlosigkeit unseres Kaisers im letzten Feldzuge von Italien (als Prinz), und sofort in Ungarn (schon als Kaiser) erzählt wurden, äußerste dieser und jener: ‚Unser Kaiser ist doch ein Mord-, ein Teufels-, ein sak'rischer, ein verdammter ….!' – Ein anderes Mal äußerste Jemand unter ganz ähnlichen

[87] Die Bedeutung dieser Bestimmung war umstritten. Einerseits wurde vertreten, dass durch die Sondervorschrift des § 10 das jeweilige Delikt bereits zu dem in dieser Bestimmung genannten Zeitpunkt vollendet war. Das bedeutete eine Abänderung der allgemeinen Regeln über die Versuchsstrafbarkeit. Nach der Gegenansicht handelte es sich bei § 10 nur um eine spezielle Präzisierung der allgemeinen Regeln über die Versuchsstrafbarkeit. Nach der ersten Ansicht konnten Delikte in Druckschriften nicht versucht werden, nacch der zweiten schon; OLECHOWSKI, Preßrecht 433–434.

[88] RGBl. 6/1863.

[89] Zum objektives Verfahren generell siehe: OLECHOWSKI, Preßrecht 636–647; zum objektiven Verfahren speziell bei Majestätsbeleidigungen: CZECH, Lump und Spitzbube 302–344.

[90] HYE, Strafgesetz 752, Anm.; anderer Ansicht war FRÜHWALD, Handbuch 94, der meinte, dass es zwar eine Mitteilung, aber keine Verbreitung war, wenn jemand eine ehrfurchtsverletzende Schrift einer Behörde überreichte.

[91] HYE, Strafgesetz 751, Anm.

[92] Zu Attentat siehe: BENSCH, Mordanschlag; DANIEK, Mordversuch; KOVARIK, Attentat.

Verhältnissen, als vor mehreren Leuten zarte und gemüthliche Züge aus dem Familienleben des Monarchen erzählt wurden: ‚Er ist doch ein lieber und ein ganzer .... dieser Kaiser Franz Joseph!“ [93]

Anders als § 58 des StG 1803 enthielt das StG 1852 nicht mehr das Erfordernis, eine Majestätsbeleidigung müsse unverkennbar geeignet sein, Abneigung gegen den Landesfürsten zu erzeugen, um strafbar zu sein. Auch weil dieses Erfordernis nicht mehr gegeben war, stellte sich 1852 die Frage, ob eine Majestätsbeleidigung auch durch Unterlassung begangen werden konnte. An sich war § 1 über die Begehung durch Unterlassung auch auf die Majestätsbehandlung anwendbar. Tatsächlich waren durchaus auch Ehrfurchtsverletzungen durch Unterlassungen denkbar – etwa, indem man vor dem Kaiser nicht aufstand oder den Hut nicht zog.[94]

Hye meinte, dass es sich dabei zwar um Ehrfurchtsverletzungen handelte, die aber die für eine Strafbarkeit erforderliche Schwere nicht erreichten. Das entsprach seiner Auffassung, dass die Begehungsformen Schmähung, Lästerung und Verspottung zwar nur eine demonstrative Aufzählung waren, gleichzeitig aber implizierten, welche Schwere eine Ehrfurchtsverletzung haben musste, um strafbar zu sein. Diese Überlegung passt freilich nicht so ganz zu den von Hye genannten Beispielen für Unterlassungen. Die Begehungsformen Schmähung, Lästerung und Verspottung bezogen sich auf Beleidigungen des Kaisers in Abwesenheit. Die Unterlassung, vor dem Kaiser aufzustehen, oder den Hut zu ziehen, setzte aber notwendigerweise dessen Anwesenheit voraus. Es hätte sich also um einen Fall der persönlichen Beleidigung des Kaisers gehandelt, und darauf bezog sich die Aufzählung von Schmähung, Lästerung oder Verspottung nach dem Gesetzeswortlaut und der einhelligen Lehre (auch Hyes [95]) gerade nicht.[96]

f) Vorsatz

Die Majestätsbeleidigung blieb auch im StG 1852 ein Vorsatzdelikt, wobei sich der Vorsatz jedenfalls darauf beziehen musste, die Ehrfurcht gegenüber dem Kaiser zu verletzen. Ob der Täter darüber hinaus auch den Vorsatz haben musste, den Kaiser zu lästern, zu schmähen oder zu verspotten, hing davon ab, ob man deren Aufzählung als taxativ oder demonstrativ beurteilte. Wie bereits ausgeführt betrachtete die Judikatur diese Aufzählung als bloß demonstrativ und verlangte daher lediglich einen Vorsatz Ehrfurchtsverletzung. Selbst das Vorliegen dieses Vorsatzes wurde in der Praxis nicht sonderlich genau geprüft. Immer wieder gab es Verurteilungen, bei denen das Vorliegen eines entsprechenden Vorsatzes mehr als zweifelhaft war. Markant ist etwa das Beispiel des Josef Mayrhofer, der 1861 auf den Vorwurf, er sei ein Lump, antwortete:

„Ich bin kein Lump und wenn ich ein Lump bin, dann ist der Kaiser auch einer.“ [97]

Mayrhofer wurde in zweiter Instanz wegen Majestätsbeleidigung verurteilt. Nach der Ansicht des Oberlandesgerichts Wien lag allein deshalb eine Majestätsbeleidigung vor, weil das Wort Lump in unmittelbarem Zusammenhang mit dem Kaiser verwendet worden war.

Im Ergebnis bedeutete diese Judikaturlinie, dass es praktisch unabhängig von der subjektiven Tatseite zu einer Verurteilung kommen konnte, wenn nach Meinung des Gerichts eine objektive Ehrfurchtsverletzung vorlag – und auch diesbezüglich vertraten die Gerichte eine sehr weitgehende Auffassung.[98] Bis zum Inkrafttreten der StPO 1873 konnte sich diese Praxis auf eine Beweisregel in der StPO 1853 stützen. § 268 dieses Gesetzes, dem die freie Beweiswürdigung fremd war, normierte

„Wenn der Beschuldigte zwar die Verübung der Tat gesteht, aber angibt, daß er nicht mit bösem Vorsatze gehandelt, oder daß er ein geringeres Uebel als das wirklich erfolgte beabsichtigt habe, so kann seine Angabe nur dann für glaubwürdig gehalten werden, wenn sich die That plötzlich ereignet hat, und das Uebel nicht schon in der Handlung selbst gelegen ist, oder nach der natürliche Ordnung der Dinge nicht schon nothwendig aus der Handlung erfolgen mußte, oder nicht gewöhnlich aus solchen Handlungen zu erfolgen pflegt.“ [99]

Diese Bestimmung bedeutete praktisch, dass die subjektive Tatseite nicht weiter geprüft werden musste, wenn nur der objektive Tatbestand verwirklicht war. Die StPO 1873 enthielt keine vergleichbaren Bestimmungen mehr; vielmehr führte sie endgültig den Grundsatz der freien Beweiswürdigung ein.[100] Trotzdem dürfte sich die Judikatur bezüglich der subjektiven Tatseite der Majestätsbeleidigung nicht entscheidend geändert haben.

Eine Besonderheit der Majestätsbeleidigung bestand darin, dass der Täter auch dann nicht straflos werden konnte, wenn er bewies, dass er seine Äußerung in gutem Glauben gemacht hatte, ja nicht einmal dann, wenn er deren Wahrheit beweisen konnte. Dies wurde im Umkehrschluss aus den Bestimmungen über die allgemeinen Ehrdelikte abgeleitet. Dort war nämlich ausdrücklich normiert, dass der Beweis der Wahrheit oder des guten Glaubens zur Straflosigkeit führen konnte.[101] Bezüglich der Majestätsbeleidigung fehlte aber eine vergleichbare Regelung. Offenbar war hier die Sorge groß, dass versuchte oder er-

[93] HYE. Strafgesetz 757, Anm.; Zum Verständnis dieser Beispiele ist zu bedenken, dass „Kerl“ im Sprachgebrauch des 19. Jahrhunderts ein wesentlich drastischerer Kraftausdruck war als heute. Das wird nicht zuletzt daran deutlich, dass Hye das Wort nicht auszuschreiben wagte und es durch „....“ ersetzte.

[94] HYE, Strafgesetz 759.

[95] HYE, Strafgesetz 743–753.

[96] Wenn man freilich annahm, dass eine persönliche Beleidigung nur vorlag, wenn der Kaiser sie tatsächlich wahrnahm, wäre das Nicht-Ziehen des Hutes dann keine persönliche Beleidigung gewesen, wenn es der Kaiser es nicht bemerkt hätte.

[97] CZECH, Lump und Spitzbube 180–181.

[98] Besonders deutlich wurde diese Nichtbeachtung der subjektiven Tatseite im „objektiven Verfahren“. Siehe die konkreten Beispiele bei: CZECH, Lump und Spitzbube 318–344.

[99] Dazu HYE, Strafgesetz 764, Anm.

[100] RGBl. 119/1973.

[101] § 490.

folgreiche Beweise der Wahrheit oder des guten Glaubens zum öffentlichen „Waschen von Schmutzwäsche“ geführt hätten.

g) Strafe

Die Strafdrohung für Majestätsbeleidung im StG 1852 entsprach mit schwerem Kerker von einem bis fünf Jahren jener des § 59 im StG 1803. Eine Unterschreitung des Strafmaßes war gemäß § 54 möglich. In der Praxis wurde diese Möglichkeit häufig genützt. Eine Folge davon war allerdings, dass in diesem Fall nach der StPO 1873 eine Berufung gegen die Strafhöhe nicht möglich war.[102]

3. Störung der öffentlichen Ruhe

Im StG 1852 wurde die Majestätsbeleidigung ganz von der Ruhestörung getrennt, deren Unterfall sie im StG 1803 gewesen war. Das Delikt der Ruhestörung gab es aber auch nach 1852 unter der leicht geänderten Bezeichnung „Störung der öffentlichen Ruhe“ in § 65. Trotz der Trennung der beiden Delikte war auch in der Ruhestörung ein gegen den Kaiser gerichtetes Verhalten pönalisiert:

„Des Verbrechens der Störung der öffentlichen Ruhe macht sich schuldig, wer öffentlich oder vor mehreren Leuten, oder in Druckwerken, verbreiteten Schriften oder bildlichen Darstellungen

a) zur Verachtung oder zum Hasse wider die Person des Kaisers [...] aufzureizen versucht,“

Die Abgrenzung von § 65 lit. a 1. Fall zur Majestätsbeleidigung war unklar. Die Begehungsformen (öffentlich, vor mehreren, in Druckwerken, Schriften, Bildern) entsprachen weitestgehend jenen des § 63. Nur die persönliche Beleidigung des Kaisers war nicht genannt. Außerdem gab es keine Einschränkung auf Schmähungen, Lästerungen oder Verspottungen. Dies war aber insofern wenig relevant, als deren Aufzählung auch in § 63 ganz überwiegend als nur demonstrativ angesehen wurde.

Es ist kaum vorstellbar, dass jemand zu Hass oder Verachtung gegen den Kaiser aufrief, ohne dabei auch eine Majestätsbeleidigung zu begehen, Hye meinte daher, dass der Unterschied im Vorsatz gelegen sei: Während für eine Majestätsbeleidigung schon Eventualvorsatz genüge, sei für die Ruhestörung nach § 65 lit. a Absicht erforderlich. Konsequenterweise leitete er daraus ab, dass die Ruhestörung nach § 65 lit. a die Majestätsbeleidigung konsumiere. Hye sah zumindest in dieser Form der Ruhestörung das schwerwiegendere Delikt, das (trotz gleicher Strafdrohung!) auch schwerer bestraft werden sollte.[103] Gerade angesichts der völlig identen Strafdrohungen scheint dieser Gedanke aber nicht völlig in das System des StG zu passen. Hyes Überlegungen liefen in etwa darauf hinaus, dass die gegen den Kaiser gerichtete Ruhestörung eine Art Qualifikation der Majestätsbeleidigung war – das entsprach aber schlichtweg nicht der Formulierung der §§ 63 und 65.

In der Praxis spielte die gegen den Kaiser gerichtete Ruhestörung jedenfalls eine geringe Rolle. Die Gerichte beließen es bei Verurteilungen wegen Majestätsbeleidigung – wohl auch, weil die Praxis bei der Annahme eines Vorsatzes sehr großzügig war, während für eine Verurteilung nach § 65 lit. a die Absicht des Täters hätte nachgewiesen werden müssen.[104]

4. Beleidigung der Mitglieder des kaiserlichen Hauses

Im StG 1803 war ausschließlich der Monarch in besonderer Weise strafrechtlich geschützt gewesen. Alle Straftaten gegen sonstige Mitglieder des Kaiserhauses unterlagen den allgemeinen Strafbestimmungen. Das änderte sich 1852 durch das in § 64 neu eingeführte Delikt der Beleidigung der Mitglieder des kaiserlichen Hauses:

„Werden derlei Handlungen, oder thätliche Beleidigungen gegen andere Mitglieder des kaiserlichen Hauses vorgenommen, so sind sie, insofern sich darin nicht ein schwerer verpöntes Verbrechen darstellt, als Verbrechen mit Kerker von einem bis zu fünf Jahren zu bestrafen.“

In diesem Delikt wurden sämtliche Begehungsformen der Majestätsbeleidigung auch in Bezug auf die anderen Mitglieder des Kaiserhauses pönalisiert. Darüber hinaus wurden auch tätliche Beleidigungen gegen diese unter Strafe gestellt. Unter tätlichen Beleidigungen waren alle Angriffe oder Handgreiflichkeiten zu verstehen, die aber noch kein anderes Delikt wie insbesondere Körperverletzung verwirklichten.[105] Bezüglich des Kaisers verwirklichten tätliche Beleidigungen aufgrund des weitgehenden Tatbestandes schon das Delikt des Hochverrats. Die anderen Mitglieder des Kaiserhauses waren aber vom Tatbestand des Hochverrats nicht erfasst. Daher waren einerseits tätliche Beleidigungen eine Begehungsform des § 64, und andererseits enthielt § 64 eine Subsidiaritätsklausel, aus der sich ergab, dass sonstige, gravierendere Angriffe auf Mitglieder des Kaiserhauses nach den allgemeinen Vorschriften des StG strafbar waren. Bezüglich des Kaisers war eine solche Bestimmung nicht erforderlich, weil alle Angriffe auf ihn ohnehin Hochverrat waren. Lediglich Straftaten gegen das Vermögen des Kaisers unterlagen den allgemeinen Vorschriften. Sonstige Mitglieder des Kaiserhauses standen hingegen nur bezüglich ihrer Ehre unter erhöhtem strafrechtlichem Schutz.

Wer überhaupt ein Mitglied des Kaiserhauses war, ergab sich aus dem Familienstatut von 1839.[106] Dieses normierte in § 1.

„Das Allerhöchste Erzhaus besteht:
aus dem Kaiser, als Oberhaupt desselben,
aus dessen Gemahlinn,
aus den etwa vorhandenen Witwen seiner Regierungs-Verfahren,
aus den Herren Erzherzogen und Frauen Erzherzoginnen, welche von des regierenden Kaisers Majestät, oder von einem der Söhne der gemeinschaftlichen Stammeltern, der Kaiserinn und Königinn Maria Theresia und des Römischen Kaisers Franz I. M.M. aus standesgemässer von dem jedesmaligen Allerhöchsten Familien-Oberhaupte genehmigter Ehe in männlicher Linie abstammen, und zwar die Frauen Erzherzoginnen, in so lange sie nicht außer dem Erzhause standesmäßig vermählt sind, endlich

[102] § 283 StPO 1873.
[103] HYE, Strafgesetz 787, Anm.
[104] Vgl auch CZECH, Lump und Spitzbube 85.
[105] HYE, Strafgesetz 777; tätliche Beleidigungen waren an sich in § 496 geregelt.
[106] ÖStA, HHStA, Familienurkunden Nr. 2362.

aus den anerkannten Gemahlinnen der Herren Erzherzoge, auch als Witwen, so lange sie im Witwenstande verbleiben."

Das Familienstatut war bis zum Ende der Monarchie geheim. Das führte zu der rechtsstaatlich durchaus bedenklichen Situation, dass sich weder aus dem § 64 noch aus dem StG insgesamt noch aus anderen Gesetzen eindeutig ergab, wer durch dieses Delikt überhaupt geschützt war. Finger kritisierte dies zu Recht. Gleichzeitig geht aus seinen diesbezüglichen Ausführungen hervor, dass trotzdem ziemlich genau bekannt war, wie das Familienstatut die Mitgliedschaft im Kaiserhaus definierte.[107] Letzte Sicherheit konnte aber immer nur im Einzelfall durch eine Anfrage beim Ministerium des Äußern und des kaiserlichen Hauses erzielt werden.[108]

Keine Mitglieder des Kaiserhauses waren morganatische Ehegatten von Mitgliedern und die Kinder aus solchen Ehen. Ein Mitglied, das eine morganatische Ehe einging, blieb aber Mitglied des Kaiserhauses und somit durch § 64 geschützt. Konkret bedeutete dies etwa, dass Erzherzog-Thronfolger Franz Ferdinand auch nach seiner Hochzeit mit Sophie Chotek durch § 64 geschützt blieb – für seine Frau und seine Kinder galt das aber nicht.

Jene Erzherzöge, die freiwillig aus dem Kaiserhaus ausschieden, verloren mit ihrem Austritt den Schutz des § 64.[109] Bei verheirateten Erzherzoginnen konnte es vorkommen, dass die Regelungen des Familienstatus nicht der landläufigen Vorstellung von Familienzugehörigkeit entsprachen. Nach dem Familienstatut waren (geborene) Erzherzoginnen nicht mehr Mitglieder des Kaiserhauses, sobald sie heirateten (außer sie heirateten einen Erzherzog).[110] Sie waren wohl noch Familienmitglieder im landläufigen Sinn, aber nicht mehr Mitglieder des Herrscherhauses im Sinn des Familienstatuts. 1863 entschied der OGH aber, dass auch ehemalige Erzherzoginnen, die außerhalb des Erzhauses verheiratet waren, durch § 64 geschützt waren.[111]

Da das Objekt der Majestätsbeleidigung ausschließlich der regierende Kaiser war, verwirklichten auch Beleidigungen eines abgedankten Kaisers das Delikt des § 64, nicht aber jenes der Majestätsbeleidigung. Diese Frage war insbesondere bis zum Tod des 1848 abgedankten Kaisers Ferdinand 1875 durchaus relevant, wenn auch keine konkreten Beleidigungen Ferdinands nach seiner Abdankung überliefert sind. Auch die Beleidigung allfälligen Regenten[112] hätte wohl nur § 64, nicht aber § 63 verwirklicht. Genauso wenig waren abgedankte Monarchen oder Regenten durch Hochverrat nach § 58 lit. a geschützt.

Da nur der regierende Kaiser im Delikt der Majestätsbeleidigung geschützt war, konnte dieses Delikt nicht durch Beleidigungen eines bereits verstorbenen Monarchen verwirklicht werden. Dies war auch schon zur Vorgängerbestimmung des § 58 im StG 1803 judiziert worden.[113] Das 1852 neu eingeführte Delikt der Beleidigung der Mitglieder des kaiserlichen Hauses wurde hingegen von der Judikatur so weit interpretiert, dass es auch Beleidigungen verstorbener Mitglieder des Kaiserhauses umfasste,[114] insbesondere auch Beleidigungen verstorbener Herrscher. Tatsächlich kam es zu Verurteilungen wegen Beleidigungen Maria Theresias und sogar Rudolfs I. – etwa 600 Jahre nach seinem Tod.[115] Finger meinte mit Recht, dass diese extreme Auslegung des § 64 eine objektive Geschichtsschreibung praktisch unmöglich machte – dies umso mehr, als auch hier der Beweis der Wahrheit oder des guten Glaubens als nicht zulässig erachtet wurde.

Durch Beleidigungen des Kaiserhauses als Gesamtheit wurden nach einhelliger Ansicht sowohl § 63 als auch § 64 in Realkonkurrenz verwirklicht, weil die undifferenzierte Beleidigung des ganzen Hauses eine Beleidigung des Kaisers und der anderen Mitglieder in sich schloss.

Die Strafdrohung des § 64 mit einem bis fünf Jahren (einfachem) Kerker unterschied sich nur durch den geringeren Grad der Kerkerstrafe von jenem der Majestätsbeleidigungen.

5. Anwendungsbereich und Auslandsbezüge

Anders als das StG 1803 galt das StG 1852 bei seinem Inkrafttreten für alle Länder der Monarchie (mit Ausnahme der Militärgrenze), also auch für Ungarn. Im Zuge der Ausgleichsbemühungen ab 1860 wurde das StG in Ungarn (aber nicht in Kroatien) schon 1861 wieder außer Kraft gesetzt.[116] Somit waren Ungarn nur von 1852 bis 1861 Inländer im Sinne des StG, danach aber wieder Ausländer.

Wie schon das StG 1803[117] war das StG 1852 generell auf alle Straftaten im Inland sowie auf Straftaten, die von Inländern im Ausland begangen wurden, anwendbar.[118] Die Sonderbestimmung, nach der auch besonders gewichtige Straftaten, die Ausländer im Ausland begangen hatten, nach österreichischem Recht strafbar waren, wurde gegenüber dem Gesetz von 1803 präzisiert. In § 38 waren nämlich nicht mehr, wie im § 32 von 1803, verletzte Rechtsgüter aufgezählt, sondern konkrete Delikte, nämlich Hochverrat sowie die Verfälschung österreichischer öffentlicher Kreditpapiere oder Münzen.

Im Ergebnis änderte sich daher nichts: Hochverrat blieb auch dann strafbar, wenn er von Ausländern im Ausland begangen wurde, bei Majestätsbeleidigung, bei der Beleidigung von Mitgliedern des Kaiserhauses und bei Ruhestörung war das aber

[107] FINGER. Strafrecht 517–518.
[108] HAUKE, Monarchenrecht 113.
[109] Im Einzelnen waren das die Erzherzöge Johann Salvator (Johann Orth), Leopold Salvator (Leopold Wölfling) und Peter Ferdinand (Ferdinand Burg). Ein Sonderfall war Erzherzog Heinrich, der einige Jahre nach seinem Austritt wieder in das Erzhaus aufgenommen wurde; dazu: LIST, Erzherzoge.
[110] Dazu SCHMETTERER, Kaiserhaus 15.
[111] ANONYMUS, Strafrechtliche Entscheidungen.
[112] Geregelt in § 10 des Familienstatuts.
[113] HYE, Strafgesetz 680–681, 686, 741–742.
[114] Justiz-Ministerial-Erlass vom 10. 6. 1854, Z. 5887; FRÜHWALD, Fortbildung 15.
[115] Sten.Prot. AH., XI. Sess.,341. Sitzung, 22. 2. 1895; FINGER, Strafrecht 518.
[116] LOEFFLER, Strafrecht 38.
[117] §§ 30–31 StG 1803.
[118] §§ 36–37.

nicht der Fall. Auch die schon im Vormärz entwickelte Lehre, dass zwar der Hochverrat selbst strafbar war, wenn er im Ausland von Ausländern begangen wurde, nicht aber die unterlassene Hinderung oder Anzeige, wurde für das StG 1852 weiterhin vertreten.[119]

Der Schutz ausländischer Staatsoberhäupter war im StG 1852 differenziert geregelt. Einen besonderen Schutz vor Beleidigungen genossen sie in Österreich nicht. So wie bisher unterlagen Beleidigungen ausländischer Staatsoberhäupter in Österreich aber den allgemeinen Bestimmungen über strafbare Handlungen gegen die Ehre. Dabei war die Beleidigung eines ausländischen Staatsoberhaupts aber ein besonderer Erschwerungsgrund (§ 494 lit. a).[120] Tathandlungen gegen fremde Staatsoberhäupter nach § 58 lit. a StG (also Verletzungen oder Gefährdungen von Körper, Gesundheit und Freiheit sowie die Hinderung an der Ausübung der – jeweiligen – Regierungsrechte) konnten unter bestimmten Voraussetzungen aber auch in Österreich qualifiziert strafbar sein. Im Einzelnen ordnete § 66 dazu an:

„Wer eine der in dem §. 58 bezeichneten Handlungen gegen einen deutschen Bundesstaat oder gegen ein Oberhaupt eines dieser Staaten begeht, macht sich, in soferne sich darin nicht ein schwerer verpöntes Verbrechen darstellt, ebenfalls des Verbrechens der Störung der öffentlichen Ruhe schuldig, und ist mit Kerker von einem bis zu fünf Jahren, bei erschwerenden Umständen aber mit schwerem Kerker von fünf bis zu zehn Jahren zu bestrafen.

Desselben Verbrechens macht sich schuldig, und ist auf dieselbe Art zu bestrafen, wer eine dieser Handlungen gegen einen anderen fremden Staat oder gegen dessen Oberhaupt unternimmt, in soferne von dessen Gesetzen oder durch besondere Verträge die Gegenseitigkeit verbürgt, und im Kaiserthume Österreich gesetzlich kundgemacht ist."

Der besondere Schutz für ausländische Staatsoberhäupter galt nach § 66 Abs. 1 somit nur für die Staatsoberhäupter des Deutschen Bundes in jedem Fall.[121] Als der Deutsche Bund 1866 aufgelöst wurde, verlor diese Bestimmung Ihren Anwendungsbereich.[122] Von nun an wurden die deutschen Staatsoberhäupter genauso wie die anderen ausländischen Staatsoberhäupter strafrechtlich nur unter der Bedingung des § 66 Abs. 2 StG besonders geschützt: Der entsprechende ausländische Staat müsste den österreichischen Kaiser und Staat genauso schützen – sei es durch gesetzliche Bestimmungen oder Staatsverträge. Tatsächlich galt diese Gegenseitigkeit nur für Russland.[123]

In seiner dogmatischen Konstruktion war § 66 eine seltsame Kombination von Verweisen auf zwei andere Delikte. Die Tathandlungen waren jene des § 58 nur mit einem anderen Objekt, nämlich einem fremden Staat oder Staatsoberhaupt. Diese Tathandlungen waren dann aber nicht als Hochverrat strafbar und verwirklichten auch kein eigenes Delikt, sondern einen Sonderfall der Ruhestörung – obwohl die Tathandlungen des § 66 gerade nicht jenen des § 65 entsprachen.

Ebenso wie § 64 enthielt § 66 eine Subsidiaritätsklausel. Die war beim Hochverrat nach § 58 lit. a nicht erforderlich, weil der ohnehin in jedem Fall mit der schwersten Strafe, nämlich dem Tod bedroht war. Bei § 66 war es hingegen (wie bei § 64) durchaus möglich, dass die Tathandlung auch ein anderes Delikt (z.B. Mord) verwirklichte. Wenn dieses andere Delikt schwerer bedroht war als § 66, verdrängte es diesen wegen der Subsidiaritätsklausel.[124]

Die ungarischen Unabhängigkeitsbestrebungen innerhalb der Doppelmonarchie machten übrigens auch vor dem Thema Majestätsbeleidigung nicht halt: Ab 1861 waren Beleidigungen des österreichischen Kaisers, wenn sie in Ungarn von Ungarn begangen wurden, an sich nicht mehr nach dem österreichischen StG strafbar (weil die Sonderregel des § 38 hier nicht anwendbar war). Bemerkenswert ist aber, dass es nach der ungarischen Lehre auch nicht nach ungarischem Recht strafbar war, den Monarchen zu beleidigen, wenn er nur als Kaiser von Österreich beleidigt wurde. Dies wurde damit begründet, dass der Kaiser von Österreich ein „ausländischer Monarch" sei – und das obwohl es sich zwangsläufig um denselben Mann handelte, der auch König von Ungarn war.[125] In der cisleithanischen Lehre und Judikatur hingegen wurde offenbar nicht in Zweifel gezogen, dass es nach § 63 auch strafbar war, nur den König von Ungarn zu beleidigen. Ich nehme an, dass es in der Praxis nur selten vorgekommen ist, dass Franz Joseph in Cisleithanien explizit und nur als König von Ungarn oder in Ungarn ausschließlich als Kaiser von Österreich beleidigt wurde. Dass diese Abgrenzung in Ungarn trotzdem so betont wurde, war wohl einfach Ausdruck der ungarischen Tendenz, bei jeder Gelegenheit die ungarische Unabhängigkeit und Eigenstaatlichkeit zu betonen.

III. Meinungsfreiheit?

Aus heutiger Sicht drängt sich angesichts der so weitgehenden Strafbarkeit von Ehrfurchtsverletzungen gegenüber Kaiser und Mitgliedern des Kaiserhauses die Frage nach dem Verhältnis zwischen diesen Delikten und der Meinungsfreiheit auf.

Im Neoabsolutismus stellte sich diese Frage nicht, weil es schlichtweg keine Meinungsfreiheit gab. Das Grundrechtspatent 1849 hatte die Meinungsfreiheit in § 5 zwar ausdrücklich

[119] HYE, Strafgesetz 723–724.

[120] Dies galt nach dem Gesetzeswortlaut allerdings nur für die Staaten, die „mit dem österreichischen Kaiserstaate in anerkannt völkerrechtlichem Verkehre" standen; FRÜHWALD, Handbuch 381 meinte daher, dass in einem konkreten Anwendungsfall eine Anfrage beim Außenministerium empfehlenswert sei.

[121] Verletzungen der Existenz, Integrität, Sicherheit und Verfassung des Deutschen Bundes selbst waren hingegen nach § 58 lit. c Hochverrat; Angriffe auf das Oberhaupt des Deutschen Bundes konnte es mangels eines solchen nicht geben.

[122] Friede von Prag, insbesondere Art. 4, RGBl. 103/1688.

[123] FINGER, Strafrecht 511.

[124] HYE, Strafgesetz 801 meint, dass die Subsidiaritätsklausel nur klarstellenden Charakter hatte, weil es sich um einen Fall der Idealkonkurrenz handelte.

[125] RUMPLER, Chance für Mitteleuropa 411–412.

festgeschrieben, aber es wurde nie umgesetzt.[126] Die Silvesterpatente 1851 ließen dann nur vier Grundrechte bestehen, zu denen die Meinungsfreiheit nicht gehörte.[127]

Mit der endgültigen Rückkehr zum Konstitutionalismus 1867 wurde auch die Meinungsfreiheit wieder in Art. 13 des StGG-ARStB[128] verankert. Allerdings bestand ein formeller Gesetzesvorbehalt: Die Ausübung der Meinungsfreiheit war nur im Rahmen der Gesetze garantiert – und eines der Gesetze, die den Rahmen der Ausübung der Meinungsfreiheit absteckten, war eben das StG 1852.

Die Vorstellung, dass ein Grundrecht durch ein Gesetz verletzt werden könnte, war dem System der Dezemberverfassung überhaupt fremd. Der Adressat der Grundrechte war die Verwaltung, nicht die Gesetzgebung. Das Reichsgericht konnte lediglich feststellen, dass Verwaltungsorgane Grundrechte verletzt hatten.[129] Eine Verletzung der Grundrechte durch den Gesetzgeber war schon begrifflich nicht möglich. Es hätte sowohl am Beurteilungsmaßstab gefehlt als auch an einem Organ, das die Verletzung hätte feststellen oder gar sanktionieren können. Gemäß Art. 7 des StGG-RiG war den Gerichten die Überprüfung ordentlich kundgemachter Gesetze untersagt – das galt sowohl für die ordentlichen Gerichte als auch für die Gerichtshöfe des öffentlichen Rechts. Somit bestand nach der ordnungsgemäßen Kundmachung der Gesetze keine Möglichkeit mehr, diese zu überprüfen (Nur der Gesetzgeber selbst konnte sie wieder abändern.)

Aber selbst wenn es einen Verfassungsgerichtshof gegeben hätte, wie es Jellinek 1882 in seiner berühmten Schrift erstmals überlegt und gefordert hatte,[130] hätte wohl noch immer der dogmatische Hintergrund gefehlt. Die Lehre vom Stufenbau der Rechtsordnung war noch nicht entwickelt und die Vorstellung inhaltlich verfassungswidriger Gesetze war der zeitgenössischen Dogmatik ebenfalls fremd. Es gab zwar schon Begriffe von formeller und materieller Verfassungswidrigkeit, aber unter materieller Verfassungswidrigkeit verstand man lediglich Verstöße gegen die Kompetenzverteilung, keine (sonstigen) inhaltlichen Widersprüche zu Verfassungsbestimmungen wie insbesondere Grundrechten.[131]

Mangels eines Organs mit entsprechender Kompetenz und ohne dogmatischen Hintergrund war es bis zum Ende der Monarchie begrifflich nicht möglich, dass Grundrechte durch Gesetze verletzt wurden. Es gab keine Instanz, die Grundsätze dafür hätte entwickeln können, welche Erfordernisse ein gesetzlicher Eingriff aufgrund eines formellen Gesetzesvorbehalts hätte erfüllen müssen, um verfassungswidrig zu sein. Das blieb dem VfGH der Republik vorbehalten. Für die Monarchie blieb es dabei, dass die Meinungsfreiheit nur im Rahmen der Gesetze gewährleistet war und somit jegliche gesetzliche Einschränkung der Meinungsfreiheit zulässig war; etwa durch die Delikte der Majestätsbeleidigung und der Beleidigung der Mitglieder des kaiserlichen Hauses – und wie die vorstehenden Ausführungen gezeigt haben, waren das durchaus weitgehende Einschränkungen.

Abkürzungen:

AH	Abgeordnetenhaus des österreichischen Reichsrats
HHStA	Haus-, Hof- und Staatsarchiv
OGH	Oberster Gerichtshof
ÖStA	Österreichisches Staatsarchiv
PGS	Politische Gesetzessammlung
PreßG	Gesetz gegen den Missbrauch der Presse
ProvPreßG	Provisorisches Preßgesetz
PreßVO	Provisorische Verordnung gegen den Missbrauch der Presse
RGBl.	Reichsgesetzblatt
Sess.	Session
Sten.Prot.	Stenographische Protokolle
StG	Strafgesetz
StGG-RG	Staatsgrundgesetz über die Einsetzung eines Reichsgerichts
StPO	Strafprozessordnung

Literatur

ANONYMUS, Strafrechtliche Entscheidungen in Preßsachen, in: GZ 15 (1864) 118–120.

Friedrich BENSCH, Der Mordanschlag auf Kaiser Franz Joseph am 18. Februar 1853, in: Wiener Geschichtsblätter 28/Nr. 2 (1973) 38–48.

Edmund BERNATZIK, Die österreichischen Verfassungsgesetze (Wien ^{2}1911).

Philip CZECH, Der Kaiser ist ein Lump und Spitzbube. Majestätsbeleidigung unter Kaiser Franz Joseph (Wien 2010).

Edmund DANIEK, Der Mordversuch Johann Libenys an Kaiser Franz Joseph I., in: Unsere Heimat 34 (1963) 17–27.

Elgin DRDA, Die Entwicklung der Majestätsbeleidigung in der Österreichischen Rechtsgeschichte unter besonderer Berücksichtigung der Ära Kaiser Franz Josephs (= Dissertationen der Johannes-Kepler-Universität 100, Linz 1992).

August FINGER, Das Strafrecht systematisch dargestellt, Bd. 2 (Berlin ^{2}1910).

Daniel FLEISSNER, Die rechtshistorische Entwicklung des crimen laesae maiestatis mit einem Ausblick auf seine Nachwirkungen im geltenden österreichischen Strafrecht (iur. Diss., Univ. Wien 2008).

Hans von FRISCH, Die Verantwortlichkeit der Monarchen und höchsten Magistrate (Berlin 1904).

[126] RGBl. 151/1850.
[127] RGBl. 3/1852.
[128] RGBl. 142/1867.
[129] Art. 3 lit. b StGG-RG.
[130] JELLINEK, Verfassungsgerichtshof.
[131] WEYR, Rahmengesetze 39.

Wilhelm Theodor FRÜHWALD, Handbuch des österreichischen Strafgesetzes über Verbrechen, Vergehen und Uebertretungen und der Preßordnung vom 27. Mai 1852 (Wien [3]1855).
Wilhelm Theodor FRÜHWALD, Die Fortbildung des österreichischen materiellen Strafrechts durch Gesetzgebung, Literatur und Praxis (Wien 1865).
Friedrich GAMPP, Lehrbuch des Österreichischen Strafrechts (Wien 1905).
August GEYER, Einige Bemerkungen zu der Lehre von dem Verbrechen der Majestätsbeleidigung, in: GZ NF 17/Nr. 98 (1866) 389–390.
Peter HARUM, Das Preßgesetz vom 13. März 1849 und die bestehenden allgemeinen Strafgesetze, in: Oesterreichische Zeitschrift für Rechts- und Staatswissenschaft 2 (1849) 262–270.
Franz HAUKE, Die Lehre von der Ministerverantwortlichkeit (Wien 1880).
Maximilian HERBERGER, Ministerverantwortlichkeit, in: HRG[1] (Berlin 1984) 578–582.
Eduard HERBST, Handbuch des österreichischen Strafrechts, Bd. 1: Von den Verbrechen (Wien [7]1879).
Hugo HOEGEL, Geschichte des Österreichischen Strafrechts mit einer Erläuterung seiner grundsätzlichen Bestimmungen, 2 Hefte (Wien 1904–1905).
Anton HYE Freiherr von GLUNEK, Das österreichische Strafgesetz über Verbrechen, Vergehen und Uebertretungen und die Pressordnung vom 27. Mai 1852, 1. [und einziger] Bd. (Wien 1855).
Karl JANKA, Das österreichische Strafrecht, Zweite Auflage, durchgesehen und ergänzt von Friedrich RULF (Prag u.a. 1890).
Georg JELLINEK, Ein Verfassungsgerichtshof für Österreich (Wien 1885).
Sebastian JENULL, Das österreichische Criminal-Recht nach seinen Gründen und seinem Geiste dargestellt, 2. Teil (Grätz 1809).
Michaela KOVARIK, Das Attentat Johann Libenyis auf Kaiser Franz Joseph 1853 und die Gründung der Votivkirche. Eine Studie zur Ära des österreichischen Neoabsolutismus (phil. Diss., Univ. Wien 1976).
Heinrich LAMMASCH, Grundriß des Strafrechts (Leipzig [4]1911).
Joachim LIST, Beiträge zur Stellung und Aufgabe der Erzherzoge unter Kaiser Franz Joseph I. (phil. Diss., Univ. Wien 1982).
Adalbert LUCZ, Ministerverantwortlichkeit und Staatsgerichtshöfe. Eine staatsrechtliche Abhandlung (Wien 1893).
Thomas OLECHOWSKI, Die Entwicklung des Preßrechts in Österreich bis 1918 (Wien 2004).
Thomas OLECHOWSKI, Zur Entstehung des österreichischen Strafgesetzes 1852, in: Thomas OLECHOWSKI, Christian NESCHWARA, Alina LENGAUER (Hgg.), Grundlagen der österreichischen Rechtskultur. Festschrift für Werner Ogris zum 75. Geburtstag (Wien–Köln–Weimar 2010) 319–341.
Petra POPP, Ministerverantwortlichkeit und Ministeranklage im Spannungsfeld von Verfassungsgebung und Verfassungswirklichkeit (Münster 1996).
Helmut RUMPLER, Eine Chance für Mitteleuropa. Bürgerliche Emanzipation und Staatsverfall in der Habsburgermonarchie (= Österreichische Geschichte 1804–1914, Wien 1997).
Christoph SCHMETTERER, Die Rechtsstellung der Mitglieder des österreichischen Kaiserhauses 1839 bis 1918, in: in: Journal on European History of Law 2/Nr. 1 (2011) 15–20.
Christoph SCHMETTERER, Die Funktion von kaiserlicher Sanktion und ministerieller Gegenzeichnung in der österreichischen Gesetzgebung 1861–1918, in: Journal on European History of Law 3/Nr. 2 (2012) 40–46.
Christoph SCHMETTERER, Der Schutz des Kaisers im StG 1803, in: Journal on European History of Law 5/Nr. 1 (2014) 79–84.
Carl STOOSS, Lehrbuch des österreichischen Strafrechts (Wien–Leipzig [2]1913).
Wilhelm Emil WAHLBERG, Grundriss zu Vorlesungen über österreichisches Strafrecht. Besonderer Teil (Wien 1888).
Josef WASER, Das Verbrechen der Majestäts-Beleidigung, in: GZ 4 (1853) 165–179.
Franz WEYR, Rahmengesetze. Studie aus dem österreichischen Verfassungsrechte (Wien 1913).

Parties and Rules. Constitution-making in the East German Länder after 1990*

*Astrid Lorenz***

Abstract

The article investigates how the varying party constellation in the founding parliament influenced constitution-making in the East German federal states after 1990. All other context conditions of constitution-making were almost identical. The study observes that weak governing parties accepted the opposition's wish for an early legal obligation to adopt the constitution by a qualified majority because they needed political support. However, they tended to re-interpret or circumvent the provisions in face of stalemates. Stronger governing parties avoided constitution-making rules but involved other parties to increase legitimation at a low cost. Opposition parties accepted governments' offers and withdrew some procedure-related demands in exchange for substantive gains, e.g. constitutionally entrenched social rights. In sum, the party constellation in parliament determined the formal procedure of constitution-making and deviances from it.

Key words: *Constitution-making; constitutional law; Germany.*

1. Introduction

Since 1975, more than 200 constitutions have been adopted all over the world (Widner, 2005, 2008; Elkins and Ginsburg, 2011). There is a growing number of case studies on several constitution-making processes. However, to understand how constitution-making works in different contexts, we still need additional empirical knowledge. Especially the relationship between party constellation, rules for constitution-making and the constitutional negotiations remains unclear so far. This perpetuates the conventional illusion that political conflicts about rules and conflicts within rules can be separated and that constitution-making is not bound by rules.

Empirical studies highlight the conflictive nature of constitution-making (Hart, 2001). 'While the whole idea of a constitution is that the people have reached a consensus about the rules by which they choose to be governed', stated De Palma (1997), 'no other legal document is the source of more controversy'. Constitutions are of the highest relevance for the personal interests of the constitution-makers because they design rights and duties to which they will have to comply and a government system which influences their own chance of entering public offices. Therefore, actors are interested in stabilizing or expanding their influence by suitable rules (Elster, 1995; Elster, Offe & Preuss, 1998).

As a contribution to a better understanding of constitution-making, the present article analyses whether and how the party constellation in the founding parliaments in the East German *Länder* affected the choice and the implementation of constitution-making procedures. This research design seems very fruitful because the five Eastern federal states of Germany adopted their constitutions after 1990 under almost identical context conditions. Thus, the cases ensure a variation of solely the party constellation in the founding parliaments. This enables us to observe its effects in more detail.

The first section of the article reviews the state of research and identifies its lacunae. Section two outlines the design of the empirical study. The third section of the article deals with the formal rule-making in the cases and the fourth part refers to the rule implementation. Both sections link their empirical findings to the theory section. The article ends with a summary which includes open questions to be answered by future research.

2. Theoretical Uncertainties Concerning Party constellation and Rule-making

In principle, constitution-makers are not institutionally bound in how to adopt a new constitution. Many case studies and comparative analyses have therefore highlighted the potential relevance of non-institutional context factors for constitutional choice, e.g. party positions, internal and external political conflicts, societal fragmentation, pre-tax income distribution (Hayo & Voigt, 2013; Ticchi & Vindigni, 2010; Aghion, Alesina & Trebbi, 2002). However, these factors do not imply which actors actually make the new constitution and in which mode. Often formal rules are established to structure the procedure.

Andrew Arato (1995) and Jon Elster (1995) have rightly pointed out the problem that finding the original source of legitimation for constitution-making easily runs into the problem of

* This work was supported by the Federal Foundation for the Reappraisal of the SED Dictatorship under Grant PV 036-2008.
** Prof. Dr. Astrid Lorenz, Institute of Political Science, University of Leipzig, Germany.

infinite regress. Someone has to determine who is to decide on the constitution-making rules and these decision-makers have themselves to be legitimized by some kind of decision. We cannot find a logical first source. It is therefore important to empirically observe how people solved this problem in different cases.

Normative democratic and constitutionalist legal theory leads us to expect that the actors deliberate on the constitution-making procedure in a special way and are interested in guaranteeing a high legitimation. This theory traditionally separates the logic of constitutional and 'normal' politics. Whereas normal politics are supposed to involve 'a focus on policy considerations and the promotion, balancing and aggregation of sectional interests', constitutional politics are expected to consist 'of deliberation on the common good to arrive at a consensus on those principles required to show each person equal concern and respect' (Bellamy & Schönlau, 2004). Recent democratic theories highlight the importance of participatory constitutional politics for the social and political integration and legitimacy (Wiener & Della Sala, 1997; Samuels, 2006). Conventions and referendums have attracted the special interest of scholars (Ghai, 2006; Ghai & Galli, 2006; Elkins, Ginsburg & Blount, 2008; Landfried, 2006; Samuels, 2006).

The approach of constitutional economics, in contrast, leads us to believe that actors use their legislative and other resources to control the agenda, the process as well as the output of constitution-making. They are supposed to be always and exclusively interested in maximizing their gains from cooperation (Buchanan, 1990; Voigt, 1999). Only a 'veil of uncertainty' about the future distribution of power might make actors abstain from following their own narrow sectional, class, or group interests (Buchanan & Tullock, 1962: p. 77-8; Brennan & Buchanan,1985: pp. 29 et seqq.). But Buchanan and Tullock theorized on constitution-making by people when dealing with the effect of the decision rule. In practice, most constitutions are made by parties in parliaments and constitutional assemblies (Widner, 2008: p. 1523) and the process takes some time. Often there is a clear government and opposition side and after a certain time span, actors can anticipate the effect of the constitutional rules that they elaborate.

Interestingly, none of the two competing schools of theorizing constitution-making makes clear how the party constellation in a constitutional assembly affects the choice and implementation of rules for rule-making. Party constellation can be measured by three indicators: share of mandates, ideological preferences, and status as governing and opposition party.

The first blind spot of theory refers to the *degree of formal participation*. Participation here means the right to introduce a draft, to participate in discussions and to veto. We can assume that parties' ideological positions make a difference. Leftist parties are typically in favor of broad and direct participation while conservative parties support a representative style of democracy. Yet we do not know their normative beliefs concerning the special case of constitution-making.

It is also still unclear whether the structure of government and opposition and the relative strength of the major governing party play a role. In general, we can expect that opposition parties prefer broad participation because this provides them veto capacity. While in principle, a strong governing party might be interested in approving the constitution by its own majority without concessions, it can feel public pressure regarding broader participation rules. Weaker governing parties might agree to participatory rules to find support but they might also avoid participation because it is already costly for them to uphold the day-to-day coalition.

What is more, we cannot derive from theory how parties rank their procedure-related demands if asked to prioritize. If participatory rights are mere means to the end of realizing policy aims, then oppositional parties should rank procedure-related demands low when the government side has made substantive concessions. However, there might be a low level of trust that it will keep its promise to include the policy preferences. Therefore, oppositional parties might continue to demand a formal adoption rule ensuring them veto capacity even when the government side has accepted to make substantive concessions. Or oppositional parties may simply insist on high participation and a participative adoption rule because of their normative beliefs.

The second blind spot of theory refers to the general *formalization of procedural provisions*. Based on rationalist thinking, we can assume that a governing party prefers to avoid fixing such rules. It is not interested in binding itself by agreements with a high degree of legal obligation and it tries to postpone formal agreements for several reasons. Parties want to know the costs of a possible veto capacity of others, i.e. their demands and possible lines of compromise, before agreeing to it. Actors who have fixed participatory rights will use them and they will evaluate offers by the major party in a different manner. The same concession that the major actor offers can be interpreted as a gesture of good will (when he is not obliged to do so) or as a poor offer (when the decision rule obliges him to compromise) which causes a risk for stalemate in negotiations. However, we cannot derive clear expectations from theory concerning the effect of the party constellation on the realization of these preferences. We only know that weaker parties must make more concessions.

The third blind spot refers to the *implementation of the constitution-making procedure*. Often these rules are taken as indicators for the negotiations, at least in non-authoritarian or -totalitarian contexts. In fact, we can theorize that all actors generally respect the formal constitution-making procedure because having such rules decreases risks and enables them to anticipate the actions of others. But what happens when no rules exist? Moreover, actors will probably interpret the constitution-making rules in different ways that are favorable to their interests. In struggles about interpretations, a governing party might be interested in cutting unwanted concessions to others. But perhaps its share of mandates influences whether it succeeds in doing so. Will a weak governing party implement the rules more in line with other veto players than a predominant government party because it needs their support or will it deviate more to decrease the high costs of concessions, coordination and possible stalemate?

3. The Methodological Design of the Study

Unfortunately, there is a lack of comparative studies which might help us to obtain a clearer picture. A large number of single

case studies provide deep insights into specific processes (cf. Ginsburg, Elkins & Blount, 2009: pp. 202-204), other works present selective evidence used to illustrate the plausibility of a certain theoretical idea. These studies are very instructive for generating ideas yet unable, for methodological reasons, to provide generalizable hierarchies of causes. We cannot use them directly as a basis for comparative research because the authors operationalize factors in different ways and make selective observations.

As pioneers, Widner (2005, 2008, 2013), Elkins and Ginsburg (2013) collected data on the process of adoption for 460 of the 806 national constitutions promulgated in the period 1789–2005. Their work gives very important hints on possible inter-relationships. However, summarizing all the constitution-making processes in very different times, cultural and political contexts is an ineffective method of explaining *contemporary* constitution-making processes resulting in *democratic* constitutions. Moreover, the large number of cases makes it impossible to observe individual long-term patterns of party behavior. Therefore, this method has a limited capacity for analyzing complex causalities. Ginsburg, Elkins and Blount (2009) also mention that large-n work is hindered by a need for conceptual refinement.

All in all, it seems fruitful to use a middle-way research strategy. The following analysis is based on a qualitative comparison of actors' behavior in a small number of similar cases. It deals with the most widespread and thus typical form of contemporary constitution-making processes all over the world (Ginsburg, Elkins & Blount, 2009; Widner, 2008) – constitution-making by parliaments and constitutional assemblies. Of course, the cases are subnational entities who lacked the authority to meet some key decisions. Some federal law provisions override subnational rules (Ginsburg & Posner, 2010). This limits the generability of insights that we get from the study. However, the study's intention is not to analyze the emergence of particular legal frameworks but actors' strategies in the use of the constitution-making procedure. These features were not pre-structured by the federal level. All *Länder* had state quality and adopted constitutions which included instructions for state organization as well as charters of rights. In such cases, comparing subnational entities has proved its usefulness in important studies concerning certain aspects of constitution-making (Tarr, 1998; Lutz, 1994; Dinan, 2008; Ginsburg & Posner, 2010).

The study presented here focuses on the same time window and context. When the German Democratic Republic joined the Federal Republic of Germany in 1990, its territory fell apart into five states which all received their own constitution-making power (GDR constitution, 1990) within a similar general institutional framework (e.g. belonging to Germany, to the European Community). The historical, cultural, social and economic context of constitution-making was rather identical. In all five states, the same five parties were included in the constitutional negotiations. Only their relative strength and their status as governing or non-governing party varied (Table 1). If a causal relationship existed between the power constellation and the constitution-making rules, its variation should result in different outcomes.

Table 1 shows the varying power structure in the parliaments. In one pole case, Saxony, the party with the highest share of mandates, the CDU, was able to govern without a coalition partner and to adopt the constitution with its absolute majority. Even with the possible adoption by a qualified majority, it had two alternatives: a compromise only with the Social Democrats or with the Greens and the Civil Rights Movement. This increased its outside options for negotiation. In the other pole case Brandenburg, the major party SPD was quite weak and founded a three-party coalition. In case of adopting the constitution by a qualified majority, it had to compromise with even more supporters, either the conservative CDU or the socialist PDS. The other power structures ranked between these pole cases with Thuringia tending more towards Saxony and Mecklenburg-Western Pomerania tending more towards Brandenburg.

We used a qualitative analysis of archive documents, media coverage, a roundtable and individual interviews with politicians and experts to reconstruct the constitution-making processes (in more detail: Lorenz, 2013).

Table 1: Constitution-making in the East German Federal States

	Saxony	Thuringia	Saxony-Anhalt	Mecklenburg-Western Pomerania	Brandenburg
Strength of major party	High	Medium to high	Medium	Medium to low	Low
Share of mandates*	*CDU 58%*, SPD 20%, PDS 11%, FDP 6%, Greens 6%	*CDU 49%*, SPD 24%, PDS 10%, *FDP 10%*, Greens 7%	*CDU 45%*, SPD 25%, *FDP 13%*, PDS 11%, Greens 5%	*CDU (44%)*, SPD (32%), PDS 18%, *FDP 6%*	*SPD 41%*, CDU 31%, PDS 15%, *FDP 7%*, *Greens 7%*
Legal provisions for constitution-making	2 adoption alternatives in interim constitution, final provision in ultimate draft constitution	deadline in interim constitution (1992 deleted), adoption rule in ultimate draft constitution	Need for 3 readings in parliament and adoption rule in an act (1992)	Adoption rule in ultimate draft constitution, referendum act 1993	Provisions for adoption in interim constitution, others in act on procedure (1990)
Authors of first draft constitutions	commission of Saxony and Baden-Wuerttemberg, revised by CDU, FDP	parliamentary factions separately	parliamentary factions of Greens; CDU/FDP; SPD; GDR 'Central Roundtable'	regional commission cooperating with Roundtables; CDU	regional Roundtable, revised by the regional commissioners
Discussion arena(s)	Parliamentary committee	Parliamentary committee	Parliamentary committee	Commission with PMs and 'experts' (including politicians)	Commission with PMs, experts, societal groups+ parliamentary committee
Chair	governing party	major governing party	major opposition party	major governing party	Commission: major gov. party; Committee: major gov. party, later opposition leader
Adoption rule	2/3 majority in parliament	2/3 majority in parliament + referendum majority	2/3 majority in parliament	Commission majority + 2/3 majority in parliament + referendum majority	Commission majority + 2/3 majority in parliament + referendum majority

***** *Italic letters*: **Governmental parties**

4. Party Constellation Effects on Constitution-making Provisions

When the parties in Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia discussed how to establish the constitution, their general ideological positions were visible. The conservative CDU and the Liberal Democrats argued that the parliament had the legitimate right to adopt the constitution alone and according to the regular parliamentary rules. The Social Democrats, the Socialists and the Greens together with the Civil Rights Movement demanded to also include societal actors and to complement the parliamentary approval with an additional referendum (for details and sources see Lorenz, 2013).

However, the parties' preferences concerning the constitution-making procedure were not consistent across the states because of a cross-cutting cleavage between government and opposition side. In the case of the Social Democrats as the governing party in Brandenburg we can clearly observe the government's 'organizational' preference not to limit itself by giving other actors formal rights. Their first draft of the interim constitution did not contain constitution-making provisions. On the opposition side, all parties including the Conservatives in Brandenburg and the Liberals in Saxony demanded to codify the need to adopt the constitution by a parliamentary qualified majority. This opened the chance to veto. Oppositional parties often demanded to also fix deadlines or other provisions. The rationale was to bind the government's options by law.

This preference structure caused a similar pattern of procedure-related key conflicts irrespective of the government party composition. In all states, the conflicts affected the number of veto arenas (only parliament or a referendum) and the decision rule for parliamentary approval (ordinary or qualified majority). How did the parties deal with these conflicts?

In all states, the major party made full use of its legislative resources in the process of determining the formal provisions for constitution-making. Therefore, depending on the power constellation within the parliament, different procedures of constitution-making were adopted (see Table 1). In the following, the concrete relationship is explained with a focus on the pole cases with a very strong and a very weak major party.

In Saxony, the very strong CDU met the interests of the opposition parties to a certain degree but insisted on its dominant position. When it adopted the interim constitution at the beginning of the legislative period, it codified that the final constitution should be adopted by a qualified majority in parliament *or* a relative majority in a referendum. The final decision upon the procedure was left open and no other formal provisions were fixed. Both were to the governing party's liking because the oppositional parties felt unsure whether they could insist on revisions of the CDU draft constitution or not. We see here that establishing *alternative* ways of constitution-making can be a strategy of comfortable self-binding.

The final provision concerning majority rule and adoption arena(s) was only established in the ultimate Saxon draft constitution. That means the opposition could only consent to obtaining an own veto right (through establishing a qualified majority threshold) by adopting the constitution as a whole. The governing CDU was now aware of the concessions necessary to gain a two-third majority in parliament. The agreements reached under the condition of uncertainty of the decision rule remained in force. With rejecting these agreements or the whole constitution, the opposition would have risked being accused of sabotaging democratization.

In the other pole case Brandenburg, the weak governing Social Democrats gave way to the high pressure by one of their coalition partners, the Civil Rights Movement, to include constitution-making provisions in the interim constitution. For this party, broad participation was a key element of their normative concept of democracy. It was more important to them than securing a strong own influence. The SPD agreed to also approve the interim constitution and all 'essential legal provisions' by a qualified majority. The consequences of these concessions quickly became visible. For getting the qualified majority for the interim constitution, it was necessary to find intra-coalition compromises and compromises with the opposition. At least four parliamentary factions had to agree, which caused problems.

The Brandenburg SPD consented to include in the interim constitution that the new constitution had to be adopted by a qualified majority in parliament plus a referendum. But the Civil Rights Movement wanted to fix additional procedural provisions, inter alia the need for a constitution commission. Half of the 30 members should come from outside the parliament, nominated by the parliamentary parties in a non-proportional way. 15 members should be delegated by the parliamentary parties proportionally. Each of the five factions should also nominate two non-parliamentary members. Five other non-parliamentary members, among them at least one representative of the Sorb ethnic minority, should be unanimously nominated by all parliamentary party factions. Citizens should comprehensively become involved in the drafting and obtain the right to introduce proposals concerning the draft after its publication. The CDU argued that such a procedure would impinge on the constitution-making competence of the parliament and the election results. The party held 31 per cent of the parliamentary seats and feared to lose influence with the proposed procedure.

A quick solution of this conflict was necessary because adopting the interim constitution was the legal precondition for all political and administrative measures. Following harsh controversies, all factions accepted a compromise. The interim constitution prescribed a qualified majority in parliament and a referendum for adopting the constitution along with the need for a constitution-drafting procedure Act. It also contained the provision that this special act had to be adopted by a two-third majority. In that act which was adopted some weeks later, the procedure of establishing a 'constitution commission' was upheld but all commission members including experts and societal groups had to be nominated by the parliamentary factions according to their share of mandates. People's participation was not defined in more detail.

In the other new East German federal states with a medium strength of the major party, the constitution-making procedure

was left open or formalized by rules which could be changed by a relative majority. An example was the establishment of a constitutional commission with non-parliamentary members in Mecklenburg-Western Pomerania. In these cases, procedural rules became more a subject of bartering. The majority parties offered package deals to the main opposition party whose consent was sufficient to mobilize a qualified majority. In the course of negotiations, its addressee often voluntarily withdrew demands for broader participation in exchange for having own policy preferences included in the constitution (see for the details Lorenz, 2013). A typical substantive preference which was ranked higher than enlarged participation in constitution-making was a constitutional obligation of the state to foster employment and to ensure social rights.

In two cases (Saxony and Saxony-Anhalt) the major government party finally left it to the main opposition party's discretion to choose one of two alternative adoption rules – either a qualified majority for parliamentary approval alone or an absolute majority for parliamentary approval plus additional referendum. When confronted with this crunch question, the main opposition party chose the exclusive parliamentary approval which provided them direct veto power. Earlier it had criticized such an exclusive parliamentary adoption.

With regard to our theory blind spots we observe that the parliamentary structure of mandates, ideological positions and organizational preferences (governing or opposition party) resulted in a varying degree of *formal* participation in constitution-making. A strong governing party prevented provisions for high participation or delayed formal agreements and ensured a low level of obligation. Weak governing parties were forced to accept the typical oppositional demands for higher majority hurdles and broader participation for getting support. A constitutional referendum and a semi-parliamentary commission were only prescribed in cases with a medium or weak power lead of the (major) governing party. Table 1 contains the details.

This pattern of variation follows the rationale of 'normal politics' in established liberal parliamentary democracies where electoral results determine the legislative resources and thus the political influence of parties on political decisions. But the pro-rationalist causality does not explain the chosen *minimum* participation threshold. None of the constitutions had to be passed by only a simple parliamentary majority although this was legally possible. Some representatives of the major governing parties threatened to do so as long as the decision-making provisions were not clearly fixed, especially in moments when the government and opposition side could not reach substantive compromises. But in the end of the constitution-making process, they spoke of a 'moral obligation' to find a broader compromise across party lines. The transition to democracy should be finalized with a special legitimation for the new constitution.

Contrary to rationalist theorizing, this deviance from the possible low-cost procedure with only a relative majority in parliament was not enforced by public pressure. The citizens were occupied with re-organizing their personal life in times of company closures and not much interested in the constitution-making process. But it was not caused by purely normative beliefs either. The majority parties' interest in broad support became prevalent when the final constitutional draft was shaped and the costs of others' support were acceptable. In sum, mixed motives on the government's side guided the collective choice of constitution-making rules.

5. Deviations in the Implementation of Constitution-making Provisions

The formal constitution-making procedure had been a subject of intense political conflicts but it proved a limited capacity to bind the actors. Government parties with a low share of mandates accepted rules for higher participation but tended to re-cut the number of veto players in practice. Strong government parties prevented obligations for high participation in the constitution-making process but in practice they included others more than necessary in legal terms. The rationale behind this intriguing causality between power lead and implementation of rules is shown in the following.

In Saxony, the very strong governing party CDU introduced a complete draft constitution as a bill. This was one of their first measures at the beginning of the legislative period. It thus made their constitutional preferences clear and it planned to adopt the constitution within some months. It also integrated other preferences to a limited degree. The draft was an adapted version of a draft that had been elaborated prior to the founding elections by a 'commission' of politicians from Saxony and the West-German state of Baden-Wuerttemberg. This commission was convened by the county executive of Dresden, one of the three counties that later formed the new state of Saxony. Nine members of the respective expert group within the commission were entitled to vote. Among them were three politicians from the CDU, two from the SPD, one from the Civil Rights Movement, and three scientists. Later the drafters presented their work to the public and discussed it in several places, mostly party meetings. The CDU then revised the draft version and introduced it together with the oppositional liberals in parliament.

While the oppositional Social Democrats accepted this draft as a basis for the constitutional talks, the socialist PDS and the Civil Rights Movement introduced their own constitution bills. Both were slightly different adapted versions of a draft constitution made by several Leipzig university lecturers. The lecturers' draft in turn was inspired by a draft constitution of the GDR 'Central Roundtable' which had been ignored by the last freely elected GDR parliament. Like the draft by the CDU and the Liberals, the drafts of the PDS and the Civil Rights Movement got the formal status of bills.

Based on its clear position of strength, the CDU was willing to discuss the oppositional constitution bills in the parliamentary committee instead of rejecting them immediately by its own majority. In the constitution committee, the Conservatives listened extensively to the opposition. Nine several-day 'retreats' without the public were held for this purpose outside the capital of the federal state. Additionally, public forums took place when the pre-final draft was ready.

The CDU had nothing to fear. It even discussed at length the demands made by the very proactive Socialist PDS which was marginalized in all other parliamentary processes at the time

because of its past as the GDR 'leading party'. In most of the crucial points it was 'cheap talk', combined with some marginal concessions in the end. However, these measures were effective in improving the political climate within the constitution committee. As a sign of respect, the PDS member in the parliamentary constitution committee, who in the meantime was the PDS parliamentary party leader, finally did not vote against the constitution irrespectively of his clearly deviating substantive preferences. The document was adopted by a high 87-per cent parliamentary majority.

In the other pole case Brandenburg, the weak Social Democrats abstained from introducing an own constitution bill. Instead, the revised draft of the former regional 'Roundtable' was taken as the first basis for the talks. In contrast to the Saxon commission style of pre-parliamentary drafting, the 'Roundtable' was a public forum where various political and societal actors jointly elaborated a draft constitution. Like in Saxony, the first drafters were not legitimized by elections. Later the three regional commissioners that were appointed by the GDR government for preparing the founding of the federal state Brandenburg revised the constitution draft. According to the results of the first free local elections, two of them were members of the SPD, one of them of the CDU. It was their revised version of the draft which was used in the constitution commission as the single basis for the talks.

The Social Democrats rather soon regretted their decision to give societal actors a formal member status in the constitutional affairs commission. They had the feeling that they were mainly driven by their special interests and not interested in creating a text that could get a qualified parliamentary majority. In fact, when the commission presented its revised version of the draft constitution, the oppositional Brandenburg CDU rejected many provisions as being 'too much left-wing'. It was backed by prominent federal CDU politicians and the clash of interests aroused high public attention. In this context, the government factions did not want to adopt the constitution with only the support of the former 'leading party's' successor PDS. A stalemate emerged.

The formal constitution-drafting rules did not anticipate such a situation and therefore did not provide instructions. Again the main government party SPD was busy with searching for compromises behind closed doors. After several months, the parliamentary parties finally decided to treat the commission draft as a bill and to deal with it in a regular parliamentary committee according to the standing order and the interim constitution. In this way, the special constitution-making act remained in force, but the parliament changed the commission's draft version substantially without any new special procedural provisions. Thus the constitutional commission de facto lost its central formal role in the constitution-making process and just became an idea generator. This was accepted by the parliamentary parties and the public.

Regardless of the substantive concessions in parliament, it was unclear whether the CDU faction would consent to the constitution. The SPD even gave its faction leader the chairman position in the committee to improve the atmosphere. The final reading was postponed. Finally, only half of the CDU members of parliament consented to the constitution. It was adopted by 82 per cent of the representatives. This share of mandates was lower than in Saxony (87 per cent) although the main governing party had made far more compromises.

Similar problems of stalemate and legitimacy competition arose in the new federal states with a medium number of formal veto points. Obviously, the need for a qualified majority and the establishment of different drafting and voting arenas provoked difficulties that are well-known in the literature on political systems, constitution-making and negotiations (e.g. Bellamy & Schönlau, 2004: 31; Elster, 1995; Arato, 1995). In order to have a constitution adopted, the main governing parties were often inclined to limit the number of negotiation participants and of particular procedures in practice. The constitutional commission in Mecklenburg-Western Pomerania, for instance, was circumvented by informal side agreements between the governing parties and the oppositional Social Democrats which were then formalized in the commission.

In all cases, the final substantive compromises were negotiated in informal talks between the (main) governing party and the main opposition party, sometimes including one third party or a representative of the executive. This way of negotiating without the public did not correspond to the demands of the opposition for broad participation in- and outside parliament. However, when the talks succeeded, their results were always legitimized by adopting them in parliament.

It has already been said that government parties feared to formalize broad participation, especially referendums. Avoiding them can in fact be rational to decrease uncertainty as we can see in the three cases where constitutional referendums took place (Table 1). Here the parties tried extensively to discuss the constitution draft with the people prior to the referendums but the interest remained low. Only certain aspects, e.g. social rights, got special attention. The referendum participants finally confirmed their favorite party's position in constitution-making. The number of approvals was similar to the amount of votes for the pro-constitution parliamentary parties in the elections close to the referendums (Lorenz, 2013). Obviously, the parties succeeded in communicating to their voters that their position was responsive towards their interests. However, the electors were not mainly driven by constitutional interests. In Brandenburg for instance, the constitutional referendum was to a high degree a vote of confidence in the prime-minister Manfred Stolpe who was publicly accused at that time of having collaborated with the GDR Secret Service.

In the end, the percentage of the constitution supporters in parliament and referendums was *not* higher in cases with broader formal participation. It only outweighed the lack of support of the major governing party that had made the introduction of high-participation constitution-making rules necessary. That questions the idea that constitutions must avoid mirroring unbalanced political interests because otherwise they may fail to be adopted (Elster, 1995; Ghai, 2005). A predominant party can rely on its own supermajority to ensure own interests irrespectively of higher majority rules while weak parties' conciliatory and participatory style fuels many actors' expectations in a way that can hardly be met to everyone's satisfaction.

In sum, we observe for rules' implementation that institutions had an effect once they are established. However, governing parties used their power lead to circumvent or re-interpret procedural rules when the veto actors failed to compromise within their framework. Veto arenas outside parliament, e.g. extra-parliamentary commissions and referenda, failed to work as real veto points. On the other hand, governing parties were willing to increase input legitimation when the overarching aim of realizing substantive policy aims was accomplished. This pattern of deviations from formal constitution-making rules and the use of procedural rights as bargaining chips made the formal veto player structure (Tsebelis, 2002) a deficient indicator for real negotiations and thus a deficient predictor for substantive constitutional choices.

6. Conclusion and Outlook

The article intended to elaborate on deeper insights in the choice and implementation of constitution-making rules as interconnected elements of the causal chain between the contexts and contents of constitution-making. Based on a research survey, the article identified lacunae of theory concerning the effect of power constellation. A qualitative comparison of the five federal states of Germany which were founded in 1990 was used to contribute to filling the gaps.

The study shows that the parties clearly used their relative strength for shaping the constitution-making rules. Their status as governing or opposition party and their general ideological position influenced parties' preference structure while the share of mandates of the major governing party affected its openness to compromise. Weak governing parties accepted early the opposition's demand for broad participation because they needed support. Stronger governing party delayed formal agreements, ensured a low level of obligation and offered barters to lower the demands for participation. The main opposition party prioritized to get certain policy aims, e.g. social 'state objectives', included in the constitution and accepted to withdraw its demand to increase procedural legitimation when this substantive aim was reached.

Concerning the implementation, we observed considerable deviations from formal rules depending on the relative strength of the power constellation. Governing parties with a high share of mandates were willing to include others more than formally necessary. This openness should increase legitimation and it is based on a position of political and procedural strength. Weak governing parties circumvented the high number of veto players because it caused a stalemate. The support for the constitution was higher in the case with a predominant party and low formal participation than in the case with weak parties, high formal participation and many compromises.

All in all, the study indicated a strong relationship between power (i.e. ideological preferences, status as governing and opposition status, share of mandates) and rules in constitution-making. Obviously, the functioning of rules as political instruments and norms can be ambiguous. This should be analyzed in more detail. We need more case studies and comparative analyses of constitution-making in similar and other contexts to test and perhaps refine these findings.

References

AGHION, Philippe, ALESINA, Alberto, TREBBI, Francesco. (2002). *Endogenous political institutions*. National bureau of economic research Working paper, No. 9006.

ARATO, Andrew (1995). Forms of Constitution Making and Theories of Democracy. *Cardozo Law Review, 17*, 191-225.

BELLAMY, Richard, SCHÖNLAU, Justus. (2004). The Normality of Constitutional Politics: an Analysis of the Drafting of the EU Charter of Fundamental Rights. *Constellations: An International Journal of Critical and Democratic Theory, 11*(3), 412-433.

BRENNAN, Geoffrey, BUCHANAN, James (1985). *The Reason for Rules*. Cambridge: Cambridge University Press.

BUCHANAN, James M. (1990). The Domain of Constitutional Economics. *Constitutional Political Economy, 1*(1), 1-18.

BUCHANAN, James M., TULLOCK, Gordon (1962). *The Calculus of Consent*. Ann Arbor, MI: University of Michigan Press.

DE PALMA, Anthony (1997). Constitutions Are the New Writers' Market. *New York Times*, November 30.

DINAN, John (2008). Patterns of Subnational Constitutionalism in Federal Countries. *Rutgers Law Journal, 39*(4), 837-861.

ELKINS, Zachary, GINSBURG, Tom (2013). Comparative Constitutions Project. Database. http://comparativeconstitutionsproject.org/.

ELKINS, Zachary, GINSBURG, Tom, BLOUNT, Justin (2008). The Citizen as Founder: Public Participation in Constitutional Approval. *Temple Law Review, 81*(2), 361-382.

ELSTER, Jon (1995). Forces and Mechanisms in the Constitution-Making Process." *Duke Law Journal, 45*, 364-396.

ELSTER, Jon, OFFE, Claus, PREUSS, Ulrich K. (1998). *Institutional Design in Post-Communist Societies. Rebuilding the Ship at Sea*. Cambridge: Cambridge University Press.

GDR constitution 1990. http://www.verfassungen.de/de/ddr/ddr74-i.htm.

GHAI, Yash (2005). A journey around constitutions: reflecting on contemporary constitutions." *South African Law Journal, 122*, 804–831.

GHAI, Yash (2006). *The Role of Constituent Assemblies in Constitution Making*. Issue Paper of the Institute for Democracy and Electoral Assistance.

GHAI, Yash, GALLI, Guido (2006). Constitution Building Processes and Democratization. *International IDEA, 10*, 232-249.

GINSBURG, Tom, POSNER, Eric A. (2010). Subconstitutionalism. *Stanford Law Review, 62*(6), 1583-1628.

GINSBURG, Tom, ELKINS, Zachary, BLOUNT, Justin (2009). Does the Process of Constitution-Making Matter? *The Annual Review of Law and Social Science, 5*, 201–223.

HART, Vivien (2001). Constitution-Making and the Transformation of Conflict. *Peace and Change, 26*(2), 153-176.
HAYO, Bernd, VOIGT, Stefan (2013). Endogenous constitutions. Politics and politicians matter economic outcomes don't. *Journal of Economic Behavior & Organization, 88*, 47–61.
LANDFRIED, Christine (2006). Difference as a Potential for European Constitution Making. *European Law Journal, 12*(6), 764–787.
LUTZ, Donald S. (1994). Toward a Theory of Constitutional Amendment. *American Political Science Review, 88*(2), 355–370.
LORENZ, Astrid (2013). *Demokratisierung in Ostdeutschland. Verfassungspolitische Weichenstellungen in den neuen Ländern und Berlin*. Wiesbaden: Springer VS.
SAMUELS, Kirsti (2006). Post-Conflict Peace-Building and Constitution-Making. *Chicago Journal of International Law, 6*(2), 663-82.
TARR, G. Alan (1998). *Understanding State Constitutions*. Princeton: Princeton University Press.
TSEBELIS, George (2002). *Veto players: How political institutions work.* Princeton: Princeton University Press.
TICCHI, Davide, VINDIGNI, Andrea (2010). Endogenous Constitutions. *The Economic Journal, 120*, 1–39.
VOIGT, Stefan (1999). *Explaining Constitutional Change – A Positive Economics Approach*. Cheltenham: Elgar.
WIDNER, Jennifer (2005). Constitution Writing and Conflict Resolution." *Round Table, 94* (381), 503-518.
WIDNER, Jennifer (2008). Constitution Writing in Post-Conflict Settings: An Overview. *William and Mary Law Review, 49*(4), 1513-1541.
WIDNER, Jennifer (2015). *Constitution Writing & Conflict Resolution, Database*. http://www.princeton.edu/~pcwcr/about/index.html.
WIENER, Antje, DELLA SALA, Vincent (1997). Constitution-making and Citizenship Practice. *Journal of Common Market Studies, 35*(4), 595–614.

Victorian Jury Court Advocacy and Signs of Fundamental Change

Andrew Watson *

Abstract

Over the last three centuries advocacy in the courts of England and Wales, and other common law countries, has been far from static. In the second half of the 19th century, roughly until the beginning years of the 1880's, the foremost style of advocacy before juries in English criminal and civil cases was melodramatic, declamatory and lachrymose Aggressive and intimidating cross-examination of witnesses took place, sometimes, unless restrained by judges, descending into bullying. Questions asked often had more to do with a blunderbuss than with a precise forensic weapon. Closing speeches were frequently long and repetitious. Appeals to emotion, and prejudice, usually reaching their peak in the peroration, were often greater than those to reason. The Diety and the Bible were regularly invoked. Vivid and floral language was employed and poetry liberally put to use to awaken generous sympathies. Examples of this style of advocacy, parodied amongst others by Gilbert and Sullivan's in their Trial by jury - a short comic operetta, first staged in 1875, about a trial of an action in the Court of Exchequer for breach of promise to marry, are presented.

However signs of change began to appear. Men like Hardinge Giffard, who became Lord Halsbury and Lord Chancellor for a total of eighteen years, John Holker, later to be appointed Attorney General, Charles Russell, a future Lord Chief Justice, and Edward Clarke began to significantly change the style of advocacy. Their approach was quieter, more learned and less inclined towards violent appeals to emotions, use of florid language and quoting widely from popular verse and literature. Less concerned with relying on the tricks of the Victorian stage, they also were developing a more dignified and controlled manner in their conduct towards each other and to witnesses. These barristers tended to select the best arguments from their client's case and to drive them home forcefully to jurors, rather than saturate them with rhetorical elaboration of all conceivable points. They also avoided tiring juries with needless repetition. In the bar's tradition of copying what appeared to succeed, they began to be emulated by its junior members. Their success may well have been because they recognised that jurors, for a variety of reasons, were becoming better informed and educated and expected more than empty rhetoric, artful bombast, verbal chicanery, dramatic gestures and aggression.

At the end of the 19th Century and during the first quarter of the 20th Century the jury advocacy of Rufus Isaacs, Edward Carson, F. E. Smith and Edward Marshall Hall, who frequently opposed each other in greatly publicized cases, was an important influence on other barristers of the period and beyond. In very broad terms, and aware of the limitations of this approach, it might be said that the first three were the descendants in advocacy of Hardinge Giffard, John Holker, Charles Russell and Edward Clarke, but who took the art further - especially in employing conversational language and in carefully planning precise cross-examination rather than making long and emotive closing speeches; the small quiet sniper's rifle with accurate sights was replacing the loud blunderbuss, often unpredictable in results and dangerous to its user. Marshall Hall's advocacy, on the other hand, with its blatant appeal to emotion, sometimes sprinkled in tears, fell within the tradition of 19th Century histrionic advocacy.

Key words: *History; Law; Advocacy; Victorian.*

Introduction

Courtroom advocacy has not developed according to an over-riding logical plan, but has grown piecemeal and at an uneven pace, the result of a complex interplay of many influences. A non exhaustive list of principal factors, the relative importance of each has varied over time, includes: the effect on juniors of successful styles and approaches used by senior advocates; judicial tastes for the advocacy of lawyers, especially in the absence of jurors, when it is usually for the practical and the unadorned; changes in court procedure made by judges; reforms in the law of evidence concerning who and what may be put before courts and informing the content of submissions made; alterations in civil and criminal procedure and in the substantive law; the amount of media reporting of court cases; public and press opinion about the acceptable limits of advocates' tactics and oratory; the forming, by advocates, of professional rules of conduct and how much they are followed; levels of respect and civility between the bench and the bar; the standing of the judiciary and its power to control proceedings in court; the extent to which juries are used in trials and the social origins of those serving on them; greater education of jurors and less susceptibility by them to melodramatic appeals to emotion; awareness by advocates that in addressing juries they have to take into account contemporary use of language and, when making allu-

* Andrew Watson, LLB, MA, MPhil (Cantab), PhD., Department of Law and Criminology, Sheffield Hallam University, United Kingdom.

sions, draw on popular culture, itself far from still, formed by newspapers, novels, radio, films, television and increasingly the computer internet; the school educational curriculum, which has substantially evolved, usually received by lawyers and judges; general styles of public speaking and discourse in society; the formal teaching of advocacy, only introduced comparatively recently; and a relationship, although not a simplistic one, between quality of advocacy and the amount parties and the state are prepared to pay for it. New technology will, very probably, exert a strong influence on future forensic oratory. Recent widening of the pool of advocates may also be important.

This article concentrates on the mid -19th Century until the 1880 s, a period in which the style of advocacy before jurors established earlier during the century continued to be dominant, but signs of major change, which later developed further, began to appear.

Advocates of their time

In the second half of the 19th century, roughly until the beginning years of the 1880's, the foremost style of advocacy before juries in criminal and civil cases remained melodramatic, declamatory and lachrymose[1]. Aggressive and intimidating cross-examination of witnesses took place, sometimes, unless restrained by judges, descending into bullying[2]. Questions asked often had more to do with a blunderbuss than with a precise forensic weapon. Closing speeches were frequently long and repetitious. Appeals to emotion, and prejudice, usually reaching their peak in the peroration, were often greater than those to reason. The Diety and the Bible were regularly invoked. Vivid and floral language was employed and poetry liberally put to use to awaken generous sympathies. Special juries, in particular, because of the usually greater education of their members, would be treated to quotations from, and allusions, to English literature, history and the classics. This style of advocacy was parodied in Gilbert and Sullivan's *Trial by jury* - a short comic operetta, first staged in 1875, about a trial of an action in the Court of Exchequer for breach of promise to marry[3].

Mentioned is now made of some prominent advocates of the period, whose cases were greatly reported and whose style, because of their successes, influenced those of other barristers. In a small profession which lacked formal training in advocacy, watching and emulating the style and techniques of leading advocates was central to the education of younger lawyers.

A writer of several books on Welsh literary history, and originally employed in the Printed Book Department of the British Museum, John Humphreys Parry (1816 – 1880) decided to qualify for the Bar. He was called at Middle Temple in 1843. With a pleasing heavy set appearance, a deep Welsh voice and clear talent, especially for cross-examination, he achieved rapid success and soon built up a large practice at the Old Bailey, the Middlesex Sessions and on the Home Circuit, of which he soon became an acknowledged leader[4]. In 1856, he was made a serjeant. Amongst the great cases in which he figured, were for the prosecution in the trial of the Mannings in 1849, charged with

---

1 J. R. Lewis, *The Victorian Bar*, Robert Hale, London,1982, pp.119-120, describes how prospective barristers would sometimes attend a course on declamation with John Cooper, who had given up the stage himself to teach young hopefuls. His classes on declamation were attended by a mixture of aspiring barristers and actors. Recollecting the criminal bar in the 1870's and early 1880' s, Edward Purcell, *Forty Years at the Criminal Bar*, p. 27, wrote of "*many advocates who deliberately took a dramatic approach to advocacy and were prepared to adopt mannerisms, tricks of speech and gestures to heighten the effect of their pleas* and of *the prevailing fondness for noise".*

2 Lord Chief Justice Cockburn's comments in 1874 on the treatment of witnesses indicate this was particularly bad in England:
"I have watched closely the administration of justice in France, Germany, Holland, Belgium, Italy, and a little in Spain, as well as the United States, in Canada, and in Ireland, and in no place have I seen witnesses so badgered, brow beaten, and in every way so brutally maltreated as in England. The way in which we treat our witnesses is a national disgrace, and a serious obstacle, instead of aiding the ends of justice. In England the most honourable and conscientious men loathe the witness- box. Men and women of all ranks shrink with terror from subjecting themselves to the wanton insult and bullying misnamed cross-examination in our English courts. Watch the tremor that passes the frames of many persons as they enter the witness box. I remember to have seen so distinguished a man as Sir Benjamin Brodie shiver as he entered the witness box. I dare say his apprehension amounted to exquisite torture".
Calling for judges to exercise more control over the way cross-examination was conducted, the Lord Chief Justice continued:
"Witnesses are just as necessary for the administration of justice as judges or jurymen, and are entitled to be treated with the same consideration, and their affairs and private lives ought to be held as sacred from the gaze of the public as those of the judges or the jurymen. I venture to think that it is the duty of the judge to allow no questions to be put to a witness, unless such are clearly pertinent to the issue before the court, unless such as are clearly pertinent to the issue before the court, except where the credibility of the witness is deliberately challenged by counsel and that the credibility of a witness should not be wantonly challenged on slight grounds". Irish Law Times, 1874, quoted in Francis L. Wellman, *Wellman's Art of Cross – Examination*, 4th Edition, 1936, pp.188-189.
Nearly a decade after Lord Justice Cockburn's comments, and demonstrating continuing concern about cross-examination, Sir James FitzJames Stephen, who at the time had nearly thirty years experience in the courts firstly as a barrister and then a judge, wrote, in similar terms, that " *it was the highest importance that judges and counsel bear in mind the abuse to which* cross-examination *is liable and should do their best not to ask questions conveying reproach on character, except in cases in which there is a reasonable ground to believe that they are necessary".*
Like Cockburn, Stephen was not only exercised about the subject of questions put to witnesses but also the way in which they were asked. "*Cross-examination is not infrequently converted into an occasion for the display of wit, and for obliquely insulting witnesses. It is not uncommon to put a question in a form which is in itself an insult, or to preface a question or receive an answer with an insulting observation. This naturally provokes retorts, and so cross-examination so conducted ceases to fulfil its legitimate purpose and becomes a trial of wit and presence of mind which may amuse the audience, but is inconsistent with the dignity of justice, and unfavourable to the object of ascertaining the truth".* Stephen principally blamed judges for this state of affairs by not stopping examinations unnecessary for any proper purpose and for failing to prevent questions in improper forms. Sir James FitzJames Stephen, *A History of The Criminal Law of England,* MacMillan and Co, 1883, Chapter XII, pp. 435 – 436.

3 George Gilbert, when a practising barrister on the Northern Circuit, later as a magistrate for Middlesex and who also involved himself in much litigation about his work, would have been familiar with courtroom advocacy of his time. It is said he compiled his notes for *Trial by jury* in 1868. Still performed today, it is often produced in the Royal Courts of Justice, or Bow Street Magistrates Court, as part of the annual Covent Garden Festival.

4 B. Kelly, *Famous Advocates and their Speeches*, London:Sweet and Maxwell, 1921, p. 109.

the brutal murder of their lodger, the excise man O' Connor, and for the defence of Franz Muller in 1864, indicted with the murder of Mr Briggs on the underground railway[5]. In 1873 -74 he appeared for the prosecution in Regina V Castro, the Tichborne claimant perjury trial. Parry was considered to have a great deal of Charles Dickens's Buzfuz about him[6], but his theatrical performances won him considerable support and work from attorneys and were copied by others at the bar. His opponent in many cases, William Ballantine, described Parry's noise and thunder as *"passion passing for eloquence"*[7]. Despite this, J Alderson Foote, in his book of reminiscences of decades of practice as a barrister in Victorian England wrote[8]:

"Parry was an oldish man when I remember him, but to my mind he was the most persuasive advocate that ever addresses a jury. He had not the overwhelming force of Russell, nor the incisive persistence in cross-examination of Hawkins, nor the silver tongue of Coleridge; who were all in their own peculiar style unapproachable. But he had persuasion, which after all, is the end to which other qualities are the means; and I doubt if any other advocate of his day could have shown a higher average of successes".

William Ballantine (1812 – 1887) became a barrister of Inner Temple in 1834 Long before he was appointed a serjeant in 1856, he established himself as one of the leading criminal advocates of his day at the Old Bailey, where he remained for his working life, surpassing others in cross- examination and retention of essential facts[9]. For many years he dabbled in the theatre and journalism. Ballantine's clients were numerous and ranged from Prince Louis Napoleon (Napoleon III of France) to the Gaekwar (Prince) of Baroda, tried in 1875 with attempting to poison the British Resident. For this case he received Ł 10,000, then an enormous sum. He appeared for the claimant in Tichborne v. Lushington which straddled 1871 and 1872. Attracting crowds and huge press interest, the case hinged on whether the claimant, Arthur Orton, was or was not the missing aristocratic heir, Roger Tichborne. Its outcome led to Orton's later trial for perjury. His manner in court tended to be less passionate than some of his more florid rivals such as Parry. Ballantine's voice, however, was notable for its hesitancy and drawling tone, said to be *"half infirmity, half affectation"*[10]. It has been claimed that he was the inspiration for Anthony Trollope's Chaffenbrass in *Orley Farm*[11].

Another prominently successful barrister of the time was Montagu Williams (1835 – 1892). Prior to being admitted to the bar, Williams, who at Eton had been a fine classics scholar with a particular enthusiasm (later to be heard in the courts) for Horace, had pursued a number of occupations including acting[12]. Before and after becoming a barrister he wrote for the stage, including two farces, *A fair exchange* and *Easy Shaving*. Williams had a ready address and was skilled in marshalling circumstances favourable to his client[13]. He mainly appeared in the criminal courts. His style, perhaps unsurprisingly, was artificial, theatrical and prone to purple passages[14]. In the Turf frauds case of 1877 three Scotland Yard detectives and a solicitor were tried for complicity in the frauds of two notorious criminals, Kurr and Benson, who had already been sentenced for defrauding an old French lady[15]. The two were produced from prison to give evidence against the detectives. Montagu Williams, defending one detective, said this of the criminals:

"Excellent in vice and exquisite in fraud – the cunning of a cat teeming from the eyes of one; the oily soft serpent-like treachery of deceit trickling down from the mouth of the other".

A few years earlier, in similar vein, Sergeant Vaughan had poured scorn on a witness by saying:

"And then we come to Brown. Ah, there the impudent and deceitful fellow stands, just like a crocodile, with tears in his eyes and his hands in his breaches pockets"[16].

Montagu Williams prided himself on being able to assess how receptive jurors were to his advocacy and accordingly what more, if anything, was required. On this subject, in his *Reminiscences*, he wrote[17]:

"An advocate who has had large experience (especially if that experience has been in criminal cases), can pretty well, when he has finished

---

[5] His closing speech for Franz Muller was widely praised as a memorable piece of advocacy (Kelly, *ibid*, p. 109.), especially those parts which dealt with: the influence of the press on public (the jury's) opinion; that counsel's personal opinion was to be ignored; and for circumstantial evidence to be complete.

[6] J. R. Lewis, *The Victorian Bar,* Robert Hale, London, 1982, p. 62.

[7] *See* J. R. Lewis, *ibid,* p. 63.

[8] John Alderson Foote *Pie powder from the Law Courts: being dust from the law courts, collected, and recollected on the Western Circuit by a circuit tramp.*, first published by John Murray, London, 1911, re-published by EP Publishing, Yorkshire, Chapter IV, p. 81.

[9] B. Kelly,*Famous Advocates and their Speeches* London: Sweet and Maxwell,1921, p. 124.

[10] J. R. Lewis, *The Victorian Bar* Robert Hale, London,1982, p. 63. Bernard Kelly, *ibid*, p. 124, also noted a *certain hesitation* but also wrote of his *great charm of manner*.

[11] Law Times 82 (1886-8), pp. 198-199.

[12] Details of these and of his very early years are presented in Montagu Williams's memoirs, *Leaves of a Life being the Reminiscences of Montagu Williams QC,* MacMillan and Co, 1893, Chapters I – VI.

[13] B. Kelly, *Famous Advocates and their Speeches,* London:Sweet and Maxwell, 1921, p. 127.

[14] Two good examples of his style are given in the Appendix to Williams's *Leaves of a Life*. The first (Pp. 335-348.) is his address to the jury on behalf of Percy Lefroy, tried in 1881 for the murder of Frederick Gold on the London to Brighton Railway. According to Williams, this was *"the most sensational trial"* of his career. Lefroy was convicted and hanged. The second (Pp. 348-363.) is Williams's jury speech, which he delivered over two days, for George Lamson, a surgeon tried, convicted and executed in 1881 for the murder by poison of his young brother in law. The case was very widely reported in the press.

[15] For an account of this case, in which Williams had defended another prisoner, one Murray, see Montagu Williams, *Leaves of a Life*, MacMillan and Co, Chapter XXXIII, pp. 217-222.

[16] Robert Walter, *Random Recollections of the Midland Circuit* (1869), Chiswick Press, p. 13.

[17] Montagu Williams, *Leaves of a Life*, MacMillan and Co, 1893, p. 87.

speaking, tell which way the jury incline. It was the custom of mine to try and make sure of two or three of the most likely men first, and then to devote my attention to the others. Sometimes one man in particular would present special difficulties. It would be easy to see that he had formed an opinion adverse to my client, and was resolved not to be influenced by what I was saying. There was nothing for it but to patiently hammer away. I found it was half the battle to rouse him from his indifference, and to thoroughly arrest his attention; while, of course, if he once opened his mouth to make an inquiry, and thus gave me an opportunity of addressing myself directly to him, I could usually count upon his allegiance. It was sometimes my experience, too, that, when it came to considering the verdict, one or two strong men would easily carry their fellow – jurors along with them".

In *Reminiscences,* Williams approvingly described Serjeant Ballantine's ability to delight jurors by *firing off a number of small jokes* in his speeches, something he had observed early in his career as a junior to Ballantine in a case on a bill of exchange. Montagu Williams was noted for using humour in court to aid his persuasiveness. He recorded, *"I have noticed, indeed that jurors in a court of law, as also the ushers, are always convulsed with laughter on the smallest possible provocation"* [18].

The ill-fated Edwin James (1812-1882) QC, upon whose rather florid countenance it was said Charles Dickens based his description of the barrister Stryver in a Tale of Two Cities, and for a time Radical MP, was another with words. After his call at Inner Temple in 1835, he gradually built up a considerable practice in the criminal courts. He excelled in forcible address especially in cases where passion or prejudice might be relied on to sway the verdict of a common jury [19]. His most famous defence was that of the refugee Dr Simon Bernard, tried, in 1858, for conspiring to assassinate Emperor Louis Napoleon III of France ("The "Orsini Conspiracy"). Edwin James's speech on behalf of his rather sinister client was a masterpiece of florid and rhetorical advocacy. It was laced with "glittering steel" and "mounted lancers" – the words had little to do with the issue in hand but, jurors passions aroused with fears of a French invasion, were rewarded by Bernard's acquittal which led to frantic scenes of rejoicing at the Old Bailey and outside. Passionate advocacy by James, on another occasion, led to the judge suggesting, in view of comments made by counsel, that the Archangel Gabriel should be called to the witness box [20]. Three years after defending Dr Bernard, the popular advocate was disbarred by the Benchers of Inner Temple for dishonourable conduct in financial transactions and was later declared bankrupt. Just before these events occurred it was said the government was contemplating appointing him as Solicitor General. James left London for New York where he put himself to work at the New York Bar, as well as appearing on the stage at the Winter Gardens Theatre.

Digby Seymour (1822-1895) QC, an Irishman, also stands out for the use of flamboyant language which was successful before juries even in technical cases. As a member of the Historical and Literary Institution of Dublin he had produced an essay on the genius and study of rhetoric. Public speaking was regarded by him as a subject for careful cultivation and constant improvement. He was briefed in a compensation claim concerning some grass- fields near Neasden, where a large number of carriage –horses had been allowed to graze. Digby Seymour made a colourful speech, not entirely empty of patriotic sentiment, about:

"Arab steeds with flowing manes and panting flanks, careering over these fields as though they had been in the desert".

His opponent, however, was a great expert in compensation cases like this and reminded the jury that they had to consider:

(a) the value of the land
(b) the number of years' purchase that should be given on it
(c) special principles of discount which applied, and so forth.

Out of his depth, a horrified Digby Seymour asked a junior counsel, who he was leading, what to say. His junior answered *"Don't worry about that rot…just give them some more of those Arab steeds with their panting flanks".* This he did and won the highest compensation that had ever been awarded for land in the locality [21].

Digby-Seymour's capacity for emotive denunciation was shown in his address to the jury in the Fenian Trial in Manchester, November 1st 1867. Although he was instructed as one of the counsel for three Fenians, Irish nationalists, charged with murder, following bombings in the city, Digby-Seymour was at great pains to disassociate himself with the Fenian cause:

"Of all the curses that ever fell on my unhappy country, Fenianism is the blackest and the worst. Famine may desolate and destroy; a pestilence may mow down its hundreds or its thousands, returning spring will renew the crops of the earth, and a refreshing atmosphere will subdue the pestilence. But Fenianism is a blighting curse, a cancer, fastening itself to the fairest spots of an otherwise fair island, and looking for its mischief and exerting its influence upon the most vital parts of my native country".

A little later he continued:

"There is not a politician in my native land who has not denounced it; not a capitalist who is not afraid of it, nor an alter throughout the country which has not cursed it! The clergy have spoken of it as, in times of old, the Levitical priesthood and the priesthood of the East spoke: ' Go forth into the wilderness thou leprosy. Unclean! Unclean!" [22].

Another highly considered member of the bar was Henry Hawkins who, like Edwin James, had made his name as a criminal advocate in securing acquittals in the Orsini Conspiracy (1858) and also in the prosecutions that followed the collapse, in 1866, of the Overand Gurney discount house [23]. Like Montagu Williams, he had an interest in the stage. This assisted him to develop a graphic power of characterization which was

[18] Montague Williams, *Leaves of a Lif,e* MacMillan and Co, 1893, pp. 50-51.
[19] Bernard Kelly, *Famous Advocates and Their Speeches*, Sweet and Maxwell, 1921, p. 119.
[20] J. R Lewis, *The Victorian Bar*, Robert Hale, London,1982, p. 120.
[21] Arab Steeds. Viscount Alverstone's *Recollections of Bar and Bench (*1914), cited by Richard Hamilton, All Jangle and Riot, p. 270.
[22] Reproduced by Kelly, *Famous Advocates and their Speeches*, London: Sweet and Maxwell, London, 1921, pp.132-133.
[23] J. R. Lewis, *The Victorian Bar,* Robert Hale, London,1982, pp. 70-71.

frequently employed before juries in richly dramatic speeches. Lacking a classical education, and thus unable to make allusions to antiquity and the great oratory and literature of the past, he compensated by treating jurors with confidences, assuming them to be worldly men like himself, convincing them he was no different from them and making many references to horse-racing, then the leading gambling sport. Jokes were told by him to good effect. He had an extraordinary ability, by a wink or a gesture, to plunge courts, judge, jury, counsel and audience, into uproarious laughter, putting the jury into good humour and distracting them from damaging pieces of evidence[24].Unlike some others, who relied on a mixture of vanity, flair and memory, he was thorough in his preparation and worked hard, although on those occasions when he did not know his brief he appeared to manage competently[25]. Hawkins had a reputation as a rough cross-examiner. This was borne out in the case of *Tichborne v. Lushington* in 1871-72 where he behaved with such aggression towards the Claimant's witnesses that some of them refused to attend the later criminal trial for fear of facing him again. Repeatedly in Tichborne v. Lushington Hawkins used the weapon of selecting one small item from a witnesses evidence and on which to concentrate his energies, examining it in minute, and often embarrassing detail. One of the issues in the case was whether the real Roger Tichborne had tattoo marks on his arm like those of the claimant. A man called Boyle claimed to have seen such marks when Tichborne pulled up his sleeve to rub his arm. Hawkins put these questions:

Hawkins: "Do you know why he rubbed his arm?"

Boyle: "I suppose it itched. I do not know".

Hawkins: "But what you think when you saw him rubbing his arm?"

Boyle: "I thought he had got a flea".

Hawkins: "A flea! Did you see it?"

Boyle: "No, of course not ".

Hawkins: "Whereabouts was it? Just show me (*The witness pointed to his upper arm*).

What time was this?"

Boyle: "Ten past eleven".

Hawkins: "On the second occasion did you think it was a flea again?"

Boyle: "I suppose so…"

Hawkins: "What time was it? About the same time?"

Boyle: "Yes".

Hawkins: "Ten past eleven?"

Boyle: "YES".

Hawkins: "Then all I can say is, he must have been a very punctual old flea"[26].

It was said that Hawkins often rose to his feet with no firm ideas of the way his cross-examination should proceed; he had to rely on experience and instinct which was sometimes spectacularly correct[27].

Hawkins, along with many other of his contemporaries, acknowledged that little children in court could rend the hearts of jurors in criminal and civil cases and indeed encouraged their presence[28]. In his *Reminiscences*[29] Hawkins describes how he defended a man who had suddenly, and without any apparent reason, killed his wife. Securing his acquittal was helped by the evidence of a Vicar, who explained he had regularly attended church for thirty five years. In his view even greater assistance had been rendered by the presence in court of the prisoner's intensely sobbing children. Henry Hawkins conceded that their excessive grief might not have been all it appeared to be after hearing that just a few days before the trial they were playing on an ash-heap in the village where they lived, swinging around a dead cat with a string about its neck, and singing:

"This is the way poor Daddy will go!

This is the way poor Daddy will go!"

Away from juries, Hawkins had little reputation in arguing law before the appellate courts. After seventeen years as a QC, Hawkins was elevated to the Bench in 1876.

Willie Mathews was another barrister with a sense of drama. He had been the pupil of Montagu Williams. A child of the stage, the son of the playwright Charles Williams, he had a flow of language and a passionate earnestness that juries found irresistible, despite an unusual habit, which was possibly cultivated to hold the attention of listeners, of beginning a sentence with an accusative case and ending on a preposition. J.A Foote, KC., who knew Mathews on the Western Circuit, in his book *"Pie Powder"* speaks of Mathews's *"fervid eloquence which became the admiration and despair of his rivals and contemporaries"* and adds, *"He was the only advocate I have ever known who could make a jury-man shed tears, and on one occasion at least I have seen him perform the same operation in cold blood upon a reluctant judge"*[30]. In his memoirs, Travers Humphreys, an eminent QC and later High Court judge, recounts how he had also seen a judge and jury being reduced to tears by Mathews[31].

---

[24] J. R. Lewis, *ibid,* p. 15.

[25] An aspect of Hawkins's abilities marvelled upon by Sir Edward Clarke in his unfinished short treatise on advocacy, published some years after his death as an Appendix to E. W. Fordham, Notable Cross-examinations, 1951.

[26] Reproduced by Richard Du Cann, *The Art of the Advocate*, Pelican Books, 1980, p. 126.

[27] See Henry Hawkins, *Reminiscences of Henry Hawkins, Baron Brompton*, *Edited by Richard Harris, K C,* E. Arnold, 1904, republished by Kessinger Publishing, USA 2004, especially Chapter XIV: 'The case of Mr Faker and the Welsh Will', in which, through testing his evidence in cross examination, Hawkins exposed a well-known dissenting clergyman, thus destroying the plaintiff's case, called as a witness by his opponent Edwin James.

[28] This was, of course, appreciated at least since the days of ancient Rome, see Appendix 1, Excursus: Classical Rhetoric.

[29] Chapter 5. J.Murray, 1911.

[30] *Pie Powder*, J. Murray, 1911, P. 32. On the following p., Foote wrote about hearing Mathews addressing a common jury in a "*torrent of burning eloquence, probably incomprehensible to most of them, but nonetheless impressive*".

[31] Travers Humphreys, Criminal Days, Hodder and Stoughton, 1946, pp. 68-69.

Signs of Change

Even though histrionics continued to thrive amongst these leaders of the bar and were copied by some juniors, signs of change began to appear. Men like Hardinge Giffard, who became Lord Halsbury and Lord Chancellor for a total of eighteen years[32], John Holker, later to be appointed Attorney General, Charles Russell, a future Lord Chief Justice, and Edward Clarke began to significantly change the style of advocacy. Their approach, which was increasingly emulated by others at the Bar, was "*quieter, more learned and less inclined towards violent appeals to emotions and florid language and quoting widely from popular verse and literature*"[33]. Less concerned with relying on the tricks of the Victorian stage, they also were developing a more dignified and controlled manner in their conduct towards each other and to witnesses. These barristers tended to select the best arguments from their client's case and to drive them home forcefully to jurors, rather than saturate them with rhetorical elaboration of all conceivable points. They also avoided tiring juries with needless repetition.

Hardinge Giffard (1823-1921), who narrowly escaped a pistol bullet fired by a deranged clergyman in the Old Bailey in 1854, was recognized for his judgement, power of expression, freedom from speaking nonsense, not talking for talking's sake and for his ability to grasp all the facts of complicated cases[34]. He accepted a wide variety of briefs and in London divided his time between the Chancery bar and the Old Bailey. His courtroom demeanour was often understated, even stilted[35].

Recalling his association with Hardinge Giffard, Sir Edward Clarke, in1916, wrote:

"It is now fifty years since I made his acquaintance at the Old Bailey where he had a most lucrative practice. It was then a rough place and some of the older men had habits of cruel and offensive cross - examination and violent and unscrupulous advocacy, which Giffard's influence and example did much to banish from our criminal courts. He was not a great defender of prisoners: Ballantine and Parry…had the most important defences but…Giffard was constantly appearing in important prosecutions.To listen carefully to the whole of a case when Giffard prosecuted with Poland for his junior and Russel Gurney was the presiding judge, was the best lesson a young barrister intending to practice in the criminal courts could possibly have[36]*".*

John Holker (1828-1882) did not attend university and was articled to a Westmoreland solicitor before being called to the Bar at Gray's Inn, at the then comparatively late age of 26, in 1854. He began to specialize in patent cases and then commercial law more generally. The Tichborne cases, in which he was not involved, did much to promote his career: As they occupied many of the leaders of the bar, solicitors had to look elsewhere for forensic ability. This resulted in Holker being thrust to the fore. There he thrived, with a great knowledge of business and of how businessmen thought, suppressing all oratory, claiming little or no knowledge of law and always putting the most common place view of a case to a jury. "*A great getter of verdicts, the impression he made on a jury was that his client had a first – rate case and was to be pitied for having such a second rate advocate*[37]". A contemporary wrote of him; "*this tall plain Lancashire man never seemed to labour a case nor to distinguish himself by ingenuity or eloquence, but through whom the justice of his case appeared to shine through a somewhat dull but altogether honest medium".* He had *the art of never seeming to be cleverer than the people he was addressing*[38]. J. A. Foote, who had also encountered him, wrote, *he was massive and deliberate, with a hesitating delivery that amounted at times to a stammer, but he could address a jury as if he was one of themselves, and won their confidence by his apparent sincerity rather than by a parade of oratorical power*[39]. The appearance of great candour was his most valuable asset in advocacy. In court it was said he would accept suggestions from juniors and solicitors clerks[40], marking him out from many barristers of the old school, who had much of the prima donna about them. Sir John Holker became Solicitor- General under Disraeli's administration in 1874 and was briefly Attorney General. After the fall of the Conservative government, he was appointed a Lord Justice of Appeal.

Charles Russell (1832-1900), born at Newry in Ireland, became a solicitor in 1854 and soon became noted for vigorous advocacy in the county courts. He was called to the English

---

[32] See John Hostettler, *Lord Halsbury*, Barry Rose, 1998.

[33] J. R. Lewis, *The Victorian Bar*, Robert Hale, London, p. 120.

[34] Such qualities were praised by the eminent solicitor William Freshfield in a letter he wrote to Giffard in 1883, and cited in Lewis J. R. *The Victorian Bar*, p. 163. He was said to be blessed with great powers of memory to such an extent that he could read a brief without making a single note and conducted one heavy case without taking the ribbon off the papers in court; they were later found to have only one thing written on the outside: a list of the trains back to London. Richard Hamilton, *All Jangle and Riot*, Professional Books, 1986, p. 177. Another, although somewhat later, advocate, who was also renown for a phenomenal memory was Sergeant A. M. Sullivan, the last Sergeant at the Irish Bar who died in 1959. It was said of him that he never needed to refer to papers in court. Brian Gibbens, *Elements of Modern Advocacy*, New Law Cassettes, Butterworths, London,1979. Minimising the need to read papers, enabling barristers to maximize time looking at witnesses, judges and juries, was often seen as a valuable persuasive technique in advocacy, projecting confidence and sincerity of belief in a client's case. Indeed in his short treatise on advocacy Sir Edward Clarke, *infra,* remembers being told by Harry Hawkins*, earlier,* to *never examine or cross-examine from your brief. Know your brief and examine from your head*. He recalled this *as one of the most useful pieces of advice I ever received.*

[35] R. F. Heuston, *Lives of the Lord Chancellors 1885-1940*, Oxford, 1964, 12. Hardinge Giffard, although generally eschewing it, did vividly employ theatrical emotion and drama, presumably for entirely tactical reasons, in his six hour speech before lay magistrates at Market Drayton in1867. He was instructed to halt the prosecution of Edward Eyre, the former governor of Jamacia, for murder, arising from his bloody suppression of the Morant Bay uprising in 1865. At one stage, Giffard broke down in tears and called on God before resuming his appeal to the biases of rural magistrates. Eyre was not committed. (See Korstal, R. W. *A Jurisprudence of Power; Victorian Empire and the Rule of Law*. Oxford University Press, 2005, pp. 302-310).

[36] Reproduced by J R Lewis*, The Victorian Bar,* Robert Hale, London, 1982, pp.163-164.

[37] AW Cockburn QC. An Address on Advocacy to the Christ Church Law Club, May15th 1952. Published by the University of Southampton.

[38] Mr Balfour Browne K.C. Quoted by Francis Cowper, *Holker of Gray's Inn, Graya* 14, Easter 1934, p. 71.

[39] J. A.Foote, *Pie powder from the Law courts,* John Murray, 1911, p. 177.

[40] Francis Cowper,*Holker of Gray's Inn*, Graya 14, Easter 1934, p. 72.

Bar at Lincoln's Inn in 1859 and soon became established in the North of England. His chief rival on the Northern Circuit was John Holker. In his early days, perhaps keeping with the spirit of the times, flashes of temper were seen and many angry exchanges with opposing counsel, judges and jurors occurred. This was to change and as the years passed he won great admiration for his advocacy. Russell's powers of cross- examination were acclaimed as those of genius[41], whilst in the art of forcibly stating a case to a jury he was extraordinary, said to be beyond every advocate in living memory[42]. In the opinion of J Foote, who heard him conduct cases, Russell was an *elemental force*. In similar vein Travers Humphreys, who had also observed him, wrote:

"What one remembered after witnessing one of his great performances was not the admission extorted from a witness, the astuteness of the questions put in cross-examination, or even the eloquence of speech to the jury, but the atmosphere which the man created. Whoever was *the judge, from the moment Russell got going he dominated the court"*[43].

Unlike many of his contemporaries, he did not attach much importance to what he jokingly called *"rhetorical fireworks"*, believing that juries were becoming increasingly suspicious of florid oratory and theatricality and preferred to base their decisions on what they believed to be solid facts[44]. Again, distinguishing himself from many others, Russell always meticulously prepared his cases so that when he was in court he could watch the jury and the judge in everything they did, however trivial it might seem. He was always ready and alert and would not hesitate to stand up to any judge if he thought the rights of the advocate were being invaded[45]. Russell was made a Queen's Counsel in 1872. Such leaders of the Bar as Serjeants Ballantine and Parry and Henry Hawkins QC found in him a very formidable rival. Russell was engaged in many well known cases, but his most famous were the successful defence of the Irish Nationalist leader Charles Stewart Parnell, before the Parnell Commission in 1888, and the defence of Florence Maybrick at the Liverpool Assizes in 1889 who was convicted of murdering her husband by poisoning him with arsenic[46]. Sir John Russell was Attorney General in the Liberal Governments of 1885 and 1892 and was appointed Lord Chief Justice in 1894, the first Catholic to hold that office for centuries.

The late Victorian period saw a number of contests in court between Sir Charles Russell and Sir Edward Clarke. Edward Clarke (1841-1933) was not from a privileged background, beginning his working life as a shop assistant in a silversmiths run by his father. Although lacking money, influential friends, connexions with the law and social standing, he had a driving ambition to excel first by becoming a barrister and then by entering politics. After periods as a writer at East India House and a law reporter, he raised sufficient funds to enter Lincoln's Inn as a student and to be called to the bar in 1864, aged 23. Small criminal cases came his way. In time they were followed by weightier matters. Solicitors noticed his skill in persuasively presenting medical evidence and cross-examining doctors - both the result of vast preparation before trials[47]. The case which established him was that of Harriet Staunton in 1877, when Clarke was 36. He was briefed to defend Patrick Staunton on a charge of murder. The kernel of the Crown's case was that a woman of limited mental powers had been neglected and starved to death over months by her callous husband, Patrick, and his relatives, to obtain her small inheritance. Public outrage and interest in the trial was intense. Despite much undermining by Clarke of medical evidence on behalf of the Crown, all four defendants were convicted and sentenced to death after a summing up by Mr Justice Hawkins (Henry Hawkins, *earlier*) pointedly against the defendants[48]. Clarke's closing speech had a very great effect on the country and propelled him up to advocacy's top rank. His early desire for political fame was abandoned. During his remaining thirty seven years at the bar he appeared in many famous and sensational cases. Against Sir Charles Russell in 1886, he obtained a verdict of not guilty for Adelaide Bartlett who was charged with murdering her husband with chloroform. In 1890 he appeared in the Parnell Divorce suit. The following year Sir Charles Clarke represented the plaintiff in the Baccarat case in which the Prince of Wales gave evidence. He fought for Oscar Wilde in his three trials at the Old Bailey in 1895. And in 1896 he appeared for Dr Jameson, who was prosecuted in London after the Jamieson Raid in South Africa.

Clarke was a fine speaker and had taken lessons in voice production and public speaking. He knew the value of pause and of a change in tempo[49]. Unlike others of the period, "*he had in-*

---

41 Charles Russell's biographer, R. Barry O' Brien *wrote: It was a fine sight to see him rise to cross-examine. His very appearance must have been a shock to the witness, - the manly, defiant bearing, the noble brow, the haughty look, the remorseless mouth, those deep set eyes, widely opened, and that searching glance which pierces the very soul. "Russell", said a member of the Northern Circuit, "produced the same effect on a witness that a cobra produced on a rabbit".* R. Barry O'Brien, *O'Brien's Life of Lord Russell*, Smith, Elder, 1901, p. 101. John Singer Sargent's large portrait of Charles Arthur Russell, Baron Russell of Killowen, painted in 1899, hangs in Lincoln's Inn.

42 B. Kelly, *Famous Advocates and their Speeches*, London: Sweet and Maxwell, 1921, p. 135.

43 *Criminal days*, Hodder and Stoughton, London, 1945, p. 91.

44 R. Barry O' Brien, his biographer, said to Russell, "*Your methods are altogether different, you do not as a rule manoeuvre, you go straight at the witness.* Russell replied: *With an English jury it is different. They are busy and they want to go away quickly. Mere finesse they do not appreciate; go straight at the witness and at the point; throw your cards on the table. It is a simple method and I think it is a good method". O'Brien's Life of Russell*, Smith, Elder, 1901, pp.100-101.

45 Lord Norman Birkett, *Six Great Advocates*, Penguin,1961, p. 71.

46 See Lord Norman Birkett, *ibid,* pp. 71-80. Also, for a highly readable account of the trial, F. E. Smith, *Famous Trials*, Hutchinson and Co, Ltd, 1930, *Mrs Maybrick*, pp. 399- 412.

47 Edgar Lustgarten, *R v The Stauntons*, part of the Old Bailey Series, broadcast in 1970 on Radio 4.

48 Following a public outcry, and a petition signed by over seven hundred doctors that the cause of Harriet Staunton's death was not starvation but tuberculosis, they were reprieved.

49 Travers Humphreys, *Criminal Days*, Hodder and Stoughton, p. 92.

herited few of the declamatory, lachrymose, resonant talents of the early Victorian Bar[50]". Clarke relied on persuasion in his speechmaking, an appeal to logic that sprang from a deep sincerity, rather than almost wild appeals to emotion. Unlike many barristers, he seldom employed ridicule[51]. Juries found for him because they believed he believed.

Edward Clarke's unfinished short treatise on advocacy, only published some years after his death[52], shows he employed in both cross-examination and speeches, the two forming what he called "*a combined address to the jury*", subtle psychology and close attention to those details his preparation and management of the case in court led him to believe would concern jurors:

"The cross-examination of the chief witness for the plaintiff is always of great importance It is the first opportunity which counsel for the defence has of indicating, instead of presenting, because the most skillful and effective cross-examination is that which interests the jury and sets them thinking what the answer to the plaintiff's case, or the case for the prosecution, can possibly be, and by the selection of and arrangement of the facts referred to, suggests the defendant's case instead of stating it.

Presently comes the speech in which the defence is formulated; and if, listening to that speech, a juryman says to himself, "Why that is just what occurred to me when the witness was in the Box," the verdict, so far as he is concerned, is safe. The conclusion which his own intelligence has suggested must be right"[53].

In the assessment of Lord Birkett:

"In an age when advocacy was held in great esteem, nobody ever equalled Clarke in marvellous persuasive power. Some of his learned brethren excelled him in some spheres. He lacked, for example, the overwhelming elemental force of Charles Russell and could not rival his incisive, persistent, penetrating power of cross – examination. Others perhaps had a greater sense of the dramatic or were more truly versatile; but Edward Clarke had the supreme gift – the advocate's pearl of great price – the gift of persuasion. This, when all is said and done, is the gift to which all other qualities of the advocate are subordinate: and it was by this gift that Clarke won his enduring fame"[54].

Norman Birkett (1883 – 1962), was called to bar in 1913. He never saw Edward Clarke in action, but recalls that older barristers, whenever conversation turned at the Inns of Court or in the Bar Messes on circuit to great advocates, spoke of him with admiration and wonder. It is, therefore, very likely that his highly successful advocacy was an influence on them in the later Victorian period and after[55].

It is perhaps not too fanciful to suggest that the more restrained advocacy before juries that was emerging may have been influenced by the style of an earlier barrister James Scarlett (1769-1844), Lord Abinger (1835), who was appointed Lord Chief Baron of the Exechequer in 1834. Invariably mastering each brief sent to him, not taking more that he could really attend to[56], having a deep knowledge of the law and consummate advocacy soon made him one of the leaders of the bar. A particular talent was getting witnesses to tell their stories as if for the first time. In marked contrast to many of his contemporaries, Scarlett's highly winning method of addressing juries did not involve rhetorical expedients but choosing the very best argument on his client's behalf and putting it with all his ability in a well modulated musical voice, paying strict attention to facts and good diction. His manner was relaxed and his tone conversational. Of Scarlett's achievements with juries a number of stories are told, some of which contrast him with Henry Brougham. One has it that at the end of a Yorkshire Assizes a lawyer found himself in the company of a juryman. The lawyer asked the juror what he had thought of leading counsel. " '*Well' said the juryman 'that Lawyer Brougham be a wonderful man; he can talk, he can: but I don't think nowt of Lawyer Scarlett*. *Indeed* replied the lawyer, *but you have given him all the verdicts Oh, there's nothing in that* said the juror, *he be so lucky, you see, he be always on the right side"*[57].

In later Victorian and in Edwardian times Sir James Scarlett's accomplished advocacy was seen as instructive in a number of practical books for barristers beginning their careers.

It may well be that the success of men such as Hardinge Giffard, John Holker, Charles Russell, and Edward Clarke was partly because they recognised a change in public mood away from artful bombast, verbal chicanery, gestures, aggression and some-

---

[50] J. R. Lewis, *The Victorian Bar*, Robert Hale, London, p. 141.

[51] DuCann, Edward, *The Art of the Advocate,* Penguin Books, 1993, p. 144.

[52] In the form of an Appendix to E.W. Fordham, *Notable Cross-examinations*, Constable and Company, 1951.

[53] Elsewhere in his treatise, Clarke criticizes Sergeant Parry, *earlier*, for often spoiling shrewd and powerful cross-examinations by *violence and harshness* to witnesses. John Duke Coleridge (1820-1894), eventually Lord Chief Justice of England, was praised for his ingenious and painstaking cross-examination, in which the more closely a witness was entangled the more suave and gentle Coleridge's manner became. Clarke, however, described, as "*studiously unfair*", Coleridge's *habit* of repeating a witness's answer or quoting it in a subsequent question but not exactly as it had been said, though insufficiently altered to attract comment from opposing counsel or judges, as a means of quietly getting the witness to give his or her case away.

[54] *Six Great Advocates*, Penguin, 1961, p. 38.

[55] Sir Malcolm Hilbery,born in the same year as Lord Birkett, in a speech, entitled *Duty and Art in Advocacy*, at Gray's Inn, delivered in 1938 when he was a High Court judge, (*Graya* No XX, Easter), recounted how, as a young boy, he had seen, Sir Edward Clarke in the Kings Bench: "*It has remained a vivid memory and a model to this day*". Travelling back in generations, and showing how young advocates may to some extent be influenced by older and outstandingly successful ones, Edward Clarke himself professed, in his short treatise on advocacy, Fordham, *ibid,* admiration for William Ballantine, Henry Hawkins and John Duke Coleridge.

[56] It was said of James Scarlett, in contrast to many of his colleagues, that "*One of his great merits was that when he was engaged in a cause his services might always be relied on. He disdained to adopt the vicious practice of some barristers, then far too common, of wandering from court to court and taking contemporaneous briefs in all, to the damage of those whose briefs they had accepted"*. Unattributed quote in Richard DuCann, *The Art of the Advocate,* Penguin Books, 1993, pp.40-42. The habit, to the detriment of the quality of their advocacy, of leading silks to accept, when they were in court, as many small briefs as their clerks could collect is also mentioned by Sir Edward Clarke in his short unfinished treatise on advocacy, *ibid.*

[57] A. W. B. Sampson, *Biographical Dictionary of the Common Law*, Butterworths, 1984. For Scarlett's own assessment of his advocacy, in a biography written by his son, see Peter Campbell Scarlett, *A Memoir of the Right Honourable James, First Lord Abinger*, J. Murray, 1877, Chapter 18.

times insults and altered their advocacy accordingly in the later 19th Century. In the bar's tradition of copying what appeared to succeed, they began to be emulated by junior members.

Jurors became far better informed than before, capable of seeing through it and resentful when empty rhetoric was tried on them. As a consequence of 19th Century reforms, education was available to more people[58]. Universal elementary school education, with its emphasis on the "3 Rs" (reading, writing and arithmetic), was introduced in the 1860's. Although teaching ended at an early age, the basic literacy and numeracy provided by it gave many the means of obtaining further knowledge[59].

Parliament's decision in 1857 to create public lending libraries provided an important source. The growing number of national and municipal museums and galleries helped stimulate intellectual curiosity. Working class self improvement, though unevenly spread, was another significant cause of increase in overall educational standards[60].

Dozens of new private schools, often modelled on Thomas Arnold's Rugby School, to cater for the sons, and some daughters, of the growing middle class were opened in the latter part of the Nineteenth Century. These added to the general level of education in society.

Beyond elementary education, the content of many school curriculums expanded to encompass the burgeoning sciences with their rational enquiry. Increasing amounts of knowledge were disseminated in newspapers. By the 1880's Darwin's theory of evolution had entered popular culture[61]. Religious certainty, because of scientific explanation - succinctly put, *Darwin's books drove a cart through an older book* - began to lessen from mid Victorian times. For this and other reasons, it diminished still further in the remaining part of the century and after[62]. The sort of impassioned appeal before juries to the deity, quotations and stories from the bible, so much used earlier, could no longer be relied upon. In short, jurors with broader perspectives expected more of an appeal to reason from advocates in a conversational and matter of fact manner, rather than one histrionically directed at their emotions and faith[63].

Opportunities for passionate appeals to emotion, flowery passages and histrionic gestures by barristers considerably reduced as trial by jury in civil actions diminished with the establishment of County Courts, where the overwhelming majority of cases were heard by judges alone, and the Common Law Procedure Act 1854 which, provided both parties consented, permitted issues of fact in the higher courts to be tried by judges without juries. Judges had little taste for sensational appeals, floridity, and theatricality but did have a high regard for fact, law and logically structured argument. Accordingly advocacy before them adjusted and shortened in length. Some barristers mourned what they saw as the decay of forensic oratory, due to the reduction of trials by jury; others accepted the altered style required as a necessary adaptation to changed circumstances. Specialist statutory tribunals, conceived to implement new regulatory legislation and to resolve disputes between the state and the subject, or between subjects, did not employ juries. Indeed the majority of them had little or no need for advocates.

At the end of the 19th Century and during the first quarter of the 20th Century the jury advocacy of Rufus Isaacs, Edward Carson, F. E. Smith and Edward Marshall Hall, who frequently opposed each other in court in greatly publicized cases, was an important influence on other barristers of the period and beyond. In very broad terms, and aware of the limitations of this approach, it might be said that the first three were the descendants in advocacy of Hardinge Giffard, John Holker, Charles Russell and Edward Clarke, but who took the art further - especially in employing conversational language and in carefully planning precise cross-examination rather than making long and emotive closing speeches; the small quiet sniper's rifle with accurate sights was replacing the loud blunderbuss, often unpredictable in results and dangerous to its user. Marshall Hall's advocacy, on the other hand, with its blatant appeal to emotion, sometimes sprinkled in tears, fell within the tradition of 19th Century histrionic advocacy.

Conclusion

It has been the intention of this article not only to exhibit jury advocacy that predominated until the 1880 s in Victorian England but also to show the beginning of what was to transform it in succeeding.

---

58 See Michael Hyndman, *Schools and Schooling in England and Wales*, *a documentary history,* Harper and Row, 1978, especially Chapter 10, with a chronology of principal educational reforms in the 19th and 20th Centuries.

59 In assessing factors which led to a general improvement in educational standards in the 19th Century publication and wide circulation of pamphlets, magazines and books, with the purpose of educating persons of modest learning, was of significance. Such works were produced cheaply by commercial publishing houses, including *John Murray*, exploiting contemporary advances in printing technology and distribution. Informative and sometimes entertaining, works were also published by non commercial organisations whose aim was to promote education amongst the masses. Prominent amongst these was the Society for the Diffusion of Useful Knowledge which operated during the first half of the century.

60 Jonathan Rose, *The Intellectual Life of the British Working Classes*, Yale University Press, 2001, based upon the evidence of almost two thousand published and unpublished memoirs from 19th and 20th Century Britain, portrays a picture of a working class determined to achieve self-education by reading literature, including the Roman and Greek classics, going to concerts and the theatre - Shakespeare and other classical dramatists attracted enthusiastic and rowdy working class audiences, learning to play musical instruments, setting up mutual improvement societies and establishing the Workers Educational Association in 1903. In an interview, held at the Royal Society, London, on 2nd July, 2010, Professor Rose agreed with the thesis that jurors drawn from a more educated society than previously could reasonably be supposed to have expected more of an appeal to reason and to examine evidence more closely than before. He saw working class and lower middle class self – education contributing to this.

61 *On the Origin of Species by Means of Natural Selection* (1859), *The Descent of Man and Selection in relation to Sex* and *The Expressions of the Emotions in Man and Animals* (1872) were read by a large section of the public. Many more people would have absorbed Darwin's key ideas from reports in the press.

62 See J. F. Von Arx, *Progress and Pessimism: Religion, Politics and History in late 19th Century Britain.* Harvard University Press, 1985.

63 Touching on this subject, George Elliot K.C., in his Forward to *Illustrations in Advocacy by Richard Harris K.C. Fifth Edition, 1915,* a work intended mainly as a guide to effective court advocacy for newly qualified barristers, wrote: *Further it may also be remembered that the development of education amongst all classes of the people has rendered juries much less susceptible to mere tricks of advocacy and less easily diverted from the real issues before them.*

The Revenge of Soghomon Tehlirian

Patrizia Resta *

Abstract

One of the cases that emerges from the many pages of the Armenian genocide is the case of Soghomon Tehlirian who, on 15 March 1921, in Berlin, killed Talaat Pasha, the Turkish Prime Minister who was considered responsible of it. Tehlirian during the trial declared that he was guilty affirming that he acted in order to revenge his spilt-blood and he was acquitted. The analysis of this case of legal ethnography, through data and transcriptions, will focus on the judicial ability expressed by retaliative paradigm as a basic element of the jury's choice, focusing on some aspects of the decision that the literature on revenge can help better understand.

Key words: *Legal Anthropology; revenge; Armenian genocide; political trial.*

Revenge was and is an arcane principle. According to a primitivist perspective, it is conceived as an expression of destructive violence, a natural principle and a rudimentary means to resolving conflicts. It has been defined a juridical institution [1], due to the fact that it is a form of punishment, but also, according to a systemic perspective, "un rapport d'échange bilateral résultant de la réversion de l'offense et de la permutation des rôles de l'offenseur et de l'offensé" [2], and a moral idea [3] expressed in terms of honour, blood and violence. Revenge is therefore a multifaceted paradigm, scaleable according to different principles. In my opinion, its effectiveness does not cease with the establishment of formal law but it is preserved in contemporary societies. It is a part of judicial imagination and it contributes to the process of legalisation that is the foundation of the common objective to "assurer la régulation de ce qu'elles considčrent comme essentiel à leur perpétuation" [4].

As already argued in a previous publication of mine [5] revenge can be considered as a semantic code that comes from an interiorised traditional model. All the same, revenge can counteract tradition, for the simple reason that it has the ability to embed itself in tradition, to give back as negotiated forms of social action. This article aims to show that revenge appears as the generative matrix of the regulatory criteria that performs in the semi-autonomous social fields where the law can be declined [6] even in contemporary societies.

In order to sustain our theory, we will use as a case study of legal ethnography the case of Soghomon Tehlirian who, on 15 March 1921, in Berlin, assassinated Talaat Pasha, the Turkish Prime Minister had sought asylum there and was considered the main party responsible for the Armenian genocide in the majority of the historical reconstructions [7] and for the conscience of many, and not just the Armenians [8]. Tehlirian was tried two months later. The trial took place between 2 and 3 June of that same year. The young man, who had pleaded guilty, was acquitted and immediately released from custody.

The court case itself was short but intricate, given the large number of players involved and the conflicting interests that formed its backdrop. The political context in which the trial

* Prof. Patrizia Resta, Department of Humanities, University of Foggia, Italy.

1 Paul Bohannan, *Justice and Judgement among the Tiv*, (New York: Oxford University Press, 1957).

2 Raymond Verdier, *Le systčme vindicatoire* in *La Vengeance et pouvoir dans quelques sociétés extra occidentales*, vol I, éds by Raymond Verdier (Paris: Cujas, 1980) pp. 12-42, p. 14.

3 Edward Westermarck, *Blood-Revenge and Compensation. The Punishment of Death*, "*The origin and development of the Moral Ideas*", vol.I, cap.xx, (London:Macmillan and Co.,1906-1908).

4 Norbert Rouland, *Anthropologie juridique*, (Paris: Les Presses Universitaires de France,1988) p. 124.

5 Patrizia Resta, *Pensare il sangue*, (Roma: Meltemi, 2002).

6 Sally Falk Moore, "Law and the social Change: The Semi-autonomous social field as an appropriate subject of study", *Law and Society Review*, 7 (1976), pp.719-746.

7 See, among the others, Richard Falk, *Foreword*, in "The Armenian genocide in Official Turkish Records": collected essay by Dadrian Vahakn N., *Journal of Political and Military Sociology*, XXII n. 1 (1994); Vahakn N. Dadrian, *The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucasus,* (Providence: Berghahn, 1995); Guenter Lewy, *The Armenian Massacres in Ottoman Turkey,* (Salt Lake City: The University of Utah Press, 2005); Marcello Flores, *Il genocidio degli armeni*, (Bologna: Il Mulino, 2006); Taner Akçam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* (London, Constable, 2007); Vahakn N. Dadrian. and Taner Akçam, *Judgment at Istanbul: The Armenian Genocide Trials* (New York: Berghahn, 2011); Taner Akçam, *The Young Turks' Crime Against Humanity,* (Princeton, Princeton University Press, 2012).

8 Hasan Chemal, *1915 Ermeni Soykirimi*, (Hrant Dink Foundation 2012) (trans. in Italian *Genocidio armeno*, Guerini Associati, 2015) p. 54.

was held was a deciding element for the fate of the same. Therefore, the first part of our observations will focus on outlining the political scenario that intrinsically constitutes the interpretative key of the case. This will then set us in good stead to examine the actual trial documents, on which we will focus later, revealing how the hearing underpins the need to conceal the political motive for the murder behind the theory that cites revenge as the cause.

Indeed, the reason that drives us to focus our analysis on this event lies in the fact that even although Soghomon declared that he was guilty[9], he never actually believed that he was, protesting that he had acted to avenge the honour of his family and his people. It is also interesting that the jury, called upon to judge the action in a context of civil law, accepted the defence attorneys' argument, translating it into a verdict of acquittal. The case was therefore embedded between different criteria for verifying the reality of the situation that are not of a strictly legal nature. Over the last few years, most of the studies which have focused on interpreting the verdict that followed the trial, tie its fate to that which some define the genocide[10], and others the deportation[11], of the Armenians. Instead, in this short paper, we aim to offer a different perspective. The young Soghomon, it was written, acted "followed the only law he knew, not man-made but biblical law – the simple dictum that if a man kills another, he should himself be killed"[12]. In the following pages we will attempt to understand how and why an act of revenge might have played a deciding role in planning the murder, and in justifying why it was committed and why, even if it is concealed in the folds of a line of reasoning that is legally acceptable, it was used as the founding element for the jury's decision to absolve a self-confessed murderer, judging him in a State such as Germany, which, like Italy, is considered to be the cradle of the principles that gave rise to the Romanist legal system.

The case

Soghomon Tehlirian was a young Armenian. He belonged to a family of merchants that had been exterminated during the exodus to which the Armenians living in Turkey had been sentenced by a power that historical sources portray as tyrannical towards them. Talaat Pasha was the Turkish Prime Minister who, together with Cemal Pasha and Enver Pasha, had played an active role in the Armenian affair and was considered the person most responsible for organising the genocide[13]. This was why Soghomon Tehlirian killed him.

There is a reasonable amount of literature available about the trial brought against Tehlirian in 1921. Most of it consists of sources that are not original, often based on the stenotype transcription of the trial records or on the memories subsequently drafted by all those who took part in the event[14]. Over the last few years, several documents regarding the trial have emerged and these have still only been partially analysed by historians[15]. In recent years, several interesting postgraduate theses have focused on the case[16]. With the exception of a few, negligible differences, the various analyses agree on the phases of the trial, the contents of the testimonies and on several crucial facts that enabled the defence attorneys to obtain the not guilty verdict. The material which has been published reconstructs the event within a perspective that is mainly historical. Indeed, the episode certainly has a specific political dimension of its own that cannot be ignored and which obviously influenced the trial. Consequently, in the literature on the case, two lines of reasoning can be distinguished. One, which takes the side of the Armenians, tends to highlight the hegemonic, violent role of the Government of the Young Turks, which was an expression of the Union and Progress party that had taken power. This line of reasoning- although this never expressly emerged during the trial, according to the trial records – assumes that a link existed between the accused and Nemesis, the organisation at the service of the ARF (Armenian Revolutionary Federation), whose duty it was to organise an active form of resistance to the Ottoman government. Furthermore, it focuses, in the reconstruction of the trial, on the atrocities about which testimony was provided therein and which justified Soghomon's revenge on Talaat based on the concept of payback. Indeed, in this case, his acquittal is seen as part of a trial designed to re-establish the relationship of exchange between victim and murderer on an equal level, showing that the victim, Talaat Pasha, was the

[9] See *The Trial of Soghomon Tehlirian*, Transcripts. 3rd State Court, Criminal Department, Berlin, 1921, http://www.cilicia.com/armo_tehlirian.html pag.10.

[10] Stephan H Astourian, "The Armenian Genocide: An Interpretation", *The History Teacher*, 23, N. (2 Feb., 1990), pp. 111-160; Edward Alexander, *A Crime of Vengeance An Armenian Struggle for Justice*, New York: Free Press, 1991); Donald Bloxham, "The Armenian Genocide of 1915-1916:Cumulative Radicalization and the Development of a Destruction Policy", *Past and Present,* CLXXXI (2003), pp.141-191.

[11] Lewy, 2005; About the theme of genocide denial see also Yves Ternon, *Enquęte sur la Négation d'un Génocide,* (Paris: Seuil, 1989)*;* Richard G. Hovannisian, *The Armenian Genocide, History, Politics, Ethics*, (New York: St. Martin's Press, 1972); Richard G. Hovannisian, *The Armenian Genocide in Perspective,* (New Brunswich: Transaction Publishers, 1986); Ata Atun, Sükrü Server Aya, "Talaat Pasha's Murder (15. 3. 1921):A Parody in the Courts of Berlin Belying 'The Miller of Sansoucci Legend of Justice'", *The International Journal of Social Sciences and Humanities Invention*, 1, Issue 05 (2014), pp. 279-300 (hptt://valleyinternational.net/index.php/our-jou/theijsshi).

[12] Alexander, p. 7.

[13] Among the others, Taner Akçam *From Empire to Republic. Turkish Nationalism and the Armenian Genocide,* (London: Zed Book, 2004).

[14] Vahakn N. Dadrian, "The Naim-Andonian Documents on the World War I Destruction of Ottoman Armenians: The Anatomy of a Genocide", *International Journal of Middle East Studies*, Vol. 18, N. 3 (Aug., 1986), pp. 311-360; Türkkaya Ataöv, *The Andonian Documents Attributed to Talat Pasha are Forgieries*, Ankara: Sistem Ofset, 1984).

[15] Tessa Hofmann, "New Aspects of the Talât Pasha Court Case. Unknown archival documents on the Background and Procedure of an Unintended political Trial", *Armenian Review,* 4/168 (1989), pp. 41-53.

[16] Osik Moses, '*The Assassination of Talaat Pascha in 1921 in Berlin: A Case Study of Judicial Practices in the Weimar Republic*'. MA Unpublished Thesis, California State University, Northridge, May 2012 http://scholarworks.csun.edu/handle/10211.2/1564; Ertür Başak, *Spectacles and Spectres: Political Trials, performativity and Scenes of Sovereignty*. PhD thesis, Birkbeck, University of London, 2015, Hptt://bbktheses.da.ulcc.ac.uk/110/.

true criminal, while Soghomon Tehlirian, the murderer, was in fact the victim of such a brutal act of cruelty that it had obliged him to seek revenge[17]. As a result, considering the military alliance between Germany and Turkey, the verdict of acquittal was reached for political reasons, underlining how, it "denied Germany's guilt and absolved Germany of complicity in those crimes"[18]. On the contrary, the literature which supports the Turkish cause reduced the genocide to a mere deportation. It interprets it as an event caused by a political decision that the Turkish government was obliged to make to combat the repeated uprisings of the Armenians, sustained by Russia and by Great Britain. It focuses on the exquisitely political role of Talaat, on his openness, and that of the Young Turks, to the Armenian minority, on the injustice of a trial and verdict constructed in such a way as to propose a perverse image of the victim and use it to justify an acquittal that appears unrealistic on both the legal and political levels.

Considering the two different points of view, since the objective of this analysis is not to reconstruct the historical truth of the facts but instead to highlight the ability to juridicize[19] expressed by the vengful paradigm, we have decided to consider the different contributions, focusing closely on certain aspects of the decision that the legal anthropological literature on revenge can perhaps help us to understand. Whether Soghomon's hand was armed by the Armenian resistance[20] or whether he acted on his own initiative, as he testified during the trial[21], and whether the causes that led to the acquittal of Soghomon the avenger and the motivations that sustained the jury's decision were, in the end, more political than legal, one thing is certain: the vengeful paradigm served as the foundation on which Tehlirian chose to base his version of events, making it understandable for the members of the jury and the entire nation of Germany.

Indeed, the hearing was not hinged on the requirement to verify the facts, as the dynamics of these were clear and the responsibilities for the same had been confirmed. The second defence attorney, Mr. Werthauer, clearly explained in his indictment that "the question does not ask whether or not the defendant killed Talaat Pasha; rather, it ask whether the defendant is guilty of killing Talaat Pasha"[22]. The conclusive evidence which demonstrates Tehlirian's guilt was not in doubt. In this case, just as in the other trials against humanity that have since gone down in history, verifying that a person was guilty of a single crime appeared less important than completely and truthfully reconstructing the historical events of the time[23]. Instead particular emphasis was dedicated to the genocide, seen as the premise for the events that followed and this was the real motive for the murder, which its perpetrator saw as an act of revenge.

Hence, in the trial, on one hand, we witness the actions of the Court, which imposed the limited times of the hearing, the district attorney who agreed to play a secondary role and the jury, which let itself be led through Soghomon's ghosts and, on the other hand, the defence attorney which built the trial.

The trial

The transcription of the trial was published as early as in 1921 in German under the significant title of *Der Process Talaat Pasha*[24]. Over time, it was joined by other documents[25], containing information perhaps not directly related to the execution of the trial but which in any case enabled historians to interpret several of its darker aspects. Indeed, the trial appears to present many irregularities. And if the looming presence of Soghomon's mother's at the trial is the most conspicuous of these, it does not however appear to be the most worrying.

From the trial documents, we learn that the defendant himself, Soghomon, when questioned, was responsible for reconstructing the events connected to the exodus of the Armenian people, and in particular that of his own family[26]. Many authoritative witnesses corroborated his testimony, all called by the defence attorney. Of these, the testimony of Professor Lepsius was decisive. He was considered the highest German authority on Turkish history and had been included, together with General Liman von Sanders as an expert in the list of witnesses[27]. His deposition, and that of Sanders, who had been responsible for helping to reorganise the Turkish army that was preparing to enter the war as a German ally, and who was not only an authoritative person, but also fully informed of the facts, brought to light the atrocities that took place during the deportation. However, in Sander's opinion, these were not attributable to the cruelty of the Turkish government, but to the lack of discipline of some auxiliary police force members[28]. His testimony was more of a bid to safeguard the good reputation of Germany, Turkey's ally, than an attempt to deny the massacres. But other witnesses were not heard. For instance, Andonian, who had with him five telegrams sent by Talaat containing the

[17] As is known, the inversion of victim and murderer was not an unusual expedient in trials held at the time of the Republic of Weimar. The objective, which could be fulfilled in cases similar to Tehlirian's trial, was that of limiting the debate on the political issues implicated in the event which had provided the setting for the criminal act on which the trial was based, minimising the effects that the latter could have had on the national political situation. See Moses, p. 67.

[18] Alexander, p. 187.

[19] Rouldand, (1988).

[20] Chemal, p. 34.

[21] See *The Trial of Soghomon Tehlirian,* In this essay we have referred to the translation of he trial in english language at the website http://www.cilicia.com/armo_tehlirian.html.

[22] *The Trial of Soghomon Tehlirian*, p. 80.

[23] Martti Koskenniemi, *Between Impunity and Show Trials*, Max Planck Yearbook of United Nations Law, Vol. 6, (2002), 1-35 p. 3.

[24] *The Case of Soghomon Tehlirian.* 1985. trans. Vartkes Yeghiayan. Los Angeles: ARF Varantian Gomideh, pag. XIV.

[25] Başak, p. 147.

[26] See *The Trial of Soghomon Tehlirian.*

[27] *The Trial of Soghomon Tehlirian*, p. 2.

[28] *The Trial of Soghomon Tehlirian*, p. 50.

extermination orders, which were considered authentic, was not heard. The court sustained the objection raised by the district attorney[29], on the grounds that said testimony would have had no effect on the murderer's belief, which had already been verified, that the victim was guilty of the offences perpetrated against his family and Armenian people, regardless of the real guilt of the latter[30].

Instead the testimony of the young defendant played a decisive role. He insisted on a specific issue, referring to episodes that he himself claimed to have experienced, both as a witness and as protagonist. Tehlirian told of the violence suffered by the women, stressing in particular the treatment reserved for one of his sisters, the demeanour of the soldiers who escorted the convoy of exiles and the murder of those who had made up that sad group. He told how he had woken up, having remained unconscious for almost two days, and found himself under a pile of bodies, those of his companions who had been killed during that awful adventure, and of the horror he had felt when he realised that one of the bodies weighing down on him was that of his elder brother. He told the court about his mother's body, she too having been killed like all the others not far away. He then talked about the days that followed: his return to his father's house, him finding the cash that his family had stashed away in a hole dug in the garden before they had been forced to get going, the epileptic fits that took hold of him and tormented him from that moment on, his arrival in Berlin and his chance meeting with the man whose orders in his opinion, had caused the massacre[31]. Even if his story was not true, as some of the literature sustains[32], it was indeed believable. And he never denied that he was responsible for the murder. He suggested, rather, to interpret it as a blood feud.

Since the moment when he was arrested, the defendant had affirmed several times that the event had nothing to do with German justice as, although the murder had occurred in Germany, it was also related to a question that had remained unresolved between the Turkish people and their leaders and the Armenian people and he who had risen up as its defender, obliged to carry out this function by the right to avenge spilt blood. And indeed, during the trial, a third party that shared the limelight with Soghomon was hovering in the wings: the spirit of his mother. According to the murderer's testimony, after his encounter with Talaat, the woman had repeatedly appeared to him in his dreams, reminding him of his duty to take revenge: "you have seen that Taalat is here and you are totally indifferent? You are no longer my son"[33]. And the fact that such a plea was issued by his mother's ghost made it even more shameful. The ghosts of all the Armenians who had disappeared then entered the court room where the trial was in progress, their presence designed to provide "living"[34] evidence of the massacre.

Up until this point, the trial procedure quickly outlined here brings to light several elements of critical importance. Several doubts are less relevant for the purposes of establishing the meanings of the vengeful paradigm for the case. For example, the speed with which the jury reached its verdict is close to stupefying. There were no more than two days between the hearing and the jury's decision. Far too few to formulate a verdict that would allow a self-confessed murderer to go unpunished, even if from the published version of the transcription of the court documents it is not clear, as Flores rightly observes[35], whether the verdict expressed by the jury only rejected the theory of premeditation. Only one thing is clear: the jury's spokesperson did not cite any grounds for the acquittal[36]. Another fact that appears puzzling is that although the defence counsel had focused on the horrendous atrocities that had characterised the genocide and on the effects that these had had on the defendant, it did not consider it appropriate to assign more emphasis to the sentence that Talaat Pasha had already received in his homeland, which would seem to be an additional motive, even if it was expressed by the second defence attorney, Mr. Warthauer, who explained that "On June 10, 1335 (according to the Turkish calendar), a Court Martial… condemned Talaat Pasha" Reason for which "it is incorrect and contrary to German Jurisprudence to say that I am guilty of slander identifying these person as criminals"[37]. Indeed, the triumvirate of the Young Turks had already been tried in Istanbul in 1919, and sentenced *in absentia* for the crimes it had committed, even if only as civil servants of the party which was in power in Turkey in 1915.

Instead, another two debatable elements are more interesting for our purposes. The first concerns the fact that, during the trial, an implicit reduction of the charge is witnessed. As the defendant himself had confessed during the first interrogatories that followed his arrest, he had arrived in Berlin approximately two months before the event occurred, and as soon as he had identified Talaat, he had moved to live in an apartment in front of the victim's house, in order to monitor his movements more effectively. These circumstances were a deciding factor in opting for premeditation, whether he had developed this intention before arriving in Berlin or whether the murder had been planned when he was already there, having discovered that Talaat lived there in luxurious exile[38]. In view of this certainty, there are two elements that can only be considered bewildering. Firstly, the fact that Kalustian, the Armenian translator who was assigned to the defendant throughout the proceedings, did not sign the deposition rendered by the latter to the police, citing

[29] *The Trial of Soghomon Tehlirian*, p. 53.
[30] Dadrian (1986) p. 325, about this topic among the others see also: Lewy (2005); Sinasi Orel und Süreyya Yuca, *The Talat Pasha "telegrams" : historical fact or Armenian fiction?* (Nicosia, Northern Cypruss,1983).
[31] *The Trial of Soghomon Tehlirian*, p. 5 et seq.
[32] Başak, p. 149.
[33] *The Trial of Soghomon Tehlirian*, p. 10; see also Alexander, p. 73.
[34] See Jacques Deridda, *Spectres de Marx*, (Paris: Galilée, 1993).
[35] Flores p. 254.
[36] Hofmann, p. 47.
[37] *The Trial of Soghomon Tehlirian*, p. 96.
[38] Alexander, p. 19.

the defendant's incapacity to understand what he was being asked in German. This was a strategy that served to undermine the validity of the confession and exclude it from the evidence admitted for the purposes of the trial. Secondly, the limited role played by the defendant and instead the ample space reserved for the defence counsel and its witnesses during the hearing.

Instead, the defence attorneys' decision to focus on Article 51 of the German Criminal Code appears unquestionable. When applicable, Article 51 allowed the court to acquit a party who had committed a crime when not of a fully sound mind, overshadowing Article 211 of the code of 1870 which envisaged the death penalty for premeditated murder and Article 213 which punished manslaughter with a minimum of five years in prison. In line with this framework, the defence's theory was mainly based on an attempt to prove that the defendant's psychological conditions had altered since he had arrived in the German capital, due to the onset of a form of psychological epilepsy caused by the shock he had suffered when he had returned to Erzinga, and realised that he was the only survivor of his family. Attacks, generated by the memory of the smell of the bodies of his loved ones, already putrefying, when he woke up. The five doctors who gave evidence in relation to this specific issue, and whose testimonies were decisive for the final verdict, expressed different opinions. No less than three out of five considered the defendant to have been of sound mind at the time of the murder, even if almost all of them admitted that his understanding of reality was strongly influenced by the trauma he had suffered. Instead, the Court's decision to focus the entire hearing on the possibility of applying Article 51 alone to the case appears less justifiable. The Court appeared to immediately ignore the request from the Public Prosecutor to consider the murder as premeditated, leading the district attorney to affirm, at the end of the hearing, that the event had been a matter of revenge, motivated by political hatred.

The second debatable aspect is closely connected with the first one and concerns the search for accomplices. The defendant had also made reference to this aspect in his famous confession which had not been admitted as evidence. The only parts of Soghomon's life that were meticulously investigated were those linked to the deportation and the murder and everything else that he had done in the meantime was recorded but not deemed to be of value. Nothing was mentioned about his travels and his stay in the United States. Although all the documents describing and discussing the trial may have reported Soghomon's dream and the weight of his mother's words to her son, attributing to these the emphasis they deserved, instead, it is no coincidence that they also highlighted the link between the young Tehlirian and the Armenian resistance, which believably armed him. Although he had affirmed, except in his very first interview, which had been excluded from the trial, that he had always acted alone, reasonably this was not the case, as he himself testifies in the diary that he wrote many years later and which has been cited on various occasions in the literature[39]. His duty was indubitably to keep his link with the organisers of the Armenian resistance hidden during the trial, and instead convince the Court that the murder was motivated by a desire to avenge his family, as reducing a political story into a personal responsibility for an individual act of killing[40] could also serve other purposes. The progress of the trial seems to have followed a logic that is not coherent with the facts, and was instead designed to protect the position of Germany in a rather difficult international scenario for the nation: It appeared to be a attempt to avoid exposing her to additional sanctions for her inability or lack of desire to stop the appalling crimes committed by the government of the then Ottoman Empire. Crimes known in Germany where the Lepsius and Wegner book's[41] were yet published. Even the decision to host an awkward former ally, albeit in incognito, seemed to be problematic for Germany[42]. This was probably why the defence theory prevailed, enabling the German justice system to make a compromising decision, freeing the perpetrator of a crime that hinged on the right to protect the honour of his Homeland and avenge the spilled blood of his people. The lack of attention paid to the potential presence of any accomplices on the scene of the crime therefore fits in with the idea that an external control room was steering the trial from outside the court rooms: one that was more concerned about playing its role in line with the rules of politics rather than with those of the justice system.

This leads us to reflect on why Garo who in 1919, when leading the Nemesis project, had already drawn up the list of Turkish celebrities to be killed[43]. The element which appears most important, in the perspective prompted by our thoughts, is that, of the many militants ready for action, Tehlirian was indeed the one chosen to kill the former Prime Minister, probably due to his outstanding inclination for hiding the political plan in the guise of a retaliative action, based on which he had had assumed the duty of spilling the blood of those had spilled that of his family and his people. This is why it appears futile to investigate whether he was truly an eye witness of the massacres or not[44], except from a historical point of view. Whether he had seen the things he had recounted first hand or whether he in turn had heard the stories told by true eye witnesses. Whether his determination had grown by virtue of the common desire of the Armenians to organise an active political resistance to the Ottoman government or whether he had been urged on by the cry of blood provoked by the dream about his mother. Whether he had really dreamed about his mother, or decided to take her spirit with him into the courtroom, along with those of all the

[39] Başak, p. 147.

[40] Ross Poole, '*Two Ghosts and an Angel: Memory and Forgetting* in *Hamlet, Beloved,* and *The Book of Laughter and Forgetting*'. *Constellations* 16(1) (2009) pp. 125-149.

[41] Johannes Lepsius, *Bericht über die Lage des armenischen Volkes in der Türkei* (Potsdam, 1916); Armin T. Wegner, *Der Weg ohne Heimkehr ein Martyrium in Briefen* (Berlin: Verlag von Egon Fleischel & Company, 1919).

[42] Moses, p. 5.

[43] *The Case of Soghomon Tehlirian,* p. XIII.

[44] see Başak, p. 150.

other dead Armenians who lived and writhed like spectres in his mind, spurring him on to avenge them.

There may be many different ways of interpreting the introduction of a ghost as evidence[45] and it may be true that the pain inflicted on war victims and those in extermination camps played, and still plays, a leading role in the trials for the atrocious crimes committed last century and just as much so in this one, starting with the Nuremberg trial. But here too, as we have affirmed from the beginning, the intention is to follow a different line of enquiry, which is certainly not unrelated to the previous one: the semantic device enclosed in the vengeful paradigm that enabled the victims' pain to be released, by sharing it and postponing the requirement to punish the perpetrator, which is the linchpin of the criminal trial process, to the need to re-establish the justice between the parties at the origin of the vengeful exchange, as interpreted by legal anthropology. In Tehlirian, the impulse to kill was generated by the memory of blood, much more so and long before it was generated by the political and libertarian motion that was the driving force behind Nemesis. And this fact could certainly not be considered an example of extenuating circumstances by the court, but of circumstances that also had their own force and effectiveness. It was claimed to be part of a principle, that of the inviolability of the bloodline, to which during the years that saw the advent of fascism, Germany was perhaps particularly sensitive. It evoked the sense of honour, the latter being a category which is the founding principle of revenge. "Lu sangu fa lu murmuru" is a common saying in the tradition of south Italy[46], meaning that blood gurgles and makes noises, makes itself heard, imposes its law, murmurs, and continuously reminds the living of their duty to avenge the group whose blood has been spilled. And it is no coincidence that revenge, also in the definition provided by Westermark[47], which is even a little too well-known, is not only violence or an archaic right, but, on the contrary, a duty hinged on the moral, which defines the identity of its subjects, shows that they belong to a group, creates confines and redefines spaces. An archetypal principle that is reaffirmed in the more civilised nations, which still punish the perpetrators of shocking crimes with the death penalty. Civilised states that kill to avenge a death.

Revenge

The first question we need to answer therefore concerns the possibility that for Soghomon Talaat's murder was an act of revenge. The question is only superficially simple, and for this reason we will only discuss certain formal aspects of Soghomon's revenge and the violence implied therein, in the light of the legal anthropological literature regarding revenge.

Investigating the theme of revenge involves stepping into a minefield which spans from the meaning attributed to the concept, mainly by legal experts, which tends to consider it as a rudimentary form of penalty, the prologue to the subsequent development of the formalised law[48], and a perception, mainly among anthropologists, that considers it to be a principle which has its own paradigmatic force with the power of juridicization. The latter principle, defined by Rouland[49], is one based on which the law is affirmed and consolidated practically, rather than existing in the same abstract form as that of legal concept. The theory that it is a primitive form of justice was, and is still today, widespread. It is therefore no surprise that the attorney named Niemeyer, who was part of the defence counsel and was also a professor of law[50], justified Soghomon's belief that he was not guilty by explaining that he belonged to an eastern culture of which we have no further details, implicitly considered to be archaic, in which custom, law and religion contributed to performing the disposition that shapes the juridical fields, legitimising a violent action as the expression of the moral obligation embedded in the perpetrator's adherence to the logic that sets store by revenge. This line of reasoning proved to be useful and effective, precisely because instead, modern criminal law considered revenge to be an occult, regressive and subversive practice.

Unlike western tradition, which interpreted revenge as an act of violence, from the perspective undertaken by anthropological studies, the reciprocity and exchange of the act seem to be the categories which enabled it to be justified, accentuating its systemic dimension. Under this profile, the inversion that took place in the trial which saw Tehlirian, the avenger, being recognised in the role of victim and on the other hand Talaat, the murdered party, represented in the role of the guilty one, who had activated the retaliatory process before Tehelirian, supports the theory that Soghomon's action was one of revenge. However, several other aspects of the event which came to light during the trial invite us to tread carefully.

Of course, here there is no point venturing into the maze of the definitions that ethnography has allowed us to formulate about revenge[51]. One thing that is certain: the state that one enters when driven by a moral obligation must prevalently be a state of prolonged and continuative hostility[52]. Considering mainly the formal aspect, Pospisil strived to estimate the minimum limit under which a murder fails to indicate the presence of an act of revenge and established this in a sequence composed of at least three murders which could also follow on from one another after very long period, but which were always committed in response to the previous murder[53]. This aspect creates

[45] Shoshana Felman, Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History.* (New York: Routledge1992), see also Austin Sarat, *Vengeance, Victim and the Identities of Law*, in *Law and Anthropology,* ed. by Martha Mundy, (Ashgate, 2002) pp.347 – 373.
[46] Luigi M. Lombardi Satriani, Mariano Meligrana, *Il Ponte di San Giacomo*, (Milano, Rizzoli, 1982).
[47] Westermarck (1906-1908).
[48] Rodolfo Sacco, *Antropologia Giuridica*, (Il Mulino, Bologna, 2007).
[49] Rouldand p. 133.
[50] *The Trial of Soghomon Tehlirian* p. 92.
[51] Patrizia Resta, "Vendetta. Theory and practice of conflict resolutions", *Etnoantropologia-Online*, 3 (1) (2015), pp. 3-22.
[52] Max Gluckman "The Peace in the Feud", *Past and Presente*, n.8, 1955, pp. 1-14.
[53] Leonard Pospisil, *Feud*, in D.L. Sill (ed.) International Encyclopedia of the Social Sciences, n.5, (New York, Mcmillan and the Free Press 1968), pp. 389-393.

a few elements of difficulty. If we consider Soghomon's revenge to be founded on the principle of solidarity and therefore on his duty to his bloodline, to which his mother's ghost constantly called his attention, even if it can be demonstrated that the murder was planned and executed in response to the extermination of Tehlirian's family, the murder could not be considered an act of blood feud as it failed to generate a chain of murders between the families of Tehlirian and Talaat. But things change if we consider Talaat's murder as one of the episodes in a long line that characterise the conflict between Armenians and Turks, the violence of which continued far longer after the death of the former Ottoman Prime Minister.

These considerations address another two opposing principles that discipline the act of vengeance: violence and solidarity. Violence is an element that repeats itself: the violence that is active in an act of revenge, as Girard has explained, perpetuates itself over time because it is inspired by a mimetic logic[54] that allows it to self-generate, reverberating back on itself in the person seeking revenge, now doubly antagonistic, mirroring the initial act of murder which incessantly renews itself in the chain of revenge, where each death has the quality of the first death[55]. The perverse, destructive violence testified to in the trial reveals its mimetic force if we consider the action performed by Soghomon as part of a vast political action and therefore functional for the plan of Nemesis. Otherwise, if the drive to perpetuate the violence is generated in, and hinges on, Soghomon's desire to avenge his descent for the blood spilled due to the orders given by Talaat, we find ourselves facing the difficulty of having to admit that the mimetic force of violence stops with the death of the Prime Minister.

In this logic, an essential role is played by solidarity, which divides those involved in the revenge into friends and enemies. Solidarity is the founding principle that reveals the existence of two opposing groups, whose members battle with one another, each striving to defend the honour and blood of his own group. In the literature on revenge it is no coincidence that the set of people and things, forces and values, beliefs and rites, which are the basis of a group's unity and cohesion, are represented using two symbols: blood, the symbol of union and the continuity of the line and the generation, and honour, symbol of identity and of the difference which, in the end, allows us to recognise the other party and demand their respect[56]. This time the key issue is the reciprocity, which, together with solidarity and social distance, gives the agency of revenge its structure[57]. The enigma, in the case in hand, again concerns the identity of the two conflicting groups. If we consider the revenge of Tehlirian as a blood feud that he is urged to perform by his mother, the two groups would be the family of Talaat and that of Soghomon. Otherwise the two groups would be on one hand the Armenians and on the other the Ottomans and Turks of today. The theory of Black-Michaud[58], which sees revenge as a series of transactions in which the objective of the exchange is death, and in which those seeking revenge, having incurred the debt of blood, must honour it in order to be respected and gain social prestige, is immediately applicable especially in the second case. According to this theory, the practice of retaliation which the two groups are obliged to uphold, forces them into a status of permanent debt, set in a symbolic order which authorises the practice of reciprocal violence. The status of debt in which victims and murderers repeatedly find themselves is a symptom of the relationships of power implied in the act of revenge. In this sense, Black Michaud interprets revenge as an instrument of battle for gaining leadership. If we interpret the Berlin episode in this key, the events described assume a different meaning. Talaat and Tehlirian appear to be the pawns of a political game in which each of the two contenders defends their own objectives. The Ottomans pursue the expulsion of the Armenians from their lands and the Armenian resistance avenges its people. Under this profile, the crime could have been committed by Tehlirian just as it could have been committed by any other follower of the Nemesis project. The question revolves around circular axes that return to favour an interpretation of the murder in terms of political sabotage or perhaps civil war but not a blood feud. The figure of Tehlirian could therefore be relegated from that of avenger to guerrilla fighter, and the image of his mother and the blood that murmurs could appear to be a mere pretext.

Verdier's theory provides a more interesting method of escaping from this corner. The pillar of his theory is the distinction between that which is known as the *registre vindicatif* and that which is known as the *registre vendicatoire*. *Registre vindicatif* includes private revenge which implies the choice of taking justice into one's own hands[59]. The *registre vendicatoire* traces revenge back to the theory of the exchange of violence and the balance of the forces of enemy groups acting based on a legal habitus that mirrors the organisation of the power managing a given society[60]. If we investigate the data in the light of this distinction, we can see that in the trial the tendency was to consider Soghomon's decision as a personal one. Therefore, in this case it could be defined under what Verdier defined as *registre vindicatif*. Revenge that is not regulated by a system, which has no strong structure: archaic revenge. Instead, the acquittal is generated by the recognition of certain extenuating circumstances, which allowed the jury members to find an explanation for, or even justify the reasons that motivated the criminal action. While the gazes of the gallery followed the twists and turns of Soghomon's mother's ghost, behind the curtain, glimpses of the true main character of the trial were visible. This was the criminal policy of the Young Turks, which was seen as much by the

54 René Girard, *La Violence et le Sacré*, (Paris: Bernard Grasset, 1972).
55 Lombardi Satriani, Meligrana, p. 349.
56 Verdier (1980) p. 15.
57 Raymond Verdier, *De l'une a l'autre vengeance*, in La *Vengeance*, eds by Verdier Raymond et al., vol II, 9-13, p 9.
58 Jacob Black-Micaud, *Cohesive Force*, (Oxford: Blackwell, 1975).
59 Raymond Verdier, *Une justice sans passion, une justice sans bourreau*, in La *Vengeance voll 1 – 4,* eds by Verdier Raymond et al., (1980-1984), vol III (Paris: Cujas, 1984), 149- 153, p. 149.
60 Ibidem.

defendant as it was by the larger audience that followed the events of the trial from both sides of the Atlantic, as the true guilty party in the entire case, and which also risked dragging with it down into the abyss the performance of the war policy carried out by Germany during the First World War. The shifting of the focus to the unworthiness of the victim that we saw in the analysis of the formal plan of the trial reveals itself here in all its semantic force, repositioning Tehlirian's revenge within a logic of exchange that traces it back to the systemic nature of revenge and to the principle of reciprocity that governs it. Although by this way, Soghomon's revenge can be classified in the category of the *registre vindicatoire*, instead the duration and uncertain identity, at least during the trial, of the two players in the conflict prevents it from being interpreted as a blood feud. Again, we have been sucked into an unsuccessful hermeneutical circle which eventually drives us to return to the analysis, but this time proceed in the opposite direction.

Up until this point, the decision to consider revenge as the heritage of a primitive form of law has not been any more useful that the attempt to distinguish between its systematic aspects. The functionalist approach of Black Micaud appears to be more favourable, allowing us to evaluate the sphere of the political theory by presenting it to us by way of an interpretation that paints it within the revenge logic. But again, this theoretical perspective has also failed to help us banish all doubts. The unresolved crux of the question still concerns the fact that in a civil law court of justice a show was orchestrated for the purpose of freeing an assassin, not only by appealing to the law which, by citing mental insanity, would in any case have ensured his impunity, contemporaneously safeguarding the political motions of German diplomacy. Indeed, the doubt concerns the fact that this occurred based on the decision to cite revenge as the motive, allowing a ghost to enter the scene. Not just any old ghost but that of the assassin's mother, or rather the ethereal incarnation of the memory of the family calling upon the assassin to perform his duty and avenge the blood that had been spilled. Here revenge was a device with a power that must be recognised, according to the defence counsel, much more widespread in eastern rather than western culture. A device which proposes to be, for the results generated by the rich anthropological ethnography collected in various societies contemporaneous to our own, a significant paradigm. It appears that since the tales of Agamemnon, Clytemnestra and Aegisthus, magisterially recounted by Euripides in the Oresteia, passing through the Othello of Shakespearian memory, the figure of the avenger, even if diluted, has never allowed the judge much space to shape the contemporary judicial imagination.

And herein lies the semantic force expressed by the vengeful paradigm, in its presentation as a shared paradigm that is effective for everyone, capable of interpreting and providing a voice for the crisis experienced by the group that believes it has been wronged, in this case just as much the Armenians, who suffered the loss, as the Turks, who considered that their honour had been violated.

In other words, the vengeful paradigm reveals itself to be the structure of the meaning that enabled the performance-like process which took place during the trial to be decoded. Recognising that it was political violence that provoked the murder and acting accordingly based on a logic of revenge, enabled the violence of Tehlirian's gesture to be eliminated, or rather, rendered it unpunishable, deploying it within the mimetic logic already discussed. Tehlirian's gesture was therefore a political one and, as such, was understandable within the conceptual framework proposed by revenge in its paradigmatic form, as the recognition of the other party as an equal, endowed with the same dignity as and not inferior to his assassin.

Conclusions

We can now perhaps begin to draw some conclusions from the complex event discussed herein, the trial of Soghomon Tehlirian. It is an event that represents a face-off between a line of enquiry based on principles that are not strictly legal but capable of tying the judicial event to its historical circumstances, and the political context which provides us with the key for its interpretation.

The question we have attempted to answer, that is, whether or not the act performed by the young Armenian in Berlin on 15 March 1921 was an act of revenge, has not been clearly resolved. The defendant seems to have acted guided by an idea of legality that it founded in a cultural habitus rather than on decisions implied by the law. The sense of the evidence by virtue of which the reconstructed actions of the self-confessed murder were deemed justifiable by the jury, seems to be founded on the vengeful paradigm. Unfolding within a vast circle of meanings, Tehlirian's act seemed to form part of the vindictive category of crimes, while the jury's decision to acquit him adheres more to the model of a vengeful act. The vengeful paradigm has therefore enabled the element of performance which played such a big role in Tehlirian's trial to be decoded. A trial in which the recognition that political violence was responsible for motivating the murder of Talaat Pasha, made it impossible to punish the violence enclosed within the Armenian's gesture, as this was considered an expression of the mimetic logic which spurred the vengeful act, and so turned the victim into the assailant.

Our analysis has therefore focused on establishing the reason for which the witnesses, the experts summonsed to give evidence and the jury itself believed Tehlirian's theorem, in order to evaluate the effects of this. The defence strategy of attorney Mr. Niemeyer, tinted by a meaningful orientalism[61], has revealed the wider scenario spanned by the hearing, with the intention of anchoring the Armenian's lack of guilt to his adherence to an unspecified "eastern culture", in which custom, law and religion were equally important for the performance of the legal field, legitimising a violent action as the expression of the moral obligation to seek revenge.

A different light was shed on our interpretation by the appropriateness of reflecting on the fact that, leaving aside the need to issue a verdict which would favour the German political strategy

[61] Edward Said, Orientalism, (New York: Pantheon Book, 1978).

at that time, the jury shared the defendant's ghosts with him. The victims of the genocide, present at the trial through the words of the defendant and the witnesses, imposed his acquittal as an essential requirement, seen as a retaliatory action which could bring the two sides to a settlement, by changing hostility into alliance and therefore enabling reconciliation[62]. A retaliatory action which, as history teaches us, did not achieve the results that had been hoped for.

Finally, considering that the main objective of the trial, as has been explained, was dominated by a careful political strategy, even if it was guaranteed by a trial procedure based on evidence of a legal nature, the antithesis seems to have regulated the performative dimension with which the events conformed during the hearing, through the figure of Soghomon's mother's ghost. The maternal ghost, whose task was to focus the court's attention on an act of revenge that had its origins in a family saga, instead became the engine for freeing, in the memories of witnesses and experts, the group consisting of the victims of the Armenian genocide. In this way, a different political plan was assigned to the action, based on the credit of blood that the Armenian people was owed by the Turkish people and its leaders, and which therefore enabled the murder to be redeemed as a vengeful action. Moreover, the intention to play down Germany's responsibility for having ignored the extermination carried out by the Turkish allies, which was not supposed to emerge during the trial, instead appeared explicit. The line followed by the defence attorneys emerged clearly from the very first comments, when attorney Mr. Von Gordon, responding to the question of the district attorney which served to prevent issues not directly inherent to the case being admitted as evidence, replied dryly"Believe me, gentlemen, it is in the interests of the German government that nothing be left out"[63] and proceeded with the same tone until the end of Niemeyer's indictment, which terminated in an appeal that seemed to be more of a warning: " If a German court were to find Soghomon Tehlirian not guilty, this would put an and to the misconception that the world has of us. The world would welcome such a decision as one serving the highest principles of justice"[64]. An affirmation that encloses the sense of the trial, which celebrates the triumph of vengeful justice[65], only formally consulting legal rationality and in this way bringing peace to the ghosts who had shaken the trial up.

However, it must be admitted that the effort made in what can be considered the first political trial of the 1900 s was useless, considering that, twenty years later, the Nuremburg trial opened, and more ghosts appeared, similar to those which still flutter around in the political trials taking place in the African continent today[66], the latter having had to face the bloody sore of ethnic conflicts after colonisation, which is the scenario of today's atrocities.

We can conclude that cruelty is a code for political acts, justified by military requirements and, if it is true, as Derrida[67] has sustained, that the ghosts which inhabit the courts of war were a new idea that is returning, or, indeed, the ghosts of the past are also those to be generated in the future, it must be admitted that they mark a continuous return of episodes subject to the atrocity of political reason. A reason that is far-placed from the retaliatory logic active in the vengeful paradigm which perhaps, for this very reason, we have seen at work as the ghost of itself, in the trial brought against Soghomon Tehlirian.

[62] Verdier, (1980), p. 28.
[63] *The Trial of Soghomon Tehlirian*, p. 2.
[64] *The Trial of Soghomon Tehlirian*, p. 98.
[65] Ignasi Terradas Saborit, *Justicia vindicatoria,* (Madrid: Consejo Superior de Investigaciones Cientificas, 2008).
[66] Gerhard Anders, "Contesting expertise: anthropologists at the Special Court for Sierra Leone", *Journal of the Royal Anthropological Institute* 20, (2014) p. 426-444.
[67] Derrida (1993).

The Pleasure of Privacy: Confession and Inquisition as Means to Cause the Correction of Sinful Consciences around the IV Lateran Council

Javier Belda Iniesta *

Abstract

The passage of the public penance to private penance was the loss of the public character of the punishment, but also that the Church lost the control of behavior, because its repression would depend now only of the personal need for forgiveness of each faithful. In addition, under these new circumstances, heterodox forms of profess religion, heresies, which infected the population, and it was linked to the fact that many sexual behavior contrary to Catholic morality extend arise among the population, which already should not purge their sins in public. This situation pushed the Church to face a new situation: to cause voluntary contrition of the penitent. The IV Lateran Council faces the problem from four aspects: 1. the annual obligation to the confession and that this is done with the "proprio sacerdote", to ensure that the Confessor knows the circumstances of the sinner, 2. The canonical regulation of marriage, in order to exclude attitudes contrary to morality; 3. The creation of chairs of theology, to train priests and these to the faithful, through the preaching; 4. The establishment of the inquisitorial courts, which will be the punishment for those who do not accept the contrition and the amendment of its life. Our work is focused on this need of cause the voluntary contrition, and the means employed to achieve this. We study the similar evolution of the sacrament of penance and the inquisitorial process, which together with the preaching, involves the exercise of the triple ecclesial Ministry: munus regendi and munus docendi, munus santificandi.

Key words: *Heresy; Inquisition; guilt; confession; excommunication; condemnation; sin; crime.*

1. Introduction

The power to absolve sins that the Church has received from Christ: "*Any to whom you give forgiveness, will be made free from their sins; and any from whom you keep back forgiveness, will still be in their sins*" (Io 20, 23) has always meant the ability of the Church to exercise a certain domain over the consciences of its members in particular and all the society in general. For many centuries, the calamities that the man has suffered had made clear his fragility. All his hopes were focused on Sky, whose door, perhaps very close, was guarded by the Church (*Go in by the narrow door; for wide is the door and open is the way which goes to destruction, and great numbers go in by it. For narrow is the door and hard the road to life, and only a small number make discovery of it.* Mt 7, 13-14); this door should be crossed with the soul without sin, and the only way to clean it was in the Church's hands. In this way, the Church had a very useful tool to dominate the conscience of the faithful, but after some time, the believers will gain space in decision making. It was the beginning of the pleasure of privacy.

My work is focus on the evolution of the way in which the Chuch battles against this pleasure, especially when the public character of the management of the confession is lost and the Church ceases to get their hands on the conscience of the faithful. The man obtains a freedom that allows him to assess his own actions (to some extent; the conscientious Christian was typical of that time, not only a product of the strict control over the salvation or condemnation of the men). However, this liberty often leads to immoral acts or situations opposed to the straight Christian conscience. This situation will cause a series of acts by the Church that will be directed to regain its authority in not only collective but also individual morality.

2. The exercise of the confession during the first millennium

The exercise of this power over minds, traditionally exercised by the Church in the confession, suffered several variations throughout history. At first, it is an institution distinctly legal. It was the presence of an inmate and a court, an offence and a sentence that should be obeyed. Note here where both justices are different, this is the divine and the human, is in the fact that all accused who voluntarily come to confess his fault are absolved by the Mercy's Court [1]. This is a note, however, that resembles the grace periods that accompanied the arrival of an Inquisitor and the objective of the sermons of the itinerant preachers [2].

* Prof. Dr. Javier Belda Iniesta, Co-Director Chair Innocent III, Law Faculty, Catholic University of Murcia, Spain.

1 Cf. «Concilium Tridentinum», en DS 1682.

2 Cf. Ioannes Paulus PP. II, «Adh. Ap. "*Reconciliatio et Paenitentia*"» *cit.* n. 31, II: "(…) secundum antiquissimam translaticiam notionem genus quoddam actionis iuridicialis. At hanc apud tribunal fieri contingit misericordiae, magis quam strictae severaeque iustitiae, quod cum iudiciis humanis nisi analogice conferri non potest, quatenus illic peccata sua peccator suamque ipsam condicionem creaturae peccato subiectae patefacit; sese officio obligat ut abiciat evincatque peccatum; suscipit poenam (sacramentalem paenitentiam), quam imponit ei confessarius, eiusque recipit absolutionem."

It is precisely for this medicinal character that the simple and transparent compression of the gravity of evil committed by the sinner is required, as well as the serious danger that entails the persistence in sinful attitudes for personal salvation [3]. In fact, when the Church punishes with the highest penalty, i.e. the excommunication, an fact, it does so to reveal the terrible gravity of the sin, not only for the own actor but for the entire ecclesial community. It is precisely this fact of belonging to the ecclesial community that makes that all sins necessarily impact on others, and the community must be defended against such a threat, but without forgetting the desiring to return to the fold, as it is the salvation is the true objective of the action of Ministers [4].

2.1 Confession, advertising of sin and the penitents in the first centuries

It is precisely this public character which involves some special conditions in some sins [5]. Heresy, or apostasy in times of persecution, meets the usual conditions of the sinner (a baptized, which retains the name of Christian) an Act (intellectual error with pertinacity) and an object (sinful matter: (*aliquam ex veritatibusfide divina et catholica credendis*) [6]. In addition, it is present the public character of his act, which causes scandal to others and have to necessary a public penance. Tertullian, around the year 203, write: "*"They shy away from this duty as well as of the public disclosure of their people, one day and another… is it perhaps better to be sentenced in secret and forgiven in public?*" [7]

Until the 7th century, the Church recognizes three forms of forgiveness of sins: baptism, which cleans the man from all previous sin [8]; daily penance, reserved for less serious sins [9], and public penance, required for serious sins, such as adultery, murder and apostasy [10].

Public confession (what we might call specifically sacrament) was only received once [11], and it was considered as a second baptism [12]. Certainly, because of the degree of close intimacy existing between the members of the first Christian communities, was difficult that sins were not public, either because the apostasy during the persecutions was not strange or because the faith was lived communally. Therefore, the familiarity of the spiritual life difficults the privacy, as well as the difference of conception of private or intimate at the time. In addition, we must consider also that sin was an offense to the community because it loses greatness on their way to heaven. A detail that shows the seriousness of this separation of the flock of the Lord, as said Cesareo, is the imposition of the sackcloth during the ceremony of admission to the penitential group, which obliges the Council of Agde (*poenitentes, poenitentiam petunt impositionem manuum cilicium super caput et quod tempore sacerdote*). This sign represents that it is not sheep but billy goat: "*non is agnos sed haedos publice profitentur*" [13].

Therefore, despite that the Evangelical Council invites to intimate correction, "*corrige eum inter te et ipsum solum*" (Mt 18, 1-5) [14], during the first centuries the public practice of confession is the norm. For this penance the sinner suffers a long, public and severe process. It has three well defined parts:

Incoming *in ordine poenitentium*, where the sinner accuses himself in front of the Bishop, he is separated from the rest of faithful (*locus poenitentiae, ad limen ecclesiae*) and the sackcloth is imposed him;

The expiation's period, which could be just over a little period or a very long time on the basis of the decision of the Bishop [15]. In this time the sinner could be secluded in a monastery (*suscipis eum IV fair mane in capita et cooperis eum cilium et quadragesimae oras pro eo, et inclaudis usque ad Coenan Domini* [16]) and had to pray and fast.

---

[3] CCE n. 1473: "Venia peccati et restauratio communionis cum Deo remissionem aeternarum poenarum peccati secumferunt. Sed poenae peccati permanent temporales. Christianus, passiones et probationes omnis generis patienter tolerans et, cum advenerit dies, mortem sereno respiciens animo, niti debet ut has peccati temporales poenas accipiat tamquam gratiam; per opera misericordiae et caritatis atque etiam per orationem et diversa poenitentiae exercitia, incumbere debet ad «veterem hominem» plene exuendum et ad «novum hominem» superinduendum (cf. Ef 4,24)."

[4] Sancti Caelestinus I, *epist. 21, ad episcopos Gaellicum. Apostolici verba praecepti, in* PL 50, 530 A.

[5] Augustini Hipponesis, «In epistulam Iohannis ad Parthos tractatus, 1, 6» en PL 35, 1982.

[6] St. Thomas says that heresy is the refuse of "verdades de la Escritura revelada, exposiciones de la Sagrada Escritura, verdades de cuya negación se sigue algo contrario a la fe… lo cual puede ser muchas veces una verdad formalmente revelada e incluso explícitamente" (C. Pozo, «La noción de *"herejía"* en el Derecho Canónico Medieval», *en Revista de Estudios Eclesiásticos* 35 (1960) p. 238).

[7] The *ἐξομολόγησις*, or public pennace, (Cf. Tertullianum, «*de paenitentia*», in PL 1, 1243-1248).

[8] Remember that although infant baptism was also not strange at the time, Christianity is still hiding leaving and arriving for the first time the inhabitants of the Empire, which was unusual for the sacrament was received already in adulthood, with the whole process that entailed and will not explain here.

[9] Cf. 1 Pe 4,8. Some of these media were prayer, listening to the Word, the sharing of goods, the fast… Shall the Shepherd of Hermas "*Ayuna, para Dios un ayuno de este modo: sin hacer mal alguno en tu vida, sino que servirás al Señor con puro corazón; cumple sus mandamientos, caminando en sus preceptos, y ningún deseo malo entre a tu corazón*" (*Lib. III, Sim. V*, en PG 2, 961-962, Tr. Del A).

[10] Offenses that always are on the jurisdiction of the Inquisition.

[11] Hermas, «*Pastor*», Lib. III, *Sim. VIII*: (in PG 2, 971-972).

[12] Tertullian speaks of the second plank (of salvation) after the shipwreck which is the loss of grace (Cf «*de paenitentia* 4», en PL 1, 1233).

[13] Cf. *Concilios visigóticos e hispano-romanos*, ed. Vives, J. y otros, Barcelona-Madrid 1963, p. 160, sermo 56.

[14] „*Poenitentia publica de peccatis publicis, oculta de occultis*". (Cf. Rankin, T., *Jurisdiction in the sacrament of penance: a canonical-theological schema*, Katholieke Universiteit Leuven 2011, p. 10).

[15] «Concilium Carthaginensis», in DS 64: *"Ut poenitentibus secundum differentiam peccatorum, episcopi arbitrio, poenitentiae tempora decernantur."*

[16] Cf. *Sacr. Gelasianum,* n. 16. Some aspects of this section of Gelasian ritual show us that amendments were included, such as detention.

Finally, reception of the solemn absolution by the Bishop[17] during the Maundy Thursday night, with the recovery of the right to the Eucharist (*reconciliatio altaris*)[18].

But there is not an abandonment of the penitents, despite the humiliation that involved their separation from the rest of the flock, which reached even affect family relationships, and which frequently caused the shock of the community. The ambrose liturgy includes prayer for the penitents (*pro… poenitentibus precamus te*), and Hieronymite tells us how Fabiola, an illustrious community's member who has sinned, arose at the Lateran with the sackcloth, covered in ash, barefoot and crying for her sins. Such it was the shock, *tota urbe romana spectante*, that she was immediately readmitted among the faithful[19].

The sinner is included in the catechumens' group (*humilitas lugentium should impetrare misericordiam*). This again highlights the need for re-education of the sinner, who should restart the path of salvation. In addition, in order to control the spiritual life of the people, it existed the visit Diocesan, common since at least the 6th century. It was intended to check the health of the coetus fidelium that the Bishop has to care, and he used to do it with the inquisitorial process. It was not even a disciplinary visit, but it shows the future inquisitors' visits to extirpate the sinful action. They are not actions of the medieval times but respond to a behaviour used for centuries to take care of the souls[20].

2.2 From the British Isles to the *proprio sacerdote*

After penance will gradually, under the influence of the practice of the British Isles, abandoned his public appearance and almost only to finally become extinct any solemn and public practice[21].

So much so that in the year 589, the Third Council of Toledo warns that "in some churches of Spain men do penance for their sins, not according to the canons, but a reprehensible manner so that every time that they sin you ask for reconciliation to the priest"[22]. It is also said that "in order to end this execrable presumption, this holy council establishes that penance must be given by the canonical form of the ancients"[23].

But the public practice will remain stable on the continent for several centuries, until the religious are sent to the British Isles to evangelize those distant lands. It is the birth of the penitential books. This sort of literature was produced alongside the secular law, with Germanic influence, and adopted many of the legal principles of the time, transferring them to a Christian context. Thus, the popular idea of Justice in Ireland during this period plays an important role in the formation of the penitential literature of the local church, especially in the philosophy of punishment: a specific punishment for a specific sin[24].

In this way, it is the birth of a particular Institution, legal and sacramental at the same time, commutation, which will be applied when it was impossible to carry out a penance whether by reason of illness, disability, age, etc…[25]. In addition, it is accepted the possibility of replacing the penance with the payment of an amount of money. it was usual for the people to accept this way to settle the sanctions imposed by the secular authorities, and it was received in some of the penitential books in the form of relaxation of penance in exchange of an economic payment. This irregular practices crossed the English channel and came to the continent, opening the door to a variety of abuses in the administration of penance making clear the necessity of a respond by the Church.

Another problem is the question of the jurisdiction, a very common problem in the inquisitorial courts, that will cause several battles between religious and secular priests, who collide sometimes to administer the sacrament[26]. The Council of Paris, in 813, will prohibit administer to the monk the confession except to the monks of his own monastery.

Although the authority had already ruled on the matter, the penitential court had increasingly become a source of conflict between the secular clergy and religious orders. Apart from the need to resolve conflicts between secular and religious clergy, the ecclesiastical legislation also sought to regularize the administration of penance within the diocesan curia:

"Sane quia inter cetera unum est, quod sanctam maxime perturbat Ecclesiam, falsa videlicet paenitentia, confratres nostros et presbyteros admonemus, ne falsis paenitentiis laicorum animas decipi et in infernum pertrahi patiantur. Falsam autem paenitentiam esse constat, cum spretis pluribus, de uno solo paenitentia agitur: aut cum sic agitur de uno, ut non discedatur ab alio. Unde scriptum est: 'Qui totam legem observaverit, offendat autem in uno, factus est omnium reus (Jac 2,10): scilicet quantum ad vitam aeternam. Sicut enim, si peccatis esset omnibus involutus, ita, si in uno tantum maneat, aeternae vitae ianuam non intrabit. Falsa etiam fit paenitentia cum paenitens ab officio vel curiali vel negotiali non recedit, quod sine peccato agi nulla ratione praevalet;

---

[17] El perdón está reservado al Obispo: *„Otórgale, Oh Señor todopoderoso, a través de Cristo, la participación en Tu Santo Espíritu para que tenga el poder para perdonar pecados de acuerdo a Tu precepto y Tu orden, y soltar toda atadura, cualquiera sea, de acuerdo al poder el cual Has otorgado a los Apóstoles*" (Cf. *Constitutione Apostolica* VIII, 5 p. i., 1. 1073.)

[18] Cf. *Sacr. Gelasianum,* n. 38.

[19] Cf. Hieronymus, Epistula 77, *ad Oceanum*, en PL, XXII, 748-752.

[20] Cf. García y García, A., *Historia del Derecho Canónico, cit.* p. 370.

[21] It is also true that, from the V century, some voices calling for the privacy of penance (Saint Leo the Great) and repeated (St. John Chrysostom) rise The Chrysostom says: *„Si pecas una segunda vez, haz penitencia una segunda vez, y cuantas veces vuelvas a pecar, vuelve a mí y yo te curaré*" (Cf. San Juan Crisóstomo, «Homilía 61», en *Homilías sobre el evangelio de san Mateo* 2, Madrid 2007).

[22] Cf. *La colección canónica hispana*. *Concilios hispanos* 5/2, ed. F. Rodríguez Barbero, y G. Martínez Díez, Madrid 1992, c. 11.

[23] Cf. *Ibidem*

[24] Cf. Rankin, T., *Jurisdiction in the sacrament…, cit.* p. 11.

[25] Cf. *Ibidem*, p. 12.

[26] McCartney, M., «Faculties of Regular Confessors», en *Canon Law Studies* 280 (1949) pp. 12-13: "This in reality amounted to a local decree on the necessity of confessing to one's proper pastor, local legislation that was to be made universal almost four centuries later by the IV Lateran Council in 1215".

aut si odium in corde gestetur, aut si offenso cuilibet non satisfiat, aut si offendenti offensus non indulgeat aut si arma quis contra iustitiam gerat". [27]

However, this process was slow, mainly because the turbulent years preceding the Fourth Lateran Council did not help at all to determine the jurisdiction of religious, secular missionaries and with the entry of preachers and inquisitors and the constant rumor of civil interference through particular priests [28]. With regard to preaching —the other system to Ccause the correction of sinful consciences— his importance, of course, is not a special feature of the Middle Ages, even the introduction of the exemplum as a means of evangelization, Apart from that was the style of Christ and the *Doctrina christiana* of St. Augustine says that the examples advantage than the convoluted words: *Plus docent exempla quam verba subtilia* [29]. But over the years she made this practice was lost; in fact, during the Middle Ages traditionally distinguished three stages: "*una primera que se corresponde con la llamada Alta Edad Media y se caracteriza por una predicación destinada exclusivamente a los clérigos —ad cleros—; la Baja Edad Media, cuando se recupera una predicación popular —ad populum—; y un último periodo de transición entre ambas etapas, que se extendería desde el siglo X hasta el XIII aproximadamente*" [30].

3. Education, sacraments and inquisition: the IV. Lateran council

This way, the imminent change of Millennium went before by fights in the Diocesan curia, especially between the medieval Archdeacon and the diocesan Bishop. These battles about the penance's administration are another example why the Church needed a new and definitive reform, whose rotting had reached all levels of the institution. Despite the impetus of the Gregorian reform, the new rules failed to sink deeply, and issues like sexual morality or the breaking of celibacy, among others, prove the need for an urgent renewal which must to reach all levels, and which must be carried out organically [31].

In addition, as I have said, the passage of the public penance to private penance not only supposed the loss of the public character of the punishment, but also that the Church lost the control of behavior, because its repression would depend now only of the personal need for forgiveness of each faithful. Under these new circumstances, it arose up heterodox forms of profess religion -heresies in modern sense- which infected the population, and many sexual behavior contrary to Catholic morality extended among the population, which already should not purge their sins in public. This situation pushed the Church to face a new situation: to cause voluntary contrition of the penitent. The Church needs to recuperate the lost control over the conscience, so the intention of Innocent Pope when he convened the Council was "*to uproot vices and plant virtues, to correct excesses and reform morals, to eliminate heresies and strengthen the faith*" [32].

From my point of view, three will be the areas where the Church focuses the fight to control free conscience, corresponding with its triple function, and each one corresponding to the three levels which impacts the sinful attitude: a reform of the sinful preventing, preaching to teach the truth and stir the souls (*munus docendi*); a sacramental reform, with important changes in relation to the confession in order to restore the communion those who have moved away (*munus santificandi*) and, finally, a judicial reform (*munus regendi*), where the authority tries to force the contrition of the sinner.

As I said, any ecclesiastical rule is directed to organize the life of the Church. An essential part of this stability is the cult that has the sacraments as liturgical expression. The liturgy is praxis, the external way to celebrate an internal common faith. Logically, if we desiderate to celebrate the same creed in the same mod, rules to regulate it are needed. Innocent understood this well and continued the work of his predecessors in placing the law at the service of the Church's reform [33] the very purpose of the Church's disciplinary rules are precisely to organise and direct the Church « *to divine worship, peace, and preserving Christian justice, at last to reach the eternal happiness*», and the law on the sacraments lies at the very heart of the canonical discipline. Moreover, as liturgical expressions of the unity found in the Church's *depositum fidei*, only fitting that they be regulated with a view to strengthening that unity.

Again, we see as sacrament, preaching and fight against the sinful attitudes are sides of a same Prism, because if you get educated in the faith of the people [34] and the way of celebrate it, there will be many advances in order to suppress the sin, as well as in the prevention of the emergence of new diversions, both doctrinal and structural [35].

---

[27] En el II concilio de Letrán (1139) se reprenderá el abuso que se había introducido en el sacramento de la Penitencia (can. 22): (Cf. «Concilium Lateranense II», en DS 717).

[28] Cf. J. Belda Iniesta, *La donatio…*, cit. p. 125.

[29] F. Bravo, «Arte de enseñar, arte de contar. En torno al exemplum medieval», en *La enseñanza en la Edad Media. X Semana de Estudios Medievales*, Nájera 1999.
(http://www.vallenajerilla.com/berceo/bravo/exemplum.htm, december 3, 2012): "A los nombres de San Agustín y de San Oregorio Magno cabe añadir, entre los primeros y más destacados teóricos de la predicación, los de Rabano Mauro (De institutione clericorum - 819-), Guillermo de Nogent (Liber quo ordine sermo fieri debet -1084-) y, aunque más moderno, Alain de Lille (Summa de arte praedicatoria -hacia 1199-)".

[30] Cf. B. Marcotegui Barber, «Ad eruditionem simplicitum. La trasnmisión del mensaje evangélico a la sociedad bajomedieval», en *Medievalismo. Boletín de la Sociedad Española de Estudios Medievales*, 15 (2005) pp. 9-38.
(http://www.vallenajerilla.com/berceo/marcotegui/transmisionmensajevangelico.htm, December 3, 2012).

[31] BELDA INIESTA, J., «Excommunicamus et anathematisamus. Predicación, Confesión e Inquisición como respuesta a la herejía medieval (1184-1233)» en *Anuario de Derecho Canónico* 2 (2013), pp. 97-128.

[32] Cf. Rankin, T., *Jurisdiction in the sacrament…, cit.* p. 12.

[33] Cf. Inocentius III, *De Sacro Altaris Mysterio Libri VI, S.I.,* Sylvć-Ducum 1846.

[34] Cf. «Concilium Lateranense IV, const. 10 y 11», In *COD*, Bolonia 1973, p. 239-240.

[35] *Ivi.* const. 7. p. 237.

3.1 The confession's Reform

In this sense, the 21 constitution of IV Lateran Council will be a fundamental change of the penitential policy. With the Innocent's reform the confession became obligatory, at least once a year. This was obligation for everybody: both men or women who have achieved the age of reason. And they must do it with the own priest:

"*Omnis utriusque sexus fidelis, postquam ad annos discretionis pervenerit, omnia sua solus peccata confiteatur fideliter, saltem semel in anno proprio sacerdoti, et iniunctam sibi poenitentiam studeat pro viribus adimplere*" [36]

The the obligatory character of the confession was one of the fundamental point of the reform. One of the fundamental points of the conciliar reform will be the obligatory nature of the confession. By the Decree the fourth Lateran Council urges all the baptized who have reached the age of reason, both men or women, to confess their sins at least once a year with their own priest, at least once a year and strive to fulfill the penance enjoined.

While the practice of frequent confession had been well established under the influence of Irish penitentials [37] the supreme authority of the council had not pronounced yet [38]. It must be seen here how, what was a local decision before, is raised to a universal norm by the competent authority: *"By means of this action [Decree promulgation] the Council did not established new rights and did not impose any new obligation, but it gave an ecumenical sanction and a universal character to an already existent discipline"* [39].

The reference to the term itself implies a clear delimitation of the priest's jurisdiction. Confession, even though not public already, will be done with the priest who, given the situation and way of living of the moment, knows us thoroughly. This means that he is perfectly conscious of the existence of some type of public sin. At the same time, it implies the perfect link with those who, up to now, have the authority to resolve sins [40]. As we have said before, during the first centuries it is an activity exclusively reserved for the bishop, but the fact of clearly stating the jurisdiction of the confessor means framing the territorial extension inside the terms of the jurisdiction of the community pastor. The importance of the penitential jurisdiction originated from the decree could be better understood through the perspective of the unique exception to the requirement itself. Here we talk about the clause, *"unless he [the adequate priest] has been granted permission to confess another one"*. Without such authorization, the canon says, the other priest *"does not tie or untie"* [41]. Therefore, we find a casual relation between the permission of the adequate priest and the validity of the sacramental absolution given by another one: *Si quis autem alieno sacerdoti voluerit justa de causa sua confiteri peccata, licentiam prius postulet et obtineat un sacerdote proprio, cum aliter ille ipse possit no solvere vel ligare*. This concession of permission, far from being a mere formality to be observed, establishes the nullity of the absolution (*no possit solvere*).[42]

3.2 The domain of consciences and the triple mission of the Church

In addition, the lines that characterize the institution of the Inquisition and its mode of proceeding were published by this Council. It ruled that the investigations will be carried out in parishes during the diocesan visit, the legitimacy of the process' opening without the suspect was been accused by anyone, the possible penalties and sanctions imposed during the process and at the end of it, and sending to secular justice to apply the established punishment. This, with the obligation of annual confession, can be interpreted as two ways of addressing the spiritual health of the people of God: keeping clean the soul, and if this interior repentance was not true because sin has led him to deny their faith, regulate the way in which the human resources can force it. In addition, the same conciliar text urges bishops to take care of the people education. The way in which the prelates will care the instruction of the people promotes the homily renovation. The primordial contribution to it was the exempla that appear on sermons and which were reintroduced by the new orders, preachers and mendicants, who were fundamental tools to carry on the reform. They visit the village in temporal missions, and they prepared the terrain to do growing the papal faith, removing sinful attitudes and correcting the local clergy. Again, we see here how the three aspects that we said converge. In fact, not long after, the preachers will become the papal inquisitors.[43]

If we observe the phases of the process, it is easy to recognize the triple ecclesial actuation. Once the Inquisitor was arrived on a place, he brought together in the public square to all the habitants of the area. With exhortations, He invited to anyone that knew himself guilty of a crime against the faith, however small that was foul, to submit to his authority and confess it voluntary. Usually the time for the voluntary confession of sins against the faith ranged from fifteen days to a month. Those that were been repented during this "time of grace" -*tempus gratiae sive principalium*– and were been confessed their sins unknown for the people was obligated to carry on a secret penance.[44] Here he returns to see that the main goal is the conversion of the sinner, like we are told by the biblical expression: "*Si autem impius egerit paenitentiam ab omnibus peccatis suis, quae operatus est, et custodierit universa praecepta mea et fecerit iudicium et iustitiam, vita vivet, non morietur*" (Ez 18, 21).

After the time of grace it was promulgated an edict whereby anyone who knew the existence of suspicious or sinful attitudes

[36] «Concilium Lateranense IV, const. 21», en *COD*, p. 245.
[37] Cf. Rankin, T., *Jurisdiction in the sacrament…, cit.* p. 16.
[38] *Ibidem.*
[39] Cf. *Ibidem.*
[40] BELDA INIESTA, J., «Excommunicamus et anathematisamus.» cit. p. 105.
[41] Cf. Rankin, T., *Jurisdiction in the sacrament…, cit.* p. 17.
[42] Cf. *Ibídem*, p. 17.
[43] *Ille humani generis,* 1232. (Cf. Sánchez Herrero, J., «Los orígenes de la Inquisición medieval» *cit.* p. 29).
[44] Cf. Sánchez Herrero, J., «Los orígenes de la Inquisición medieval» *cit.* p. 36.

had an obligation to report it to the authorities (*diffamatio or infamy*) [45]. The accused were cited through the priest of the village. However, not only those who had confessed the profession of sinful doctrines were the only ones who came under the jurisdiction of the Inquisition, because while was the infamy that indicated who could be condemned, in fact all those suspected of unorthodox conduct fell under the authority of this Court. When the accused was cited, if they refused to submit to the authority of the Court, could be judged as guilty of contempt, and ordering his arrest. Done this, the defendant was informed of the charges against them, and the court demanded him the oath on the Holy Gospels that oblige them to say all the truth, with the famous formulation *se ut principalis, quam de aliis vivis et mortuis, ut testis* [46].

At first, the prosecution was exercised by the complainants, but because of the terrible complexities of these actions they abandoned this legal practice. However, it did not imply that any indictment was accepted; in principle, the Inquisitor should rely only on discrete people, avoided clashes between witnesses and defendants, and it is not supported, at least at first, heretics to accuse other heretics, though this practice was also abandoned because, logically, it was normal to those professing the same doctrine know the secret practices of the others. Finally, it must be stressed that it avoided personal clashes outside causes, i.e. habitual enemies were not supported as witnesses. From here, all the activity of the tribunal was intended to get the confession of the accused. All types of media could be used to obtain it, in order to overcome the resistance of the defendant. Traditionally, what has been become known in this part of the process is the application of various means of torture, in faith processes since Pope Innocent IV. We have to recall that the practice of torture, not as punishment but as a means to obtain a confession from the accused, was common in laical law, just as it had been commonly used as a means of asceticism and repression of bad behavior in the Christian tradition.

However, the need for confession, the acceptance of own sinful condition, has some different connotations in the Christian world: "*you convert us, Lord, and we will develop*" (Lm 5.21). It is not just the certainty of guilt and, therefore, the merit by the defendant of the penalty that will be imposed him, but the genuine contrition needs precisely such recognition of own misery and own error, and it returns to man to the place in which Christ rescues him of the lost path.

Thus, the Church is aware that sin is the root of all human failures [47], that it perverts the nature of man and damages it severely, but not to annihilate it [48]. Precisely for this reason, because the fact of human nature and freedom have been injured but not killed, is necessary the instruction regarding the bad attitude, mercy and the possibility of amendment. Also, it is necessary the punishment in order to purge the sinful. Repentance [49], grace that is obtained by means of the blood of Christ, is root for the conversion. And it is precisely this confrontation with Christ through the preaching that makes us discover our mistake, first step for repentance and forgiveness.

4. Conclusion

This ending, this noble aim, unfortunately, which has been persecuted by the Church since its foundation, has not always been achieved. The presence within the Church itself of groups that will use interested these new practices, as well as the unstable relations with the secular power will end by increasing the rift between Orthodox and heterodox. For some time the objective was achieved, and there was a renewal of the life of faith, especially with the emergence of new forms of consecrated life, but the freedom of conscience and of interpretation of the faith had already begun to grow. From the point of view of faith and the sacraments, this separation will conclude with the Protestant Reformation, which will result in the Grand Council of the modern age. From the point of view of education, until the establishment of seminars, also with the Council of Trent, only religious orders have usually some instructed clerics. Finally, in relation to the part legal, the Inquisition, born to protect faith -*favor fidei*-, will be used usually by all the parties involved for their own benefit: the civil power to complete its domination over the population, the population for their personal revenge and the religious power -of any creed, because it was present in all Christian churches- to suppress the faith that it was obligated to defend.

---

[45] BELDA INIESTA, J., «Excommunicamus et anathematisamus…» p. 118

[46] Cf. Sánchez Herrero, J., «*Los orígenes de la Inquisición medieval*» cit. p. 37.

[47] «*Et cum venerit ille, arguet mundum de peccato et de iustitia et de iudicio: de peccato quidem, quia non credunt in me*" (Io. 16, 8-9).

[48] CCE n. 1426: "Conversio ad Christum, nova in Baptismo nativitas, donum Spiritus Sancti, corpus et sanguis Christi tamquam nutrimentum recepta nos effecerunt sanctos et immaculatos «in conspectu Eius» (Eph 1,4), sicut Ecclesia ipsa, Christi Sponsa, est coram Eo «sancta et immaculata» (Eph 5,27). Tamen vita nova recepta in initiatione christiana fragilitatem et debilitatem naturae humanae non suppressit, neque inclinationem ad peccatum quam traditio concupiscentiam appellat, quae manet in baptizatis ut ipsi suas probationes subeant in vitae christianae proelio, Christi gratia adiuti. Hoc proelium est illud conversionis propter sanctitatem et vitam aeternam ad quam Dominus nos incessanter vocat" (Cf. DS 1515)".

[49] Cf. Sancti Ambrosii Mediolanensis, «Epistolae in duas clases distributae», in PL 16, 1164: "(…) Ecclesia autem et aquam habet, el lacrymas habet: aquam baptismatis, lacrymas poenitentiae (…)"St. John Chrysostom also includes reconciliation seems like a kind of new baptism, at 10th catechesis. (Cf. Juan Crisóstomo, *Las catequesis bautismales*, ed. Ceresa-Gastaldo, A.- Velasco, A., Madrid 1988², p. 185. [Jean Chrysostome, *Huit catéchèses baptismales inédites* (S. Chr. 50bis), ed. A. Wenger, Paris 1970, p. 226.] 'Like we are told by the Gelasianum "Adest, o uenerabilis pontifex, tempus acceptum, dies propitiationis diuine et salutis humanae, qua mors interitum et uita accepit aeterna principium, quando in vinia domini sabaoth sic nouorum plantatio facienda est, ut purgetur et curatio uetustatis. Quamuis enim a diuitiis bonitatis et pietatis Dei nihil temporis uacet, nunc tamen et largi[t]or est per indulgentiam remissio peccatorum et cupiosior per gratiam adsumptio renascentum. Augemur regenerandis, crescimus reuersis. Lauant aquae, lauant lacrimae. Inde gaudium de adsumptione uocatorum, hinc laeticiae de absolutione paenitencium. (…)".(cf. *Liber Sacramentorum Romanae Aeclesiae ordinis anni circuli, (Sacramentarium Gelasianum),* ed. Cunibert, L., Mohlberg, Eizenhöfer, L., Siffrin, P., Roma 1968, n. 353 (= *Sacr. Gelasianum*). CCE n. 1429 and Gandía Barber, J. D., *La cuaresma: camino de renovación y salvación. Hermenéutica catecumenal de las lecturas veterotestamentarias de lso domingos de cuaresma,* Murcia 2012, p. 166-167.

History of Legal Profession in India

Rudransh Sharma *

Abstract

The Legal Profession is an important limb of the machinery for administration of justice. Without a well-organized profession of law, the courts would not be in a position to administer justice effectively as the evidence in favour or against the parties to a suit cannot be properly marshaled, facts cannot be properly articulated and the best legal arguments in support or against the case of the parties cannot be put forth before the court. "A well-organized system of judicial administration postulates a properly equipped and efficient Bar." [1] *It is, therefore, in the fitness of things to take note briefly of the development of the legal profession in India.*

Key words: *India; legal profession.*

Mastering the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances,
Through which a few, by wit or fortune led,
May beat a pathway out to wealth and fame.[2]
Lord Tennyson

1. Introduction

Legal history or the history of law is the study of how law has evolved and why it changed. Legal history is closely connected to the development of civilizations and is set in the wider context of social history. Among certain jurists and historians of legal process it has been seen as the recording of the evolution of laws and the technical explanation of how these laws have evolved with the view of better understanding the origins of various legal concepts, some consider it a branch of intellectual history. Twentieth century historians have viewed legal history in a more contextualized manner more in line with the thinking of social historians. They have looked at legal institutions as complex systems of rules, players and symbols and have seen these elements interact with society to change, adapt, resist or promote certain aspects of civil society. Such legal historians have tended to analyze case histories from the parameters of social science inquiry, using statistical methods, analyzing class distinctions among litigants, petitioners and other players in various legal processes. By analyzing case outcomes, transaction costs, number of settled cases they have begun an analysis of legal institutions, practices, procedures and briefs that give us a more complex picture of law and society than the study of jurisprudence, case law and civil codes can achieve.

India has a recorded legal history starting from the Vedic ages and some sort of civil law system may have been in place during the Bronze Age and the Indus Valley civilization.[3] Notwithstanding this, the development of 'law' as a profession is only a recent phenomenon. The Indian legal profession is one of the largest in the world and plays a vital role in the world's largest democracy. While the roots of this profession lie before Independence, since then the profession has evolved immensely and currently faces various challenges; the most important being to provide access across the profession, ensure ethical foundations and modernise the practice across the board.

A well-organized and independent legal profession is an essential condition for proper administration of justice.[4] It is also a necessary ingredient and guarantor of the rule of law.[5] Its proper organization and maintenance of its independence are therefore, necessary for a good and just society. This project, traces the history of our efforts in that direction. It will be too ambitious to trace that history from the time of ancient or even Muslim rulers because firstly, we have very little information about that and secondly, our present legal profession, like most of the other legal institutions, is based on the British model.

* Rudransh Sharma, National Law University, Assam, India.

1 Law Comm, *XIV.*

2 Glanville Williams, *Learning the Law*, Sweet & Maxwell Ltd., London, Eleventh Edition, 2010, p. 67.

3 www.barcouncilofindia.org, Retrieved on 03. 05. 2012.

4 The Law Commission in its Fourteenth Report observed: "A well organized system of judicial administration postulate a properly equipped and efficient Bar", 1958, p. 556.

5 "It is essential for maintenance of the rule of law that there should be an organized legal profession free to manage its own affairs…" *The Rule of Law in a Free Society.* A Report on the International Congress of Jurists, New Delhi, India, 1959, p. 311.

Therefore, we trace the *istory of the Legal Profession in India* form the advent of the British rule.

The authors of the instant research hope that this piece of work provides the readers with a decent understanding of the *history of the Legal Profession in India.* The instant work shall give a brief highlight to the *development of the Legal Profession in the world* befor addressing India.

2. A brief history of the legal profession in the world

The development of the legal profession has received a lot of attention from scholars. This can be seen in Paul Brand's *The Origins of the English Legal Profession* (1992), and J.H. Baker's *The Legal Profession and The Common Law – Historical Essays* (1986). The eminent jurist Roscoe Pound also wrote *The Lawyer from Antiquity to Modern Times* (1953).

In Peter Coss (Ed.), Thomas Wright's Political Songs of England (1996), the following verse occurs:

"Attorneys in country, they get silver for naught;
They make men begin what they never had thought;
And when they come to the ring, they hop if they can.
All they can get that way, they think all is won for them with skill.
No man should trust them, so false are they in the bile."

2.1 Ancient Greece

The earliest people who could be described as "lawyers" were probably the orators of ancient Athens. However, Athenian orators faced serious structural obstacles. First, there was a rule that individuals were supposed to plead their own cases, which was soon bypassed by the increasing tendency of individuals to ask a "friend" for assistance.[6] However, around the middle of the fourth century, the Athenians disposed of the perfunctory request for a friend.[7] Second, a more serious obstacle, which the Athenian orators never completely overcame, was the rule that no one could take a fee to plead the cause of another. This law was widely disregarded in practice, but was never abolished, which meant that orators could *never* present themselves as legal professionals or experts.[8] They had to uphold the legal fiction that they were merely an ordinary citizen generously helping out a friend for free, and thus they could never organize into a real profession—with professional associations and titles and all the other pomp and circumstance-like their modern counterparts.[9] Therefore, if one narrows the definition to those men who could practice the legal profession openly and legally, then the first lawyers would have to be the orators of ancient Rome.

2.2 Ancient Rome

A law enacted in 204 BC barred Roman advocates from taking fees, but the law was widely ignored.[10] The ban on fees was abolished by Emperor Claudius, who legalized advocacy as a profession and allowed the Roman advocates to become the first lawyers who could practice openly—but he also imposed a fee ceiling of 10,000 sesterces.[11] This was apparently not much money; the Satires of Juvenal complain that there was no money in working as an advocate.[12]

Like their Greek contemporaries, early Roman advocates were trained in rhetoric, not law, and the judges before whom they argued were also not law-trained.[13] But very early on, unlike Athens, Rome developed a class of specialists who were learned in the law, known as jurisconsults (*iuris consulti*).[14] Jurisconsults were wealthy amateurs who dabbled in law as an intellectual hobby; they did not make their primary living from it.[15] They gave legal opinions (*responsa*) on legal issues to all comers (a practice known as *publice respondere*).[16] Roman judges and governors would routinely consult with an advisory panel of jurisconsults before rendering a decision, and advocates and ordinary people also went to jurisconsults for legal opinions.[17] Thus, the Romans were the first to have a class of people who spent their days thinking about legal problems, and this is why their law became so „precise, detailed, and technical." [18]

During the Roman Republic and the early Roman Empire, jurisconsults and advocates were unregulated, since the former were amateurs and the latter were technically illegal.[19] Any citizen could call himself an advocate or a legal expert, though whether people believed him would depend upon his personal reputation. This changed once Claudius legalized the legal profession. By the start of the Byzantine Empire, the legal profession had become well-established, heavily regulated, and highly stratified.[20] The centralization and bureaucratization of the profession was apparently gradual at first, but accelerated during the reign of Emperor Hadrian.[21] At the same time, the jurisconsults went into decline during the imperial period.[22]

---

[6] Robert J. Bonner, *Lawyers and Litigants in Ancient Athens: The Genesis of the Legal Profession*, 1927, p. 202.
[7] *Ibid.,* p. 204.
[8] *Ibid.,* p. 206.
[9] *Ibid.,* p. 208-209.
[10] John A. Crook, *Law and Life of Ancient Rome*, Cornell University Press, Ithaca, 1967, p. 90.
[11] *Id.* Crook cites Tacitus, *Annals* VI, 5 and 7 for this point. For more information about the complex political affair that forced Emperor Claudius to decide this issue, see *The Annals of Tacitus*, Book VI, 1982, p. 208.
[12] *Ibid.,* p. 91.
[13] *Ibid.,* p. 87.
[14] *Ibid.,* p. 88.
[15] *Id.*
[16] *Ibid.,* p. 89.
[17] *Ibid.,* p. 88.
[18] John A. Crook, *Law and Life of Ancient Rome*, Cornell University Press, Ithaca, 1967, p. 88.
[19] *Ibid.,* p. 90.
[20] A. H. M. Jones, *The Later Roman Empire,* University of Oklahoma Press, Norman, 1964, p. 507.
[21] Fritz Schulz, *History of Roman Legal Science*, Oxford University Press, Oxford, 1946, p. 113.
[22] *Id.*

In the words of Fritz Schulz, „by the fourth century things had changed in the eastern Empire: advocates now were really lawyers."[23] For example, by the fourth century, advocates had to be enrolled on the bar of a court to argue before it, they could only be attached to one court at a time, and there were restrictions (which came and went depending upon who was emperor) on how many advocates could be enrolled at a particular court.[24] By the 380 s, advocates were studying law in addition to rhetoric (thus reducing the need for a separate class of jurisconsults); in 460, Emperor Leo imposed a requirement that new advocates seeking admission had to produce testimonials from their teachers; and by the sixth century, a regular course of legal study lasting about four years was required for admission.[25] Claudius's fee ceiling lasted all the way into the Byzantine period, though by then it was measured at 100 solidi.[26] Of course, it was widely evaded, either through demands for maintenance and expenses or a *sub rosa* barter transaction.[27] The latter was cause for disbarment.[28]

The notaries (*tabelliones*) appeared in the late Roman Empire. Like their modern-day descendants, the civil law notaries, they were responsible for drafting wills, conveyances, and contracts.[29] They were ubiquitous and most villages had one.[30] In Roman times, notaries were widely considered to be inferior to advocates and jurisconsults.[31] Roman notaries were not law-trained; they were barely literate hacks who wrapped the simplest transactions in mountains of legal jargon, since they were paid by the line.[32]

2.3 Middle Ages

After the fall of the western Empire and the onset of the Dark Ages, the legal profession of Western Europe collapsed. As James Brundage has explained: "[by 1140], no one in Western Europe could properly be described as a professional lawyer or professional canonists in anything like the modern sense of the term 'professional.'"[33] However, from 1150 onward, a small but increasing number of men became experts in canon law but only in furtherance of other occupational goals, such as serving the Roman Catholic Church as priests.[34] From 1190 to 1230, however, there was a crucial shift in which some men began to practice canon law as a lifelong profession in itself.[35]

The legal profession's return was marked by the renewed efforts of church and state to regulate it. In 1231 two French councils mandated that lawyers had to swear an oath of admission before practicing before the bishop's courts in their regions, and a similar oath was promulgated by the papal legate in London in 1237.[36] During the same decade, Frederick II, the emperor of the Kingdom of Sicily, imposed a similar oath in his civil courts.[37] By 1250 the nucleus of a new legal profession had clearly formed.[38] The new trend towards professionalization culminated in a controversial proposal at the Second Council of Lyon in 1275 that *all* ecclesiastical courts should require an oath of admission.[39] Although not adopted by the council, it was highly influential in many such courts throughout Europe.[40] The civil courts in England also joined the trend towards professionalization; in 1275 a statute was enacted that prescribed punishment for professional lawyers guilty of deceit, and in 1280 the mayor's court of the city of London promulgated regulations concerning admission procedures, including the administering of an oath.[41]

2.4 Legal profession in England

In England, the admission of lawyers has been regulated since the middle of the 13th century. In the late 13th century, three critical regulations were adopted[42] – (a) the Statute of Westminster I, chapter 29 (1275); (b) The London Ordinance of 1280; and (c) the Ordinance of 1292, de Attornatis et Apprenticiis. During the medieval period, further regulations were enacted, called the Statute, 4 Henry IV, chapter 18 (1402) and the Ordinance, 33 Henry VI, chapter 7 (1455). In addition, judges have always used their inherent power to control the admission of lawyers and check their misconduct.

2.5 Professional Conduct and The Law Society

The attorneys were expelled from the principal Inns of Court in the 16th century and in 1739 they formed a professional group called "Society of Gentleman-Practicers in the Courts of

[23] *Ibid.,* p. 268.
[24] A. H. M. Jones, *The Later Roman Empire,* University of Oklahoma Press, Norman, 1964, pp. 508-510.
[25] *Ibid.,* pp. 512-513.
[26] A. H. M. Jones, *The Later Roman Empire,* University of Oklahoma Press, Norman, 1964, p. 511.
[27] *Id.*
[28] *Id.*
[29] *Ibid.,* p. 515.
[30] *Id.*
[31] *Id.*
[32] *Ibid.* p. 516.
[33] James A. Brundage, "The Rise of the Professional Jurist in the Thirteenth Century," 20 SYRACUSE J. INT'L L. & COM., 1994, p. 185.
[34] *Ibid.,* pp. 185-186.
[35] *Ibid.,* pp. 186-187.
[36] James A. Brundage, "The Rise of the Professional Jurist in the Thirteenth Century," 20 SYRACUSE J. INT'L L. & COM., 1994, p. 188.
[37] *Ibid.,* pp. 188-189.
[38] *Ibid.,* p. 190.
[39] *Ibid.,* p. 189.
[40] *Id*.
[41] John Hamilton Baker, *An Introduction to British Legal History*, Butterworths, London, Third Edition, 1990, p. 179.
[42] http://www.barcouncilofindia.org/about/about-the-legal-profession/history-of-the-legal-profession/, Retrieved on 03. 05. 2012.

Law and Equity".[43] Thus the Law Society was born, though it was not until 1986 that the Law Society formed a committee to collect and draft principles of professional conduct. Now there exists the Guide to Professional Conduct of Solicitors reflecting the ideals of modern solicitors as well. Both branches of the English legal profession had the same core duties over the centuries of litigation: fairness, competence, loyalty, confidentiality, reasonable fees and service to the poor.

Nicholas, in Introduction to Roman law stated that the Roman jurists were not paid for their work, but were supposed to function due to a keen sense of public service. In Europe, lawyers were under an oath, which was an essence, a condensed code of legal ethics.[44]

In France, lawyers had to take an oath which included a pledge of care, diligence and an agreement to support only just causes. In France, the oaths were taken by ecclesiastical lawyers and the French legal tradition had a lasting influence even outside France in Switzerland and other parts of Europe.[45]

The concept of a lawyer as an officer of the Court is arises from the Roman idea of a lawyer being an '*advocatus*', who when called upon by the praetor to assist in the cause of a client, was solemnly reprimanded to "avoid artifice and circumlocution".[46]

3. History of the legal profession in India

3.1 Introduction

The history of the legal profession in India can be traced back to the establishment of the First British Court in Bombay in 1672 by Governor Aungier. The admission of attorneys was placed in the hands of the Governor-in-Council and not with the Court. Prior to the establishment of the Mayor's Courts in 1726 in Madras and Calcutta, there were no legal practitioners.

3.2 Mayor's Court

In the Charter of 1726, which established the Mayor's Courts at the three Presidency Towns, no specific provision was made laying down any particular qualifications for the persons who would be entitled to act or plead as legal practitioners in these courts. Presumably, it was left to these courts to regulate this matter by rules of practice which these courts were authorized to frame.[47] No change was effected in this position when a fresh Charter was issued in 1753.[48] No organized legal profession came into being in the Presidency Towns during the period of the mayor's Courts.[49] They who practiced law were devoid of any legal training or any knowledge of law. They had adopted the profession in the absence of anything better to do. Quite a few of these so-called lawyers were the dismissed servants of the Company.[50]

3.3 Supreme Courts

3.3.1 Regulation Act, 1773

The first concrete step in the direction of organizing a legal profession in India was taken in 1774 when the Supreme Court was established at Calcutta. The Regulating Act,1773, empowered the Supreme Court to frame rules of procedure as it thought necessary for the administration of justice and due execution of its powers. Under CI.11 of its Charter, the Supreme Court was empowered to approve, admit and enroll such and so many Advocates and Attorneys-at-law, as to the Court shall deem fit. Attorneys of record were to be authorized to appear and plead, and act for the suitors in the Supreme Court. The court was to have power to remove any Advocate or Attorney on a reasonable cause. No other person whatever, but Advocates or Attorneys so admitted and enrolled, were to be allowed to appear and plead, or act in the Court for or on behalf of such suitors. Thus the persons entitled to practice before the Supreme Court could be Advocates and Attorneys. The term Advocate at the time extended only to the English and the Irish barristers and the members of the faculty of Advocates in Scotland. The expression "Attorneys" then meant only British Attorneys or Solicitors. As CI.11 of the Charter prohibited any other person whatsoever to appear and plead or act, it would appear that the Calcutta Supreme Court was, from its very inception, a completely exclusive preserve for members of the British legal profession, namely, the British Barristers, Advocates and Attorneys. The indigenous Indian legal practitioner had no entry in this Court. The Charter of 1774 introduced the British system of legal practice in Calcutta.[51]

Similar position obtained in the two other Supreme Courts at Bombay and Madras. Thus, in the three Supreme Courts the only persons who were entitled to practice were the British Barristers, Advocates and Attorneys. The Indians had no right to appear before these Courts. This continued to be the position all through the existence of these Courts.

Under CI.11 of the Charter, the Supreme Court at Calcutta could admit Advocates and Attorneys who could "appear, plead and act for the suitors of the Court." But, the Supreme Court provided for the Advocates and Attorneys to exercise the ordinary powers of their respective professions-Advocates having power to appear and plead and Attorneys to appear and act, for the suitors. Similar was the position in other Supreme Courts as well. Thus, the two grades of the legal practice became distinct and separate as they were in England. Commenting on the position prevailing at this time, the Supreme Court of India observed in *Aswini Kumar Ghosh v Arbind Bose:*[52]

"Though the Supreme Court were given by the Charter Acts and the Letters Patent establishing them, power to enroll advocates who could be

[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Ibid.,* p. 37. It seems that the Mayor's Courts exercised power to dismiss an attorney guilty of misconduct: See, Love, *Vestiges of Old Madras*.
[48] M. P. Jain, *Outlines of Indian Legal & Constitutional History,* LexisNexis Butterworths Wadhwa Nagpur, Gurgaon, 2012, p. 669.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] AIR 1952 SC 369.

authorized by the rules to act as well as to plead in the Supreme Courts, Rules were made empowering advocates only to appear and plead and not to act, while attorneys were enrolled and authorsed to act and not to plead. In the Sudder courts and the courts subordinate thereto, pleaders who obtained a certificate from those courts were allowed both to act and plead."

3.4 Company's Adalat

3.4.1 Regulation VII of 1793 [53]

In the Company's adalats, the deplorable state of affairs concerning the legal profession has been graphically narrated in the preamble to Bengal regulation VII of 1793. The Vakils were and large ignorant of the law and were subject to harrashment and extortion from the ministerial officers of the courts. The professional Vakils charged exorbitant fees. Regulation VII called itself on "for the appointment of Vakils or native pleaders in the courts of civil judicature in the Provinces of Bengal, Bihar and Orissa." The regulation stated in its preamble the *objects of its enactment* as follows:

***Object of Enactment*:** *"It is therefore indispensably necessary for enabling the courts duly to administer and the suitors to obtain justice, that the pleading of causes should be made a distinct profession and that no persons should be admitted to plead in the Courts but men of passed by the British Government, and that they should be subjected to rules and restrictions calculate to secure to their clients a diligent and faithful discharge of trusts. The pleaders therefore on either side whilst they will bring the merits of every case to light and collect into one point of view of the information necessary to enable the courts to formtheir opinion upon it, will be a check upon them by exposing every deviation from the law in their judgments."*

Provisions: The regulation thus laid emphasis on the useful role which a sound legal profession can play in the administration of justice. The Regulations were enacted with a view to strengthen the legal profession in the best interests of the litigant public, the members of the bar serving a trustees of their clients and thus helping in the sound administration of justice. The Regulation created for the first time a regular legal profession for the Company's adalats. The Regulation brought some order and measure of quality to pleading and sought to establish practice of law as a pleaders and also a scale of professional fee based on a percentage of the value of the property. He could not demand or accept any fee, goods, effects or valuable consideration from his clients over and above the sanctioned fees. The ultimate punishment for such a violation was dismissal of the lawyer. Thus, the theory of freedom of contact between the Vakil and his client was not recognized. The fees of the pleaders were payable only after decision, and not before, the Court being practically the paymaster.

An interesting provision made was that after a party retained a pleader, he was to execute a *vakalatnama* constituting him pleader in the clause and authorizing him to prosecute or defend the matter and binding himself to abide by and confirm all facts which such pleader might do or undertake in his behalf in the cause, in the same manner as if he has been personally present and consenting. This provision is the genesis of the modern *vakalatnama.*

An extraordinary feature of this Regulation was that only Hindus and Muslims could be enrolled as pleaders. Persons for the purpose were to be selected from amongst the students of the Muhammadan College at Calcutta and the Hindu College at benaras. The Sadar Diwani Adalat could appoint other proper persons of good character and liberal education if sufficient number of persons qualified from the said college were not available. Vakeels attached to one court were not permitted to plead in any other court without the sanction of the Sadar Diwani Adalat. Every pleader was required to attend the court to which he was attached punctually and regularly. If he was unable to attend the court due to any reason he had to notify it in writing to the Registrar of the court. Failure to do so made him liable to a fine. The courts exercised several disciplinary powers over the Vakils. A pleader showing disrespect to the court in open court could be fined up to one hundred rupees by the court. The court could suspend a pleader if convicted of encouraging litigious suits, frauds, or gross misbehavior. Further action against the lawyers could be taken by the Sadar Adalat. A Vakil found to charge more fee than authorized by the Regulation could be dismissed by the Sadar Adalat. Taking note of the drastic control which was imposed on the legal profession in 1793 by Regulation VII, a commentator has observed: [54]

"What was intended to be the first chatter of the profession turned out to virtually its death warrant. The legal profession which had retained its independent existence down to 1793 was broken up and the members of the bar were made, in a sense, subordinate to the Courts and they were still left an appearance of freedom within narrowly circumscribed limits."

The provisions in the Regulation were not fully consistent with the objects stated in the Preamble thereto. In effect, the Vakils were converted into servants of the court. It was doubtful if Vakils being under a tight control and supervision of the courts could effectively discharge another function envisaged of them in the Preamble, *viz,* to point out any deviations from the law made by the courts.

3.4.2 Regulation XXVI of 1814 [55]

From time to time several other Regulations were passed to regulate the legal profession in the Company's adalats in Bengal, Bihar and Orissa. Then came a rather lengthy and detailed regulation. Regulation XXVII of 1814, passed on 29 November 1814, which consolidated the law on the subject. The purpose of the Regulation as stated in its Preamble was:

"For reducing into one regulation, with amendments and modifications the several rules which have been passed regarding the office of the Vakeel or native pleader in the Courts of Civil Judicature."

Provisions: This consolidating and amending Regulation came into force on 1 February 1815 throughout the whole of territory subject to the Presidency. The power for licensing, disciplining and removal of Vakils which was hitherto vested in the Sadar Adalat was now conferred by the Regulation in the Pro-

[53] M. P. Jain, *Outlines of Indian Legal & Constitutional History,* LexisNexis Butterworths Wadhwa Nagpur, Gurgaon, 2012, p. 670.
[54] AIR 1923 JI. at 92.
[55] M. P. Jain, *Outlines of Indian Legal & Constitutional History,* LexisNexis Butterworths Wadhwa Nagpur, Gurgaon, 2012, p. 671.

vincial court also. Whenever the appointment of a Vakeel was required in any court, the judge was to nominate some suitable person for the approval of the Provincial Court. Only person of Hindu or Muhammadan persuasion were eligible for appointment as pleaders. Rule concerning fees, practice, government pleaders and malpractice were considerably more detailed than before. Preference for enrolment as Vakils was to be given to candidates educated in any of the Muhammadan or Hindu Colleges established or supported by the Government provided that such candidates were in other respects duly qualified for the position. Vakeels were to subscribe to several agreements as required by the Regulations, *viz,* not to receive less than the prescribed rates of fees[56]; not to plead in other courts than to which attached. The disciplinary powers over the Vakeels were re-enacted in substantially the same form as in the 1793 Regulations. The power of dismissing Vakeels was vested in the Sadar Diwani Adalat as well as the Provincial Court, and a Zillah and city court could suspend a Vakeel. Even the professional work of the Vakeels came under the scrutiny of the courts. The courts were required to carefully point out to the notice of the Vakeels such part of their pleadings as were irrelevant, and otherwise objectionable, and to record their censure of any Vakeel whose conduct was opposed to the practice of the court as laid down by rules or otherwise demanded an inadversion.

3.4.3 Regulation of 1831

Regulation V of 1831 prescribed that vakils need not Hindu or Muhammadan, but could be persons belonging to any religion. Bengal Regulation XII of 1833 modified the provisions of the earlier regulations regarding selection, appointment remuneration of the pleaders. The regulation permitted any qualified person of whatever nationality or religion to be enrolled as a pleader of Sadar Diwani Adalat. The parties were also given freedom to settle with the pleaders any fees for their professional services.[57]

3.4.4 Madras and Bombay Regulations

Madras Regulation X of 1802 copied verbatim Bengal regulation VII of 1793 with minor verbal attractions. One notable difference being that pleaders were permitted to stipulate for more, but not less, than the regulation fee payable to them. Madras regulation XIV of 1816 was modeled on Bengal regulation XXVII of 1814. It provided for some decentralization of powers of the courts over Vakils. In Bombay, Regulation XIV of 1802 was a consolidating regulation modeled entirely on Bengal regulation verbatim with minor variations here and there. A further consolidation of the regulations relating to legal practitioners was effected by Regulation I of 1827 which repealed all the previous Regulations on the subject. The Regulation went much further than the Bengal regulations e.g., every person duly qualified was entitled to get a *sannad* to practice without any reference admitted to practice in a court and henceforth any qualified person of good character was enacted between the Vakil and the client was recognized and a lawyer could agree with his client for a larger or smaller fee than the established fee.[58]

3.4.5 The Legal Practitioners Act, 1846

The Legal Practitioners Act (1 of 1846), which was the first All-India law concerning the pleaders in the mofussil, made several important innovations, namely:

1) The office of the pleaders in the courts of the Company was thrown open to all persons of whatever nation or religion, provided he has duly certified (in such manner as directed by the Sadar Courts) to be of good character and duly qualified for the other office. Thus, religious test was abolished for enrolment as a Pleader.

2) Every barrister enrolled in any of Her Majesty's Courts in India was made eligible to plead in the Sadar Adalats subject to the rules of those Courts applicable to pleaders as regards as language or any other matter.

3) Vakils were allowed freedom to enter into agreement with their clients for their fees for professional services. This Act is regarded as *"the first charter of the legal profession"*[59] although it left unsolved the important question of the right of vakils to practice in the Supreme Courts.[60]

The Legal Practitioners Act, 1853 (Act XX of 1853), declared every Attorney on the roll of any of Her Majesty's Supreme Courts to be entitled to be plead in any of the Company's Sadar Adalat. The Barristers and Attorneys of the Supreme Courts were permitted to plead in the Company's Adalat (subordinate to the Sadar Adalats) as well. Thus, while Barristers and practitioners were rigorously kept out of the three Supreme Courts. The reason was that the authorities held a poor opinion of the native lawyers and it was thought that appearance of English Barristers in the Company's Adalats would improve the situation.[61] The Act also did away with the system of compulsory attendance of the pleaders in the court to which they were attached. Henceforth no pleader was bound to attend in any court of company

---

[56] On this point, clause 7 made the following drastic provision: "All agreements which may be entered to between pleaders and their constituents, for paying or receiving less than the established fees, are to be considered null and void the whole of Vakil's fees, which may be payable by the party in such cases be forfeited to Government and the pleader who may be convicted of having been a party to such illicit agreement shall be liable to immediate dismissal from his office."

[57] M. P. Jain, *Outlines of Indian Legal* & *Constitutional History,* LexisNexis Butterworths Wadhwa Nagpur, Gurgaon, 2012, p. 672.

[58] *Id.*

[59] See AIR 1924 JI. 13, 14.

[60] Veeraraghavan, *Legal Profession and the Advocates Act, 1961,* (1972) 14 *JILI.,* 228,230.

[61] Commenting on the impact of the Barristers and Attorney on the local bar, a commentator in AIR 1924 JI at 132 stated thus: "…As far as the legal Profession practicing in the Company's Court's was concerned the introduction of the Barrister and Attorney element had a wholesome influence. They were in no sense officers of the court. They owed their appointment neither to the Company's courts nor to their executive officers. Their interests were not provincial and they had unlimited opportunities in all the Presidencies being entitled to appeal in all the courts all over India. It must be admitted that some high class Barristers and Attorneys improved the general level of the profession in the early stages and by their independence and learning added considerably to the strength of the Bar.

on any day fixed for the transaction of civil business, or to notify the court his inability to attend, unless he was employed in some business or cause which according to the court practice, might be heard or transacted herein on the day.[62]

3.4.6 Pleaders, Mukhtars and Revenue Agents

For long there functioned non-licensed inferior grades of practitioners in the mofussil, known as mukhtars, who practiced in criminal courts as well as acted as solicitors for the pleaders. There also functioned revenue agents in revenue offices. All these were recognized and brought under control of the courts for the first time through the pleaders, Mukhtar, and Revenue Agents Act XX of 1865. The High Courts were authorized to make the rules for the qualifications, admission and enrollment of proper persons to be Pleader, Mukhters, for the fee to be paid for the examination, admission and enrolled. Revenue Agents who worked in the revenue offices and courts were also given status as legal practitioners by this Act. They were deemed to be the lowest in grade and did not play a significant part in the development of the legal profession.[63]

3.5 High Courts

3.5.1 Three Categories of Practitioners

In 1861, legislation was passed by British Parliament to establish High Courts at Calcutta, Madras and Bombay. At this time, there were in existence three bodies of practitioners in the Supreme Courts and, the Sadar Adalats-Advocates, Attorneys and Vakils. CI9 of the Letters Patent of 1865 of the High Court of Calcutta empowered the Court "to approve, admit and enroll such and so many Advocates, Vakils and Attorneys as to the said High Court shall deem fit." These persons were "authorized to appear for the suitors of the High Court, and to plead or to act, or to plead and act for the said suitors, according as High Court may by its rules and directions determine, and subject to such rules and directions."[64]

CI.10 of the Letters Patent ran as follows:

"…the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualification and admission of proper persons to be advocates, Vakeels, and Attorneys-at-law of the said High Court and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakeels, or Attorneys-an-laws; and no person whatsoever, but such Advocates, Vakels or Attornies shall be allowed to act or to plead for on behalf of any suitor…"[65]

Similar provisions were made in the Charters of the High Courts of Bombay and Madras.

The admission of Vakeels to practice before these High Courts put an end to monopoly which the Barristers had enjoyed in the Supreme Courts preceding the High Courts. This very much increased the practice and prestige of the India Lawyers by giving them opportunities however achieved without some struggle. The Commissioners appointed to arrange the merger of the Sadar Adalat and the Supreme Court had suggested that the proposed High Court benches be exclusively British and that the bar be open only to the Barristers.[66] But, this suggestion was opposed by several persons on the ground that the exclusion of Indians would nourish class antipathies and injure "at once the state and the individual by depriving the public of the service of the ablest men, preventing wholesome competition, and unduly exalting some without reference to their personal merits and depressing others."[67]

According to the rules framed by the Chartered High Courts, speaking broadly, there were three categories of legal practitioners: Attorneys, Advocates and Vakils. Advocates were mainly the Barristers of England or Iceland or the members of the faculty of Advocates of Scotland. The Vakils were the Indian Practitioners.[68]

To begin with, on the Original side of the High Courts only Advocates were entitled to appear and plead, on instruction of Attorneys. On the original side the High Court, solicitors and Advocates remain distinct. This differentiation in the function of legal practitioners was continued under the notion that the High Courts, in the exercise of its Ordinary original Jurisdiction, was the successor of the Supreme Court. On the other hand, the Advocates were entitled both to act and plead on the Appellate Side of the High Court and its subordinate courts. This was because of the feeling that the High Court, on its appellate side, inherited the jurisdiction and powers of the Sadar Adulates. Because of these distinctions, the Vakils were not allowed to act or plead on the Original Side, but they could both act and plead on the Appellate Side.[69]

3.5.2 Madras High Court

Within a short time, the Madras High Court altered its rules. As early as 1866, this Court permitted Vakils admitted under the rules of 1863[70] and Attorneys to appear, plead and act for suitors on the Original Side. The result, therefore, was that in the Madras High Court there remained no distinction between Barristers, Vakils and Attorneys as regards their rights to appear and plead on the Original Side. Under the new rules, while the vakils and Attorneys could also act on the original side, the Advocates had to be instructed by an Attorney.

These rules admitting Vakils on the Original Side were challenged by the Attorneys of the High Court in the High Court itself in *In the Matter of the Petition of the Attorneys.*[71] Their grievance was that these rules had worked great injustice to the

[62] M. P. Jain, *Outlines of Indian Legal & Constitutional History,* LexisNexis Butterworths Wadhwa Nagpur, Gurgaon, 2012, p. 673.
[63] *Id.*
[64] *Ibid,* p. 674.
[65] *Id.*
[66] *Id.*
[67] B. S. Baliga, *Studies in Madras Administration,* 1960, p. 316. Also see, *Law and Society Review,* p. 356.
[68] M. P. Jain, *Outlines of Indian Legal & Constitutional History,* LexisNexis Butterworths Wadhwa Nagpur, Gurgaon, 2012, p. 674.
[69] *Id.*
[70] The first Charter of the High Court was issued in 1862. Accordingly, the High Court made rules in 1863 to admit Vakils.
[71] ILR (1876-78) 1 Mad 24.

Attorneys and Advocates of the Court by taking away a large portion of their practice. Also, the rules had admitted to the Original Side a set of practitioners who were less specially and professionally educated for the practice of law than the Advocates and Attorneys. These rules were challenged as being *ultra vires* the explanatory letter of the Secretary of State enclosing the Charter of 1862. The relevant clauses in the Charter of 1865 concerning admission of Advocates, Attorneys and Vakils to practice in the Courts were challenged as being ultra vires the Indian High Courts Act. The High Court ruled that the rules permitting the Vakils to appear, plead and act on the Original Side of the High Court were not ultra vires. These rules were framed under Clauses 9 and 10 of the Letters Patent of 1865. The Court observed:

"…the High Court is empowered by the Letters Patent to enroll Vakils, who are thereby expressly authorized (if the Court so directs) to appear, plead and act for the suitors of the court and not merely for the suitors of the division of the Court."

Having upheld the legality of the rules, the High Court did however point out an anomaly in the existing situation, viz, "The largest powers are given to one class of practitioners (the Vakils) who are certainly not in advance of the Advocates and Attorneys of the Court in respect of attainment and professional skills." Therefore, the Court suggested that "some change is required in the present system of admitting Vakils and in the rules of the ascertainment of their qualifications whereby we hope to secure professional attainments proportioned to their large privileges."[72]

The matter again came before the High Court in 1916 in *Namberumal Chetty v. Narasimhachari*,[73] and the rules permitting the Vakils to appear, plead and act for suitors in the matters of ordinary original jurisdiction were held to be within the powers conferred on the Court by the Letters Patent of 1865. The Court also ruled that S4 of the Legal Practitioner Act, 1879, did not prevent a Vakil from appearing on the Original Side of a High Court.

3.5.3 Bombay High Court

The Original Side of the Bombay High Court was initially a close preserve of the Barristers alone could be enrolled as Advocates entitled to appear and plead on the Original Side on the instructions of any Attorney. The Vakils were not originally permitted to act or plead on the Original Side. This position, however, was relaxed in course of time and a non-Barrister, on passing an examination conducted by the High Court, became eligible for enrolment as an Advocate entitled to appear and plead on the Original Side.[74] The only limitation was that the Advocates' of the Original Side, whether Barristers or non-Barristers, had to be instructed by an Attorney before they could appear and plead.

The Vakils of the Calcutta High Court were not entitled to act or plead on the Original Side or in appeals from the Original Side. The High Court maintained this distinction right up to the year 1932.[75]

3.5.4 Calcutta High Court

In course of time the Calcutta High Court also liberalized its rules so as to permit non-Barrister Advocates to practice on its Original Side as well which so far had been preserve of the Barristers only. Thus, the distinction between Barristers and Advocates was abolished. There was really no rational reason for any such distinction. In this way what, in the words of K.M. Munshi, was "a hated monopoly or at least an anomaly foisted on them by an alien race" came to an end. However, no Advocate, whether Barrister or not, could act on the Original Side but had to appear and plead on the instruction of an Attorney on record.[76]

In no High Court other than the three High Courts, of Bombay, Calcutta and Madras, there was original jurisdiction. Consequently, in the other High Courts except these three high Courts, there was no distinction maintained between Advocates and Solicitors as well as between Advocates (who were Barristers) and Vakils as regards their respective rights to appear act and plead.[77]

3.5.5 Non-Chartered High Courts

In the non-Chartered High Courts, there used to be the Advocates, were usually the Barristers, Pleaders and Mukhtars differed from High Court to High Court in the courts below the High Courts, there used to be different classes of legal practitioners. The setting up of a regular hierarchy of courts of varying jurisdiction and important necessarily led to the creation of different categories of legal practitioners. Because, of paucity of law graduates, permission was granted, to others also to practice as Vakils after having passed an examination conducted by the High court concerned.[78]

3.6 The Legal Practitioners Act, 1879

The Act, XVIII of 1879, was enacted to consolidate and amend the law relating to legal practitioners in the mofussils.[79] The Act repealed the Pladers, Mukhtars and Revenue Agents Act.1865. At this time, there were six grades of practitioners functioning in India. Advocates, Solicitors (Attorneys), and Vakils of the High Court: Pleaders, Mukhtars and revenue agents

---

[72] M. P. Jain, *Outlines of Indian Legal & Constitutional History,* LexisNexis Butterworths Wadhwa Nagpur, Gurgaon, 2012, p. 675.
[73] (1916) 31 MLJ 698.
[74] Motilal Setalvad, the first Attorney-General of India, had passed this examinations and thereafter he began a successful career on the original side of the Bombay H.C. in 1906.
[75] M. P. Jain, *Outlines of Indian Legal & Constitutional History,* LexisNexis Butterworths Wadhwa Nagpur, Gurgaon, 2012, p. 675.
[76] *Ibid.*, 676.
[77] The Allahabad High Court ruled in Bakltawar Singh v Sandal, ILR 9 All, 617, "that an Advocate may act for his client in this court… and do all things that a Pleader, i.e., a Vakil may do provided always that he be upon the roll of the Court's Advocate."
[78] M. P. Jain, *Outlines of Indian Legal & Constitutional History,* LexisNexis Butterworths Wadhwa Nagpur, Gurgaon, 2012, p. 676.
[79] The Act extended to the following territory: Lower Provinces of Bengal, North-Western Provinces, the Punjab, Oudh, Central Provinces and Assam.

in the lower courts. The High Court laid down standards for admission of Vakils to practice in the High Court; for Zila Courts, standards were laid down in the Regulations which were lower for pleaders than the High Court vakils. Thus, Vakils became a distinct grade above the Pleader.

3.6.1 Six Grades of Legal Practitioners

The Legal Practitioners Act, 1879, brought all the six grades of legal practitioners into one system under the jurisdiction of the High Courts. The Act empowered an Advocate or a Vakil on the roll of any High Court to practice in his own High Court, in all the courts subordinate thereto, in any court in British India other than a High Court on whose roll he was not entered or with the permission of the court in any High Court on whose roll he was not entered. There was a provision, however, to this section to the effect that this power would not extend to the Original jurisdiction of the High Court in a Presidency Town. An Attorney on the roll of any High Court was enabled to practice in all the courts subordinate to such High Court and also in any court in British India other than a High Court established by Royal Charter on the roll of which he was not entered. The right to practice thus conferred by these provisions included the rights to plead as well as to act in the courts.[80]

The Act conferred power on the High Court not established under a Royal Charter to make rules, with the previous sanction of the Provincial Government, to prescribe the qualifications, admission and certificates of proper persons to be Pleaders and Mukhtars of the High Court as well as the subordinate courts, and for suspension and dismissal of these persons. But a Chartered High Court could make such rules for Pleaders and Mukhters of subordinate courts without the approval of the Provincial Government concerned. Under the rules framed by the High Courts under the Legal Practitioners Act, law graduates who not possesses the additional qualification to enabled to them to be enrolled as the High Court Vakils, and non-law graduates after passing the pleaders examination conducted by the high Court, were enrolled as Pleaders to practice before subordinate courts. These pleaders could not practice before the High Court, unless after a certain numbers of years practice they enrolled themselves as High Court Vakils. In course of time, the High Courts framed rules under S.6 of the Act permitting only those who had taken an L.L.B. degree from an Indian University to enroll as Vakils. Besides the Pleaders, there were Mukhtarship who after passing the Matriculation or equivalent examination passed the Mukhtarship examination held by the High Court. The Mukhtars pleaded mainly before the criminal courts. The Revenue Agents were to be regulated by rules made by the Chief Controlling revenue Authority. The legal profession in India thus presented a very confused picture.[81]

The Pleaders and Mukhtars of the High Courts (except the Attorneys), and of those of the subordinate courts, were subject to the disciplinary jurisdiction of the High Court under the Act.

3.6.2 The Legal Practitioner Act, 1884

The power to make rules regarding Advocates of the High Court was also conferred on the non-chartered High Courts by the Legal Practitioners Act, 1884 (X of 1884). Such a High Court could make rules, with the previous sanction of the Provincial Government, as to the qualifications and admission of proper persons to be Advocates of the Court, and subject to such rules could enroll so many Advocates asit thought fit. The High Court could dismiss any advocate or suspend him from practice after giving him an opportunity of defending himself, but such an order needed the confirmation of the Provincial Government.[82]

The Calcutta High Court held that women were not entitled to be enrolled as Vakils or Pleaders of courts subordinate to the High Court. A similar case came before the Patna High Court. Miss Hazara secured a B.L. Degree for the Calcutta University. She was refused enrolment as Pleader. She challenged this in the High Court of Patna. The Court ruled that the section of the Legal Practitioners' Act referred to males and not to females. This was to be expected as since 1793 no women held ever been admitted to the roll of pleaders. Dawson Miller, C.J. observed: *"…it is not shown that the women ever acted as pleaders in the courts of this country. On the contrary the enactments referred to show that they have been invariably excluded not by any direct prohibition but inferentially by words appropriate only to the male sex, as though the matter were one well settled by inveterate usage and requiring no express legislation."*

3.6.3 The Legal Practitioners (women) Act, 1923

To remove doubts about the eligibility of women to be enrolled and to practice as legal practitioners, the Legal Practitioners (Eomen) Act,XXIII of 1923, was enacted to expressly provide that no woman would by reason only of her sex disqualified from being admitted or enrolled as a legal practitioner or from practicing as such. Since this enactment, women began getting enrolled as legal practitioners and their number has been increasing ever since.[83]

3.7 Indian Bar Committee, 1923

Munshi Ishwar Saran moved in febuary, 1921, a resolution in the Legislative Assembly recommending legislation "with a view to create an Indian Bar so as to remove all distinction enforced by statue or by practice between Barristers and Vakils." The mover of the resolution not only laid emphasis the removal of distinction between Barristers and Vakils but also advocated the constitution of a recognized body consisting exclusively of lawyers in India to provide for legal education, to exercise disciplinary control over the Bar and to deal with all others matters relating to the legal profession. This was deemed important

[80] M. P. Jain, *Outlines of Indian Legal & Constitutional History,* LexisNexis Butterworths Wadhwa Nagpur, Gurgaon, 2012, p. 677.
[81] *Id.*
[82] *Id.*
[83] *Id.*

because many High Courts exercised disciplinary powers over lawyers on the theory that Vakils were officers of the court. As finally adopted, the resolution merely recommended the eliciting of opinion from all quarters before undertaking legislation in the proposed direction.[84]

In response to the pressures thus generated the Government of India in 1923 appointed the Indian Bar Committee, popularly known as the Chamier Committee, under the Chairman of Sir Edward Chamier, a retired Chief Justice of the Patna High court. The Committee was composed of four Barristers, one Attorney, one civilian and three representatives of the Vakil Bar. The Committee was asked to examine and report on the proposal to constitute an Indian Bar, whether on an all-India or Provincial basis, and the extent to which the existing distinction between Barristers and Vakils might possibly be removed.

Thus, the Committee made certain proposals to achieve "the largest degree of unification of grades of practitioners" which was then possible to effectuated. Accordingly, the Committee recommended inter alia:

(a) that in all High Courts, a single grade of practitioners entitled to plead, to be called advocates (not Barristers), should be enrolled, and that the grade of for admission to plead on the Original Side of a High Court Vakils or Pleaders be abolished;
(b) that when special conditions are maintained for admission to plead on the Original Side of a High Court, the only distinction should be within the grade which should consist of Advocates entitled to appear on the Original Side and Advocates not so entitled;
(c) that Vakils fulfilling certain conditions be admitted to practice on the original Side;
(d) that the future one-third of the High Court Judges need not necessarily be Barristers;
(e) that Advocates of one High Court should be entitled to practice in another High Court subject to the conditions to be imposed by the Bar Council of the latter court, or by the court where there is no Bar Council.

On the question of organizing the legal profession on an all-India basis, the Committee came to the conclusion that it did not consider it practicable at the time to organize the bar on an all-India basis or to continue an all-India bar Council. The Committee suggested however that a Bar Council should be constituted for each High Court. But, immediately such bar Council were to be established for a few and not all High Courts. The Bar Council should have power to enquire into matters calling for disciplinary action against a lawyer, but the existing disciplinary jurisdiction of the High Court should be maintained.

The Committee proposed that a Bar Council should have power to make rules subject to the approval of the High Court concerned in respect of such matters as inter alia: (a) the qualifications, admission, and certificates of proper persons to be advocates of the High Court; (b) legal education (c) matters relating discipline and professional conduct of Advocates, etc.; (d) the terms on which advocates of another High Court could appear occasionally in the High Court to which the bar Council is attached; (e) any other matter prescribed by the High Court.

3.8 The Indian Bar Councils Act, 1926

To give effect to the recommendations of the Chamier Committee to some extent, the Central Legislature enacted the Indian Bar Councils Act, 1926.[85] The object of the Act, as stated in its preamble, was to provide for the constitution and incorporation of bar Councils for certain Courts in British India, to confer powers and impose duties on such bar Councils, and to consolidate and attend the law relating to legal practitioners entitled to practice in such courts. The purpose of the act thus was to unify the various grades of legal practitioners and to provide some measure of self-government to the bars attached to the various Courts.

3.8.1 Extent

The Act extended to the whole of British India, but it was applied immediately only to the High Courts of Calcutta, Madras, Bombay, Allahabad and Patna. The Act could be applied to such other High Court as the "Governor-General in Council may, by notification in the Official Gazette, declare to be High to which the Act applied."[86] Sections 3 to 7 of the Act dealt with the constitution and incorporation of a Bar Council as a body corporate and its powers of making by-laws. There was to be a Bar Council for each High Court. A Bar Council was to consist of 15 members as follows: Advocate –General, four persons nominated by the High Court, of whom not more than two could be the judges of that court; ten members elected by the advocates of the High Court from amongst themselves. A Bar Council was to elect a chairman and a vice chairman but in Madras, Calcutta and Bombay the Advocate general was to be ex-officio chairman of the bar Council.

3.9 All India Bar Committee, 1951

The Indian Bar Councils Act had left the pleaders, Mukhters etc. practicing in the mofussil courts entirely out of its scope and did not bring about a unified Indian Bar. Further, the Councils constituted under the Act were merely advisory bodies and were neither Autonomous nor had any substantial authority. The Indian Legal profession was not satisfied with what had been achieved by the Act of 1926. The Indian Practitioners had three main aims in view, namely:

1. The abolitions of all distinctions between various classes and grades of legal practitioner,[87]

---

[84] *Ibid.,* p. 678.
[85] Act XXXVIII of 1926.
[86] The Act was made applicable to the Chief Court of Oudh on March 1, 1928. The Act was not made applicable to the High Courts of Lahore, Karachi and Nagpur.
[87] M. P. Jain, *Outlines of Indian Legal & Constitutional History,* LexisNexis Butterworths Wadhwa Nagpur, Gurgaon, 2012, p. 683.

2. The democratization of Bar Councils by bringing in representatives Mofussil Lawyers on them,[88]
3. The taking away of the control exercised by the High Courts over the members of the legal profession, and vesting the same in the Bar Council.[89]

To end this, they continued the effort for a long period of time. With the establishment of the Supreme Court of India in 1950, under the new consideration, a new stimulus was given to the demand for a unified All India Bar.

Accordingly in 1951 the Govt. of India constituted a Committee under the chairmanship of Justice S. R. Das of the Supreme Court to examine a report on[90] -

(a) The desirability and feasibility of a completely unified Bar for the whole of India
(b) The continuance or abolition of the dual system of council and solicitor which obtains in the Supreme Courts and in the High Courts of Bombay and Calcutta.
(c) The continuance or abolition of different classes of legal practitioners, like advocates of the Supreme Courts, advocates of the various High Courts, district court pleaders, Mukhters, revenue agents, income tax practitioners etc.
(d) The desirability or feasibility of establishing a single Bar Council
    i. For the whole of India; or
    ii. For each state
(e) The establishment of a separate Bar Council for the Supreme Court
(f) The consolidation and revision of the various enactments relating to legal practitioners;
(g) All other connected matters.

3.9.1 Report of the All India Bar Committee

The Committee reported in 1953 and recommended the creation of a unified national bar. The Committee recommended that all grades of legal practitioners be abolished and that one integrated an autonomous All India Bar be formed. There should be a common roll of advocates who would be entitled to practice in all courts in the country. The Committee accordingly suggested compilation and maintenance of one comprehensive common roll of advocates. The committee recognized that the task of preparation of a common roll of advocates would be difficult but was not an impossible one. The committee made recommendation as to how a State Bar Council was to compile a register of all existing advocates, Vakils and pleaders and sent copy of the same to the All India Bar Council which was then to compile a common roll of advocates.[91]

The establishment of a unified All India Bar necessarily would require the prescription of minimum qualification to be possessed by a advocate. At the time the committee went to a question qualifications required by different High Court were not uniform. The committee suggested that the uniform minimum qualification for admission to roll of advocates should be a law degree from university obtained at least a two year study of law after graduation as regards new entrance, a candidate having the minimum qualification may apply for enrollment as an advocate to any State Bar Council. On his name being entered in the register of advocates of the state, his name would also be entered in the common roll of advocates maintained by the All India Bar Council.[92]

The committee was not favour of abolition of the dual system (advocates & attorneys) whenever it prevails in the High Court as if involved a division of labour and had a no. of advantages and di not militate against the ideal of the All India Bar. The dual system ensured for the better preparation of the case.[93]

The committee was of the view the different classes of legal practitioners be abolished. In earlier times, when there was a dearth of law graduates, it was necessary to create inferior grade of lawyers with varying qualification to practice in subordinate courts. So, there came into existence vakils and advocates of the High Court as well as pleaders and Mukhtars. In the larger interest of the unification of the Bar the committee recommended that in future there should be no further recruitment of non graduate leaders and Mukhtars, and that there should be only one class of legal practitioners, viz, advocates.[94]

The committee also recommended the creation and All India Bar Councils and State Bar Councils. Under the Indian Bar Council Act'1926, the Bar councils were merely advisory bodies in the power of admission, suspension and removal from the role of advocates was entirely vested in the respective High Courts. Subject to some safeguards, the committee suggested that in the interest of a Autonomous National Bar, the power of enrollment, suspension and removal of advocates be vested in the Bar Councils. The committee did not feel the need for a separate Bar Council for the Supreme Court. Every advocate on the common roll to be maintained by the All India Bar Council would be entitled as of right to practice in the Supreme Court and be amenable to the jurisdiction of the appropriate State Bar Council and of the All India Bar Council.[95]

3.10 Law Commission Report, 1958

The recommendations of the Bar Committee were not acted upon for long. Then India came to have a Law Commission, and of its terms of reference mentioned "The level of the Bar." The law Commission made its famous Fourteenth report in 1953 in which, among other things, it again recommended establishment of a unified All India Bar, preparation of a common role of ad-

[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Ibid.,* p. 684.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*

vocates with right to practice in all the courts. The c committee lamented that notwithstanding the lapse of ten years, "the Bar still remains divided into different grades of practitioners and even practitioners of the lowest grade, namely, Mukhtars, a still being recruited in some of the states". The Law Commission regretted that the recommendation made by the Bar committee as per back as March, 1953, had not yet been given legislative effect. The committee fully endorsed the recommendation of the Bar committee, 1951, that there should be no further recruitment of non graduate pleaders of Mukhtars. The commission also endorse the Bar committees view that the insistence on a certain no. of years practice in a High Court as a condition of eligibility for enrollment as a advocate of the Supreme Court should be abolished and that an advocate should be left free to practice in any court including the Supreme Court irrespective of his standing at the bar. The commission also agreed with the Bar Committee that no case had been made out for the abolition of the dual system prevailing on the Original Side in the Calcutta and the Bombay High Court and that there was no reason why that system should not continue in those two places. The commission felt that the system made for greater efficiency.[96]

The commission also favoured division of the Bar into senior advocates and advocates on a voluntary basis. An advantage of the system would be to put some work in the hands of the junior member of the bar. The system did not militate against the concepts of a unified All India Bar in a common roll of advocates entitled to practice in all courts in the country.

The Committee emphasized the principle of autonomy of the Bar on which the Bar Committee of 1951 had laid stress. Therefore, the Bar Councils would to be entirely Autonomous Body consisting wholly of the members of the profession. The Bar Council would elect their own chairmen.

3.11 The Advocates Act, 1961

In 1961, parliament enacted the Advocates Act to amend in consolidated the law relating to the legal practitioner, and to provide for the constitution for the State Bar Council and All India Bar Council. The Advocates Act implements the recommendation of the Bar Committee in the Law Commission with some modifications. It repeals the Indian Bar Council Act, 1926, the Legal Practitioners Act, 1879, in other laws under subject. The act has undergone several amendments since its enactment in 1961. The Act extends to the whole of India.

The Act establishes an All India Bar Council for the first time. The Attorney General of India in the Solicitor General of India is the ex-officio members of the Bar Council of India. Besides, it has one member elected by its State Bar Council from among its members. The Council elects its own chairman and vice-chairman. The Bar Council of India has been entrusted inter alia with the following important functions:

(1) To lay down standards of professional conduct and etiquette for advocates.
(2) To safeguard the rights, privileges and interest of advocates
(3) To promote legal education
(4) To lay down standards of legal educati0on in consultation with the universities imparting such educations in the State Bar Councils.
(5) To recognize universities which degrees in law shall qualify for enrollment as an advocate and up to visit and inspect the universities for that purpose.
(6) To exercise general supervision and control over state bar councils.
(7) To promote and support law reform
(8) To organize legal aid to the poor.

The Act creates a State Bar Council in each state. It is a autonomous body. The Advocate general of the state is ex-officio member, and there are 15 to 25 elected advocates. These members are to be elected for a period of five years in accordance with the system of proportionate representation by means of single transferable votes from amongst advocates on the roll of the State Bar Council. The State Bar Council has power to elect is own chairman. The main powers and functions of the State Bar Council are:

(a) To admit persons as advocates on its roll
(b) To prepare and maintain such rolls.
(c) To entertain and determine cases of misconduct against advocates on its roll
(d) To safeguard the right, privileges and interest of advocates on its roll
(e) To promote and support law reform
(f) To organize legal aid to the poor

Thus, every State Bar Councils prepares and maintains a roll of advocate as an authenticated copy of the roll which to be sent to the Bar Council of India.

Advocates have been classified into Senior Advocates and other Advocates. An Advocate may, with his consent, be designated as a Senior Advocate if the Supreme Court or a High Court is of opinion that by virtue of his ability, experience and his standing at Bar he is deserving of such distinction. Senior Advocates are, in the matter of their practice, subject to such restrictions as the Bar Council of India may, in the interest of the legal profession prescribe

Originally, the Act had saved the dual system i.e. Advocates and Attorneys, prevailing in the Bombay and Calcutta High Courts on their Original Side.[97] It was left to the two High Courts to continue the system or not. These provisions were deleted with effect from 1st January, 1977. The result is that, as a matter of law, Attorneys are no longer recognized as a separate class of lawyers. However, since the system prevailed for a long period in the two towns it continues there still as a matter of practice.

[96] *Ibid.,* p. 684.
[97] S. 31 of the Act. The High Courts of Bombay and Calcutta were authorized to admit Attorneys and exercise over them power of removal or suspension from practice for reasonable cause.

Thus, admission, practice, ethics, privileges, regulation, discipline and improvement of the profession are now all in the hands of the hands of the profession itself. The legal profession has achieved its long cherished object of having a unified Bar on All-India basis.

3.12 Supreme Court Bar

The rules of the Federal Court laid down "a person shall not be entitled to be enrolled as an Advocate unless he is, and has been for not less than ten years in the case of a Senior Advocate or five years in the case of any other Advocate, enrolled as an Advocate in the High Court of a Province". Under those rules it was not necessary that such an Advocate should hold a degree in law of a University.[98]

Any Advocate enrolled with a State Bar Council is now entitled to practice in the Supreme Court irrespective of his standing at the Bar.

In the Supreme Court there exist three categories of advocates Senior Advocates, Advocates and Advocates on record.

A Senior Advocate is one who with his consent may be designated as such if the Supreme Court is of the opinion that by virtue of ability, experience and standing at the Bar he is deserving of such distinction. *An Advocate* can become an Advocate on record after undergoing one year training with an Advocate on record and passing an examination held by the Court. He has to have an office in Delhi within a radius of 16 kilometers of the Court House and has to employ a registered clerk.[99]

An Advocate on record corresponds to a Solicitor in Calcutta or Bombay and has the right both to act and plead. Senior and other Advocates have only the right to plead but not act. A senior Advocate cannot appear before the Supreme Court without an advocate on record or without a junior in any other court or tribunal in India. An Advocate (other than a Senior Advocate) cannot appear and plead before the court in any matter unless he is instructed by an Advocate on record. Thus, a sort of dual system exists in the Supreme Court.

There is no separate Bar Council for the Supreme Court. The reason is that every Advocate practicing in the Supreme Country is already a member of one of the State Bar Councils and subject to its discipline. According to the Law Commission: "The Advocates ordinarily practicing before the Supreme the Court will have the opportunity of exercising their franchise as members of the profession in regard to the Bar Council of the State to which they belong."[100] They would also have representation in the All-India Bar Council.

Under Article 145 (1) (a), the Supreme Court has power to make rules as to the persons practicing before it subject to any law made by Parliament and with the approval of the President.

4. Conclusion

Legal history existing, law as a profession has evolved after thousands of years which, no denial, is flourishing. Through the various stages of development has it come to the place of recognition and social acceptance! Yet there exists some bias and ill-informed criticisms among the lower strata of the society besides bordering condemnations.

The immense stride that the 'legal profession' has made post independence is to the credit of the Government and the Bar Council of India and various states. Globalisation has had its own contribution to the development of law as a profession. But with globalisation and the trend of India's emergence on the international fora shortcomings have come to light which immediately need attention and address. The immense population growth and emerging domestic spheres have added to the growth of the profession and also to irreconcilable shortcomings. Immense strides made, there still is enormous room for evolution and development of the profession. What is needed is a vision based on philosophy.

The area of legal education is one where urgent steps need to be taken to ensure that law students receive sufficient training to deal with the rapidly evolving practice of law in India and abroad. It is well known that there are various shortcomings in this area, including issues that are generic to the higher education space in India such as a teaching resources deficit, access to knowledge databases and accepted practices, lack of monitoring and evaluation etc. While the top law schools in India have surmounted some of these problems, there is clear divide between these law schools and the significant majority of law schools (and law students) that are struggling to ensure a basic level of competence in the legal profession.

[98] M. P. Jain, *Outlines of Indian Legal & Constitutional History,* LexisNexis Butterworths Wadhwa Nagpur, Gurgaon, 2012, pp. 689-690.
[99] *Id.*
[100] *Id.*

Dogmatics of Criminal Law and the Roman Jurisprudence

János Jusztinger *

Abstract

In contrast with Roman private law, criminal legal regulations – instead of cases – are normative rules principally that have demanded jurisprudential interpretation much less. Still, in the sources of ancient Roman law we can already find several basic concepts that show surprising similarities with the modern criminal doctrine. Although we can see an absence of abstract definitions serving for the notation of legal cases, the intention to demonstrate the criminal legal mentality of antique jurists – by using these fragments as casuistic illustrations in our study – cannot be regarded as it is for its own sake. What is more, by the abstraction of their observations and the comparison with basic concepts of modern dogmatics of criminal law we can get to such general theoretical conclusions that can help to reveal the "general part" of Roman criminal law expansively and systematically.

Key words: *Roman law; criminal law; jurisprudence; delicta privata; crimina publica; modern dogmatics; objective elements; subjective elements; general part; Criminal Code.*

I. Introduction

Legal public identifies Roman law with private law – being the most elaborated part of it – that has become the basis of modern civil codes by its precise solutions and perfect system. Contrary to this, it is frequently stated in connection with Roman criminal law – being in the rough – that it could not serve as a guideline for legislators of the latter ages. No doubt, jurisprudence has played a modest role in the scope of criminal law, contrary to private law.

Searching for its reasons our starting point is the peculiarity of Roman *ius privatum*, according to that in ancient Rome the representatives of jurisprudence – beyond education and theoretical study of law – have taken part in the formation of legal norms directly.[1] Namely, the real creators of developed Roman private law – in absence of a legislative organization being able to satisfy every demand aiming at the formation of a modern legal system and perform the legislative duties of *imperium Romanum* established as a result of conquests – were jurists (*iurisperiti*, *iurisconsulti*) being active around state organizations (the *praetor* and the *princeps* later on). They have taken part in the process of legislation in a direct way by formulating the praetorian edict, the formula-models and the imperial decrees, they have exerted influence on civil jurisdiction by giving expert opinions (*responsum*) to litigants and lay judges, besides, they have formed everyday legal practice by giving advice concerning the conclusion of contract (*cavere*). As a result of such a peculiar structure of legislation, those who have possessed legal skills as private individuals – but have not occupied a position of public authority – could have institutionally connected both to the sphere of legislation and the implementation of law. This outlined mechanism could have prevailed in Roman private law entirely and this way they managed to make it perfect in order to point out the main directions of modern civil law development further on.[2]

In contrast with private law – forming into a casuistic system of legal cases – criminal law is a statute law, basically. Instead of cases, criminal legal regulations, such as criminal rules of the Twelve Tables, the reforms of Sulla,[3] or different *lex*es and im-

* János Jusztinger, PhD, Department of Roman Law, Faculty of Law, University of Pécs, Hungary.

1 About the history of Roman jurisprudence, thoughts of antic jurists see SCHULTZ, Fritz, *Geschichte der römischen Rechtswissenschaft*, Weimar, 1961; from Hungarian literature see PÓLAY, Elemér, *A római jogászok gondolkodásmódja. Kazuisztika és absztrakció* [The Thinking of the Roman Lawyers. Casuistic and Abstraction], Budapest, 1988.

2 Generally about the role of Roman legal tradition in the formation and development of modern systems of civil law see HAMZA, Gábor, *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján* [Trends of the Development of Private Law in Europe. The Role of the Civilian Tradition in the Shaping of Modern Systems of Private Law], Budapest, 2002; STEIN, Peter, *A római jog Európa történetében* [The Roman Law in the History of Europe], Budapest, 2005; SCHLOSSER, Hans *Grundzüge der Neueren Privatrechtsgeschichte*, Heidelberg, 2005[10]; HAMZA, Gábor, *Entstehung und Entwicklung der modernen Privatrechtsordnungen und die römischrechtliche Tradition*, Budapest, 2009; IDEM, *A római jog és hatása a modern jogok fejlődésére* [Roman Law and its Influence on the Development of the Contemporary Legal Systems], Budapest, 2013.

3 About the criminal reforms of Sulla with further literature see SÁRY, Pál, Sulla büntetőjogi reformjai [The Criminal Reforms of Sulla], *Jogtudományi Közlöny* 6 (2001), pp. 275–286; IDEM, *Sulla büntetőjogi reformjai. Doktori értekezés* [The Criminal Reforms of Sulla. Doctoral Thesis], Miskolc, 2002; IDEM, Sulla büntetőjogi reformjai [The Criminal Reforms of Sulla], *Ókortudományi Értesítő* 11 (2003), pp. 27–36; IDEM, The Criminal Reforms of Sulla, *Publicationes Universitatis Miskolcinensis. Series Juridica et Politica* 22 (2004), pp. 123–139.

perial decrees – following from their character – are normative rules principally that have demanded jurisprudential interpretation much less. In comparison with private law, in the scope of criminal law direct political influence has dominated in a more powerful way, that is why jurists had a narrow margin of discretion: acts regarded as potentially harmful to society (*crimina publica*) have been sanctioned by the public authority. Thus – instead of the participants of practical life – much rather certain state organizations have taken part in legal development. The legal facts of different criminal offences and their sanctions have been ascertained independently of one another, often *leges rogatae* originated from *ad hoc* cases. Because of the fact that regulations have been created in different ages and in changing historical circumstances, we can talk about uniformity neither in respect of punishments, nor the wording of facts – therefore a coherent regulation of criminal law could not have come into existence. Consequently, the "general part" of Roman criminal law could not have developed without the institutional contribution of jurisprudence, therefore it has remained a heterogeneous set of legal facts created independently of each other.[4]

II. The practice of criminal law and the Roman jurisprudence

Since the Roman state has not built up an apparatus of investigation and jurisdiction that would have been suitable enough to pursue criminal offences – being less harmful to society and occurring in everyday life – called *delicta privata*, in these cases the victim has been able to impose sanctions in the scope of delictual obligation: the perpetrator of a criminal offence – as debtor – has been obliged to give monetary satisfaction called penalty-money (*poena*) to the victim – as creditor.[5] Jurists have dealt with these delicts belonging to the sphere of *ius privatum* more intensively, and in the course of this they have alluded to criminal legal questions quite often – beside private legal questions of course. Considering that these private delicts have been judged in a private action, namely in the scope of *ordo iudiciorum privatorum*, jurisprudence has had the same opportunity to develop law as in private law. For this reason, the formation of criminal legal concepts – in other words the elaboration of propositions in the "general part" of Roman criminal law – has happened in this field principally.

In the case of criminal offences under public pursuit – in absence of a unified criminal court system – jurisprudence has been far from its abovementioned role of developing law, because different types of criminal offences have fallen within the competence of different state organizations[6] and each organization has implemented its own procedural law. This statement is true even if we accept the standpoint[7] regarded as minority in Romanistics, according to which the procedural rules of *crimen*s and *delictum*s have not differed from each other as much as it is usually represented in literature.[8] In the course of historical development of Roman criminal law and procedural law – mainly from the period of Late Republic, due to the reorganization of criminal courts and the establishment of regular courts (*quaestiones perpetuae*)[9] – the gradual expansion of the circle of *crimen*s, often at the expense of *delictum*s, is a noticeable tendency.[10]

The flexible procedural rules of imperial procedure code (*cognitio extra ordinem*) – originally called extraordinary as opposed to *quaestio*s – have aroused the interest of jurists much better as it has subjected criminal jurisdiction to its domination more and more from the Classical Age. From the second half of Principate we can mention several pieces of work – dealing with

[4] Classics of historiography in Roman criminal law MOMMSEN, Theodor, *Römisches Strafrecht*, Leipzig, 1899 and FERRINI, Contardo, *Diritto penale romano. Teorie generali*, Milano, 1899 besides, from old – mostly exploded – literature see REIN, Wilhelm, *Das Kriminalrecht der Römer von Romulus bis auf Justinian*, Leipzig, 1844. repr. Aalen, 1962; LABOULAYE, Édouard, *Essai sur les lois criminelles des Romains*, Paris, 1845; ZUMPT, August Wilhelm, *Das Kriminalrecht der römischen Republik*, I-II, Berlin, 1865-1869. repr. Aalen, 1993; MAYNZ, Charles Gustave, *Esquisse historique du droit criminel de l'ancienne Rome*, Paris, 1882; DI MARZO, Salvatore, *Storia della procedura criminale romana. La giurisdizione dalle origini alle XII tavole*, Palermo, 1898. The best-known summaries from the international literature of the last hundred years: STRACHAN-DAVIDSON, James Leigh, *Problems of Roman Criminal Law*, I-II, Oxford, 1912; COSTA, Emilio, *Crimini e pene da Romolo a Giustiniano*, Bologna, 1921; FALCHI, Giuseppino Ferruccio, *Diritto penale romano. I singoli reati*, Padova, 1932; BRASIELLO, Ugo, *La repressione penale in diritto romano*, Padova, 1937; KUNKEL, Wolfgang, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit*, München, 1962; GIOFFREDI, Carlo, *I principi del diritto penale romano*, Torino, 1970; PUGLIESE, Giovanni, Diritto penale romano, in: *Il diritto romano*, Arangio-Ruiz, Vincenzo– Guarino, Antonio – Pugliese, Giovanni (cur.), Roma, 1980, pp. 247–341; GIUFFRČ, Vincenzo, *Il «diritto penale» nell'esperienza romana*, Napoli, 1989; ROBINSON, Olivia F., *The Criminal Law of Ancient Rome*, Baltimore, 1995; BAUMAN, Richard A., *Crime and punishment in ancient Rome*, London – New York, 1996; SANTALUCIA, Bernardo, *Diritto e processo penale nell'antica Roma*, Milano, 1998[2]; NOGRADY, Alexander, *Römisches Strafrecht nach Ulpian*, Berlin, 2006; HARRIES, Jill, *Law and Crime in the Roman World. Key Themes in Ancient History*, Cambridge, 2007. From Hungarian literature see ZLINSZKY, János, *Római büntetőjog* [Roman Criminal Law], Budapest, 1997[7]; SÁRY, Pál, *Előadások a római büntetőjog köréből* [Lectures about Roman Criminal Law], Miskolc, 2011; MOLNÁR, Imre, *Ius criminale Romanum. Tanulmányok a római jog* köréből [Studies about Roman Law], Szeged, 2013; NÓTÁRI, Tamás, *Római jog* [Roman Law], Szeged, 2014, pp. 275–320; FÖLDI, András – HAMZA, Gábor, *A római jog története és institúciói* [History and Institutes of Roman Law], Budapest, 2015[20], pp. 558–581.

[5] With further literature see KASER, Max, *Das Römische Privatrecht*, I, München, 1971[2], pp. 609–614; FÖLDI – HAMZA, *op. cit*. pp. 562–566; BENEDEK, Ferenc – PÓKECZ KOVÁCS, Attila, *Római magánjog* [Roman Private Law], Budapest – Pécs, 2015[3], pp. 328–330.

[6] See ZLINSZKY, *op. cit*. pp. 43–54. especially p. 47. and NÓTÁRI, *Római jog* (cit.), pp. 294–299.

[7] Thus, for example, ZLINSZKY, *op. cit*. p. 46. Cf. SANTALUCIA, *op. cit*. p. 244. and MOLNÁR, Imre, Az ókori római jogi bűncselekmény-fogalom ismérvei [Criteria of the Definition of Criminal Offence in Ancient Roman Law], *Acta Universitatis Szegediensis de Attila József nominatae. Acta Iuridica et Politica* 73 (2010), pp. 566–571.

[8] See Mac. D. 48, 19, 12: *Quod ad statum damnatorum pertinet, nihil interest, iudicium publicum fuerit nec ne: nam sola sententia, non genus criminis spectatur.*

[9] About the establishment of the regular jury system see BAUMAN, *op. cit.* pp. 22–26; SANTALUCIA, *op. cit.* pp. 213–214; NÓTÁRI, *Római jog* (cit.), pp. 295–297. In point of the procedural reforms of Sulla strengthening and reforming the system of *quaestiones perpetuae* see SÁRY, *Doktori értekezés* (cit.), pp. 38–48.

[10] Cf. FÖLDI – HAMZA, *op. cit*. p. 561. SANTALUCIA, *op. cit.* pp. 266–268. Furthermore, it discusses the so-called mixed criminal offences in detail, that of the basic case has been regarded as *delictum*, while the aggravated cases have been regarded as *crimen*. Generally see LONGO, Giannetto, *'Delictum' e 'crimen'*, Milano, 1976.

criminal law specifically – written by less significant authors[11] and famous classics such as Paul,[12] Marcian,[13] or Modestin[14] who was the last outstanding jurist of this era. However, these works review the new imperial criminal law first of all, without the role of jurists in concrete practice of implementing law. Still, it can be stated that the informality of *cognitio extra ordinem* has opened a way for jurisprudence to develop law in the sphere of public crimes as well, and it has induced a considerable development in the dogmatics of criminal law. Thus, coherence of rules applied in the procedure of *cognitio* has been ensured also by jurisprudence, beside imperial decrees.[15]

For this reason, even if we agree with the view, regarded as *communis opinio* in literature, that the science of criminal law – building up a methodologically unified conceptual system – has come into existence only in the 19th century after natural legal antecedents,[16] in the sources of ancient Roman law we can already find several basic concepts of the "general part" that show surprising similarities with the modern doctrine. In modern dogmatics of criminal law these basic concepts are discussed either in connection with the subjective part or the objective part of the criminal offence.[17]

Although it has not been defined by classical jurists – in connection with the subject of the criminal offence, namely the punishable perpetrator – they have been familiar with the concept of *delictorum capacitas*, culpability, namely sanity, and it has been regulated in compliance with the operative laws on the whole:[18] thus, the culpability of a Roman citizen has depended on his age (reach of adolescence) and mental state. The criminal liability of the perpetrator could have been established only in the case if sanity had existed both at the time of perpetration and adjudication.[19]

Roman jurists have been also interested in those cases, when a certain criminal offence (*crimen* or *delictum*) is perpetrated with the participation of more people. In our sources we can find an almost complete catalogue of the possible cases: such as perpetration by the coactor and the covert offender, in addition, the certain types of complicity[20] called abetting and – physical or psychical – aiding[21], what is more, decisions of jurists show noticeable similarity with our modern legal approach. Although an exact legal terminology – serving for the notation of perpetration forms, apart from some exceptions – is absent totally or it is in the making only, it is evident from the fragments that Roman jurists have drawn the line between the categories of 'parties to a crime' and 'accomplices' correctly, since in the case of the former category they have required the following: the act of the perpetrator had to accomplish the legal facts of the case – or at least one element – of the given criminal offence.[22] Their excellent sense of law is also confirmed by the fact that in the case when a person standing under *patria potestas* or *ius imperandi* has been ordered to commit a criminal offence, Roman jurists have qualified it as the act of a covert offender and not as abetting. Furthermore, it is emphasized in legal sources that the intention of the accomplice has to cover both his own act and the act of the principal. Therefore it is essential that the abettor and the aider are aware of both their own guilty act and the guilty act of the principal. This requirement is indicated by the phrase of *dolo malo* appearing in the connecting fragments.[23]

Drawing attention to the issue of culpability – belonging to subjective elements – it should be pointed out that even in the Classical Age, as a general rule, criminal offences could be committed with intent only,[24] while negligence had a legal relevance

[11] See, for example, Venuleius Saturninus, *De iudiciis publicis libri III* (See LENEL, Otto, *Palingenesia Iuris Civilis*, Lipsiae, 1889, col. 1214–1216); Volusius Maecianus, *De iudiciis publicis libri XIV* (See LENEL, *op. cit.* col. 587–588); Aemilius Macer, *De iudiciis publicis libri II* (See LENEL, *op. cit.* col. 566–570).

[12] Paul has written more books about punishments (*De poenis omnium legum liber singularis*; *De poenis paganorum liber singularis*), one-one about crimes belonging to the circle of imperial criminal jurisdiction (*De extraordinariis criminibus liber singularis*), and military criminal law (*De poenis militum liber singularis*) See LENEL, *op. cit.* col. 1099. and 1178–1181.

[13] Aelius Marcianus, *De iudiciis publicis libri II*. See LENEL, *op. cit.* col. 670–680. Furthermore, Book XIV of his institutions is about public crimes (*Marcianus libro XIV institutionum*) too.

[14] Herennius Modestinus, *De poenis libri IV.* See LENEL, *op. cit*. col. 728–731.

[15] Cf. FÖLDI – HAMZA, *op. cit*. p. 579.

[16] Cf. GÖRGÉNYI, Ilona – GULA, József – HORVÁTH, Tibor – JACSÓ, Judit – LÉVAY, Miklós – SÁNTHA, Ferenc – VÁRADI, Erika, *Magyar büntetőjog. Általános rész* [Hungarian Criminal Law. General Part], Budapest, 2014, pp. 32–33; BALOGH, Ágnes – GÁL, István László – HORNYÁK, Szabolcs – NAGY, Zoltán – TÓTH, Mihály, Magyar büntetőjog. Általános rész [Hungarian Criminal Law. General Part], Budapest, 2015, pp. 40–46.

[17] Cf. BALOGH – GÁL – HORNYÁK – NAGY – TÓTH, *op. cit.* p. 96.

[18] See GIOFFREDI, *op. cit.* pp. 85–87.

[19] Cf. ZLINSZKY, *op. cit.* pp. 33–35.

[20] Cf. BENEDEK, Ferenc, Tettesség és részesség a római büntetőjog forrásaiban [Parties to a Crime and Accomplices in the Sources of Roman Criminal Law], in: *Ünnepi tanulmányok V. A bonis bona discere. Festgabe für János Zlinszky zum 70. Geburtstag*, Szabó, Béla – Péter, Orsolya (eds.), Miskolc, 1998, pp. 209–230.

[21] Cf. BENEDEK, Ferenc, A felbujtó és a bűnsegéd a római büntetőjog forrásaiban [The Abettor and the Aider in the Sources of Roman Criminal Law], *Acta Universitatis Szegediensis de Attila József nominatae. Acta Iuridica et Politica* 65 (2004), pp. 46–61.

[22] Thus, for example, Gai. D. 47, 10, 34: *Si plures servi simul aliquem ceciderint aut convicium alicui fecerint, singulorum proprium est maleficium et tanto maior iniuria, quanto a pluribus admissa est. Immo etiam tot iniuriae sunt, quot et personae iniuriam facientium.* Similarly Paul. D. 47, 2, 21, 9 and Ulp. D. 9, 2, 11, 2. 4.

[23] See especially Ulp. D. 48, 12, 2, 1; Ulp. D. 47, 9, 3, 3; Marci. D. 48, 9, 1.

[24] In the case of most criminal offences (for example *furtum* and *rapina*) it comes from the perpetrating act itself. See Paul. D. 44, 4, 1, 2: *Sed an dolo quid factum sit, ex facto intellegitur.* Cf. MOLNÁR, Az ókori római jogi bűncselekmény-fogalom (cit.), p. 582.

merely as an exception in certain cases.[25] However, as Roman jurisprudence has got – from the objective obligation to fulfil a commitment – to the creation of liability forms based on culpability,[26] we can see a development concentrating on the formation of the sanction system in criminal law. In ancient Rome – with little differences in content – jurists have distinguished the categories within intention that are called direct intent and eventual intent in modern dogmatics. If the perpetrator had seen and wanted not only the act itself, but also the illegal consequence of it, then it was qualified as *dolus directus*, on the other hand, if he had wanted only the act but he had no intent to a guilty result, it was regarded as *dolus eventualis*.[27] Besides, in certain cases the intent was qualified as *dolus* – in detail *fraus* – even if the perpetrator had chosen the act being opposed to a social norm, because he was aware of the fact that this way he would not break the law directly, but he would "merely" evade the law – namely he would proceed fraudulently.[28] Jurists, in the course of the evaluation of *dolus*, have also differentiated between a premeditated intent and an intent evolving under provocation,[29] what is more, the category of criminal offences having a result over intent – which is considered one of the most important basic concepts of modern criminal law – has already been known in the Classical Age.[30] In the case of such a criminal offence – called praeter-intentional in modern terminology (a typical example is battery resulted in death)[31] – with his intentional act the perpetrator causes a result by way of negligence.[32] From this fact it follows that the criminal liability of the perpetrator cannot be established because of those consequences that were not covered by any forms of culpability.[33] As for the cases of perpetration by way of negligence, it is worth mentioning that the culpability figure of negligence (*culpa*) – in its clear and chiselled form – has already evolved by the turn of the Preclassical Age and the Classical Age,[34] while in our criminal legal sources – under the concept of *casus* – acts without intent have become blurred quite often,[35] including the acts by way of negligence as well, beside unintentional cases.[36] Furthermore, it must be emphasized that negligence – being necessary for the establishment of criminal liability – has been taken into consideration only in the case of criminal offences under private pursuit at first, and – until the end of the Age of Republic anyhow – it must have appeared in a positive action (*culpa in faciendo*).[37] Negligence appearing by omission (*culpa in*

[25] First of all, in connection with homicide – as *aberratio ictus* – for example, causing the death of a person instead of a game by way of negligence during hunting. See Marci. D. 48, 19, 11, 2: […] *cum in venando telum in feram missum hominem interfecit.* Furthermore, causing fire by way of serious negligence (*culpa lata*) – approaching *luxuria* or *dolus* – has been also punishable. See Marci. D. 47, 9, 11: *Si fortuito incendium factum sit, venia indiget, nisi tam lata culpa fuit, ut luxuria aut dolo sit proxima.* Finally, perpetration by way of negligence has been punishable in the case of certain military crimes as well. Thus, for instance, soldiers have been liable for the prisoners' escape from custody even in the case of their negligence. See Call. D. 48, 3, 12 pr.: *Milites si amiserint custodias, ipsi in periculum deducuntur. Nam divus Hadrianus Statilio Secundo legato rescripsit, quotiens custodia militibus evaserit, exquiri oportere, utrum nimia neglegentia militum evaserit an casu, et utrum unus ex pluribus an una plures, et ita demum adficiendos supplicio milites, quibus custodiae evaserint, si culpa eorum nimia deprehendatur: alioquin pro modo culpae in eos statuendum. Salvio quoque legato Aquitaniae idem princeps rescripsit in eum, qui custodiam dimisit aut ita sciens habuit, ut possit custodia evadere, animadvertendum: si tamen per vinum aut desidiam custodis id evenerit, castigandum eum et in deteriorem militiam dari: si vero fortuito amiserit, nihil in eum statuendum.*

[26] Cf. MARTON, Géza, *A polgári jogi felelősség* [The Responsibility in Private Law], Budapest, 1993, pp. 36–52. The monographic elaboration of the liability system of Roman private law from Hungarian literature see MOLNÁR, Imre, A római magánjog felelősségi rendje [The Liability System of Roman Private Law], Szeged, 1994.

[27] See ZLINSZKY, *op. cit.* p. 38.

[28] Cf. NÓTÁRI, *Római jog* (cit.), p. 288.

[29] Thus, for instance, Marci. D. 48, 19, 11, 2: *Delinquitur autem aut proposito aut impetu aut casu* […]. Cf. GIOFFREDI, op. cit. pp. 75–76.

[30] Cf. FÖLDI – HAMZA, *op. cit.* p. 580.

[31] See, for example, the case of a fight resulted in death and being punishable more leniently than homicide: Marci. D. 48, 8, 1, 3: […] *Leniendam poenam eius, qui in rixa casu magis quam voluntate homicidium admisit.*

[32] See BALOGH – GÁL – HORNYÁK – NAGY – TÓTH, *op. cit*. pp. 118–119.

[33] In connection with responsibility for the result as an aggravating circumstance it is put down in the operative Hungarian Criminal Code (Act C of 2012 on the Criminal Code) too. See Act C of 2012. § 9: Az eredményhez, mint a bűncselekmény minősítő körülményéhez fűzött súlyosabb jogkövetkezmények akkor alkalmazhatóak, ha az elkövetőt az eredmény tekintetében legalább gondatlanság terheli. [The more severe consequences attached to the result as a qualifying circumstance of the crime may be applied if the perpetrator is at least charged with negligence in respect of the result.]

[34] From latter literature see ANKUM, Hans, La responsabilitŕ contrattuale nel diritto romano classico e nel diritto giustinianeo, in: Diritto romano e terzo milennio. Radici e prospettive dell'esperienza giuridica contemporanea, Milazzo, Francesco (cur.), Napoli, 2004, pp. 143–152.

[35] Cf. WACKE, Andreas, Fahrlässige Vergehen im Römischen Strafrecht, *Revue internationale des droits de l'antiquité* 26 (1979), p. 544.

[36] See, for instance, the previously referred Marcian-fragment, where the jurist has cited concrete examples for criminal offences perpetrated with premeditated intent or an intent evolving under provocation, besides, he has dealt with criminal offences happened "by chance" (*casu*) – also including those cases when the perpetrator acted by way of negligence. Marc. D. 48, 19, 11, 2: *Delinquitur autem aut proposito aut impetu aut casu. Proposito delinquunt latrones, qui factionem habent: impetu autem, cum per ebrietatem ad manus aut ad ferrum venitur: casu vero, cum in venando telum in feram missum hominem interfecit.*

[37] See – among *delictum*s – vandalism (*damnum iniuria datum*), where the criminal liability of the perpetrator could have been established in the case of the most lenient negligence (*culpa levissima*) as well, but the action had to be postive (*culpa in faciendo*). I was called *culpa Aquiliana*. Thus Ulp. D. 9, 2, 44 pr.: *In lege Aquilia et levissima culpa venit*. For the case of *damnum iniuria datum* and the culpability form of *culpa Aquiliana* – being unique in delictual law – from literature see NÖRR, Dieter, Texte zur „lex Aquilia", in: *Iuris Professio. Festgabe für Max Kaser zum 80. Geburtstag*, Benöhr, Hans-Peter – Hackl, Karl – Knütel, Rolf (hrsg.), Wien – Köln – Graz, 1986, pp. 211–220; HAUSMANINGER, Herbert, *Das Schadenersatzrecht der lex Aquilia*, Wien, 1996[5]; CORBINO, Alessandro, *Il danno qualificato e la 'lex Aquilia'*, Padova, 2008[2]; WALLINGA, Tammo, Actio legis Aquiliae – Buße oder Schadenersatz?, in: Festschrift für Rolf Knütel zum 70. Geburtstag, Altmeppen, Holger – Reichard, Ingo – Schermaier, Martin Josef (hrsg.), Heidelberg, 2009, pp. 1385 –1400.

non faciendo and *culpa in omittendo*) has become punishable only in the latter law[38] and only in certain cases – mainly in the case[39] when the act of the accomplice has been added to the abovementioned intentional act of the perpetrator.[40]

All in all, we can say that in the case if the perpetrator had committed an act – determined in the provisions of criminal law – with intent or in certain cases by way of negligence exceptionally,[41] his act was qualified as guilty and it was followed by punishment.[42] Therefore it is clear that culpability[43] has already been regarded as a conceptual element of the criminal offence in Rome as well,[44] and this way the principle of 'no crime without culpability' – called *nullum crimen sine culpa* – has actually prevailed.[45]

In connection with the objective side of the criminal offence it has to be mentioned that jurists have already brought up the issue of a causal relation between the perpetrating act and the illegal result in the Classical Age.[46] Although they have kept away from theoretical discussions, they have examined the problem of causality, of course – aiming at the concrete solution of the given dispute.[47] As for the eventual objective elements, it is proven by several sources that in the case of certain criminal offences – for example in the case of theft (*furtum*)[48] – the place, time, device and method of perpetration have had a great significance.[49]

In general, they have imposed a sanction merely on *consummata iniuria*, namely, in Roman law a criminal offence has originally meant a perpetrated and finished infringement (*significat rem perfectam et consummatam iniuriam*).[50] However, it has not been required in respect of the result, therefore the act was considered finished even if it did/could not have a consequence. For this reason, a thief caught in the act was punishable even if he could not have taken the plunder, and it was the same in the case if a perpetrator had failed in his attempt.[51]

Thus, they have already differentiated – as a preview of modern 'stage theory' – between a finished criminal offence and the attempt of it, although the latter one has become punishable later on and beside a more lenient judgement.[52] In one of his pleas – called *Pro Milone* – Cicero has said that an unfinished act could not be punished, because the law punished for the result of acts and not for the human decision.[53] Contrary to this, Imperator Hadrian has already ordered that – in the course of the evaluation of a criminal offence – intent had to be taken into consideration instead of result:[54] it has been prescribed that anybody who killed another person, but did not have an

[38] HÖBENREICH, Evelyn, Überlegungen zur Verfolgung unbeabsichtigter Tötungen von Sulla bis Hadrian, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 107 (1990), pp. 287–313. In her opinion, in the case of *crimen*s, imposing sanctions on acts by way of negligence has been due to Hadrian's work.

[39] See, for example, in connection with counterfeiting currency Ulp. D. 48, 10, 9 pr.-1: *Lege Cornelia cavetur, ut, qui in aurum vitii quid addiderit, qui argenteos nummos adulterinos flaverit, falsi crimine teneri. 1. Eadem poena adficitur etiam is qui, cum prohibere tale quid posset, non prohibuit.*

[40] Cf. ZLINSZKY, *op. cit*. pp. 38–39.

[41] All that is in harmony with the concept of criminal offence in our operative Criminal Code, where the perpetration with intent is also regarded as a general rule. See Act C of 2012. § 4 (1): Bűncselekmény az a szándékosan vagy – ha e törvény a gondatlan elkövetést is büntetni rendeli – gondatlanságból elkövetett cselekmény, amely veszélyes a társadalomra, és amelyre e törvény büntetés kiszabását rendeli. ['Criminal offense' means any conduct that is committed intentionally or – if negligence also carries a punishment – with negligence, and that is considered potentially harmful to society and that is punishable under this Act].

[42] However, the degree of culpability has had a great significance in the course of imposing punishment. With a concrete example, see WACKE, op. cit. pp. 525–530. Generally about the relevant criteria in the course of imposing punishment see SÁRY, *Előadások* (cit.), pp. 54–63.

[43] In the case of *delictum*s we should talk about culpability, of course. For more detailed information, with references to further reading, see MOLNÁR, Imre, Magánjogi és büntetőjogi felelősség találkozási pontjai az ókori római jogban [Connecting Points of Civil and Criminal Liability in Ancient Roman Law], *Acta Universitatis Szegediensis de Attila József nominatae. Acta Iuridica et Politica* 69 (2007), pp. 522–534. For the concept of culpability in modern dogmatics of criminal law and Hungarian scientific literature see GÖRGÉNYI – GULA – HORVÁTH – JACSÓ – LÉVAY – SÁNTHA – VÁRADI, *op. cit*. pp.134–138.

[44] About certain conceptual elements in detail see MOLNÁR, Az ókori római jogi bűncselekmény-fogalom (cit.), pp. 565–589.

[45] In a survey see MOLNÁR, Imre, Büntető- és büntetőeljárásjogi alapelvek római jogi előzményei [Roman Legal Antecedents of the Principles in Substantive and Procedural Criminal Law], *Acta Universitatis Szegediensis de Attila József nominatae. Acta Iuridica et Politica* 48 (1996), pp. 167–181.

[46] Generally about the issue of causality in Roman law see NÖRR, Dieter, Kausalitätsprobleme im klassischen römischen Recht: ein theoretischer Versuch Labeo, in: *Festschrift für Franz Wieacker zum 70. Geburtstag*, Behrends, Okko – Dießelhorst, Malte – Lange, Hermann – Liebs, Detlef – Wolf, Joseph G. – Wollschläger, Christian (hrsg.), Göttingen, 1978, pp. 115–144; Furthermore, see IDEM, *Causa mortis. Auf den Spuren einer Redewendung*, München, 1986, passim., especially p. 122. and pp. 206–207.

[47] Therefore it may be too strict in MOLNÁR, Imre, A jogellenesség és vétkesség kérdése a római jogban [The Issue of Illegality and Culpability in Roman Law], *Studia Iuridica auctoritate Universitatis Pécs publicata* 123 (1996), p. 19. when the author states that Roman jurisprudence has not dealt with the issue of causality at all.

[48] Already in the Twelve Tables, see Gai. D. 47, 2, 55, 2: *Furem interdiu deprehensum non aliter occidere lex duodecim tabularum permisit, quam si telo se defendat. Teli autem appellatione et ferrum et fustis et lapis et denique omne, quod nocendi causa habetur, significatur.*

[49] For the objective elements in detail, with several examples from sources see MOLNÁR, Imre, Tényálladék az ókori Róma büntetőjogában [Facts of the Case in Ancient Roman Criminal Law], *Acta Universitatis Szegediensis de Attila József nominatae. Acta Iuridica et Politica* 55 (1999), pp. 203–204.

[50] ZLINSZKY, *op. cit.* p. 39.

[51] Ibid. p. 39.

[52] Cf. GIOFFREDI, *op. cit*. pp. 95 ff.; FERRINI, *op. cit.* pp. 241 ff.; ZLINSZKY, *op. cit.* p. 39.

[53] About the plea made in the criminal case of Titus Annius Milo see NÓTÁRI, Tamás, *Tényálláskezelés és szónoki taktika Cicero védőbeszédeiben* [Handling of Facts and Rhetorical Tactics in Cicero's Pleas], Szeged, 2010, pp. 147–170.

[54] See Call. D. 48, 8, 14: *Divus Hadrianus in haec verba rescripsit: In maleficiis voluntas spectatur, non exitus.*

intent to kill, could be acquitted, while in the case if somebody wounded the victim with an intent to kill, he had to be convicted of homicide.[55] In the Postclassical Age the *constitutio* of Arcadius and Honorius has stated a general rule: the intent to an act was punishable in the same way as the act itself.[56] Since the regulation has imposed the same sanctions on a finished criminal offence and the attempt of it,[57] we can draw the conclusion that – over almost two thousand years – it corresponds to the general rule included in the operative Hungarian Criminal Code, which states that the sanction imposed on a finished criminal offence has to be applied in the case of an attempt as well.[58]

The culpability of acts qualified as preparation does not appear in legal sources specifically, but in ancient Rome we can already find so-called *delictum sui generis*, namely a preparatory act evaluated as a finished criminal offence and pronounced punishable independently. According to *lex Cornelia de sicariis et veneficis*,[59] created in 81 BC, the case of poisoning (*veneficium*) – among other things[60] – has been punishable. The poisoner was a perpetrator who prepares, sells or possesses poison in order to commit homicide, and who possesses or sells poison in public places with the same purpose.[61] The enumerated perpetrating acts are all qualified as the preparatory acts of homicide. From the regulation we can also read out the principle elaborated in modern dogmatics, which says that preparation is always an intentional act with purpose, for this reason it can be perpetrated only with direct intent (*dolus directus*).[62]

III. Conclusion

It is evident from the abovementioned sketchy examples that – beside issues of civil law standing in the centre of researches in Romanistics – analysing certain parts and the conceptual apparatus of Roman criminal law can be reasonable and instructive as well. The issues discussed in this study – going along the subjective and objective basic elements of a legal case according to modern dogmatics principally – do not cover the "general doctrines" of Roman criminal law completely. Even if we stay within the narrow bounds of substantive criminal law, revealing the Roman legal antecedents of criminal legal principles, the issue of personal and objective scope of *ius criminale Romanum*, determining the Roman concept of criminal offence, in addition, compiling the catalogue of the obstacles of criminal prosecution, and not least, analysing the sanction system in Roman criminal law, the legal basis and purpose of punishments, or the relevant criteria in the course of imposing punishment can be the target of further researches.

Even if we acknowledge that the achievement of Roman jurisprudence in the scope of criminal law has lagged behind the results regarding civil law, this difference can be measured much rather with quantitative indicators,[63] than qualitative ones.[64] Roman jurists have kept away from general definitions and theoretical discussions both is the scope of *ius privatum* and *ius criminale*.[65] As we can say about the entirety of Roman law that it has been based on procedural law first of all, the decisions of jurists have also had a case-law character, and the conclusions drawn from them or the abstracted rules have rather been exceptions.[66]

Although we can see an absence of abstract definitions serving for the notation of legal cases, the intention to demonstrate the criminal legal mentality of antique jurists – by using these fragments as casuistic illustrations – cannot be regarded as it is for its own sake. What is more, by the abstraction of their observations and the comparison with basic concepts of modern dogmatics of criminal law we can get to such general theoretical conclusions that can help to reveal the "general part" of Roman criminal law expansively and systematically.

---

55 See Marci D. 48, 8, 1, 3: *Divus Hadrianus rescripsit eum, qui hominem occidit, si non occidendi animo hoc admisit, absolvi posse, et qui hominem non occidit, sed vulneravit, ut occidat, pro homicida damnandum* […].

56 CTh. 9, 26, 1 (Impp. Arcadius et Honorius aa. ad Caesarium praefectum praetorio): *Si quis ad illustrem palatii nostri ambierit dignitatem atque ad eos honores ascendere ambitione temptaverit, qui non nisi probatis nobis viris nostro iudicio deferuntur, cuiuslibet ille sit loci ordinis dignitatis, amissis bonis et fisco nostro protinus vindicatis deportationis multetur exilio. Neque aliud inter coeptum ambitum atque perfectum esse arbitretur, cum pari sorte leges scelus quam sceleris puniant voluntatem. Dat. XIIII kal. mar. Constantinopoli Caesario et Attico conss.* [a. 397].

57 Cf. MOLNÁR, Az ókori római jogi bűncselekmény-fogalom (cit.), p. 579; SANTALUCIA, *op. cit.* p. 146. and pp. 209–210.

58 See Act C of 2012. § 10 (2): A kísérletre a befejezett bűncselekmény büntetési tételét kell alkalmazni. [The sentence applicable to a completed criminal act shall also apply to attempt.].

59 About one of the most significant codes of Sulla discussing murderers and poisoners see SÁRY, Pál, A lex Cornelia de sicariis et veneficis [The lex Cornelia de sicariis et veneficis], *Publicationes Universitatis Miskolcinensis. Series Juridica et Politica* 19 (2001), pp. 301–325.

60 See NÓTÁRI, *Római jog* (cit.), pp. 313–314.

61 See Marci. D. 48, 8, 3 pr.-1: *Eiusdem legis Corneliae de sicariis et veneficis capite quinto, qui venenum necandi hominis causa fecerit vel vendiderit vel habuerit, plectitur. 1. Eiusdem legis poena adficitur, qui in publicum mala medicamenta vendiderit vel hominis necandi causa habuerit.*

62 Cf. BALOGH – GÁL – HORNYÁK – NAGY – TÓTH, *op. cit*. p. 182.

63 From this point of view it is enough to consider the codes of the Justininan's Codification (*Codex, Digesta, Institutiones*), since out of about 1000 pages there are only 70 pages dealing with issues of criminal law – mainly concerning private delicts. Besides, out of 50 books of the Digest there are only 2 books – *liber* 47 and 48 that are merely 7 % of the whole code – containing fragments in connection with criminal law. Cf. MOLNÁR, Büntető- és büntetőeljárásjogi alapelvek (cit.), p. 168.

64 ZLINSZKY, *op. cit*. p. 154.

65 See Iav. D. 50, 17, 202: *Omnis definitio in iure civili periculosa est; parum est enim, ut non subverti posset*.

66 The casuistic, case-law character of Roman law cannot be changed by the fact that jurists have already determined several regulations in order to generalize their casual decisions from the Age of Republic. Namely, these guiding principles have force in so far as they summarize the underlying casuistic correctly. See Paul. D. 50, 17, 1: *Non ex regula ius sumatur, sed ex iure, quod est, regula fiat*.

The Remembrance of 'Praetor Paulus' in Mid-Tudor England*

The Completion of a Previous Comparative Analysis upon the Correlation between Massive Liquidity Crises and Enactments of General Anti-Fraud Creditor Protection Laws with the Example of England during Its 16th Century Economic Crisis together with the Fraudulent Conveyances Act as a Reminiscence of the Classical Roman Paulian Action

*József Benke***

Abstract

This contribution continues a previous investigation concerning parallelisms between Anti-Fraud Creditor Protection Laws (AFCPL) and their socio-economic background lying usually in crises phenomena in different ages and legal regimes. Debtors' massive liquidity crisis in late Roman Republic and 21st century Hungarian 'post-Lehman' crisis of household debtors of mortgage home loans are as similar to each other as the morals of the prolific ancient casuistics based upon a general-clause-like ruling upon actio Pauliana are useful to consider for new shrewd non-contractual fraudulent misconducts committed in Hungary. This paper complements these analogous objects with the instance of 16th century England, the 'Mid-Tudor' era of which was also proved to be an example of the analyzed correlation between AFCPL and its critical socio-economic setting. The essay offers three evidences for proving that Mid-Tudor England and Fraudulent Conveyances Act (FCA) also suit to the comparison: the one is the history of legislation of England's AFCPL, the second is the FCA's way of formation and the third proof lies in the results of English historiography on the Mid-Tudor era.

Key words: *Liquidity Crises; Mid-Tudor England; Fraudulent Conveyances and Transfers; Actio Pauliana; Anti-Fraud Creditor Protection Law (AFCPL); History of AFCPL in England; Frauds beyond Insolvency Processes.*

1. A brief review on the previous research[1]

Massive financial crises usually produce circumstances, which make debtors to feel to be urged to invent new tricks of fraudulent transfers against creditors. It is also obvious that these socio-economical settings of law stimulate the states' particular legislative powers for making new *Anti-Fraud Creditor Protection Laws* (AFCPL) towards these objectionable conducts. The present paper and the previous essay[2] concentrate on the correlation between these socio-economic phenomena and the lawmakers' responses to that in three totally different ages of history: late republican Rome, Mid-Tudor England and contemporaneous Hungary.

The research aimed to prove the correctness of the fact that historical knowledge is able to exclude the majority of legislative problems emerging from new and not easily foreseeable or rather unexpected socio-economic symptoms. Massive economic, financial or liquidity crises are namely quite frequent in history. The reasons for choosing ancient Rome and medieval England were in two well-known facts. The first was that the vast plurality of European legal systems had been enrooted in or at least inspired by the fruits of legal thinking based either on

* This scientific contribution is dedicated to the forthcoming 650th anniversary of the establishment of my *Alma Mater*, which is the University of Pécs (in Hungarian: 'Pécsi Tudományegyetem', abbreviated as 'PTE', in Latin: '*Universitas Quinqueecclesiensis*' established by Louis I of Hungary in 1367, and the letter patent was issued by Pope Urban V.

** József Benke, Ph.D., Department of Private Law, Faculty of Law and Political Studies, University of Pécs; assistant judge, Regional Court of Appeal of Pécs, Hungary.

1 Works referred here more than once (see page numbers in the current notes of reference): ALCES, Peter A. – DORR, Luther M., Jr., *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, in University of Illinois Law Review 1985/3; ARMOUR, John – BENNETT, Howard (eds.), *Vulnerable Transactions in Corporate Insolvency*, Oxford 2003; ARMOUR, John, *Transactions Defrauding Creditors*, in ARMOUR – BENNETT (eds.), *Vulnerable Transactions in Corporate Insolvency* (see above); BACON, Francis, *The Works of Francis Bacon*. Vol. II, London 1753; BENKE, József, *What Would 'Praetor Paulus' Do in 'Post-Lehman' World? A Comparative Analysis of Lawmakers' Responses to the Spreading Practice of Fraudulent Transfers' Novel Ruses in Late Roman Republic's Liquidity Crisis and in 21st Century Hungarian 'Post-Lehman' Crunch: Some Morals of the 'Paulian Action'*, in Journal on European History of Law 6/2 (2015), pp. 122-138; GLENN, Garrard, *Fraudulent conveyances and preferences*, Vol. I, New York 1940; JONES, William John, *The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period*, in Transactions of the American Philosophical Society 69/3 (1979); LEVINTHAL, Louis Edward, *The Early History of English Bankruptcy*, in University of Pennsylvania Law Review 67/1 (1919); MATUSIAK, John, *Mid-Tudor England. Years of Trauma and Survival*, in History Review 52 (2005); ROBERTS, William, *A Treatise on the Construction of the Statues: 13 Eliz. C. 5, and 27 Eliz. C. 4, Relating to Voluntary and Fraudulent Conveyances, and on the Nature and Force of Different Considerations of Support Deeds and Other Legal Instruments,in the Courts of Law and Equity*, London 1800; THOLE, Christoph, *Gläubigerschutz durch Insolvenzrecht*, Tübingen 2010; WILLEMS, Constantin, *Actio Pauliana und fraudulent conveyances. Zur Rezeption kontinentalen Gläubigeranfechtungsrechts in England*, in "Comparative Studies in Continental and Anglo-American Legal History (CSC)" Bd. 29 (hgg. von HELMHOLZ, Richard – NÖRR, Knut Wolfgang – ZIMMERMANN, Reinhard) Berlin 2012.

2 The previous paper continued by this very essay is BENKE, *What Would 'Praetor Paulus' Do in 'Post-Lehman' World?* (*supra* n. 3), pp. 122-138.

Roman or English common law. The other pillar of selection was the understood role of judicial power within the development of 'private law' in ancient Rome and in late medieval England as well. However, I shall admit that England as homeland of judge-made law solved the problems of fraudulent conveyances by statutory law, and similar problems in Hungary as the home of codified law were settled by the authority of courts.

The reason for choosing these periods of Roman and English law was that I aimed to explore the earliest period, in which lawmakers produced the most efficient laws towards the widest range of fraudulent transfers and misconducts. The basic problem in Hungarian law was the lack of such efficient legislative solution. The more general the more efficient: it was the measure of the examined laws' efficiency. Namely, the larger number of cases being able to be subsumed under the particular law produces the broader effect. The sought laws were those, which, at the earliest period, offered a general-clause-like[3] — i.e. either theoretic and general as the Roman or exhaustively casuistic as the English — ruling towards fraudulent conveyances' tricks. The praetor's edict appearing in Ulpian's commentary under D. 42,8,1 *pr.* from the 1st century BC and the Elizabethan *Fraudulent Conveyances Act* (FCA) enacted in the 13th year of her reign (1571) were proved to be legal norms of this sort.

2. Introduction

So long as *"the Remembrance of 'Praetor Paulus' in Mid-Tudor England"* is concerned, just as it is suggested by the very heading of this paper, the parallelism between England's FCA and its classical Roman predecessor — with respect to the laws' scope and to their general-clause-like formulation as well — has already been stated by a 16th century English jurist, *John Cowell*, who had already recalled the memory of 'praetor Paulus' in his *Institutiones Iuris Anglicani* as follows: "*Et etiam apud nos, quae actioni Paulianae aliquo modo respondet, a statuto Regni suppeditata* [on the margin: *'an. 13. Eliza. c. 5'*], *quod omnem sive terrarum sive bonorum alienationem irritam reddit, quae a debitore in fraudem creditorum facta est*"[4].

The 'Paulian action', which, until the age of Cowell, had survived for more than one and a half thousand years, is one of the major procedural tools of the AFCPLs ever. Considering the extremely general hypothesis[5] of the well-known 'Paulian[6] Edict', and with respect to the colourful classical casuistics built up on it, the Paulian action has been proven to be an extraordinarily viable and exceptionally efficient legal remedy. Namely, the edict became operative not only in the case of such fraudulent misconducts, which were committed through *legal acts of private law*, but also in case of fraudulent *legal acts of public law* and in the event of fraudulent *real acts* as well[7]. For nowadays, such wide scope of law based on the classical Roman Paulian action's casuistics of the manifold fraudulent misconducts has been trifurcated into three diverse areas of the national laws. The traces of the AFCPL's classical Roman model occur, namely, in civil codes[8] and penal codes, as well as in bankruptcy or insolvency acts. As comparison to the Roman predecessor, maybe the largest and oldest commentary on the FCA written by *William Roberts* stated in 1800 that: "The statutes 13 and 27 Eliz. were conceived in very general language […] these statutes were […] a more constructive collection of the evidences of fraudulent design than had before been adopted"[9].

While English legal historians mostly acknowledge a strong continental influence on English insolvency law, it has been contended that England went its own way on the matter of

---

[3] The term of 'general clause' has no recognized distinct category in English law. Thus, it is applied in both essays of mine as a simple metaphrase of the German legal notion of *'Generalklausel'*, as 'the case law's gate for an invasion' (*Zweigert*). It is used as a legal norm, the flexible or (semi-)opened hypothesis (*Hedemann*) of which delegates power to judge and makes judge legally capable for disposing the norm to a wide range of originally unpredictable cases (cf. *Teubner* and *Ohly*). See ZWEIGERT, Konrad – KÖTZ, Hein, *Einführung in die Rechtsvergleichung: auf dem Gebiet des Privatrechts*. 3. neubearb. Aufl. Tübingen 1996, p. 71; HEDEMANN, Justus Wilhelm, *Die Flucht in die Generalklauseln: eine Gefahr für Recht und Staat*, Tübingen 1933, p. 58; TEUBNER, Günther, *Standards und Direktiven in Generalklauseln. Möglichkeiten und Grenzen der empirischen Sozialforschung bei der Präzisierung der Gute-Sitten-Klauseln im Privatrecht*, Frankfurt am Main 1971, p. 60*sq*; OHLY, Ansgar, *Generalklausel und Richterrecht*, in Archiv für die civilistische Praxis 201 (2001), p. 6*sqq*.

[4] COQUILETTE, Daniel R., *The civilian writers of Doctors' commons*, London 1988, p. 79*sq*. For a German translation see WILLEMS, *Actio Pauliana und fraudulent conveyances* (*supra* n. 3) p. 141*sq*: "Und auch bei uns [existiert ein Rechtsmittel], das der *actio Pauliana* irgendwie entspricht, durch königliches statut [am Rand im Jahre 13 Eliza. c. 5] geschaffen, das jede Veräußerung von Land oder Gütern unwirksam macht, die vom Schuldner und Gläubigerbetrug gemacht wurde…"

[5] Ulp. D. 42,8,1 *pr. libro 66 ad edictum*: *Ait praetor: »Quae fraudationis causa gesta erunt cum eo, qui fraudem non ignoraverit, de his curatori bonorum vel ei, cui de ea re actionem dare oportebit, intra annum, quo experiundi potestas fuerit, actionem dabo. Idque etiam adversus ipsum, qui fraudem fecit, servabo«.*

[6] The naming of the remedy after a certain *praetor Aemilius Lepidus Paulus* is controversial. The attempts to authentically denominate and also to date this procedural remedy as *Pauliana actio* caused a long dispute. See recently GREVESMÜHL, Götz, *Die Gläubigeranfechtung nach klassischem römischen Recht*, Göttingen 2003, 62-69. To this most recently see BENKE, *What Would 'Praetor Paulus' Do in 'Post-Lehman' World?* (*supra* n. 3) 127-129.

[7] For legal acts of private law see such legal acts as remission of positive assets (cf. D. 42,8: 1,1-2; 2; 6,5; 6,11; 7; 8; 10,15) or as undertaking negative assets or liabilities (cf. D. 42,8: 2; 3 *pr.*; 14; 19). For legal acts of public law see e.g. false lawsuits or executions, or an intended loss in trial, or providing one who owes with an exception (cf. D. 42,8,3 *pr.*). For real acts see such acts as the conscious tolerance of an usucapion, the omission of bringing a suit against a debtor for releasing him via lapse of time, the permission of an action to come to an end, the fail of appear before the court, the intentional non-use of an usufruct or a servitude, or the dereliction of an own asset (cf. D. 42,8: 3,1-2; 4; 5). See in depth most recently BENKE, *What Would 'Praetor Paulus' Do in 'Post-Lehman' World?* (*supra* n. 3) 125-127 and 136.

[8] With respect to an astonishing fragment of the Great Inscription of Gortyn (X, 20–25), as coeval of the Roman Twelve Tables, the Cretan Doric *polis* was capable of developing such anti-fraud creditor protection law towards debtors' fraudulent gifts and gratuitous legal acts in the 5th century BC, which can stand the test of comparing it with our modern general clauses appearing in contemporaneous civil codes worldwide as 'Paulian actions'. BENKE, József, *The Gortynian Model of Anti-Fraud Creditor Protection Law* (*ŕ paraître*).

[9] See ROBERTS, *A Treatise on the Construction of the Statues: 13 Eliz. C. 5, and 27 Eliz. C. 4* (*supra* n. 3), p. 544-545.

laws against fraudulent conveyances[10]. This paper intends to examine the last one, although *Blackstone*, in his *Commentaries*, described English law of bankruptcy and related Tudor innovations as "capital alterations of our legal polity"[11]. The enactment of laws towards fraudulent conveyances, namely, does not inevitably presuppose the legal institutionalization of bankruptcy as such. Even the FCA was not specifically a part of insolvency legislation, although its application was frequently associated with it[12]. By nature, defraud of creditors has always been a severe problem for the English legislation, too. At least until the 18th century, English lawmakers had approached the question preferably from a peculiar criminal law angle, and, until the Elizabethan era, mostly tightened the problems to the collusive gifts of debtors' assets to friends.

So long as the FCA had specified punishment for those who fraudulently acquired the debtor's assets before — or even after — the act of bankruptcy, by the statute of James I 1604, a fraudulent act or conveyance directly constituted an act of bankruptcy[13]. Although this was a second period of concentration upon fraudulent behaviours, this paper focuses on the Elizabethan Act of 1571. The reason for doing so lies in the statements, for example, of *Holdsworth* and *Goodinge* or more recently in that of *Jones* upon FCA, according to whom it was an *essential* attempt to prevent frauds towards creditors[14], and was favourably construed also for its suppression[15], and nonetheless the FCA was *fundamental* for future legislation[16] as an "*initial point*" (*Glenn* and *Thole*[17]). Further connections can also be imagined between 17th century 'depressions'[18] and bankruptcy legislation, but, according to the research policy used in this paper, the anteriority of the FCA binds the object.

According to these, we shall now turn to the 16th century England, that is, to the Fraudulent Conveyances Act better known as the *Statute of 13 Elizabeth* or *13 Eliz 1, c 5* enacted in 1571[19], and to its socio-economic background, namely, to the 'Mid-Tudor Crisis'. The thesis of this part lies exactly in their cause-and-effect relation. There are three kinds of evidences, which show us that our presuppositions about this very relation are probably correct: the one is the change to the mood of the previous legislations, the second is itself the text and the formation proceeding of the FCA, and the third proof lies in the results of the English historiography examining the Mid-Tudor era.

3. The pre-FCA anti-fraud creditor protection laws[20]

The characteristics of Pre-Elizabethan statutes upon certain fraud-situations show us that, by the time of the FCA's formation, something must have happened, a fact, which inspired such a widespread Act, like the FCA was. Though the reasons for the continuously increasing degree of rigorousness can be diverse, it is obvious that the main cause must have lain in the growing and widening practice of fraudulent transfers. Thus, we shall first examine the pre-FCA statutory laws, after which their one-sidedness will be easily elucidated. I remark that fraudulent alienations for the benefit of favoured creditors are no objects of this research.

It is quite strange that even English legal historiography do not particularly compare the FCA with its antecedents[21], some do not even enumerate or name the antecedent laws. A good and acceptable reason for it can be that pre-Henrician legislation — i.e. laws before the reign of Henry VIII — had not yet differentiated conceptually between the fraudulent transfers of the bankrupts and that of the debtors[22].

Examples can be introduced for the other extreme, too. According to this extremum, AFCPL legislation has enrooted in the eldest days of English legal history. For instance, *Glenn* held[23] that the sixth chapter of the *Statutes of Marlborough* — some other chapters of which are the oldest piece of statute law currently extant in England and Wales — viz 52 Hen. III, c. 6 better known as the *Wardship Act* (1267) is to be accepted as the most ancient antecedent of the Elizabethan Act of 1571. In the part that this Act is the most aged one with respect to fraudulent misconducts, he was probably true, but in the part that the Act would be an antecedent of the FCA, I tend not to agree with him, unless a partial thematic accord does truly exist. Namely, the FCA's *differentia specifica* was its most general character according to its effort to exhaustively enumerate the

[10] Most recently see WILLEMS, *Actio Pauliana und fraudulent conveyances* (*supra* n. 3). See also its review by MACLEOD, John, in Edinburgh Law Review 16 (2012), p. 454-456.
[11] BLACKSTONE, William, *Commentaries on the Laws of England*, Book IV, London 1809, p. 430.
[12] See ARMOUR, *Transactions Defrauding Creditors*, (*supra* n. 3), p. 96-97.
[13] See JONES, *The Foundations of English Bankruptcy* (*supra* n. 3), p. 24.
[14] Cf. HOLDSWORTH, William Searle, *A History of English Law*, vol. I, 3rd ed., London 1923, p. 470.
[15] See GOODINGE, Thomas, *The Law Against Bankrupts: Or a Treatise Wherein the Statutes Against Bankrupts are Explained by several cases, resolutions, judgments and decrees, both at common law, and in Chancery*, 3rd ed., London 1713, p. 34.
[16] See JONES, *Foundations of English Bankruptcy* (*supra* n. 3), p. 18.
[17] *Thole* made his commitment after *Glenn*. See THOLE, *Gläubigerschutz durch Insolvenzrecht* (*supra* n. 3), p. 103: 'Als Ausgangspunkt des modernen Anfechtungsrechts gilt gemeinhin das englische Statute of 13 Eliz., c. 5.' See also GLENN, *Fraudulent conveyances and preferences* (*supra* n. 3), p. 79*sq.*
[18] See the description by JONES, *Foundations of English Bankruptcy* (*supra* n. 3), p. 20. Cf. furthermore LEONARD, Ellen M., *The Early History of English Poor Relief*, Cambridge U. P. 1900, p. 148, and SUPPLE, Barry E., *Commercial Crisis and Change in England: 1600–1642*, Cambridge U. P. 1959, p. 52*sqq*.
[19] According to the majority of the American studies, while fraudulent dispositions of property were regulated under Roman law, Anglo-American rules in this area descend from England's FCA. See e.g. BIGELOW, Melville Madison, *The Law of Fraudulent Conveyances*, 2nd ed. Boston 1911, p. 20-30; ALCES / DORR, *A Critical Analysis of the New Uniform Fraudulent Transfer Act* (*supra* n. 3), p. 529-532.
[20] For the law of *25 Edward III stat. 5 c. 23* (1351), which was here ignored, see WILLEMS, *Actio Pauliana und fraudulent conveyances* (*supra* n. 3), p. 78-89.
[21] See MOFFATT, George, *The Bankruptcy Law of England*, London 1865, p. 6.
[22] See JONES, *Foundations of English Bankruptcy* (*supra* n. 3), p. 5-12.
[23] See GLENN, *Fraudulent conveyances* (*supra* n. 3), p. 81.

badges of fraud. With respect to this, FCA has definitely no antecedents in English law. However, some topical parallels are obviously to be adopted. These thematically analogous legal norms can be specified as follows.

The *Statute of 50 Edward III c. 6*[24] in 1376 provided that: 'Because divers people […] give their tenements and chattels to their friends, by collusion thereof to have the profits at their will, and after do flee to the franchise of Westminster, […] and there do live a great time […], until the said creditors shall be bound to take a small parcel of their debt […] it is ordained and asserted, that if it be found that such gifts be so made by collusions, that the said creditors shall have execution of the said tenements and chattels […]'.

Richard II decreed in *2 Richard II St. 2 c. 3* in 1379 among others that Westminster Abbey should be an asylum for only such debtors as were impoverished through adversity and not for those who became insolvent through their own fault; fraudulent debtors, on the other hand, could be compelled to appear before Court even if they had fled to *asyla*[25]. *Thole*[26] calls this practice facetiously *'Haftungsvermeidungstourismus'*.

By the *Statute of 3 Henry VII c. 4* in 1487, all gifts were declared to be void, where a debtor made a fraudulent transfer to friends and lived in an asylum on the rents and income. According to *Levinthal*[27], there had been no remedy for these abuses prior to the reign of Henry VII, except that in a very special case provision was made for contumacy[28].

The *Act of 34 & 35 Henry VIII c. 4* (1542) was an effort to remedy this situation. The government and members of both Houses were probably influenced most by the apparent ineptitude of existing rules applying to debt[29]. The Act aimed to establish a summary proceeding, by which the property of the fraudulent debtor should be at once seized and secured for the benefit of all the creditors, and by which all unfair alienations, even to favoured creditors, should be avoided. For preventing the fraud on the part of the debtor's friends or false claimants, a number of penal provisions are also included in the statute[30].

I shall emphasize that even *after* the FCA, scil. in the 17th century, the Act of *21 Jacob I c. 19* (1623) decreed that pillory and loss of an ear should be the penalty imposed upon debtors who failed to show that bankruptcy was due solely to misfortune[31]. The poignancy of the defrauding practices is also verified through the punitive character[32] of these Acts and the number of victims punished by their application. The 18th century discharge of these 'honest insolvents' went back to the current legislator's perception that a bankrupt might be properly an object of pity in many situations. For example, the *'Poor Man's Case'* in 1648, when — according to *Coke* — the prices were very high, showed that the unlimited incarceration of the debtors did not tend to reimburse the creditors at all (there were some 8,000 debtors thus confined through England and Wales[33]).

4. The FCA and its formation

Some scholars thought that the 'legislation [scil. in 1571] probably stemmed primarily from disquiet about existing procedures, and the other factors merely worked to give this disquiet a hearing' (*Jones*[34]). This statement is undoubtedly true about bankruptcy legislation, but its content upon fraudulent conveyances against creditors shows they are not.

Whilst it was also regarded by some — even with respect to the FCA — that only the merchants can have such peculiar facilities, by which they can delay and defraud creditors, and the landed gentry of England were allegedly not subject to this law (*Levinthal*[35]), we have no obvious sources supporting this standpoint (*Jenks*[36]). On the contrary, according to these misconducts, even the landed *aristocracy* could be the subject of the new law ceasing some 14-15th century privileges of the peerage, since its text expressed that "feigned, covinous and fraudulent feoffments… are… to be clearly and utterly void, frustrate, and of none effect". The notion of *feoffment* is used in this era as *donatio feudi* (cf. *Roberts*[37]).

The Elizabethan Act's preamble-like introduction itself helps us to recognize that radically new and dangerous practice

---

[24] For the 'imperfection' of this and the following statute see BACON, *The Works* (*supra* n. 3), p. 84. More detailed see WILLEMS, *Actio Pauliana und fraudulent conveyances* (*supra* n. 3), p. 89-92.

[25] Cf. 2 Richard II, Stat. 2, Chap. 3. Cf. BACON, *The Works* (*supra* n. 3), p. 84. See also LEVINTHAL, *The Early History of English Bankruptcy* (*supra* n. 3), p. 10. More detailed see recently WILLEMS, *Actio Pauliana und fraudulent conveyances* (*supra* n. 3), p. 92-95.

[26] See THOLE, *Gläubigerschutz durch Insolvenzrecht* (*supra* n. 3), p. 104.

[27] Scil. each creditor had to make a special petition to Parliament to receive his remedy. See LEVINTHAL, *The Early History of English Bankruptcy* (*supra* n. 3), p. 10-11.

[28] More detailed see WILLEMS, *Actio Pauliana und fraudulent conveyances* (*supra* n. 3), p. 95-98.

[29] See JONES, *Foundations of English Bankruptcy* (*supra* n. 3), p. 11.

[30] More detailed see WILLEMS, *Actio Pauliana und fraudulent conveyances* (*supra* n. 3), p. 100-110. To the statute's Flemish origins see IDEM, p. 110-123.

[31] I ignored here the laws of *1 Jac. I c. 15* (1603) and *21 Jac. I c. 19* (1623). For these most recently see WILLEMS, *Actio Pauliana und fraudulent conveyances* (*supra* n. 3), p. 142-155.

[32] '… musste das Recht der *fraudulent conveyances* zunächst aus der strafrechtlichen Einkleidung ausgelöst werden.' See THOLE, *Gläubigerschutz durch Insolvenzrecht* (*supra* n. 3), p. 104.

[33] See LEVINTHAL, *The Early History of English Bankruptcy* (*supra* n. 3), p. 18-20; DUFFY, Ian P. H., *Bankruptcy and Insolvency in London during the Industrial Revolution*, New York/London 1985, *passim*; HOPPIT, Julian, *Risk and failure in English business, 1700–1800*, Cambridge U. P. 1987, *passim*; LESTER, V. Markham, *Victorian Insolvency. Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England*, Oxford 1995, *passim*. Cf. also WILLEMS, *Actio Pauliana und fraudulent conveyances* (*supra* n. 3) 153*sq*.

[34] See JONES, *Foundations of English Bankruptcy* (*supra* n. 3), p. 18.

[35] See LEVINTHAL, *The Early History of English Bankruptcy* (*supra* n. 3), p. 16. n. 59.

[36] See JENKS, Edward, *A Short History of English Law. From the Earliest Times to the End of the Year 1938*, 6th ed., London 1949, p. 383.

[37] See ROBERTS, *A Treatise on the Construction of the Statues: 13 Eliz. C. 5, and 27 Eliz. C. 4* (*supra* n. 3), p. 47.

of fraudulent transfers has emerged. The Act stated namely that:

For the avoiding of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, bonds, suits, judgments and executions, as well of lands and in tenements, as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore[38].

We can assume that both Houses of the Parliament aimed to achieve a complex guard net towards these manifold misdemeanours. The lawgiver's presupposed intention is clearly confirmed by the FCA's above cited expressive words, and it can also be proved by the way of the enumeration of the debtors' defrauding transfers, alienations, conveyances and other misconducts and by the formulation of these misdemeanours' legal consequences envisaged to be imposed as well:

Be it therefore […] enacted, that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution at any time had or made to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken, only as against that person or persons, his or their heirs, successors, executors, administrators and signs of every of them, whose actions, suits, debts, etc; by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in anywise disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate, and of none effect, any pretence, color feigned consideration, expressing of use or any other matter or thing to the contrary notwithstanding.

The style shows a boisterous twisting passion, which might have motorized the lawgiver's imagination about illiquid debtors' conceivable defrauding tricks, which may discharge their patrimony as the financial cover of their creditors' claims.

The history of the Act's enactment process also suggests that these impulsive attempts were not by chance generated. Namely, *Constantin Willems* compressed the process as follows[39]: "Bereits 1563 beschäftigte sich das Parlament mit »fraudulent conveyances«." […] "Im Jahr 1571 begannen House of Commons und House of Lords ungefähr gleichzeitig, sich mit der Problematik betrügerischer Veräußerungen zu beschäftigen." […] "Die Einbeziehung auch dieses […] königlichen Justizbeamten, des Solicitor General […] des zweithöchsten Kronanwalts […], zu diesem Zeitpunkt Sir Thomas Bromley, spricht dabei für ein hohes Interesse der Krone an einer Gesetzgebung auf diesem Gebiet." […] "Letzlich wird die Geltungsdauer des Gesetzes beschränkt auf das Ende der ersten Sitzung des nächsten Parlaments. Diese Beschränkung der Geltungsdauer wurde durch 14 Eliz. I. c. 11 (1572) und 27 Eliz. I. c. 11 (1584–5) jeweils verlängert, bevor 29 Eliz. I. c. 5 (1586–7) die Fortdauer des Gesetzes »for ever« anordnete."

5. The 'Mid-Tudor Crisis' as the FCA's socio-economic setting

The main reason for this urgent need for making an appropriate new law, which shall have a long 'career' in English legal history and which — according to the original wording of a subsequent contemporary Act[40] — *"shall from henceforthe be remayne and contynue in force and effecte for ever"*, was the increase of fraudulent tricks.

What could be the principal reason for the piling of such novel daedal tricks of fraudulent conveyances? According to my view, by natural logic and with respect to the common sense, its chief cause were the contemporaneous socio-economic background denominated in history as the *Mid-Tudor Crisis* and its subsequent effects as well. The hypothesis about a certain connection between a crisis and the pile-up of the defrauding misconducts is also verified by the English historiography. In accordance with *Plucknett*'s observable and sharp criticism, lawyers sometimes do not even concern the historical background of law, and so the day before the 'appointed day' of the force of the law is no one's business…[41]

According to the vast majority of English historians, who examined the nature of the 'Mid-Tudor crisis' afflicted England during the middle third of the 16th century, a complex crisis of state, economy, demographics, religion etc. is debatable, however, the systematic analysis of this period showed a quite indisputable crisis of the economy (see among others *Cargill Thompson*[42]). Again, some held that this short proceeding is the part of the century long crisis of English aristocracy (*Stone*[43]), too, but some others guessed that the 'Mid-Tudor Crisis' was as such a fictitious or imaginary phenomenon, because there was no crisis in that era at all (*Matusiak*[44], *Heard*[45]).

It seems obvious that the question of qualifying a period either for crisis or for not labelling it as crunch, turns over on the definition of the notion of 'crisis'. The increase of the practice of fraudulent transfers against the creditors does not necessitate a complex totality of simultaneous crises in each and every sectors of collective and singular human life. On the contrary, a massive and deep liquidity crisis among the gross of the debtors is truly inevitable for improving such objectionable praxis.

However, it is empirically true that the grounds, which can usually cause such effects, are the combined existence of massive indebtedness and massive pauperization. Behind these

[38] Cf. e.g. ALCES – DORR, *A Critical Analysis* (*supra* n. 3), p. 529-532.

[39] See WILLEMS, *Actio Pauliana und fraudulent conveyances* (*supra* n. 3), p. 131, 133, 136, 139. Read these page numbers sentence by sentence in the citation above.

[40] Cf. 29 Eliz. I. c. 5 (1586–7), in Statutes of the Realm, vol. 4 p. 769. See WILLEMS, *Actio Pauliana und fraudulent conveyances* (*supra* n. 13), p. 140. n. 476.

[41] See PLUCKNETT, Theodore Frank Thomas, *Some Proposed Legislation of Henry VIII*, in Transactions of the Royal Historical Society 4/19 (1936), p. 120.

[42] See e.g. the critique of CARGILL THOMPSON, William David James, *on W.R. D. Jones, The Mid-Tudor Crisis, 1539–1563, London 1973*, in The Journal of Ecclesiastical History, 26/3 (1975), p. 331.

[43] See STONE, Lawrence, *The Crisis of the Aristocracy: 1558–1641*, Oxford 1965, *passim*.

[44] Ld. MATUSIAK, *Mid-Tudor England* (*supra* n. 3), p. 31.

[45] Ld. HEARD, Nigel, *Edward VI and Mary: A Mid-Tudor Crisis?* London 2000, *passim*.

causes — here as effects — can stand manifold other critical causes. These cause-and-effect interrelations are multiple-stage connections. With respect to these, I tend to accept that a *per se* qualification of the Mid-Tudor crisis for this or that kind of crisis is for us here mostly indifferent. Its classification of this sort can be interesting for us solely in the case, since it can prove the existence of a massive liquidity crisis with a joint indebtedness and pauperization tendency in its background.

We can draw the setting of law as an obviously massive liquidity crisis. The soi-disant *Phelps Brown price index*[46] showed, for example, that earnings decreased with ca. 60% in this period, and that around 80% of the average incomes were spent on food (nutrition) during this time[47]. This outcome shall be revised by the facts that price indexes mainly consider the fortunes of the agriculture and sometimes ignore some other relevant factor. Such factor was the industrialization, which began in this period, and nonetheless the fact that incomes were often received in kind, and the decline of the holidays' number (Protestantism[48]) as well. However, this correction cannot basically change the overall result[49]. Some natural disasters as, for example, harvest failures are also meaningful, just like some epidemics (such as *sudor anglicus*) during the period.

The weaknesses of the era's legal system was obviously also a severe problem, like either the disquiet about the existing laws upon procedures of execution or the inefficiency of the Henrician laws upon bankruptcy. The recognition of common interests of creditors *en masse* temporarily missed.

A certain commercial anxiety appeared during Parliament session of 1571, when some prophesized that every business of sale were in danger of rapid decay. The list of the bankrupts showed the frequency of tradesmen, industrialists and merchants, who lost their credit. In the sixties, during a famous parliamentary debate upon usury, some members of the House talked about enormous debts and the *bęte noire* of bankruptcy likewise the overspending for luxurious living and so forth[50].

The rapidity of the FCA's readings in the House of Commons shows also that the process might have been urged by the time thanks to these crisis-factors[51]. The great posterior efficiency of the FCA can also affirm that its preamble's diagnose was correct. *Lambarde* wrote on *Muschamps v Stoakes* (1598) that "Chancery could well be occupied in examining these practices, the rather because many nowadays grow bold to commit the same"[52].

6. Conclusion

The success of the Elizabethan statute was based on two factors: on the 'spirit' of the law and on the judicial practice built upon that. For the first we can state that the letters of the law showed a rather casuistical but, at the same time, an exhaustive character. This made the Act's hypothesis — in a peculiar way — general-clause-like. For the second we shall set that this large period after the FCA's enactment has produced a vast jurisdiction upon the Act. Within this casuistics, courts elaborated a list of 'badges of fraud' for defining matters of fact of fraudulent misconducts[53], and by this, they extended the Act's scope of effectiveness.

The most notable example for the judicial extension of the Act was probably its application to such matters of facts, according to which the debtor's partner for defrauding was one of his creditors. This is the so-called *fraudulent preference* also appearing in some *cause célčbre*[54]. I would refer here to the probably first one by *Lord Coke* and a case judged by *Lord Mansfield*. Coke's case was the example for post-bankruptcy preferences of *bona fide* debts. Mansfield exemplified the modern notion of preference, viz the pre-bankruptcy payments of debts of good faith[55]. Coke asserted in the *Case of the Bankrupts* (1584) that "if, after the debtor becomes a bankrupt, he may prefer one (who peradventure hath least need)… it would be… a great defect in the law"[56], and continued his approach in the analogical *Twyne's Case*[57]. Mansfield held in *Alderson v Temple* that a "fraudulent preference by a debtor, if made on the eve of, and followed by, the bankruptcy of the debtor, has been void against his creditors; because it aims at preventing that equal distribution of assets among the creditors, which has always been the object of those laws."[58]

If a correct legislative solution meets the common good and the demands of the economic operators, the efficiency of law is indubitable. The FCA was replaced in 1925 by section 172(1) of the Law of Property Act. Thus, the achievement of Elizabethan legislation was indubitably successful since the FCA had remained in force for over 350 years…

---

[46] It is a measure of relative price of a basket of goods for the average member of the commons.

[47] The important factors behind this crisis were: the Government reliance on debasement of the coinage and the population rise.

[48] That was the result of the introduction of Protestantism and its abhorrence for the veneration of saints, which established the holidays. See e.g. LOADES, David, *The Mid-Tudor Crisis, 1545–1565*, London 1992, *passim*.

[49] Cf. MATUSIAK, *Mid-Tudor England* (*supra* n. 3), p. 31.

[50] See JONES, *Foundations of English Bankruptcy* (*supra* n. 3), p. 18-20 and 30.

[51] See WILLEMS, *Actio Pauliana und fraudulent conveyances* (*supra* n. 3), p. 131-139.

[52] Cf. P. R. O. C.39/24; scil. Public Record Office, London, Chancery Supplementary Reports and Certificates. See JONES, *Foundations of English Bankruptcy* (*supra* n. 3), p. 30.

[53] Each element of this list of badges can be used either individually or cumulatively. See ARMOUR, *Transactions Defrauding Creditors* (*supra* n. 3), p. 96.

[54] See for the huge casuistics e.g. COUNTRYMAN, Vern, *The Concept of a Voidable Preference in Bankruptcy*, in Vanderbilt Law Review 38 (1985), p. 714-717; WEISBERG, Robert, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, in Stanford Law Review 39 (1986), p. 3*sqq*.

[55] Cf. WALTERS, Adrian, *Preferences*, in ARMOUR – BENNETT, *Vulnerable Transactions* (*supra* n. 3), p. 127-128.

[56] Cf. (1584) 76 Eng. Rep. 473.

[57] Cf. (1601) 76 Eng. Rep. 809. For its effects see recently WEISBERG, Robert A. – LICHTMAN, Lawrence A. – GROSMAN, Christopher A. – KUKLA, Patrick J., *Fraud and the Bankruptcy Code*, in CENDROWSKI, Harry – MARTIN, James – PETRO, Louis (eds.), *The Handbook of Fraud Deterrence*, Hoboken 2007, p. 297*sq*.

[58] Cf. (1768) 96 Eng. Rep. 384.

Development Span of the Hungarian Governmental Forms (in an International Comparison)

Csaba Cservák *

Abstract

The essay compares first the two major historical governmental forms: the monarchy and republic by describing it's main characteristics. Following that it shows, how has that evolved in Hungary from one to another, by highlighting its peculiarity, with special attention to the interim eras of the lack of the permanent head of the state. The next main topic revolves around the powers and the constitutional position of the president following the regime change and the general reform of the Stalinist Constitution from 1989 up until the new Foundation Act (Alaptörvény) came into force in 2012. Thorough description is given about the relevant changes brought by the new Foundation Act regarding the scope of authority and attempts to make a comparison it's exceptional powers to another presidential powers, with special attention to the Central and Eastern European ones.

Key words: *constitutional and legal history of Hungary; comparative constitutional law; scope of authority and constitutional position of the president of the State in Hungary.*

Regarding their forms of government, the various states in the world can essentially be divided into two categories: *monarchies* and *republics* [1] Both the identity of the head of state and the type of legal status they possess play integral roles in classifying the form of a government. However, due to the governments in certain countries encompassing elements of both a monarchy and a republic, placing the leader of such a government under sole scrutiny is insufficient for ascertaining the form of government.

The comprehensive title for the head of state in a *monarchy* is "monarch". Specific monarch titles include: king, tsar, sultan, emperor, shah, emir, prince, grand duke, duke, etc. It can almost be said that there are as many titles as there are states, however, they aren't simply regional names, as they also indicate the ruler's scope of authority and – regulated by various social norms – the source of his or her authority, i.e. an emperor is obviously a way more powerful ruler than a duke. The primary distinguishing attributes of monarchs lie in their ascension to power via succession rather than election, as well as their rule lasts for life time.[2] Due to these factors, the monarch's identity imbues this form of government with the advantages of stability and predictability, such a polity undoubtedly bearing the greater symbolic power. On the other hand, this very same rigidity demonstrates the system's disadvantage, in that the population is unable to influence the individual head of state when suffering an unpopular ruler or dynasty. Between 1920 and 1944, Hungary had a unique position amongst monarchies due the jurisdiction of its head of state - its form of government being a kingdom, but its head of state a regent, whose ever-growing legal powers overshadowed that of a semi-presidential president but did not yet reach that of a monarch. This system is called a "kingdom without a king."

The head of state of a *republic* is the president, or the president of the republic. Historically, some exceptions certainly apply - the head of state in the Republic of Venice [3] was the doge.[4] In contrast with monarchs, presidents gain their office through

* Dr. Csaba Cservák, Associate Professor, Head of Department of Constitutional Law, Károli Gáspár Reformed Protestant University, Budapest, Hungary.

1 The *system* of a government denotes a more complex concept, differentiating countries based on the legal relationship between their main branches of government. Accordingly, we can specify the following systems: parliamental, semi-presidential, presidential, collegial. (Intermediate systems naturally exist.) See: Csaba CSERVÁK: Kormányzati és választási rendszer (avagy a demokratikus hatalomgyakorlás komplex rendszere nemzetközi kitekintésben). Doctoral dissertation, University of Szeged (2010). p. 13-14 (Hungarian).

2 Succession can typically occur via the law of seniority, yielding the throne to the eldest member of the dynasty, or through primogeniture, leading to the eldest issue (typically, a son) of the deceased monarch taking his place. See: Barna MEZEY: *Az államfő* (In: MEZEY id. mű), p. 87 (Hungarian).

3 In contrast to the elected doge, members of the Great Council inherited their offices. See: Barna MEZEY: *Képviselet és választás a középkori Európában*, Rejtjel Kiadó, 1998. Budapest, p. 168 (Hungarian).

4 In the republican period of Rome, two consuls operated simultaneously, while in Napoleonic France, their number was three. Of the three, the legal powers of the First Consul were the most significant. See: Lászlóné NAGY: *A klasszikus polgári átalakulás állama és joga Franciaországban*, (In: Általános jogtörténet I., szerk.: Horváth Pál-Révész T. Mihály, Nemzeti Tankönyvkiadó, Budapest,1994.) p. 282-283 (Hungarian). (Power-sharing could naturally be found in monarchies as well, such as with the two kings of ancient Sparta.)

election instead of succession, and only for a predetermined period of time.[5] Naturally, taking a look at a variety of states provides multiple exceptions. Perhaps the most striking of these examples is Malaysia, whose king is granted a five years mandate through election by the rulers of constituent states.[6] In the Vatican City State, the head of state – the Pope – is elected for a lifetime, but a case could also be made for Andorra, where one of the co-prince head of state is the president of France, the other one being the bishop of Urgell. Therefore, neither of the heads of state gain their office through inheritance.

For the better part of a millennium, Hungary's form of government was the kingdom, led by a king. Contrary to many other medieval states, however, the ruler's power had been controlled – to invoke a modern term – by "checks and balances" from very early on, with the national assembly playing an important role in the field of legislation.[7]

The king was entitled to rule only after being crowned and simultaneously accepting his constitutional limits. Contrasted with contemporary states, the jurisdiction of the Hungarian national assembly towards the king was notably wide.[8]

The most important guiding principle of the historical Hungarian constitution was the Doctrine of the Holy Crown. Under its aegis, the backbone of the nation was made up jointly by king and nobility. In other words, the king does not rule; the crown does. (This can be understood as an early prototype of the separation of powers.) As a consequence, legally speaking, the king did not own his country as private property. It is to be noted that de iure, Hungary and Bohemia were frequently in personal union. This spurred Wenceslaus III, King of Bohemia and one of the pretenders for the Hungarian throne of the eventually triumphant Charles Robert of Anjou to lay claim to parts of the country.[9]

Sigismund of Luxemburg was elected Holy Roman Emperor as the king of both Hungary and Bohemia, with later shared rulers of these countries usually inheriting both titles simultaneously. Matthias Corvinus (r. 1458-1490) occupied parts of Bohemia and declared himself king of that country, but de iure, Bohemia remained intact as an independent entity. The Jagiellon kings of Hungary (Vladislaus II and Louis II) also reigned in Bohemia, thereby holding both titles themselves. In 1526, Hungary broke into three parts.[10] The legitimate successors to the Kingdom of Hungary became the House of Habsburg, who also constantly bore the title of Bohemian kings. Upon the outbreak of Rákóczi's War of Independence, Francis II Rákóczi was elected ruling prince. Even though his forces occupied a significant portion of the country, the Habsburgs still considered themselves its heads of state.[11]

For a short time after the dethronal of the House of Habsburg during the War for Independence of 1849, Lajos Kossuth was exercising the the power of the head of state (and, in practice, the head of government) as Governor-President in which amounted to a presidential state model. After crushing the revolution and before being compelled by historical circumstances to sign the Austro-Hungarian Gerat Compromise of 1867, the Habsburgs a military dictatorship. The Gerat Compromise created a real union between Austria and Hungary.[12] Interestingly, despite its historical role and economic importance, Bohemia was not made an equivalent constituent state of the Empire. *It begs the question whether a triadic rather than a dualistic state model would have proven more durable in withstanding the storms of history looming ahead…*

During the period following defeat in WWI, forms of government in Hungary followed one another as rapidly as the coups d'état that brought them about. Initially, Mihály Károlyi became president of the republic in what was intended to be a parliamentary system, followed by the 133 days of dictatorship by the Hungarian Soviet Republic. Upon the fall of the latter, the powers of head of state were taken over by Rear admiral Miklós Horthy, elected on March 1st 1920 as Govenor of Hungary. His jurisdiction was continuously extended and his mandate was life-long. As his legal powers over the parliament strengthened, he gained the ability to return legislation for deliberation and was granted the right to dissolve the government. He could also nominate members (more and more of them) to the second chamber of parliament. His legal powers were a peculiar "alloy" between those of a semi-presidential president and a constitutional monarch. Horthy even attempted to pass on his powers via dynastic succession. He had his own son elected Deputy Govenor who, upon meeting certain criteria, would have been able to take over the office of Govenor after the death of the head of state.[13] Following WWII, Act I of 1946 was accepted. Even though it was referred to by many in later times as a "Little Constitution", it did not explicitly declare a form of government despite reinstituting the office of president of the republic.

Through the course of the Communist takeover the Act XX of 1949 was enacted which, with significant amendments, re-

[5] During one period in Athenian democracy, the president of the Council of Five Hundred-the state premier-was elected on a daily basis. See: István STIPTA: *Az ókori görög állam- és jogfejlődés*, (In.: HORVÁTH-RÉVÉSZ T. id. mű) p. 39 (Hungarian).

[6] The two Spartan kings were likewise elected for one year by the citizen assembly. See: STIPTA id. mű p. 36 (Hungarian).

[7] Kinga BELIZNAY-Barna MEZEY: *Az Országgyűlés* (In.: MEZEY Barna (szerk.): *Magyar alkotmánytörténet*, Osiris Kiadó, Budapest 1996.), p. 102 (Hungarian).

[8] According to Zsolt Zetényi, also referencing the notions of Bertalan Szemere. See: Zsolt ZÉTÉNYI: *A történeti alkotmány*, Magyarországért kulturális egyesület, 2009. Budapest, p. 54 (Hungarian)

[9] In Hungary, he reigned as Wenceslaus I, while in his native Bohemia (following the death of his father, Wenceslaus II), he was known, between 1305 and 1306, as Wenceslaus III.

[10] A significant portion of the country was occupied by the Ottoman Empire, while the Principality of Transylvania practically functioned as a „second Hungary."

[11] Leopold I (1657-1705), Joseph I (1705-1711) and Charles III (1711-1740). It is to be noted that the latter was also known as Charles II as King of Bohemia and Charles VI as Holy Roman Emperor.

[12] Balázs ARATÓ: Az osztrák-magyar „álladalom." 2014., kézirat, p. 2.

[13] See: Thomas SAKMYSTER: *Admirális fehér lovon*, Helikon Kiadó, 2001. Budapest, (transl.: Gergely Romsics), p. 255 (Hungarian). Original title: *Hungary's Admiral on Horseback: Miklós Horthy, 1918-1944*.

mained the constitution of Hungary until 2012. It abolished the president of the republic's post again and made a collective body the head of state instead: the Presidential Council of the Hungarian People's Republic. While the parliament was not in session, this collective body had the power to enact statutory rules on legislative matters. (This actually happened very frequently.) On the other hand, the country's premier was neither the head of state, nor the prime minister, but the general secretary of the party, János Kádár. (Interestingly, according to various surveys, many people still regard him as the most popular Hungarian politician of the 20th Century.) The form of government was switched to a people's republic.

The president of the Republic power in the Hungarian constituional system- It's a slightly different from the original intention of József Antall- and goes beyond the traditional parliamentary symbolic head of statue functions. Our Constitution did not include the general formula, according to which ministerial countersignature is required for every single act of the head of state. This restriction was only applicable, in case of the the listed permissions according to the Consitution part 30/ A§ (1) paragraph part of: „The President of the Republic of all measures and actions which is stated in the (1) paragraph, expection the a),-e), d), f), and g) is necessary for the Prime Minister or the competent minsiter for counter-signature" [14]

(This is different to the German Constitution which is regarded as a model, but it's similiar to the Greek legislation. In Slovakia, some are on the opinion that, the institution of the countersignature was,was ommited due to the rapidity of the drafting the constitution, hence the head of state could act independently without it.[15]) The position of the head of state in the system of separation of powers was the subject of debate for a long time.[16] The Hungarian Constitutional Law does not give an accurate answear to the executive branch and head of state relations.[17] Some experts consider that to be one of the pillars of the dual executive power.[18] The Consitutional Court in the 4/1991 (IX.26) AB-decree rejected the above-mentioned points saying

„The executive power is outside of the scope of the Presdient of the Republic… The lack of political responsibility contrary to the State Assembly excludes legal grounds for such joint powers. A significant part of the literature category of „checks and balances" lists the Head of State.[19] This writer also commits himself to this viewpoint.

The traditional ceremonial head of state roles are considered as follows: convening of Parliament's inaugural session, closure of it, opposition, designating the date of the elections on time prescribed by law, the publication of theacts. These are very important powers, but the government's decision-making structure does not play a decisive role.[20]

The government as a whole in view of the powers of head of state emphasized regarded as follows: the government's designation/appointment, the government rights in meetings (charing, to be convened), the dissolution of parliament, veto power over the legislature and the consitutional review initiative, referendum initiative.

The government as a whole in view of the powers of head of state emphasized regarded as follows: the government's designation/ appointment, the government rights in meetings (charing, to be convened), the dissolution of parliament, veto power over the legislature and the consitutional review initiative, referendum initiative.

The executive powers and the head of state beyond the government's activities are in contact with each other at a number of points. Perhaps the most significant presidental powers regarding formation of the government. In the Parliamentary system is usally appointed by the head of state in the prime

[14] *The Hungarian Constitution in force until 2012. 30/A §* (1) The President of the Republic shall
a) represent the State of Hungary; *Article 30/A.*
b) conclude international treaties in the name of the Republic of Hungary; if the subject of the treaty falls within its legislative competence, prior ratification by the Parliament is necessary for conclusion of the treaty;
c) accredit and receive ambassadors and envoys;
d) announce general parliamentary or local government elections, and the date of the national referendum;
e) have the right to participate in and speak at sittings of the Parliament and of its committees;
f) have the right to petition the Parliament to take action;
g) have the right to initiate national referenda;
h) appoint and dismiss State Secretaries, in accordance with regulations specified in a separate law;
i) appoint and dismiss the President and Vice-Presidents of the National Bank of Hungary, and university professors upon the recommendation of persons or organizations specified in a separate law; appoint and dismiss the university rectors; appoint and promote Generals of the armed forces; confirm the President of the Hungarian Academy of Sciences;
j) confer titles, orders, awards and decorations specified by law and authorize the use thereof;
k) exercise the right to grant individual pardons;
l) issue rulings in cases of citizenship;
m) issue rulings in all issues assigned to his sphere of authority on the basis of separate laws.
(2) The counter-signature of the Prime Minister or responsible Minister is required for all of the measures and actions of the President of the Republic listed in Paragraph (1), with the exception of the items specified in Points *a), d), e), f)* and *g).*

[15] SZENTE i.m. 485. p.

[16] It is interersting that the first Constitutinal Court Presdient László Sólyom, restrictively interpreted the Head Of State powers, and then he became President of the Republic. Become his credit, he also not interpreted consistently his power differently.

[17] KUKORELLI István, Az alkotmányozás évtizede. Korona Publisher, Budapest 1995. 86. p.

[18] LŐRINCZ Lajos: A közigazgatás-tudomány alapjai, Rejtjel Pubisher, Budapest 1997. 51. p.

[19] For example Géza Kilényi formulated which based in the previously mentioned AB- decision later stages.

[20] The publication of the law only, if it is virtually become a right of veto, as in Slovakia, where there is no time limit for the Head of State announced, so actually a „swallow" the legislation they do not like.

minister, namely on the basis of considering the results of the elections of scientists behind steering rod Transferred candidate. This is a clear licence (for example two-party system) but distribution of parliamentary seats no, however a fragmented party balance of powers has been established, all the more significant. The latter - if there is no common candidate unanimously - the Head of State opens the possibility to select the most suitable person. (The power of this effect varied for each different constitution.)

The regime in force at the time of the Hungarian Constitution (as in the current) the nomination of the prime minister's right exclusively conferred on the President of the Republic. (Contrary to the German constitution, the Bundestag that has the right to conferfollowing the second unsuccessful designation attempt.) In addition the President of the Republic is not bound by any kind of rule notation, so in theory anyone can be offered. (Differently fromthe law of 1946. I.) In theory, it can not be ruled out either that the person proposed by the head of state is not the one proposed by the party winning the most votes, but seeks other representative of the same political force! In fact,he might requests the leader of the losing side, to be a candidate, who might becomes the Prime Minister on the basis of the opposing camp also choose representatives signed pact. The above are common to the Prime Minister during the term of the mandate of eliminating it. *This issue would have had received greater significance after the death of József Antall in case if Árpád Göncz would havenot sought to appoint by the Boross Péter from MDF to be a Prime Minister, however, the former head of state who often had self-popelled measures choosed a diplomatic solution limited time before the 1994 elections.*

It must be emphasized: inasmuch the former prime minister was detached from the position with a constructive mistrust, simultanously the new prime minister emereges into that position. In this case the President of the Republic has no scope of authority power, which reduces the prevailance of the „checks and balances."

Other authority appointments is in also contact with the executive head of state. The President of the Republic nominated the Ministers and the Parliamentary Secretary[21] also, who are appointed by the Prime Minister, and in this context he can very heavily „get involved" in politcs.[22] Several- even independent from the executive power- „silent partner" the president when they appointment of the heads of different institutions.[23] This can cause a lot of conflict, as was also the 1990-1994 cycle. In accordance with the rules then in force- Act of 1996 on the establishment- as some leaders of the central authorities appointed by the president based on the prime minister nominated by the public media (TV, radio) leaders as well. Árpád Göncz often created right of denial for himself. The standpoint of the Constitutional Court - somewhat narrowed the discreation of the head of state- says that the president may refuse the appointment if, „…he comes to the conclusion with a good reason that the performance of the proposal seriously disturb the democratic functioning of the State." (48/1991. AB decree)[24]

It would have had been worth creating a better controll already the above question in the regime change, as it points the lack of rule of law could justify the casuistic settlement.[25]

The President of the Republicaccording to Constitution reformed in 1989 could revert the bills to the parliament reconsidering them (political veto) or couldhave ased ask from the Constitutional Court a preliminary constituional review before the signatures.[26] In comparison, the German system is interesting. There, the head of state is inferred from the wording of the oath that if „enforce" theFoundation Act, than therefore can not sign the unconstituional laws. For such specific cases there have already been a couple of examples.

According to the previous Constitution, the head of state was empowered to dispelled the parliament in two cases.,First, when the person was nominated by him to be prime minister wasn't elected within 40 days by the Parliament or, in the case when the pariament lifted the confidence towards the government four times within a year. (The latter mentioned is only possible with a constructive trust assets, but the chance for this is very small.)

It is interesting to compare the Hungarianregime with the Czech one. The President of the Republic has a suspensive veto, it can be ignored only with an absolute parliamentary majority, and also the head of state can not exercise it in relation to the powers of the constitutional act. The President of the Republic may dissolve the Chamber of Representatives if:

- Prime minister candidate was not elected, who was adviced by the president of theParliament.
- there is no decision within three months, about a bill, what is confidental question by the government.
- the assembly of the Chamber of Representatives would be suspended for a longer time than allowed
- the Chamber was unable to make a decision within three months, althought it is not suspended

(Fairly limited, but for example in relation to the Hungarian system is therefore a wider scope for the head of state.)

When the Parliament was dissolved, with the proposal of the Government, the Senate Legislative can create Statutory regulations with the signature of the President of the Republic in legislative subjects, expect in relation to the constitution, the elections, the international treaties, budget and final accounts.[27]

---

[21] Since then the Permanent Secretary also appointed by the Head of State.

[22] Let us add, for example, the Czech Republic, the wider the appointment of the President of the Republic. So he appointed the President and the National Audit Office- the Senate confirmation of - the Constitutional Court. DRINÓCZI Tímea: Cseh Köztársaság, (In.: CHRONOWSKI Nóra-DRINÓCZI Tímea: Európai kormányformák rendszertana, HVGORAC, 2007. Budapest), 477. p.

[23] KUKORELLI István. i.m., 84-85. p.

[24] Kilényi Géza has already mentioned separate opinion which is reject this restrictive interpretation.

[25] The new Constitution includes in itself the essence AB-decision.

[26] In comparison, the Czech Republic seems wiser solution accordingly sent back by the head of state law can only be the absolute majority of the Chamber of Representative absolute majority strengthering. DRINÓCZI id. opus 473. p.

[27] Details DRINÓCZI i.m. 477. p.

The function of the president of the republic in the new Fundamental Act

The Hungarian Fundamental Act which was enacted in 2011 and entered into force on 1 January 2012 almost did not change the function of the president at all, although the Fundamental Act itself was challenged by many due to its radical changes. It presents the powers of the president in a more logical manner by listing those presidential powers in different paragraphs which depend upon external consent and those ones which require no countersigning.[28]

The normative language now includes a rule that many commentators had thought earlier as self-evident: the president can set up the structure of its own office by himself. (And therefore, he can freely designate the administrative position of its leaders.) *The new Fundamental Act simultaneously guarantees provides for both the political and the constitutional presidential veto.*

The president is now entitled to dissolve the parliament also in if case the Annual State Budget Act is not passed enacted until March 31 of any given year. (Since the Fiscal Council has a quasi-right of veto against the State Budget Act, and the head of the Fiscal Council is appointed by the president, consequently the president may indirectly compel the dissolution of the parliament. Making little sense, the option to dissolve the parliament in case of recalling for lack of trust four times in a year does not exist anymore.)

During the legislative process of the new constitution, the presidential power to dissolve the parliament was much disputed. This is a very interesting question indeed. Many arguments were raised both for and against the right to dissolve. One might say, quite obviously, that if the position of the majority of the parliament is significantly different from the popular will of the people based upon the principle of free mandating, and if the rules of referendum are only narrowly tailored, then the president should might receive some kind of a power to dissolve. Quite interesting, that in its sole parliamentary system in Italy the president has the right to dissolve the parliament based upon the written law, but we know that he has hardly utilized this power.[29]

What is the other line of argumentation? The counter-argument states that if the president has too much of an independent personality and tends to be arbitral in a pejorative sense, then it may be possible that based upon purely political reasons and/or his own consideration, without the duty to provide adequate justification, he can dissolve the parliament. However, if we disagree with both ultimate positions than the solution

[28] (1) The Head of State of Hungary shall be the President of the Republic, who embodies the unity of the nation and is the guardian of the democratic functioning of the State.
(2) The President of the Republic shall be the Commander in Chief of the Hungarian Armed Forces.
(3) The President of the Republic shall:
a) represent Hungary;
b) have the right participate in and take the floor at the sessions of Parliament;
c) have powers to initiate an act of Parliament;
d) have powers to initiate national referenda;
e) set the date for general parliamentary elections, and municipal elections of council members and mayors, as well as the dates for the elections to the European Parliament and for national referenda;
f) make decisions concerning a special legal order;
g) convene the inaugural session of Parliament;
h) have powers to dissolve the Parliament;
i) have the right to send the adopted Fundamental Law or the adopted amendment thereof to the Alkotmánybíróság for review to verify compliance with the procedural requirements set out in the Fundamental Law, as well as an act adopted by Parliament to the Alkotmánybíróság to examine it for conformity with the Fundamental Law, or send it back to Parliament for reconsideration;
j) put forward nominations for the posts of the Prime Minister, the President of the Curia, president of the Országos Bírósági Hivatal, the Prosecutor General and the Commissioner for Fundamental Rights;
k) appoint professional judges and the Chair of the Budget Council;
l) confirm the appointment of the President of the Magyar Tudományos Akadémia (Hungarian Academy of Sciences) and the President of the Magyar Művészeti Akadémia (Hungarian Academy of Arts);
m) decide upon how he will structure the office of the President.
(4) The President of the Republic shall:
a) recognize the binding force of international treaties under authorization by the Parliament;
b) appoint and accredit ambassadors and envoys;
c) appoint ministers, the Governor and deputy governors of the Magyar Nemzeti Bank, the heads of autonomous regulatory agencies and university professors;
d) appoint university rectors;
e) appoint and promote generals;
f) award titles, medals of merit and decorations specified by an act of Parliament, and authorize the wearing of foreign state medals;
g) exercise the right to grant presidential pardons;
h) decide upon land and territorial issues falling under his authority and competence;
i) decide upon cases related to the granting and termination of citizenship;
j) decide in all other matters conferred under his competence by law.
(5) The actions and decisions of the President of the Republic referred to in Paragraph (4) shall be signed off by a Member of the Government. An act of Parliament may prescribe that the signature of a Member of the Government is not required for a decision conferred by law under the competence of the President of the Republic.

[29] There is only one restriction: in the last month of the presidential term this right cannot be exercised. (Unless coinciding with the last six months of the parliamentary term) See the Constitution of Italy, Article 88.

used in Lithuania could have deserved consideration, in which/where the president can call for a referendum about extraordinary election. This is a very interesting option, since in this case a system of double-checks is introduced, which excludes presidential autocracy, but if the parliament differs departs from popular will too much, and no other peaceful means are available to restore balance, the president can still intervene in the system. The current wording opens the door for several alternative interpretations, since when discussing the powers of the parliament, the Fundamental Act provides a detailed description[30] of when the president may dissolve the parliament and simultaneously call for new/early elections, but later, when listing the powers of the president,[31] the normative text provides for an unrestricted general rule for the president to dissolve the parliament.

The constitution of Lithuania contains a tremendously very interesting solution, where the president also has a right to dissolve the parliament, but if he does so and new elections take place, then the parliament has the right to remove the president-a power that the Parliament otherwise does not possess. This was called by Géza Kilényi, in a rather cynical way the strange web of the parliament against the president who made them possible to win an extraordinary mandate.[32] Nevertheless, the Lithuanian solution does have a kind of logic, that if the dissolution of the parliament by the president was arbitrary in addition unsupported by popular sentiment and the will of the people then the composition of the new parliament is likely to follow the previous one, so the representatives of the people may enforce a peculiar "sanction" against the president.

In case If the president of the republic faces hindrance i, the president of the parliament may substitute him. Contrary to the previous constitution, the new Fundamental Act provides the traditional presidential powers for the president of the parliament. (According to the old constitution, the substitute head of state did not have the right of veto and could only exercise pardon in a restricted way. Interestingly enough, in the Czech Republic and Slovakia, the powers of substitution of the head of state are shared between the government, the prime minister and the head of the National Council.[33]) After the resignation of former head of state Pál Schmitt in 2012, László Kövér already exercised the presidential powers in such way until János Áder took over the office on 10 May 2012.

[30] Fundamental Law, Article 3., Paragraph (3)

[31] Fundamental Law, Article 9., Paragraph (3), Point h). It would have been more fortunate to add the phrase "may dissolve…" to the case regulated by Article 3, Paragraph (3)

[32] KILÉNYI Géza: *Összehasonlító alkotmányjog*, PPKE Kiadvány, Budapest 2002., p. 70-71.

[33] DRINÓCZI id. p. 478., Szlovák Alkotmány, Article 105.

Divorce and Undeserving of Permanent Alimony according to the Practices of the Hungarian Royal Curia

Ibolya Katalin Koncz *

Abstract

In the following section of this study, an answer will be sought to the question whether there were any court practices according to which, although the court approved the wife's claim for permanent alimony, the husband could be exempted from this liability.

Regarding material issues and according to the resolutions of the Curia, there were three of such conditions; the issue of undeserving, the cases the contract concluded between the parties and documented as a notarial deed would be declared to be against public mores, which specifically appeared as a reason for exemption from the liability of alimony; and the unpropertied status of husbands and the respective obligation of parents to pay maintenance, and the respective options for exemptions from this liability. Within the framework of this subject, we will only focus on the issue of undeserving.

Key words: *Divorce; Hungarian Royal Curia; Undeserving of Permanent Alimony; Demographic und Marriage; Marriage Customs Prior; Alimony.*

The Demographic Significance of Marriage

Marriage regulating the relationship between men and women has become, over the course of history, a social institution changing upon the economic and ideological relations of societies, establishing a legally protected framework acknowledged by the government for having and bringing up children. Due to the economic and legal consequences associated with marriage, every society stipulates specific regulations with respect to the conditions on getting married and on the circumstances under which marriages are allowed to be terminated.

Usually, the tendency for concluding marriages responds very sensitively to changes in the society and the economy, therefore the existence of such changes have an indirect favourable or unfavourable effect on the tendency for having children as well.[1]

Divorce means the termination of a marriage, which exists but is unable to function properly, by the order of a court. The role of divorce in the settlement of family relations has been increasing over the past decades. The reasons leading to divorce, the effects and consequences of divorce are rather diverse, and such issues are mainly assessed by sociological tools. From a demographical aspect, the most significant consequence of divorce is the growing number of single-parent families, the increasing proportions of people living alone, but divorce also plays a role in the spread of new family forms (e.g. living in partnership).[2] Changes in the number of divorces usually affect marriage tendencies as well, as the termination of marriage legally frees the ex-spouses and allows the conclusion of new marriages.

Marriage Customs Prior to the Second World War

In the past marriage customs of the Hungarian population, marriage as an institution was held at a high esteem, and people preferred to live in married relationships. Society attached great importance to marriage as the basis for family life; getting married was considered as a formal condition for becoming an adult and for fitting into the society; also, marriage was made even more memorable as one of the most significant milestones of life by ceremonial receptions. Society expected people having reached a certain age to get married as soon as possible. Persons remaining single were reproached, just like people living separated or divorcing from their spouses. The advantages of living in marriage encouraged widowers to re-marry and live again as a married person as early as possible.

In the past, Hungary was one of the countries with a high marrying tendency. Political and economic events, however, had a strong impact on the trends of marrying intentions. Accordingly, economic crises or years with bad harvests negatively affected marriage tendencies, whereas wars caused temporary boosts in marriage. Therefore it can be stated that the Hungarian society inherited customs from the past, i.e. the custom of getting married early and the intentions to get married in order to be accepted by the society, and thus it tried to adapt to changing economic conditions.[3]

* Dr. Katalin Ibolya Koncz, associate professor, Institute of Legal History and Juresprudence, Faculty of Law, University of Miskolc, Hungary.

1 Hoóz István: Népesedéspolitika és népességfejlődés Magyarországon a két világháború között Akadémiai kiadó Budapest, 1970. (Hereunder: Hoóz, 1970.) p. 73.

2 Hoóz, 1970. p. 100.

3 Hoóz, 1970. p. 82.

Nevertheless, by the end of the 19th century, an increasing number of factors appeared the cumulative impact of which generated changes in marriage customs. The re-occurring fluctuations in economic conditions, the repeated re-regulations of compulsory military service, a boosting tendency of inter-region migration and urbanisation, and eventually, the significant improvement of mortality rates resulted in a declining tendency of marriages. The unfavourable effects of emigration at the beginning of the century should also be mentioned as a reason for this decline.

The First World War shows an excellent example for the fact that the conclusion of marriages, upon extraordinary circumstances, might be even completely halted for a temporary period. The rate of concluded marriages per one thousand people plummeted to a very low level in the war years: it reached the bottom in 1915 with a 3.4 per mille value.[4]

The rate of marriages postponed due to the war and concluded upon the return of the men fighting in the war fights reached 7.6 per mille in 1918, and it ascended to a crude rate of 20.4 per mille in 1919.[5]

The marriage rates in the years between the two world wars decreased with respect to both sexes and to all age groups, in comparison to the respective data prior to the First World War. The average age for getting married for the first time was delayed to 25 to 29 years in the case of men and to 20 to 24 years regarding women; also, the rate of people remaining single until the age of 50 increased as well (to 5 to 6% regarding men and 7 to 8% regarding women). In consideration of the social and economic relations of the given period, primarily the impacts of the economic crisis dominating the beginning of the 1930's, it can be concluded that a change in marriage customs began in the Hungarian population, which primarily became apparent in the delaying of marrying age by years and, consequently, the growing rate of unmarried women under the age of 20 years.[6]

Policies on Marriage and Divorce

Although the institution of terminating marriage (divorce) was introduced in Hungary at the same time as civil marriage was adopted[7], the extent of divorces were negligible until the First World War. The significance of divorces slightly increased in the urban population between the two world wars. After the Second World War, the number of divorces has been continuously increasing, reaching a high level in our age. It was first legally supported by a government decree adopted in 1945, introducing the institution of divorce by mutual agreement and facilitating the conditions for divorce in general.

The Termination of Marriage by Way of Divorce

Effective marriages can be terminated in two ways: by widowing or by divorce. The definition of divorce, in demographic terms, is considered to be the same as the effective termination or annulment of marriage by means of a court order. However, the term of so-called "separation" is not considered as term related to divorce, as the legal act of separation declares the married spouses to be living separately from each other, but considers their marriage still lawfully effective. Based on the cumulative annual statistical data of marriages and of the termination of marriages, it can be stated that since 1978, the number of terminated marriages has been higher than that of concluded marriages. This negative rate related to marriages – further to the plummeting number of concluded marriages – was caused by an increasing number of divorces, and a higher extent of widowing due to a decreased mortality rate. In the 1960's, the number of marriages was higher by nearly 20 thousand compared to terminated marriages. 1993 can be considered as the lowest point, because in that year, the number of terminated marriages was higher by 33,910 than the number of concluded marriages.[8]

Divorces before the Second World War. In the 1870's and the 1880's, the proportion of divorce was only 0.07 per mille per one thousand people, which increased to 0.08 per mille by the 1890's.[9] From 1907 onwards, the number of divorces started increasing, as the liberal legal practices at that time provided easier conditions for terminating marriages. In 1910 and 1911, the rate of divorce per one thousand existing marriages was 1.9; by 1921, this rate doubled; by the 1930's, although slightly decreased, this rate was still higher than its value before the First World War.[10]

Before the Second World War, in the system of fault-based grounds for divorce, divorces were seldom declared, with particular differences in terms of social layers. The strong social and economic forces protecting the institution of marriage, the lack of alternatives for solutions after the divorce, single-income households and the higher number of children were - both altogether and individually – strong reasons for not filing for divorce.

In the first half of the 1920's, an average 10 to 11% of marriages were terminated by way of divorce. In the second half of the 1930's, the improving conditions increased the inclination for divorce again, and by 1938, the rate of marriages ending in divorce was higher than 7% again.[11]

The legal consequences of divorce. In cases of divorce, marriages are terminated on the date the cancellation order becomes effec-

[4] Hoóz, 1970. p. 79.
[5] Statisztikai zsebkönyv 1948. Budapest, 1948. p. 57.
[6] Hoóz, 1970. pp. 108-109.
[7] Főrendiházi Irományok 1892. VIII. kötet p. 176.
[8] Magyarország társadalomtörténete II. szerk: Fokasz Nikosz – Örkény Antal Újmandátum könyvkiadó Budapest, 2000. pp. 52-54; http://www.ksh.hu/docs/hun/xstadat/xstadat_hosszu/h_wdsd001b.html?down=979.
[9] MJL, 1903. IV. kötet p. 305.
[10] Hoóz, 1970. p. 112.
[11] Hoóz, 1970. p. 113.

tive. As, according to court practices, court orders on the divorce had to be officially introduced to the Curia (i.e. the Supreme Court), the divorce was only effective on the date of the order issued by the Curia. Upon the order of divorce of the Curia, marriage was permanently terminated; according to the practices, no retrial could be requested with respect to divorce orders. From the aspect of marriage property law, divorces had similar effects than those of the termination of marriage by death; the rights of husbands on dowry enjoyment are terminated, and jointly acquired assets have to be shared. However, while the surviving spouse was eligible to inherit assets and women could gain widow rights based on the married relationship, if the marriage ended due to death, on the other hand, divorce cancelled potential future inheritance options for the former spouses. In case of any doubts, testimonies specifying the spouses as heirs were annulled upon the divorce entering into effect, just like any inheritance contracts concluded between spouses.

In all these above aspects, there are no differentiations between the party at fault and the one not at fault. However, certain legal consequences of the divorce differed as per the guiltiness or not guiltiness of the given spouse; in the court order terminating the marriage, the spouse declared to be at fault of the divorce had to be forbidden (officially, without a special request) to get married to the person the spouse committed adultery [12]. A wife at fault could not retain her husband's name (even if they were both at fault).[13]. The spouse at fault was obliged to reimburse the other spouse in kind for any gifts given during the marriage or prior to the marriage, but in relation to it; in case such reimbursement was not possible, the spouse was obligated to ensure such reimbursement up to their financial capabilities.[14] Women not at fault were obligated to be supported by the husbands declared to be at fault.[15]

Undeserving of Maintenance, as the Potential Opportunity for Exemption from the Liability to Pay Spousal Support

The final alimony claim of women is based on the presumption of marriage being a union for life; accordingly, this obligation can be deduced from the notion of marriage. According to the definition specified in the Hungarian Encyclopaedia of Law, "The husband, as the head of the family, must bear the marriage burdens. Marriage burdens shall mean all the needs of the spouse and the children, naturally in line with the needs as required by the given couple's financial and social positions. Consequently, the husband is liable to support the wife." [16] Basically Sztehlo used very similar wording: "the man who swears upon the conclusion of marriage that he shall not leave the woman under any circumstances, thus undertakes not only ethical, but also legal obligations, according to which he will be obligated to support his wife's finances until death." [17] This principle was also stipulated by a resolution of the Curia, stating that "the supporting obligation of parents with respect to their married daughter is preceded by the alimony obligation of a husband." [18] The right for permanent alimony is the right originating from the bonds of marriage, the effect of which can be validated upon divorce.[19] The right for permanent alimony is naturally closely related to the termination of marriage; also, according the provision of Section 90 of the Act on Marriage, it was desirable that the issue of alimony [20] would be discussed in the divorce proceeding, when the judge is in the position of finding out the circumstances to be considered on determining the sum of alimony.

In the following section of this study, an answer will be sought to the question whether there were any court practices according to which, although the court approved the wife's claim for permanent alimony, the husband could be exempted from this liability. Regarding material issues and according to the resolutions of the Curia, there were three of such conditions; the issue of undeserving, the cases the contract concluded between the parties and documented as a notarial deed would be declared to be against public mores, which specifically appeared as a reason for exemption from the liability of alimony; and the unpropertied status of husbands and the respective obligation of parents to pay maintenance, and the respective options for exemptions from this liability. Within the framework of this subject, we will only focus on the issue of undeserving.

Regarding the issue of alimony, it can be stated that it is closely related to the issue of faultiness, as alimony could only be claimed by a wife if her behaviour met the expectations of the society of that age throughout the marriage.[21] In this aspect, Decision of Principle No. 410 has to be mentioned, ac-

[12] Corpus Iuris Hungarici (Hereunder: CIH) Section 85. 1 ("Marriage Prohibitions") of Act XXXIV of 1894, pp. 6.

[13] On the other hand, if the wife was not the party at fault, she was allowed to keep her husband's name, but only if she expressly requested this intention of hers during the court proceeding (i.e. until the date of the issuance of the respective first divorce order); in such cases, the court judge had to stipulate such right of the woman in the order (CIH, Section 94 of Act XXXI of 1894).

[14] Also, the promise of the spouse at fault to give presents to the one not at fault is annulled (accordingly, these legal consequences are not entered into effect, if both parties are at fault). Otherwise, the same provisions apply to the reimbursement of gifts as in case of the cancellation of an engagement.

[15] CIH, Section 90 of Act XXXI of 1894.

[16] Magyar Jogi Lexikon [the Hungarian Encyclopaedia of Law] Edited by: Dezső Márkus, Budapest, Pallas Irodalmi és Nyomdai Rt., 1903. Volume 4, pp. 119 The article was edited by: Károly Szladits.

[17] Kornél, Sztehlo: A nőtartási igények [Alimony Claims]. Jogtudományi Közlöny 1885. Vol. 10, pp. 78.

[18] Curia 1793/1929. — For the referenced resolutions – if not marked otherwise – see "Henrik Hajnal: A M.Kir. Kuria legujabb gyakorlata köteléki és nőtartási perekben (anyagi jog)". A „Polgári Jog" könyvtára ["Library of Civil Law"], Vol. 21. "Admiral" press print; Budapest, 1936.

[19] Kuria 1907: 6180. Staud, 1913. 37. o.; E.H. 1916.évi március 28-án. P. III. 10926/1915. sz. Uj Dt. 1816/240. 245. sz. Meszlényi Artur: Magyar Magánjog I. kötet II. rész. Grill Károly könyvkiadóvállalata, Budapest, 1929. (a továbbiakban: Meszlényi, 1929.), 131-132. o.

[20] CIH, Act XXXI of 1894 – On Marriage Law – "Women not at fault must be supported by husbands declared to be at fault, in accordance with their financial statuses and social positions, in case the given women's income is insufficient for making a living. Alimony shall be paid in cash in advance, usually in monthly instalments. Alimony must be payable by the husband if the woman requests so."

[21] György, Blau: Két téma I. Nőtartás. [Two topics; 1. Alimony] Jogállam; Jog- és államtudományi Szemle 1928. Vol. XXVII, pp. 16-17.

cording to which "…a wife living separately from her husband is not entitled to receive alimony in case she has become unworthy of it due to her improper conduct. This provision shall also apply in case the fact of separation can only be attributed to the conduct of the husband and the wife only behaves improperly after the separation, thus undeserving maintenance."[22] The Curia issued a decision in 1927, according to which, although the parties should be considered divorced based on a valid court decision, "…marriage has been terminated between the former spouses, therefore they are not obligated to be faithful to each other"; still, husbands were only liable to pay alimony to their wives until they became undeserving, which means "…the obligation for paying permanent alimony shall be eliminated in case a divorced woman presents such conduct according to which she could not deserve maintenance even in the course of marriage."[23]

Lajos Staud expressed the same principle, and contrary to the above statements, emphasized that "…it is an ethical requirement and it is not against statutory law to request the cancellation of alimony based on undeserving occurring in a posterior manner."[24] Nevertheless, Staud did not specify the material elements of undeserving, either.

The exact definition for the term of undeserving was not specified; we can get a clearer view of it by examining Curia decisions and court practices. The Curia first stated in 1928 in relation to a specific case that "…a woman shall only become undeserving to permanent alimony if she carries out a material unlawful act against her former husband, or if she persists to live an unethical lifestyle." Accordingly, in the case discussed, the ex-wife, in her despair caused by her poor financial situation, called her husband a scoundrel; the judges came to a conclusion that the act of the woman did not meet the material conditions of undeserving, therefore she was not deprived of her alimony.[25] Consequently, two, potentially separate content criteria were specified with respect to undeserving; they are a crime committed against the husband, more specifically, an unlawful act falling under more severe judgment, and the aggravated cases of unethical lifestyle. The practices of the Curia in the subsequent years sowed that the court judges assessed the existence of these two criteria with regards to the individual cases. The series of references to unethical lifestyle and behaviour started in the legal case taken to court in 1928; according to the case, the ex-wife of the former husband was criticised for the following act: "…she sadly noted during the performance of "Kiskomédia" theatre that she had been in a similar situation as the wife of the impotent husband acting on stage", thus allegedly spreading news about her husband's impotence. According to the decision made by the court, the woman was only motivated to make that statement due to exasperation, and „…she did not wish to derogate the ethical values of the defendant", thus undeserving was not stated.[26] In 1929, the "persistently unethical lifestyle" element of the criteria for undeserving was extended by the provision that "…until a woman acts in a manner severely affecting her morals and her decency", she was entitled to receive alimony. In line with this principle, the curia did not determine the woman's undeserving, and the claim of the ex-husband was rejected, in which the man emphasized that "…she kept making false statements about him here and there and spreads the information that she left her husband without receiving as little as a penny, although she took an asset with a high value. She only received alimony (…) upon requesting official execution, and the defendant (the ex-husband) carried out such a punishable act that would not have allowed him to keep his rank as Captain, if the claimant lady had not rescinded from reporting it for mercy; these do not qualify for the conditions of undeserving."[27]

The second element of the criteria for undeserving was brought up in 1930, the specification of writing a claim about a crime or an unlawful act falling under more severe judgment, as finding legal grounds for exemption from the obligation to pay alimony. In that year, an ex-husband submitted a claim to cancel the alimony due to undeserving. He enclosed a document to the claim certifying that a proceeding was submitted against his former wife for fraud. However, according to the decision of the Curia, just the initiation of court proceedings was not a sufficient ground for cancelling the alimony due to undeserving. Moreover, the person the proceeding was filed against was cleared of the fraud charges by the court. Consequently, the alimony obligations of the ex-husband continued to apply.[28] In this case, although a proceeding was initiated due to substantial suspicion of a crime, the suspect did not commit those acts against the ex-husband. On the other hand, according to a legal case discussed by the Curia in 1932, an ex-wife assaulted her former husband the following way: "…the claimant hit the defendant with her umbrella in the street and submitted a claim against him at the district court." In this case, although it demonstrated the material elements of undeserving, the Curia still stood by the wife's side, when it accepted its "ill, neurotic" conduct and also considered the fact in the decision that the ex-husband had not been paying the ordered amount of alimony. Based on all these circumstances, the Curia declared, that the acts of the wife were not so severe that she would be deprived of the alimony due to undeserving as claimed by the ex-husband.[29] In the same year, the Curia stated that "…mere oral insults, disgracing the husband, even if they are justifiable, cannot provide grounds for cancelling alimony due to undeserv-

[22] Hajnal, 1936, pp. 283; 14 Nov 1916 – 5483/1916.
[23] Curia 6870/1927.
[24] Lajos, Staud: Magyar magánjog tételes jogszabályainak gyűjteménye [Collection of Hungarian Civil Law Legislations]. Budapest, Franklin társulat, 1913. (hereunder: Staud, 1913.) pp. 38.
[25] Curia 756/1928.
[26] Curia 5588/1928.
[27] Curia 7170/1929.
[28] Curia 959/1930.
[29] Curia 1767/1932.

ing, even I the husband emphasizes that he has defined the act of the wife as an unlawful act falling under more severe judgment. [30]

According to the decision of the Curia, artists represented a special circle of society, therefore the act of a woman (who was an artist) talking informally to men when clinging glasses and even kissing one of the men on the forehead was not considered as severe enough by the Curia to be the ground for cancelling alimony due to undeserving.[31]

The theoretical principle of Lajos Staud was also supported in practice by the decision of the Curia made in 1931, according to which "…such faulty acts can also be grounds for undeserving regarding women, which, if stated during the divorce proceedings between the parties, would have deprived the wife form her claim for alimony." [32] The Court of Appeal used very similar wording, when it stated that women will lose their right to claim alimony, if "…after the termination of living together, the husband learns about such facts that would have enabled him to request the cancellation of the married relationship, and in case the woman… acts in a manner inappropriate for a married person, showing conduct severely and intentionally violating marriage-related obligations".[33]

The examples presented so far show that the Curia favoured the ex-wives in its decisions, and challenged the ex-husbands (and their lawyers) to difficult situations, as they had to find, present and verify such grounds for undeserving, i.e. such acts of the ex-wife that would enable the Curia to declare exemption from the liability to pay alimony.

In the following, such legal cases will be presented, where the Supreme Court found the claim of the husband justified and made decisions against the wife.

In 1931, the Curia declared undeserving based on ethical grounds, when, based on testimonies of several witnesses, the Curia accepted the fact that the ex-wife had been having a love affair in her tenancy, and the subject of the affair was not the ex-husband. "She was kissing her tenant, she slept in the same bed with him, and the tenant had keys to her apartment even after the termination of the renting relationship. The former tenant continued visiting her after that period as well, and only left her place at around 9 p. m… The woman had a love affair with him for years, and she conducted this affair without considering the most elementary requirements of decent female ethical behaviour, without the intent to disguise the affair, therefore she demonstrated severely indecent and unethical behaviour for a woman…" In this case the Curia cancelled the right to be paid alimony. Furthermore, the social welfare authority found the woman also incompetent to raise her children.[34] In the same year, the Curia declared undeserving again, and once more, for unacceptable ethical conduct. The supreme court also emphasized that in the given case at was irrelevant and "…out of concern whether the husband himself demonstrated similar unethical conduct, because the discussion of this issue is only related to the faultiness with respect to the marriage of the parties…", as only the woman's conduct and behaviour mattered from the perspective of the claim.[35]

In 1933, the Curia again ordered the exemption of a husband to pay alimony due to undeserving for a similar conduct of the ex-wife. Although the ex-wife did admit that "…She shared a room in Budapest with a man from 9 October 1932 to 9 November of the same year, she slept in the same bed with him and had an affair with him." Her actions were not considered more lightly due to the following: "…it is not an excuse for her that her lover proposed to her and engaged her." [36]

As the presented examples demonstrate, court practices developed and matured by the 1930's with respect to the issue of permanent alimony. By that time it became established who and under what circumstances could be made liable to pay permanent alimony, and how a husband could or did become exempted from the payment of alimony. It was specified when a woman became undeserving after the declaration of a final court order, and which elements of the notion of undeserving had to be assessed by the court in specific legal cases.

[30] Curia 4403/1932.
[31] Curia 4428/1932.
[32] Curia 9936/1931.
[33] Ítélőtábla [Court of Appeal] P. XI. 5779/1931. – Jogtudomány Közlöny 1932. Vol. 67 No. 30, pp.
[34] Curia 1615/1932.
[35] Curia 5447/1932.
[36] Curia 3576/1933.

The Development of Czechoslovak, Polish and Hungarian Foreign Affairs Administration between the Two World Wars (1918–1939)

Iván Halász *

Abstract

After the short intruduction to the history of Austro-Hungarian foreign affairs administration the paper focuses on the administrative development of the the Central European countries in the period between the two world wars. The Czechoslovak and Polish foreign affairs administration has formed dominantly on the basis of poliitical emigration and diaspora communities during the first world war. The Hungarian ministry of foreign affairs was established directly after the end of this war in december 1918, but the often changing governments reorganised this organ many times in unquiet 1919. The paper deals not only with the central level of foreign administration, but with the structure of the diplomatic and consular missions abroad too. Czechoslovakia and Poland had very good structure of the missions, because they were very active on the field of international relations in this time. These countries played important role inside the League of Nations too. The Post-Trianon Hungary needed the effective apparates too, but the foreign affairs administration was not very popular this time inside the country and its political life. Hungary was very active on the field of cultural diplomacy.

Key words: *administration; Czechoslovakia; diplomacy; foreign affairs; Hungary; missions; Poland; world war.*

It is a well-known fact that in 1918, the map of Central Europe was redrawn significantly. Several independent successor states were formed on the ruins of the tsarist Russian Empire and the Austro-Hungarian Empire, which had to establish their central administrative structures quickly. Czechoslovakia and Poland, as well as Hungary, which had lost a significant part of its territory – the subjects of the present study – were among them. Among other things, each of those states had to organise their foreign affairs administrations quickly, too, and they were more or less forced to do so from scratch, although the process did have some resources to work with, as the sons of those nations had always served in the Ministry of Foreign Affairs of the Austro-Hungarian Empire, and many of them joined the administrations of the successor states.

The Austro-Hungarian Empire

Between 1720 and 1742, the foreign affairs of the Habsburg Monarchy were managed by the Court Council (Hofkanzlei). Between 1742 and 1848, the professional preparation and execution of foreign policy decisions was the job of the Secret House, Court and State Council (Geheime Haus-, Hof- und Staatskanzlei). During the terms of first Wenzel Anton Eusebius von Kaunitz (1753-1792) and then Klemens Wenzel Lothar von Metternich (1809-1848) as chancellors, that latter body developed into a real office of foreign affairs. During the years, the name of the *Ballhausplatz*, the building used by the foreign affairs apparatus, became a metonym for Austro-Hungarian foreign policy.[1] However, the real ministry of foreign affairs was only established in 1848, during the heated months of the revolutions. In Vienna, the decision to create a responsible government was made as early as March, and it included a minister of foreign affairs. The organisation previously known as the State Council (Staatskanzlei) was renamed the Ministry of the Empire and Foreign Affairs (Ministerium des Kaiserlichen Hauses und des Äusseren). Naturally, the Austro-Hungarian Compromise of 1867 also had an impact on the management of foreign affairs – from 1869, the ministry was called the Imperial and Royal Ministry of the Empire and Foreign Affairs.

The Austrian, later Austro-Hungarian ministry of foreign affairs was a well-organised authority of long-standing traditions. In line with the conservative character of the Monarchy, most of its workforce was still drawn from the aristocracy and the gentry, and the system also made efforts to ensure that staff was suitably trained. The senior officials generally expected applicants to have qualifications in political science and law along with good language skills and an in-depth knowledge of history and international law.[2] In the case of consuls, economic knowledge also became increasingly important. It was a great advantage of Viennese diplomacy that it also had a well-organised system for training diplomats – new professionals were being trained by the Oriental Academy that had been founded by Maria Theresa, and later by the *k. und k.* Consular Academy,

* Prof. Dr. Iván Halász, PhD., Faculty of Public Administration, National University of Public Service; Hungarian Academy of Sciences, Research Centre for Social Sciences – Institute for Legal Studies, Budapest, Hungary.

1 Diószegi, István: A külpolitikai ügyintézés struktúrája és a döntéshozatal mechanizmusa az Osztrák-Magyar Monarchiában. www.grotius.hu.

2 Diószegi, István: op. cit. p. 6.

which, later still, became the Diplomatic Academy, today a venerable institution.[3]

The corps was open as regards nationality and territories, but due to geographical proximity and the empire's focus on the capital, most of the people who made careers there were Germans from Vienna, Upper Austria, Bohemia and Moravia.[4] Nevertheless, there were no obstacles to a Polish count (Goluchowski) or a Hungarian nobleman (István Burián) rising to the position of minister of foreign affairs. Anyway, the titular and land-owner Hungarian aristocracy (counts, barons) had a significant representation in the joint ministry of foreign affairs, as evidenced, for instance, by Gyula Andrássy senior and junior.[5] The real weight of the aristocracy is evidenced by the following numbers: between 1720 and 1918, only about 10% of those in charge of foreign representations were not aristocrats, but even among them, most had the prefix *von*, indicating noble birth, in their names. Among the ambassadors of the period 1867–1918, there were only three diplomats who were not princes, counts or barons.[6]

Within the joint Austro-Hungarian foreign service, three classes of officials were distinguished rather rigidly: officials belonging to the central apparatus, those in the diplomatic service, and persons in various consular positions. Transition between the three groups, however, was always possible.[7] The numbers are interesting: in 1914, the Vienna Ministry of Foreign Affairs had 850 employees, of which 232 were employed at headquarters, 155 in the diplomatic service and 463 at consulates.[8]

Despite regular reorganisations, the Vienna Ministry of Foreign Affairs maintained a relatively stable internal structure, whose individual components were later implemented by a number of successor states. The central administration was divided into four sections, or departments. The first one dealt with political affairs, the second one was responsible for administrative tasks, the third one operated as the cabinet for the minister in charge, while the fourth one was a sort of support office. It was responsible for encryption, translations and registration. The political section, which was considered the largest one, was subdivided into units, which always reflected the preferences of the age and the major powers concerned as well. Accordingly, Unit 1 handled eastern affairs, Unit 2 maintained relations with the Vatican, Unit 3 was in charge of relations with Germany and Scandinavian countries, while Unit 4 worked on Southwest European and overseas relations. The leaders of the units had significant influence on the administration of foreign affairs and the shaping of foreign policy. The heads of department (*Sektionschef*) above them were considered rather high-ranking state officials. The first among them was in control of the entire apparatus of the ministry when the minister was absent.[9] The diplomats who were later employed by the governments of the new states obtained their initial experiences of foreign affairs within that organisation.

Organisation of an independent Hungarian foreign affairs administration after World War I

The foundations for an independent Hungarian foreign affairs administration were laid by 5th People's Law of 13 December 1918,[10] which was still passed under the government of Mihály Károlyi[11]. However, due to the communist dictatorship and the cleansing that followed, the organisation of the Hungarian foreign service only really began in the autumn of 1919. Although the counterrevolutionary system that succeeded the defeated communist Soviet Republic did not consider itself a successor of the regimes between the autumn of 1918 and the summer of 1919, a number of initiatives from that period did remain in place, including the organisation of the Ministry of Foreign Affairs.

The short-lived Hungarian People's Republic (November 1918–March 1919) attempted to fill positions within the foreign affairs administration using partly the staff of the joint foreign ministry of the Austro-Hungarian Empire and partly officials transferred from other areas of public administration.[12] Many of the 'Viennese' served there not only during the democratic revolution but also during the period of the Soviet Republic, until Commissar for Foreign Affairs Béla Kun, who was deeply mistrustful towards most of them, dismissed them, and established the Department of International Propaganda within the Ministry of Foreign Affairs. Within that unit, he appointed trusted Communist officials from his own circles.

It is an interesting fact that the conservative right-wing opposition government in exile, which was set up first in Arad and then in Szeged, had its own ministry of foreign affairs, headed by Count Pál Teleki, between the end of May and August. It was a small organisation, with a total of eight staff members, most of whom were officials who had resigned voluntarily or were

[3] For the history of that institution, see Pfusterschmied-Hardtenstein, Heinrich: A Short History of the Dilomatic Academy of Vienna (Training for International Careers Since 1754) Diplomatische Academy Wien, 2008.

[4] Diószegi, István: ibid. p. 6.

[5] In order to render the description even more nuanced, we should add that in exceptional circumstances, even a person who was not a born aristocrat could become the minister: Heinrich Karl von Haymerle, the excellent official who spoke a total of eight languages, was such a man. Ibid. p. 7.

[6] Ibid. p. 9.

[7] Márffy, Ede: ibid. p. 710.

[8] Diószegi, István: ibid. p. 5.

[9] Ibid. pp. 2-3.

[10] For the text, see www.1000ev.hu.

[11] Count Mihály Károlyi was the country's prime minister between November 1918 and March 1919, when he became its first president. The Western-oriented, large landholder politician assumed power as a result of the bourgeois-democratic revolution that broke out in response to the collapse caused by the war, but he was later exiled and he could only return to his homeland in 1945. He emigrated again after 1948, due to the Communists.

[12] http://www.herder-institut.de/startseite/dokumente-und-materialien/moduluebersicht/ungarn-in-der-zwischen/textquellen.html?tx_himmat_pi1[showUid]=1027 & cHash=d494aca6ad2bab2ba63b8bbab5257d9b (Date of last download: 18 April 2012).

dismissed by the Soviet Republic from the Budapest ministry.[13] Of course, employment there became a great reference during their successive careers. However, with the victory of the counterrevolution in the summer, the focus returned to the tried and tested Budapest headquarters, in particular Dísz Square within the Buda Castle, which soon became the metonym for the Hungarian foreign affairs administration of interwar period.

A number of leading politicians played definitive roles in shaping the Hungarian foreign service between the two world wars. Prime ministers István Bethlen, Pál Teleki and Gyula Gömbös played particularly important roles. The first two were aristocrats from Transylvania, while the third was a professional military officer. They had their task cut out, as the lost war, the massive loss of territory and population, and the previous chaotic political and social conditions had seriously eroded the international weight and prestige of the country. What's more, the major failures had also damaged the popularity of the ministry of foreign affairs and the foreign affairs profession in Hungary, too. In addition, most prime ministers wanted to control the most important foreign policy decisions directly, so it was not in their interest to appoint strong personalities with their own ideas to the head of the ministry. This was particularly true of István Bethlen, but also later of Gyula Gömbös. Also Pál Teleki micromanaged both foreign and internal affairs policy. As a result, the position in Dísz Square saw rather a lot of comings and goings. The six-year term of Kálmán Kánya[14] as minister of foreign affairs (1933-1938) was the exception – and, in fact, he was a strong minister who was able to create an autonomous image for his ministry within the structure of government as a whole.[15]

The scholar and politician Pál Teleki,[16] who headed the ministry in the early 1920's, relied more on the old professionals and procedures. He summarized his requirements in a circular letter dated 26 April 1921. He emphasised that a great sense of responsibility was required for the work, that secrets were to be kept strictly, and that older, senior officials had to cultivate responsibility and obedience in their younger colleagues. In accordance with the old traditions of Vienna, he advised senior staff to establish social ties as well with the younger officials. Those working abroad were required to spend the time outside their official working hours extending their knowledge thoroughly, and particularly on studying issues of economics with a view to improving the situation of the country. A polite and obliging manner was advised with clients. Hungarian diplomats were required to adopt a self-respecting, yet unassuming manner in the official and social circles of foreign capital cities.[17]

During the 1930's, the attitudes described above, and the attitudes towards the old traditions of Vienna underwent some changes. They largely coincided with the term of Gyula Gömbös as prime minister and as acting minister of foreign affairs. The prime minister, who was used to having his own way, aimed to assign a much greater role than before to the Hungarian interests he envisaged, and even more so, Hungarian appearances in the foreign service. He was more reserved with respect to earlier traditions, and expected even greater commitment from officials to the National Work Plan (i.e. the government's programme). All officials were required to be familiar with the programme and to act in its spirit. Gömbös, who had a military background, saw the foreign affairs organisation – similarly to the general staff – as a tool in the hands of higher authorities. He expected the service to be highly active in the economic and the political arenas, and to represent the interests of Hungarian nationals. Hungarian diplomats were required to wear their Hungarian nationality with pride, to use their free time to promote their homeland, while their households abroad were expected to function as little islands of Hungarian culture. Naturally, Gömbös also laid great emphasis on the requirements of loyalty and discretion.[18]

The composition of Hungarian foreign service staff took an interesting turn between the two world wars. During the 1920's, it was composed of the two groups already mentioned above, the 'old guard', who had had experience in Vienna, and the 'new people', who had arrived after 1920. Initially, the most important positions were mostly held by the 'old guard'. The proportion of aristocrats also changed in the independent Hungarian foreign ministry. Despite the fact that the traditional aristocracy still played an exceptionally large role in Hungarian society, their proportion at the ministry and to a lesser degree in the foreign missions decreased somewhat. In 1921, 7% of all the people employed by the ministry were aristocrats, although the ratio was 14.9% among clerks (i.e. actual administrators). By 1938, the proportions dropped to 4.9% and 14.1%, respectively. That was a significant change relative to conditions prior to 1918, when 26.6% of clerks had been aristocrats.

According to Pál Pritz, a scholar researching the topic, the reduction was the result of a number of factors. On the one hand, most of the large landholder aristocrats in Hungary held legitimist views and found it hard to accept the 'kingdom without a king' headed by a member of the Protestant gentry (i.e. Regent Miklós Horthy). They also did not consider the much diminished state to be a successor to the once powerful empire. The aristocratic families that had been in the diplomatic service before were less prone to thinking in terms of estates and the nation, instead, their attitudes were based on loyalty to a dynasty and a Central European, supranational approach. The prestige of diplomacy was reduced as a result of World War I, anyway. What's more, during the Horthy era, the Christian nationalistic middle-class groups that were mostly distrustful of the landholder aristocracy – who, in turn, kept their distance from them – came to the fore. They wanted to place their

[13] Pritz, Pál: A magyar külügyi szolgálat keletkezése és története 1930-ig. In: Pritz, Pál: Magyar diplomácia a két világháború között. Magyar Történelmi Társulat, Budapest, 1995. p. 40.
[14] Kálmán Kánya actually also came from the joint Austo-Hungarian foreign service – he had been the Monarchy's last emissary to Mexico.
[15] Ibid. pp. 75-76.
[16] His biography see Ablonczy, Balázs: Teleki Pál. Osiris. Budapest, 2005.
[17] Pritz, Pál: cit. op. pp. 15-16.
[18] Ibid. p. 17.

own children in public administration jobs, including those at the ministry of foreign affairs. So, while Hungary remained ultraconservative in appearances, it actually underwent a certain degree of reorganisation, and an increasing number of middle-class people of bourgeois extraction were employed in the foreign service. On the other hand, the aristocracy often withdrew voluntarily – either due to lack of interest, or having had enough of the occasional attacks, or because they had formed a precise assessment of the risks of the strong orientation towards Germany and the assumption of excessive military roles.[19]

According to Pál Pritz, despite the many reorganisations and reforms, the basic components of the Royal Hungarian Ministry of Foreign Affairs actually exhibited a rather large degree of stability during the interwar period. It is an interesting fact of history that the person with a defining influence on the 'administrative' or organisational aspects of the independent Hungarian foreign ministry was a talented administrative organiser who had originally been an official of the capital city. It was Ferenc Harrer, previously a deputy mayor of Budapest during the period of Dualism, who was requested by Prime Minister Mihály Károlyi to organise the first independent Hungarian foreign mission, the Hungarian embassy in Vienna. However, the talented manager was recalled relatively soon from that post, because the previous top officials were struggling with getting the new ministry up and running. Harrer, who had never had a particular interest in foreign policy, was up to the job. He established five separate sections, supplemented with an audit office and an office of auxiliary services. The sections covered the following areas: political affairs, economic affairs, legal affairs, and the press and propaganda. He also set up a separate section called the presidential or administrative department, which actually managed human resources.[20]

The next longer-term structural transformation took place after Horthy gained power, i.e. in November 1919. The departmental structure, which put all the sections at the same level, was introduced then. The minister's cabinet was one of the most stable structural components of the system. Traditional, bilateral foreign affairs were relegated to the remit of the political department, composed of regional units. The press department was considered another constant feature. A number of departments were formed to handle legal matters: a department of public law, a department of private law, a department of criminal law, and also a department of legal assistance. Economic policy, the economy, and transport matters also had their own separate departments at that time. The presidential department continued to play a key role in the internal life of the ministry, as it managed personnel matters. That department had a general scope of authority, i.e. all matters that were not specifically assigned to the competency of a different department landed there.[21]

By the end of the period under review, in addition to the units dealing with foreign affairs in the narrow sense, the ministry still had 11 additional departments. They were mostly based on functional principles. The minister had a single permanent deputy – who had the rank of an ambassador – who controlled the minister's cabinet, composed of a few people, directly. In 1941, the cabinet had three members: the third member was the minister's personal secretary.[22] Separate departments were in charge of human resources, protocol, and press matters. During that period, economic diplomacy became quite emphatic within the ministry. Abroad, it was managed by the consulates, while at headquarters, the Department of Economic Policy was in charge of it. The affairs of Hungarian citizens living abroad, along with cultural relations were also given their own departments.[23]

Poland

In Poland, modern foreign affairs administration was established in the final year of World War I. Politicians with hopes for the restoration of an independent Poland had formed various social committees and organisations right at the beginning of the war, hoping to use them to restore the sovereignty of the Polish state – lost in 1795 –, with the assistance of one or the other military alliance.[24] One of the strongest initiatives – a rather anti-Russian one – cooperated with the Central Powers, and attempted to make use of the fact that the majority of core areas of Polish ethnicity came to be controlled by the German and Austrian armies. Accordingly, the first seeds of the later independent foreign affairs apparatus were sown within the framework of the Provisional Council of State established in the end of 1916, which cooperated with the Central Powers. It was within that organisation that the Department of Political Affairs was established in the winter of 1917, which, among other things, processed foreign policy matters and managed consular protection. Eight months later, the body dissolved itself and transferred power to the three-person Regency Council.[25] In February 1918 (that is to stay, still under German occupation), the first Council of Ministers was formed under that body. At that time, the country had no minister of foreign affairs – the tasks were performed by the director of the state secretariat. The first three embassies were set up in Vienna, Berlin and revolutionary Moscow.[26]

The independent Polish ministry of foreign affairs was established by a decree of the Regency Council on 26 November 1918, at that time without consultation with the German oc-

[19] Ibid pp. 26-29.
[20] Ibid. p. 38.
[21] Ibid. p. 42.
[22] Külügyi évkönyv 1941. (Ed.) Drucker, György: Királyi Magyar Egyetemi Nyomda, Budapest, 1941, pp. 382-385.
[23] Ladik, Gusztáv: Tételes közigazgatási jogunk alaptanai. third, fully revised edition. Attila-Nyomda Rt. Budapest, 1941, p. 90.
[24] Davies, Norman: Lengyelország története. Osiris, Budapest, 2006, p. 719.
[25] Ibid. p. 722.
[26] Szczepanik, Krzysztof: Dyplomacja Polski 1918-2005.Struktury organizacyjne. Warszawa, 2005, p. 27.

cupying force. Interestingly, that legal act took place two weeks before the official declaration of independence. Nevertheless, most researchers believe that the Polish ministry of foreign affairs was born on that day.[27] The only problem was that in parallel, there also existed a prestigious Polish centre of foreign affairs, which, from the very beginning, had sought assistance not from the Central Powers but from the Allied Powers, and therefore, in the autumn of 1818, it found itself in a much more advantageous position than the previous 'Germanophile' initiatives. The organisation in question was the Polish National Committee (KNP), which had been established by the national democratic politician Roman Dmowski and a few other émigrés to the West,[28] which, though it had been originally founded to create a Poland with significant autonomy within tsarist Russia, had quite early on moved its headquarters to Lausanne in Switzerland, and which had a Western rather than Russian orientation by 1917.[29]

The Polish National Committee, which recognised neither the earlier Regency Council, nor the later Warsaw temporary government, which it considered to be pro-German and left-wing, already had its own network of foreign missions, as it had delegations working in London, Rome, Washington and finally in Berlin, too. They all made every effort to prevent the temporary government in Warsaw from establishing its own missions in those (and other) countries. That, however, engendered a truly risky situation, which was thankfully appreciated by many people at both centres of power. Finally, in January 1919, the new – compromise – government was formed, headed by the pianist and composer Ignacy Jan Paderewski, who had returned from emigration in the West, and who soon also became, with Roman Dmowski, the leader of the joint peace delegation representing the new country in Paris.[30]

So, in 1919, the organisation of the Polish foreign affairs apparatus could begin. The Polish foreign service essentially attempted to follow the French model, while, in line with the zeitgeist, also aimed to maintain focus on economic matters. It was a manifestation of those intentions that one of its most important organisational units was called the Division of Politics and Economy for a long time. The other main unit dealt with legal and administrative matters.[31] It was one of the characteristics of the interwar period that within the ministry, the unit liaising with international organisations – in particular, the League of Nations – also played a weighty role. For Poland, a presence in Geneva was very important, and Warsaw had some major successes there. In 1925, a scientific council was established alongside the ministry, which endeavoured to liaise with various research institutes and to coordinate research that concerned foreign affairs.[32]

The internal regulations of the Polish Ministry of Foreign Affairs changed several times between the two world wars, but no major conceptual transformations took place. In effect, the structure adopted after the coup of 1926 remained operable with a series of various modifications until 1939. In fact, the coup itself didn't represent a particularly sudden change of direction, either – its effect was limited to the minister's cabinet increasing its influence and the human resources department becoming stronger.[33] In the months before the attack of Nazi Germany, the ministry was composed of the following main organisational units: divisions articulated into units, the minister's cabinet, the human resources department and the diplomatic protocol. The structures of the other divisions were more articulated, as they were divided into departments, which in turn consisted of units. But in actual fact, the following large – in effect, division-level – units formed the backbone of the ministry: the Division of Politics and Economy, the Consulates Division and the Administrative Division.[34]

Poland had an extensive network of diplomatic missions. The structure established in 1919-1920 officially distinguished six types of foreign missions: embassies, divided into three categories depending on the number of diplomats serving there, permanent missions, delegations, and finally special missions. There were only a few of the first category of embassies, with a large number of staff: only the London, Paris, Rome, Washington and Madrid units fell in that group. Those organisations had a minimum of seven people of diplomat rank working there.[35] As there were a great many Polish people living abroad already at the time, the young state devoted a great deal of attention to the creation of an extensive, articulated network of consulates.

Poland was the only new state in Central Eastern Europe that, beginning in 1924, was able to establish not only consulates but embassies. The first foreign missions to achieve that elevated rank were in Paris and the Vatican, followed by Ankara, London, Rome and Washington in 1933. Embassies in Berlin, Bucharest, Moscow and Tokyo were added later. By 1938, Poland had 9 foreign missions at the rank of embassies and 41 permanent missions. In addition, there were also a total of 203 Polish consulates around the world.[36] The special missions and the delegations were created to represent Poland at the League of Nations, and in addition in the Free City of Danzig, at the Klaipeda Directorate, the Sublime Porte in Istanbul, in Harbin in Eastern China and at the Joint Committee of Upper Silesia, although some of those missions operated during different periods.[37]

[27] Ibid. p. 28.
[28] The Polish National Committee was established in August 1917 during the Russian Revolution. Kovács István: Csoda a Visztulánál és a Balti tengernél. Európa, Budapest, 2006. pp. 64-65.
[29] Davies, Norman: op. cit. p. 719.
[30] Szczepanik, Krzysztof: op. cit. p. 28.
[31] Ibid. p. 28-29.
[32] Ibid. p. 32. The prestigious Polish Foreign Affairs Institute, which still exists, was only established after World War II.
[33] Ibid. pp. 32-33.
[34] Ibid. p. 35.
[35] Ibid. p. 37. The missions in the second category had four diplomats each, while those in the third category only had two posts each.
[36] Ibid. p. 38.
[37] Ibid. p. 39.

The diplomatic apparatus was recruited from a number of sources. Initially, the foreign officials of the Polish National Committee played an important role, many of whom retained their senior positions after the merger with the apparatus in Warsaw in some locations, particularly those associated with the Allied Powers. However, in the long term, the Warsaw ministry of foreign affairs laid greater emphasis on the recruitment of young officials, and showed a preference for the ex-legionnaires who had taken up arms to fight for independence. Among those with previous – i.e. pre-1914 – experience in diplomacy, the diplomats and consuls of the old Austro-Hungarian Empire stood the best chance of joining the foreign missions of the new republic, while people of Polish descent who had once served as Russian or German diplomats could only achieve such a feat occasionally.[38] Actually, among the 'Viennese' there were a few people who were graduates of the famous Consular Academy of the dualist Monarchy.[39]

The personnel policy of the foreign ministry was accompanied by political disputes and rivalries from beginning to end, which by and large reflected the internal power structure of Polish society. The Polish National Committee was essentially backed by the national democratic right, while the centrist and left-wing factions of society tended to favour the 'founder of the state', General Józef Piłsudski, who had been a Polish socialist as a young man. When the general – by then a marshal – became a sort of 'quiet dictator' in 1926,[40] he attempted to balance the Polish foreign service by appointing centrist and right-wing people to be the deputies of left-wing senior officials, and vice versa. In the longer term, part of his aim with those measures was to depoliticize the Polish foreign service and to turn it into a more professional organisation.[41]

However, stabilising personnel at the foreign ministry proved to be a difficult task, between 1919 and 1926, a total of 11 ministers took turns being in charge of Polish foreign affairs. It is true that after the 1926 coup d'état, there were only two more ministers at the head of the ministry – between 1926 and 1932, August Zaleski, followed by Colonel Józef Beck, who remained in charge of Polish foreign affairs until 1939. Although Zaleski had more of a liberal's reputation, it was under him that the peculiar militarization of the staff of the foreign ministry began – Piłsudski, who was actually the man in control of the country, sent more and more ex-legionnaire officers to the ministry.[42]

Naturally, the ministry's number of employees increased continuously: while in 1918, only 252 people worked there, by 1933/1934, the ministry employed about 1200 people – 500 of them held actual jobs at the foreign ministry while another 670 were contract workers. 330 people were working at headquarters while 850 were at the foreign missions. Those were imposing figures for Central Eastern Europe. Incidentally, in the 1930's, 60% of the staffers were still members of the 'old guard', and they were complemented by the 40% who joined the ministry after the 1926 coup.[43] 1938 was the last year of peace, soon to be followed by the German (and the Soviet) attack, which crushed the Polish state. Polish diplomats played their parts in the Polish independence movement both at home and in emigration, but that's another story.

Czechoslovakia

The seeds of the independent Czechoslovakian foreign ministry were also sown during the years of World War I. Czechoslovak émigrés were particularly active in two capitals: London, where it was Tomáš G. Masaryk who had good contacts, and Paris, where Edvard Beneš and Milan Rastislav Štefánik were more at home. But that proved too little, so relatively early on they were forced to extend their activities to Russia, Italy, and finally to the USA as well. Initially, those were single-person missions, but the arrival of an important personage was generally soon followed by the development of mission apparatus.[44]

After the decision made in 1916 that the National Council would be seated in Paris, the Czechoslovakian leaders also decided that a major mission would have to be maintained in London, too. The mission there cooperated closely with the national (diasporic) society called the Czech National Alliance. This reflected the fact that the Czech and Slovakian diasporas played a definitive role in launching the foreign affairs activities of the émigrés. This was all the more the case in the USA.[45]

The mission in Russia represented the most complex issue, and that country was of key importance from the perspective of later developments. The Czechoslovakian movement also fell prey to the dissent and internal conflicts that usually characterise such organisations, and the resulting establishment of parallel and alternative institutions. In 1916, the Czechoslovak National Council operating in Paris decided to set up a branch office in Saint Petersburg. They sent Josef Dürich, previously a member of parliament, to Russia to get the work started. Dürich, however, fell under the influence of the Russophile Czech and Slovakian circles there, and at the end of 1916, began to organise an alternative Czechoslovak National Council in Russia, which was more to the liking of the tsarist government. The total internal schism within the Czechoslovakian émigré community was only prevented by the outbreak of the Russian revolution in March 1917, which swept away tsarism. The first consulates of the country, which didn't even exist officially, were established

[38] Ibid. p. 40.
[39] For more details about that institute, see Halász, Iván: Diplomácia és diplomaták. Aula, Budapest, 2010, pp. 239-243.
[40] For more details about the character of his 'Sanation' regime, see Davies, Norman: op. cit. pp. 748-751.
[41] Szczepanik, Krzysztof: op. cit. p. 40.
[42] Ibid. pp. 41-42.
[43] Ibid. pp. 42-43.
[44] About the beginning of Czechoslovak foreign activities during the First World War see Rychlík, Jan: Češi a Slováci ve 20. století. Česko-slovenské vztahy 1914-1945. AEP, Bratislava, 1997. pp. 43-46.
[45] The Slovak League working amoung the Slovaks living in the USA achieved in 1916 the change of the name of Council from Bohemian to Czechoslovak. Ibid. p. 46.

in civil-war Russia (1917-1920), led by the Russian branch office of the Czechoslovak National Council.[46] It was true that those missions could not yet call themselves consulates, at least not when they began to operate. That was how the Irkutsk, Tomsk and Krasnoyarsk missions were created. For a relatively short time, until the summer of 1919, a similar Czechoslovakian 'consulate' also operated in Yekaterinburg.[47]

There was an interesting interlude during the organisation of the new Czechoslovakian foreign affairs apparatus. In the autumn of 1918, the Czech politicians who had remained at home and who had led the takeover in Prague agreed with the government in exile that the latter would retain primacy as regards the management of foreign relations. Nevertheless, the National Committee[48] that had perpetrated the Czech coup took a few steps in October and November 1918 that did concern foreign affairs. Actually, most of those steps were necessitated by day-to-day practicalities, and the fact that the National Committee was geographically closer to the states that had lost the war, with which diplomatic relations had to be resumed sooner or later.

The National Committee, which had issued a declaration to the effect that it was taking over the historically Czech parts of the country, informed the Swiss consulate in Prague of that fact on 29 October, i.e. one day after the event itself. The board of the Committee began to organise a Foreign Affairs Committee in November, which was the initial predecessor at home of what would later become the foreign ministry. One of the most important people active at that time was Ferdinand Veverka, who was not only a qualified jurist, but had also graduated from the famous Vienna Consular Academy. However, the socialists soon co-opted Veverka to the Temporary National Assembly, so he was unable to continue the work of organising the ministry.[49]

The first Czechoslovakian government in Prague, headed by Karel Kramář, issued a resolution in which it established the Office of Peace Conference Preparations, which provided many services to the Czechoslovakian peace delegation negotiating in Paris.[50] At the same time, they also began to send emissaries to the neighbouring states that, until a few days previously, had been parts of the same state as the Czech territories. Vlastimil Tusar, a former deputy chairman of the earlier Imperial Council with socialist leanings, became the first diplomatic emissary of the young republic to Vienna. His strong political connections in Vienna probably played a role in his appointment.[51]

Actually, the post of Czechoslovakian diplomatic emissary to Budapest was filled in a similar manner. Initially, the new state was represented in the Hungarian capital by the jurist Emil Stodola[52], who was 'only' appointed by the Slovakian National Council at Turčiansky Sv. Martin – he had already lived in Hungary before World War I. He received his appointment on 31 October 1918. Stodola was the one who made the first attempt to establish official relations with the Hungarian National Council. Yet by the middle of November, it was not him, but the somewhat younger, but politically more experienced Milan Hodža who represented Czechoslovakia in Budapest,[53] and he had been appointed by Prime Minister Karel Kramář.[54]

While the centre of power in Prague made efforts to provide official representations in 'nearby' capitals and regional centres in the late autumn of 1918, the 'big guns' of the new state's diplomacy were spending their time in Paris. That was particularly true of the minister of foreign affairs, Edvard Beneš, who was completely occupied by the preparations for the peace conference, as evidenced by the fact that the minister only returned to Prague in the second half of 1919. That was perhaps part of the reason why the organisation of the Czechoslovakian foreign ministry took such a long time.[55] Anyway, Prague was also short on officials with significant foreign service experience. Most of those people were in Paris, and they did not come from the old Austro-Hungarian diplomatic apparatus but from the Czechoslovakian diaspora and the more educated circles of legionnaires (most of whom had been prisoners of war). Nevertheless, some old Austro-Hungarian diplomats did join the organisation of the Czechoslovakian state in 1918.[56] Their roles were largely important in the field of organising staff, they were given less opportunities at foreign missions, because not many of the émigrés trusted those old Austrian officials. In actual fact, with just one or two exceptions, officials with that type of background only achieved lower positions within the diplomatic corps later on, too.[57]

For a long time, the ministry of foreign affairs in the Prague Castle (i.e. Hradjin)[58] consisted of the minister's cabinet plus

46 Dejmek, Jindřich: op. cit. pp. 22-23.
47 Ibid. p. 23, footnote 9.
48 See Rychlík, Jan: cit. op. pp. 55-56.
49 Dejmek, Jindřich: cit. op. p. 25.
50 Ibid. p. 25.
51 Ibid. pp. 25-26.
52 For more about him, see Krajčovičová, Natália: Džentlmen slovenskej politiky. Kalligram, Bratislava, 2007, p. 232.
53 About his negotiations in Budapest, see for instance Hronský, Marián: Rokovania Dr. Milana Hodžu koncom novembra a začiatkom decembra 1918 v Budapešti a postoj pražského centra. In: Milan Hodža štátnik a politik. Ed. Pekník, Miroslav. VEDA, Bratislava, 1994, pp. 85-90, or in Hungarian: Szarka, László: Szlovák nemzeti fejlődés – magyar nemzetiségi politika 1867-1918. Kalligram, Pozsony, 1995, pp. 216-219.
54 Dejmek, Jindřich: op. cit. p. 26 and Szarka, László: op. cit. p. 216.
55 Ibid. p. 27.
56 Two groups should be considered separately here: the aristocrats from Bohemia and Moravia with close ties to the emperor, many of whom had served the Monarchy in higher diplomatic positions, and the officials with Czech bourgeois backgrounds who were more Czech nationalists in sentiment and who very rarely reached the higher ranks. Most of them served as consuls, but only very rarely in major European cities (the only exception was Germany). Most of them were stationed in the Balkans and the Middle East. For details, see Županič, Jan – Horčička, Václav – Králová, Hana: Na rozcestí – rakousko-uherská zahraniční služba v posledních letech existence monarchie. Praha, 2009, p. 106.
57 Dejmek, Jindřich: op. cit. p. 27. Those people could most often make careers in the consular service. Ibid. p. 31.
58 The foreign ministry only moved to the Czernin Palace, which became famous later, in 1934-35.

six sections (divisions): the presidency, which operated as the organisational centre of the ministry (it handled, among other things, finances, human resources, the archives, etc.), the political section, which was considered the most important unit, and the legal section, the national economy section, an administrative section and finally the information and intelligence section. The last of those provided information to Czechoslovakian leaders about what was happening abroad, while also attempting to deliver targeted information abroad about life in Czechoslovakia. In effect, the section also operated as a press and propaganda unit. The Czechoslovakia of the time, similarly to the country's émigrés during the war, was very good at building a positive image for the country. As a result, the sixth section was especially important within the Czechoslovakian foreign service apparatus. Most of its leaders had been experienced journalists in their previous lives and were closely allied with the foreign minister, Edvard Beneš.[59]

During the 1920's, the network of Czechoslovakian foreign missions also acquired its final shape. Although, unlike Poland, Czechoslovakia failed to achieve ambassador status for the leaders of its most important foreign missions, that did not have a significant effect on the efficiency of their diplomacy. Štefan Osuský, the head of the key Paris mission also worked as an emissary, from his appointment in 1921 until 1938! That was an exceptionally long term. In addition, that outstanding diplomat also represented his country in Geneva, at the League of Nations. He also held some important positions within that organisation, for instance he played a large part in the construction of the Palace of Nations in Geneva.[60]

Czechoslovakia had embassies in most European and independent overseas states. In some smaller countries that were less significant from the Czechoslovakian perspective, it only had representations at the *chargé d'affaires en pied* level (they included Portugal, Albania and the Baltic states). In other lands, it had chief consulates (for instance in the British dominions) or consulates. It is true that the consulates in Argentina and Mexico soon became full embassies.[61] The only European country where there was never a real Czechoslovakian foreign mission of any sort was Norway, which was particularly interesting in view of the fact that prior to 1914, Norwegian intellectuals had raised their voices in the interest of forcibly Hungarianized Slovakians. Czechoslovakia maintained a presence in Norway through its mission in Stockholm.[62]

From Prague's perspective, the Berlin ambassador was another key figure, and the post was always filled by experienced diplomats. Czechoslovakia actually had numerous chief consulates (Dresden, Frankfurt am Main, Hamburg, Köln and Munich) and consulates (Bremen, Nürnberg, Breslau, Stuttgart, Dortmund, etc.) in Germany.[63]

In Moscow, for a long time Czechoslovakia only had the temporary semi-diplomatic mission established in 1922, which was only transformed into a real embassy after the Soviet Union was officially recognised (1934). The Soviet Union had a similar mission in Prague. Czechoslovakia opened its full embassy in the United States, in Washington, quite early, and in addition – mainly in the interest of the large Czech and Slovakian diasporas – it also had seven consulates. It is an interesting fact that for a long time, the Pittsburgh consuls actually came from the large Slovakian community of the city.[64] In Asia, Czechoslovakia first established missions in Tokyo, Beijing, Shanghai, Harbin, Istanbul, then Ankara, Tehran, Beirut, Jerusalem and the British-Indian Mumbai. In Africa, there was only a single Czechoslovakian embassy in Cairo, along with a full consulate in South Africa. Other countries only had honorary consulates. There was a single chief consulate in Australia, in Sydney.[65]

The senior level of foreign affairs officials was highly stable during the interwar period. Edvard Beneš remained the minister of foreign affairs from the beginning until his election to the post of president, when he was replaced by the historian Kamil Krofta in 1936. Krofta, who had previously represented his country in Vienna and Berlin, and had also headed the crucial political section, was an old hand at the ministry by then, and in effect he had been the ministry's second in command for over a decade. Krofta resigned in 1938 after the adoption of the Munich Agreement, and retired. At that time, the previous ambassador to Rome, František Chvalkovský became the foreign minister for a short while: contrary to his ambitious predecessors, he believed that under the changed international circumstances, the mutilated Czechoslovakia had to conduct "the politically resigned foreign policy of a small, neutral state". His reserve, however, proved to be in vain, as on 15 March 1939, Nazi Germany occupied Bohemia and Moravia.[66]

Staff stability was not simply a characteristic of the ministerial level during the interwar years, it extended to the entire apparatus. The Czechoslovakian administration of foreign affairs during that period was basically characterised by cooperation between two groups. On the one side, there were the so-called legionnaires, i.e. persons who had joined the armed movement against the Monarchy during World War I. The group also included those from the earlier Czech and Slovakian diaspora. The second group consisted of old Austro-Hungarian consulate officials, who continued to be employed as professionals after 1918. That group was extended by other home specialists in 1919. Some others got positions at the foreign ministry as a result of deals between the political parties that were practically omnipotent during the interwar years. Although tensions did exist between the two groups, they always remained manageable.

[59] Ibid. pp. 32-36.
[60] Králik, Juraj: Karierny diplomat. Iura Edition, Bratislava, 2006, pp. 190-192.
[61] Dejmek, Jindřich: op. cit. pp. 37-38.
[62] Ibid. 43. o.
[63] Ibid. 42. o.
[64] Ibid. p. 44.
[65] Ibid. p. 46.
[66] Ibid. p. 71.

In terms of ethnicity, most of the foreign service officials were Czechs: in 1937, among all the 37 chiefs of mission, there were only 4 Slovakians, 1 German and 1 Hungarian, although the Slovakian emissaries served in prestigious locations (Paris, Geneva, Washington and Warsaw), but the underrepresentation of Slovakians was in fact politically problematic. The first emissary of German descent (Robert Feitscher) headed the Shanghai mission opened in 1930.[67] The Hungarian, Benjamin Szalatnay-Stachó, became the chief of the Cairo mission in 1938. The majority of the diplomats heading foreign missions were jurists (18 people), a few of them were graduates in the humanities (6 people) while a few more had come from the Vienna Consular Academy (4 people). The others had various other qualifications, mostly technological, military of economic ones. As regards the proportion of 'legionnaires', 14 of the 37 chiefs of mission working in 1937 came from those circles.[68]

The Czechoslovakian foreign ministry had no separate state secretary's post until 1938, when, after the adoption of the Munich Agreement (29 September 1938), it was only established due to pressure from the Slovakian people's autonomist movement. And yet, during those months, the post was not occupied by an experienced foreign service official of Slovakian extraction (because most of them were of a Czechoslovakian democratic orientation), but by a politician of the previously opposition Slovakian People's Party (Jozef Miloslav Zvrškovec), who had no experience of foreign affairs.

When, in March 1939, the German army put an end to Czechoslovakian independence and territorial integrity, the dissolution of the foreign ministry began. The process lasted almost two years, which could be seen as a tour-de-force in procrastination by the officials involved in the self-dissolution. In the meantime, organisation of an independent Slovakian foreign ministry was begun in Bratislava, whose new leader, Ferdinand Ďurčanský, was open to accepting officials of Slovakian descent who had worked at Prague, particularly because the Slovakian People's Party, now in power, hardly had any foreign service professionals. Actually, several of the officials thus transferred later maintained intense relationships with the domestic resistance and Czechoslovakian émigrés abroad.[69] But – as with the Polish foreign ministry in exile – that's a part of a different story.

[67] Ibid. pp. 55-56.
[68] Ibid. p. 56.
[69] Ibid. pp. 77-78.

An Attempt to Establish the European Army: The Pleven Plan

Dávid Klemm *

Abstract

In the 1950's the European integration took a step towards a European army, such a remarkable step, that since then no one came so close as they did. With the Treaty Constituting the European Defence Community in 1952 a supranational common European army almost came into existence. Ahead of its time, the Pleven Plan offered the integration on the military side too soon after World War II. To create a strong foreign policy for the united Europe, it would have needed an army too.

The main cause that led to the EDC was the unsettled status of West Germany, the need to resettle it to the European setting, also on the military side, leading to its rearmament. The fear of the German aggression led France to seek the lesser evil and not rearm West Germany, but create a European military organisation and gain common control over any troops of West Germany. Fascinating thing is that France, the creator of the idea of the EDC was also who brought its downfall.

Key words: *European Defence Community; Pleven Plan; European Army.*

1. Introduction

Let us imagine a European Union with a European Army. Would it be a utopia, a dream? Or let us just think about the current European Union and a vote happening tomorrow about creating the Army of the European Union. How would such a thing even look like, moreover its legal regulations, structure and mechanisms, and financial status and funding. In the 1950 s the common European Army almost came into existence in the form of the European Defence Community that was created by the Pleven Plan. Since then, the European integration was never so close to take such a step towards the United States of Europe. We have to take a look at the road of the European integration, to get a general view what was the way that led to a European army, nevertheless how often and why the idea of a European army came into the mind of scholars and politicians.

2. The first steps of the European integration

When we speak about the European integration, the first thing that comes into the minds of people is the European Coal and Steel Community and the Paris Treaty in 1951. First things first, let us take a look at the Pan-Europe Movement, more precisely Count Richard Nikolaus von Coudenhove-Kalergi. Kalergi was the founder of the Pan-Europe idea. His father originates from Brabant, but settled down in Bohemia (as today, the Czech Republic), his mother on the other hand was Japanese. The young Kalergi grew up in Ronsperg, Bohemia, studied and met his wife (Ida Roland) in Vienna, Austria.[1] From the beginning, Kalergi urged both economic and both political overtures for the European countries. He divided the world into five enormous areas: Pan-America, Soviet-Russia, the British Imperium, the block of Japan and China, and Pan-Europe. His call for founding the Pan-Europe Movement was issued in 1922, his manifesto titled Paneuropa was published 1923.[2] The European question in the aspect of Kalergi was the following: Is it possible on a small peninsula, in Europe for 25 countries to live in international anarchy without leading to a terrific political, economic and cultural catastrophe?[3] Two major threats were outline: the first one being the possible wars inside Europe, the second one is a potential soviet expansion. Three solutions came into the mind of Kalergi: the creation of a compulsory Pan-European arbitration tribunal, a European defence union, and a Pan-European customs union. Kalergi was often accused of being a utopist, but he was only seeking to avoid war by all means and by acts. His Pan-Europe would exist without the British and the Soviet, but stressed that it is not against them.[4]

* Dr. Dávid Klemm, Deák Ferenc Doctoral School of Law, University of Miskolc, Hungary.

1 Németh István - Kocsis András: *Fejezetek az Európa-gondolat történetéből – Coudenhove-Kalergi Páneurópa-mozgalma, I. rész*, In: Társadalmi Szemle 1997. 10. szám, 51.

2 Németh István - Kocsis András: *Fejezetek az Európa-gondolat történetéből – Coudenhove-Kalergi Páneurópa-mozgalma, I. rész*, In: Társadalmi Szemle 1997. 10. szám, 52.

3 Duroselle, Jean-Baptiste: *Europe: A History of Its Peoples*, New York, Viking, 1990. 358.

4 Németh István - Kocsis András: *Fejezetek az Európa-gondolat történetéből – Coudenhove-Kalergi Páneurópa-mozgalma, I. rész*, In: Társadalmi Szemle 1997. 10. szám, 53.

Speaking of criticism, Kalergi only focused on the Soviet threat, passing over the other two clear threats: an Asian and an American one.[5] With the outbreak of World War II, Kalergi was not hopeless, but clearly stripped of European possibilities, being forced to fled to the United States. The Pan-Europe of Kalergi ensured the European integration with significant foundations, which began to develop after the World War II.

With the end of World War II in 1945 the whole world, especially Europe was torn into pieces. After the war, the threat of the Germans was still in the mind of the people, although Germany was literally in pieces and Allied-occupied. This fear led to our first treaty, the Treaty of Dunkirk, signed in 1947. The parties were France and the United Kingdom, forming an alliance and defending each other, if a German attack may occur. Some may say, it was more than that, involving the possibility of a Soviet threat too. This treaty was expanded a year later, as the Treaty of Brussels was signed in 1948, by the United Kingdom, France, Belgium, the Netherlands and Luxembourg. Upon signing the treaty, Georges Bidault, a French politician brought up the idea of a European union, and a European parliament. This idea was adopted into the French foreign policy in the same year.[6]

After a transition period, the Allied-occupied Germany was divided into two by establishing both the Federal Republic of Germany (West Germany) and the German Democratic Republic (East Germany) in 1949. The North Atlantic Treaty Organization (NATO) was founded in 1949, as a military and defence variation of the Marshall Plan and the OEEC[7] to counter the presumed Soviet power and the economic instability of Europe.[8] The NATO treaty was signed by 12 founder states: Belgium, Denmark, France, the Netherlands, Iceland, Canada, Luxembourg, the United Kingdom, Norway, Italy, Portugal and the USA. Harry S. Truman marked in his North Atlantic Pact Speech "This treaty is a simple document." Thus its simplicity it was a historical milestone defining the life, politics and fate of Europe.[9] Nevertheless as a functioning barrier it gave some breathing space for seeking new ways for the further European integration.[10]

So our three main so called communities that are defining the ways of the European integration are the Council of Europe (founded in 1949, the first Western European forum for elaborating agreements regarding cultural, social, economic and legal matters), the OEEC (The European Recovery Program set forth by the Marshall Plan in 1948 was supporting the western side of the continent only, thus aiding 16 countries; the Organisation for European Economic Cooperation (OEEC) alongside with the Econoimic Cooperation Administration were representing the 16 Western European countries. The American aid was distributed on the basis of the commercial and current account deficit of the participants) and the NATO.

Of course these three were later complemented by the European Coal and Steel Community and the Western European Union, so totally these main five factors will lead together to further integration after the fall of the European Defence Community and the European Political Community.

3. The possible rearmament of West Germany

Just a few months after the Schuman Declaration[11], which proposed the creation of the European Coal and Steel Community[12], and set the course of the European integration on a more intense level, the Korean War broke out in June 1950. The events happening in Asia had a global influence, especially on the United States and on Western Europe too. The effects had a dual nature, first creating a possible comparison between Korea (North-South) and Germany (West-East), second putting an economic and military pressure on the United States, which was present in the war, in the United Nations Command, on the side of supporting South Korea. (There was not only a comparison between Korea and Germany, there was a fear that the things happening in Korea, might broke out in Germany as well.) Let us concentrate on the second effect that forced the USA to rethink its defensive role in the NATO regarding Europe. The USA asked its allies, to allocate their expenses concentrating on the military and defence. The answer was a clear no, which led to a remark from the USA, if the European NATO members cannot stand against the threat of the Soviet Union alone, the only possible solution will be the Wiederbewaffnung, the rearmament of West Germany. On 12 September 1950 the USA made its proposal in the NATO, to rearm West Germany, which was welcomed by Konrad Adenauer, the chancellor of West Germany. He said, with this act, a double benefit could be achieved, the ability of self-defence and also the trust of the people.[13]

In August 1950 the Council of Europe served as a forum to discuss the matters. The French deputy was putting the emphasis on the Soviet threat, Churchill alongside with the USA and Canada stood up for the immediate setting of a mutual commanded European army. Adanauer was guaranteeing in a memorandum that West Germany will participate in the European army, whenever an attack against Western Europe should occur. The American standpoint was that the rearmament should be coordinated in a much more efficient way, than it was in the interwar period. The British and the France were thinking likeminded, they requested guarantees that a newly reborn Wehrmacht cannot turn against Western Europe.[14] The fear was real, because the German rearmament, the Aufrüstung in the interwar period caused a lot of horrible consequences.

---

[5] JAROSLAV, F. J.: *A negyedik Páneurópa Kongresszus*, In.: Korunk, 1935. 7-8. sz., 588.
[6] NÉMETH István (szerk): *20. Századi egyetemes történet, 1. kötet, Európa*, Budapest, Osiris Kiadó, 2005. 244.
[7] Organisation for European Economic Cooperation.
[8] NÉMETH István (szerk): *20. Századi egyetemes történet, 1. kötet, Európa*, Budapest, Osiris Kiadó, 2005. 245.
[9] RANDÉ Jenő: *Fultontól Brüsszelig*, Budapest, Közgazdasági és Jogi Könyvkiadó, 1967. 60.
[10] URWIN, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 25.
[11] 9 May 1950.
[12] later, in 1952.
[13] URWIN, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 60.
[14] NÉMETH István (szerk): *20. Századi egyetemes történet, 1. kötet, Európa*, Budapest, Osiris Kiadó, 2005. 248.

Compared to other countries like the USA, France was clearly not happy with the idea of giving West Germany an army again. They were pleased to see their archenemy being torn to half, and the idea of getting their hands on Saarland was never off the table. The old seemingly dead conflicts between France and Germany were exhumed on the France side by the idea of the rearmament.[15] Basically not only France, but all adjacent countries sympathised with the rearmament, but it was clear, that Europe needs the power and support of the USA, and there is no other American opinion regarding the current situation. Europe begun to search for another option, which will satisfy the USA and at the same time will be accepted by France too, eliminating the fear of a newly rearmed Germany.[16]

4. The idea of a European army and the Pleven Plan

Originally Konrad Adenauer brought up the idea of a European army in 1949. After the outbreak of the Korean War, France presented the common army idea in the Council of Europe. Great-Britain declined the idea, and it was later vetoed too. To answer the rearmament, France once again took sides with the common European army, to deny an independent West German army. This plan was proposed by René Pleven, the prime minister of France, on 24 October 1950. The Pleven Plan was inspired by the ideas of Jean Monnet, and aimed to create the European Defence Community (EDC), as well a common European Army, based on a supranational level, led by a European minister of defence.[17] There were two deciding factors, the West Germans, and Great Britain. The Pleven Plan gained popularity in West Germany, but they had their own terms of participation. The Allies have to end the occupation of West Germany, restoring and guarantee the sovereignty of the state, especially the foreign affairs.[18] The Pleven Plan, compared to the Schuman Declaration needed seven states instead of six.[19] The own army of the EDC would have been the European Defence Force.[20] The planned size of the European army was 1.250 million and it was divided 43 military units (France 14, West Germany 12, Italy 12, the Benelux 5) with a planned setting of 1953.[21] The German troops were planned not to be operated by Germans, but the whole army is directly controlled by the NATO.[22]

After Windston Churchill became the prime minister of the United Kingdom in October 1951, Pleven had high hopes for their support. Unfortunately for Pleven, the new Secretary of State for Foreign Affairs, Anthony Eden made a statement that the United Kingdom has no intentions to join the EDC. Instead of that, they wanted to expand the Brussels Treaty to include Italy and West Germany.[23] Eden wrote to Churchill about the Pleven Plan, highlighting the unsettled sovereignty questions, the use of the United Kingdom as a scapegoat to hide the national difficulties regarding the EDC, and the possible negative reaction of the Russians. Eden concluded to Churchill that they have to support the Pleven Plan, and if it fails a modest alternative should be created setting aside the political central body.[24] After these conflicts the Pleven Plan was accepted only by the six founder states of the European Coal and Steel Community (ECSC). West Germany, France, Italy, Belgium, the Netherlands and Luxemburg signed the treaty[25] and thus created the European Defence Community on 27 May 1952.

We have to outline, that the treaty never went into effect, but before discussing the reasons behind the fall of the common European army, let us take a look, what kind of regulations and institutes the EDC possessed. It was clearly a military organisation, which had its own budget and institutions. As the European integration grew further, besides the European Coal and Steel Community, the European army could have been a milestone for the integration. The Treaty Constituting the European Defence Community had an interesting Article, the Article 38[26], which was pressured by the Italians. This article obliged the Assembly, to study, how would it be possibly to create federal institutions, especially a directly elected legislative one. There were seeming-

[15] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 60.
[16] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 61.
[17] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 61.
[18] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 62.
[19] Randé Jenő: *Fultontól Brüsszelig*, Budapest, Közgazdasági és Jogi Könyvkiadó, 1967. 110.
[20] Judt, Tony: *Postwar, A History of Europe since 1945*, New York, Penguin Books, 2005. 214.
[21] Randé Jenő: *Fultontól Brüsszelig*, Budapest, Közgazdasági és Jogi Könyvkiadó, 1967. 111.
[22] Németh István (szerk): *20. Századi egyetemes történet, 1. kötet, Európa*, Budapest, Osiris Kiadó, 2005. 249.
[23] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 62.
[24] Randé Jenő: *Fultontól Brüsszelig*, Budapest, Közgazdasági és Jogi Könyvkiadó, 1967. 112.
[25] The Treaty Constituting the European Defence Community itself deals in its main text with the following: Fundamental Principles, The Institutions of the Community, Military Provisions, Financial Provisions, Economic Provisions, General Provisions. After its main regulations it has its own Military Protocol, about the Basic Units, General Organization and Formation of the European Defence Forces, Personnel, Principles Concerning Standardization of Doctrines and Methods; Schools, and also the Use of Languages. Also having a standalone Financial Protocol about the Preparation of the Common Budget consisting 9 titles, a Jurisdictional Protocol with 4 titles, a Tax and Commercial Protocol with 4 titles also, and several lesser protocols (Protocol Relative to the Grand Duchy of Luxembourg, Protocol Concerning Relations Between the European Defence Community and the North Atlantic Treaty Organization, […]).
[26] ARTICLE 38 1. […] the Assembly shall study: (a) the creation of an Assembly of the European Defense Community elected on a democratic basis; (b) the powers which might be granted to such an Assembly; and (c) the modifications which should be made in the provisions of the present Treaty relating to the other institutions of the Community, particularly with a view to safeguarding an appropriate representation of the States. In its work, the Assembly will particularly bear in mind the following principles: The definitive organization which will take the place of the present transitional organization should be conceived so as to be capable of constituting one of the elements of an ultimate Federal or confederal structure, based upon the principle of the separation of powers and including, particularly, a bicameral representative system. The Assembly shall also study problems to which the co-existence of different organizations for European cooperation, now in being or to be created in the future, give rise, in order to ensure that these organizations are coordinated within the framework of the federal or confederal structure.

ly similarities between the institutional framework of the ECSC and the EDC, but the objectives differed.[27] The Board of Commissioners was the supranational executive power, which had less authority than its counterpart, the High Authority, but was designed in a way, that the United Kingdom could participate in it anytime. The whole military community was born in the spirit of the unequality of the member states. It was created to prevent the rearmament of West Germany, so it became the less powerful and the most controlled member state, in the military viewpoint. France was able to persuade the USA and the UK to lend their military powers, if any of the EDC member states were attacked. This declaration is applicable when EDC member states attack each other. The French had a nearly paranoid fear from West Germany, and this action made it clear, that the EDC was not only against the Soviet threat, as they intended the whole idea in the first place.[28]

5. The question of a common foreign policy

It is important to outline, that an army cannot function without a foreign policy, and vice versa, there is no real foreign policy without an army. In this situation Konrad Adenauer was the one who stated the former fact in 1953.[29] The latter fact is applicable since the fail of the EDC, and the fail of the other efforts, that should have created a European Army. With the ECSC and the EDC gaining popularity and function, they had no such institutions and authorities that politically could control an army. With the need of a foreign policy, and institutions, negotiations began, which should result in the creation of the European Political Community (EPC), as the third community in the era of the European integration. But this third community was never meant to be even with its two peers, it was meant to be federal, and to subsume the other two. The draft of the European Political Community Treaty was conferred in Strasbourg in March 1953. It had four institutions in mind: the European Executive Council, the Council of National Ministers, the Court of Justice, and the Parliament. After the idea of the political and military integration, the next step that could have come, was the economic integration, the creation of a single market. The EPC in its final draft, was not a federal, rather than a confederate creation.[30] The main goal of the EPC was to create a link between the ECSC and the EDC and also accomplishing the political integration. The competence of the EPC covered the foreign policy, the defence, the economic and social integration, and the protection human rights. The main institution the Parliament was the bearer of some new improvements it was designed to be bicameral. Splitting the legislators into two separates, the citizens were to be represented in the folk chamber, on the other hand the member states would achieve their representation through the senate. The European Executive Council was meant to be the executive power, which is liable for the Parliament, and its president would be elected by the senate.[31]

6. The fall of the European Defence Community

The initial enthusiasm began to run out on both sides, on the EDC side as well on the EPC side. When the EPC Treaty draft was made public, none of the EDC members ratified the EDC Treaty. In 1954 West Germany, Belgium, the Netherlands and Luxembourg were gone through with the ratification. Italy on the other hand made it clear, they will not do such a thing, until France has not made its move in this question.[32] Against the British and American pressure, the opinions opposing the West German rearmament in France were not decreasing. De Gaulle held a press release in November 1953 in which he made his opinions public about the EDC, the American politics and the United Kingdom. Regarding the EDC he said: "After that we shall make a stateless army of Frenchman and Germans, and since there must be a government above this army, we shall make a stateless government, a technocracy. As this may not please everyone, we'll paint a new shop sign and call it "community"; it won't matter, anyway, because the "European Army" will be placed at the entire disposal of the American Commander-in-Chief." The American politics are forcing France both open and secretly to accept the EDC, which can bring only its devastation. On the other hand the Americans are heartening Germany to become the most powerful country of Europe once again, which will lead sooner or later to a new war. Quite other reasons are leading the United Kingdom wishing for the ratification of France in the question of the EDC Treaty, although it would not do such a thing for the world. Others commanding you soldiers while you lose your sovereignty and your dominions – it should be good for France, but the United Kingdom would never be a part of something like that? Of course they would be British soldiers remaining in West Germany, and also British spectators in the EDC, and not a single one of them would be funded by them.[33]

But France had some serious problems, which later determined the fate of the EDC (and of course the EPC as well). Compared to West Germany, which had an accelerating economic growth since 1951, France had a deficit in its budget. (It must be noted, that the Soviets also had their troubles, which were not published abroad.[34]) The main cause was the Indochina War, which began in 1946. It was clear for the French in 1953 that they will lose the war, resulting into surrendering in 1954. This loss led to the general French attitude, that they will not join such a community that requires sacrificing the independence of the national army.[35] Dark clouds gathered above France, with the impatient USA and the clear communication

[27] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 62.
[28] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 63.
[29] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 63.
[30] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 64.
[31] Németh István (szerk): *20. Századi egyetemes történet, 1. kötet, Európa*, Budapest, Osiris Kiadó, 2005. 250.
[32] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 65.
[33] Randé Jenő: *Fultontól Brüsszelig*, Budapest, Közgazdasági és Jogi Könyvkiadó, 1967. 132.
[34] *EDC's Fall Leaves Big Gap in West's Defense*, Saturday Evening Post, 10/2/1954, Vol. 227 Issue 14, 10.
[35] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 66.

of the UK, that even the EDC fails, West Germany cannot be left without an army. Pierre Mendčs-France, who was the prime minister in France for 8 months in 1954 and 1955, brought the EDC Treaty problem to the National Assembly in 1954. The Assembly voted, but not about rejecting the treaty, but simply about not discussing it.[36] The French National Assembly did not ratify the EDC Treaty and this led to the end of both the EDC and the EPC too. Refusing to vote, was basically a parliamentary tactic the Assembly used to evade conflict.[37] The only lone survivor of the three was the ECSC.

7. The legacy of the European Defence Community

It is not a question, that the EDC left its marks in the European integration. On the military side, two future milestones should be marked. The Fouchet Plan in 1961, and the European Political Cooperation in 1970. These two are less known than the Western European Union, which was created by amending the original Brussels Treaty of 1948 in 1954. The Paris Conference that was held in 20-23 October 1954 gave birth to the WEU. After the fail of the EDC the question regarding the area of defence was still open. The USA was relentless that West Germany should participate on the military side. It was the United Kingdom who offered the possibility of the return to the Brussels Treaty. Anthony Eden in 1955 now as the prime minister also mentioned that under the framework of the NATO, the West German rearmament would be possible in a controlled way especially to calm down the French. The Brussels Treaty was amended, now to include Italy and West Germany as well. Further moves were removing the phrases against the German aggression of the treaty. The following aim, "to take such steps as may be necessary in the event of renewal by Germany of a policy of aggression" was replaced by "to promote the unity and to encourage the progressive integration of Europe". So by these means the new community, the Western European Union (WEU) was born.[38]

The main aspect and goal of the WEU was to achieve the unity of Europe and to promote its integration step-by-step. The member states settled the maximum of their armies and created the system of the arm-monitoring.[39] It had two main institutes: the Council of the Western European Union and the Assembly of the Western European Union. The WEU lacked any kind of competence dealing with military matters. West Germany was called upon to join the NATO, and also the matter of Saarland was being dealt with also. Germany and France signed the agreement which gave Saarland a European status (in the framework of the WEU) which had to be approved by the citizens of Saarland. The vote was being held in October 1955 resulting into refusing the European status and deciding to join West Germany from 1957.[40]

In the following years the European integration proceeded only on political and economic fields. The Council of Europe, the OEEC, the NATO and the ECSC were complemented by the aforementioned Western European Union and some smaller, mainly regional organizations, for example the Nordic Council, founded in 1952.[41]

Again, speaking of the most well-known milestones of the European integration, the six founder states of the ECSC signed the Rome Treaties in 1957 one creating the European Economic Community, the other the European Atomic Energy Community. It took only three years to restore the way of the European integration, after the fall of the EDC and the EPC.[42] The European integration is flourishing since then, but without the aspect of the European army, nor the utter foreign policy.

8. Conclusion

The foreign policy and the army cannot be separated. This question was recognized during the EDC era, and was seen in reverse order, as it could be seen today. The EDC and the idea of a European army was the first one in order, resulting to the need of the common foreign policy of the European Integration. Today, the European Union has its own Common Foreign and Security Policy. My question is, does the fact of inseparable foreign policy and army apply to the EU? Yes it does, the need for the Army of the European Union, is as significant, as the creation of the EPC was at the beginning of the European integration. The EDC in my opinion was ahead of its time. The horrible memories of World War II were too fresh, to take such a bold step in the military fields. The EDC almost, really almost created something in the 1950's that since then was never achieved. Maybe it would have needed some years, maybe a decade to gain the ability to shine on the path of European integration. Having an own army as a union makes it less, or almost nondependent on others on the field of foreign policy. It is not because it should have start a war, it is for showing the world, that it has the power to strike back, if it was attacked by others.

Many say that the European Union is in a crisis. It is true, but was there a period in the European integration, when no problem occurred? I do not think so, there were only less stressful times. All problems can be dealt with. Maybe after this crisis period is over, the idea of the common European army will be on the table again, to strengthen the foreign policy of the EU. When such a thing would happen, could it be possible to take the Pleven Plan out of the drawer, revise it to meet the standards of today? If there is a need to have a strong EU foreign policy, so strong that it requires the common army, then yes, it can be a good basis for a debate, and we can learn from its failures too, not to make the same mistakes.

---

[36] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 67.
[37] Buckley, Priscilla L.: *A New Start*, National Review, november 5., 1990. 62.
[38] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 69.
[39] Németh István (szerk): *20. Századi egyetemes történet, 1. kötet, Európa*, Budapest, Osiris Kiadó, 2005. 250.
[40] Németh István (szerk): *20. Századi egyetemes történet, 1. kötet, Európa*, Budapest, Osiris Kiadó, 2005. 251.
[41] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 71.
[42] Urwin, Derek W.: *The Community of Europe: A History of European Integration since 1945*, London and New York, Longman, 1991. 75.

The Structure and Powers of the Councils of State in the Kingdom of Poland between 1815 and 1867

Przemysław Dąbrowski *

Abstract

Before 1807 in the Polish constitutional system there was no such institution as the Council of State. This year marks the establishment of both the first Council of State and the Duchy of Warsaw. The treaties stipulated that the Council of State (Conseil d'Etat) of the Duchy of Warsaw was a permanent institution performing an ancillary function to a king. During the existence of the Kingdom of Poland were three Council of State. Their competencies are changed.

Key words: *Councils of State; the Kingdom of Poland; the Administrative Council; Duchy of Warsaw.*

Before 1807 in the Polish constitutional system [1] there was no such institution as the Council of State. This year marks the establishment of both the first Council of State and the Duchy of Warsaw, following the Franco-Russian and Franco-Prussian provisions of the Treaties of Tilsit [2]. The treaties stipulated that the Council of State (*Conseil d'Etat*) of the Duchy of Warsaw was a permanent institution performing an ancillary function to a king. Initially it consisted of Ministers (of Police, Treasury, Justice, War, Internal Affairs and Religious Matters as well as the Secretary of State) whose work was coordinated by the king or else the viceroy or chairman appointed by the king [3]. The structure remained unaltered until 1808 when the king's decree introduced changes in the council's composition. Since then there were six, and later twelve specially appointed privy councilors. There were also four, and later six functionaries called referendaries who were not members of the council [4]. The members of the Council of State were also on the board of the Chamber of Deputies [5].

The Constitutional Law of July 22, 1807 as well as the King's Decree on the Council of State of December 24, 1807 determined the powers of the institution which could be divided into three major categories. As said Artur Korobowicz and Wojciech Witkowski, the first set were the legislative powers, which enabled the Council to draft decrees issued by the king and the Chamber of Deputies acts (after receiving the Royal Assent, the eligible minister forwarded the draft to the Chamber of Deputies. There, one of three committees, which dealt either with civil law, fiscal issues or criminal law, filed amendments which were further discussed by the Council of State. Members of the committee could hear the debates held by the Council. After a discussion in the Council of State a final draft was made and forwarded to the session of the Chamber of Deputies. It had to be heard within a day and it could only be discussed by the members of the Council of State and the Chamber of Deputies Committee. The Chamber was not eligible to file any amendments, it could only approve or reject the draft) [6].

The second group of competence comprised control rights, which simply meant controlling the officials and prosecuting them in case they committed a crime. Later, the Council could also control the ministers who were obliged to, quarterly and annually, submit substantive and financial reports concerning the "state's condition" [7].

As indicated Korobowicz and Witkowski, the third group which included judicial competence was further split into three areas. The scope of the first one, regulated by the Royal Decree on the Organization of Cassation Courts of April 1810, was last resort appeal. It enabled hearing appeals from the verdicts pronounced by the civil and criminal courts when the cassation prerequisites were fulfilled, i.e. when there was a procedural breach while a verdict was rendered or a wrongful interpreta-

* Dr hab. Przemysław Dąbrowski, Department of Theory and Philosophy of Law, Faculty of Law and Administration, University of Warmia and Mazury in Olsztyn, Poland.

At this point I would like to thank Anna Olszańska for help with translating the text.

1 A. Korobowicz, W. Witkowski, *Ustrój i prawo na ziemiach polskich. Od rozbiorów do odzyskania niepodległości*, Lublin 1996, p. 55.

2 Ibidem, p. 55, 56.

3 *Ustawa konstytucyjna Księstwa Warszawskiego z dnia 22 lipca 1807r.*, [in:] *Polskie konstytucje 1768–1990. Od szlacheckiej do Rzeczypospolitej Polskiej*, Warszawa 1991, p. 55.

4 A. Korobowicz, W. Witkowski, *op. cit.*, p. 56.

5 Ibidem, pp. 57.

6 Ibidem, pp. 57–58.

7 Ibidem, p. 56.

tion of a substantive law act was applied. An appeal could be made within three months from being notified about the verdict. The Council of State could not settle the substance of the case or change the verdict. It sat in five or nine-person panels. The Council could only point the breach in regulations, cancel the rulings and forward the case to be processed again in the court of a different instance or in another division of the same court. On the grounds of the same cassation prerequisites a judgment could have been challenged three times because the Council of State's interpretation was not binding for the court hearing the case again. Having challenged the judgment for the third time, the Council of State forwarded the case to the king whose exegesis was binding [8].

The second group of judicial competence comprised dealing with competence issues, i.e. settling the disputes between administrative institutions and courts. Such disputes could be negative if both the administrative institution and the court did not deem themselves the appropriate institution to settle the case, or they were positive if simultaneously they recognized themselves as appropriate institutions for settling the case. Administrative competence involved settling fiscal disputes between natural persons and administrative institutions which stemmed from *pro bono* contracts (for instance building a road). The Council of State was a court of the second instance hearing appeals from prefectural councils. When it acted as the first instance court, it adjudicated on the cases stemming from international contracts made by the ministers in the interest of the Duchy of Warsaw [9].

After the Kingdom of Poland was established in 1815, the Council of State remained one of the administrative institutions, however, its structure and competence were changed. Throughout the short history of the Kingdom of Poland (1815-1867) there were three Councils of State. Under the provisions of the Constitutional Law of the Kingdom of Poland of November 27, 1815, the First Council of State, which functioned since 1832, consisted of the General Assembly of the Council of State (colloquially known as the Council of State) and the Administrative Council [10].

As mentioned Korobowicz and Witkowski, the General Assembly comprised five ministers (the Minister of War, Justice, Religious Matters and Public Enlightenment, Internal Affairs, Revenue and Treasury) [11], nine ordinary privy councilors, the councilor to the Secretary of State (who organized his office), state's referendaries and extraordinary privy councilors (appointed by the king or given *ex officio*: the Chair of the Chamber of Auditors, General Prosecutor or the members of the Supreme Tribunal. They could attend the sessions of the General Assembly and had a binding vote if they were invited to attend by the viceroy). The viceroy was the chair of the General Assembly and only the member of Administrative Council holding the highest post could take over during his absence [12].

The first Council of State had almost identical competence as the Council of State of the Duchy of Warsaw, however its scope differed. The Council of State referendaries drafted the laws and royal decrees, but under condition that the initial draft was prepared beforehand by a given governmental committee and then forwarded to the General Assembly by the viceroy or the king (at whose instruction drafts were further sent to the parliamentary session to be discussed). The Council of State still had control powers. It decided about prosecuting the officials appointed by the king in case they committed a work-related crime (e.g. bribery or forgery). It was also an institution to which governmental committees had to submit their annual reports. The council also prepared reports about the condition of the Kingdom for the king. As for the judicial competence, the first Council of State could not hear cassation appeals anymore [13]. Within the set of rights granted to the General Assembly only competent and administrative jurisdiction were left (excluding property rights disputes and the possibility to file an appeal from a fiscal decision. The administrative jurisdiction until 1822 was implemented by the Administrative Delegation established in 1816) [14].

The other organ of the Council of State was the Administrative Council which also consisted of five ministers and the people appointed by the king. It operated under direction of the viceroy for whom it performed the ancillary function (the viceroy issued his decisions as the Council, in compliance with the constitution and within the scope of royal proxy [15], after obtaining the countersignature from the appropriate minister. If the minister refused to countersign, then another minister could do it. If it happened that all ministers refused to countersign, the final decision belonged to the king). The Administrative Council executed the king's decisions, settled the cases which were beyond the jurisdiction of a given ministry and it drafted legal acts for the General Assembly [16].

As indicated Korobowicz and Witkowski, the first changes in functioning of the Council began in 1826. When general Józef Zajączek died there was an opening for a new viceroy. Among all members of the Administrative Council, the king, under Article 72 of the constitution, appointed its new chair, the Secretary of State and senator Walenty Sobolewski [17]. In this way, as the king's proxy, he received the highest executive and administra-

[8] Ibidem, p. 63.
[9] Ibidem, p. 56; W. Witkowski, *Historia administracji w Polsce 1764-1989*, Warszawa 2007, pp. 112–113.
[10] A. Korobowicz, W. Witkowski, *op. cit.*, p. 102; *Ustawa konstytucyjna Królestwa Polskiego z dnia 27 listopada 1815r.*, [in:] *Polskie konstytucje 1768–1990…*, p. 68.
[11] A. Korobowicz, W. Witkowski, *op. cit.*, p. 110.
[12] Ibidem, p. 104.
[13] Ibidem, p. 104.
[14] Ibidem, pp. 104–105.
[15] *Ustawa konstytucyjna Królestwa Polskiego z dnia 27 listopada 1815r…*, p. 68.
[16] A. Korobowicz, W. Witkowski, *op. cit.*, p. 102.
[17] Ibidem, p. 103.

tive powers the viceroy could have. After November Uprising, however, in accordance with the law of September 16, 1831 the Provisional Government headed by Fiodor Berg took over the Administrative Council[18].

After November Uprising the so called Second Council of State was established. On February 26, 1832, tsar Nicholas I pronounced the Organic Statute of the Kingdom of Poland which, allegedly, replaced the Constitution of 1815 in a legal way[19]. In the Statue, the tsar announced the new order and shape of things to come after the events of 1830[20]. The Organic Statute still provided for the Administrative Council as well as for the Council of State. The former, pursuant to Article 22, was responsible for managing the Kingdom on behalf of the Russian authorities. It consisted of the viceroy as its chair[21], three directors of governmental committees (former ministers), the General Auditor on the board of the Chamber of Auditors and other members. The Administrative Council, now separated from the Council of State, became an independent institution whose decisions were reached by the majority of votes, yet the viceroy had a deciding vote in case of equal votes (the same provision applied to the Council of State)[22]. The Administrative Council selected the candidates for vacant posts (e.g. archbishops, bishops, managing directors and state councilors)[23] and presented them to the Russian authorities via viceroy's office. In December 1832 the law concerning the Administrative Council and the Council of State was introduced. From then on, all decisions made by the Administrative Council assumed a form of a resolution signed by the viceroy and certified by the Secretary of State. The Council performed the tasks which were beyond the scope of managing directors' competence and it also issued ordinances[24].

The Council of State comprised the viceroy as its chair, three managing directors, General Auditor, privy councilors and other people, appointed by the current sovereign, whose fixed number was not determined[25]. Main responsibilities of the Council included: drafting laws concerning general management of the Kingdom; settling competence disputes between administration and judiciary; controlling both annual budget prepared by the Administrative Council and the General Auditor's reports on financial audit; hearing requests of provincial assemblies and voivodeship councils; deciding about prosecution procedure towards officials in breach of law; considering reports submitted by directors of different administrative branches[26].

As shown Korobowicz and Witkowski, as a direct result of having Sejm dissolved, the bills and resolutions of the Council of State on the legislative matters and budget were directly forwarded to the Department for Kingdom of Poland Affairs created aside Russian State Council. Simultaneously, the Council of State was deprived of the right to prosecute an official for the breach of law – such lawsuit could only be filed by the king. All cases were settled by the Council of State during the General Assembly sessions. To deal with more compelling cases special committees were created *pro tempore*[27]. Since 1836, by the Council of State there was the Heraldry Office for the Kingdom of Poland which verified the nobility[28]. When in 1841, the Council of State was abolished, its competence was distributed among different institutions. Its judicial competence was transferred to 9th and 10th Warsaw Departments of the Russian Governing Senate giving rise to an institution of the highest appeal for civil and criminal courts. The General Assembly of Warsaw Departments of the Governing Senate headed by the viceroy also took over a considerable part of its competence. Considering the reports from governmental committees and drafting the bills was transferred to the Administrative Council, while drafting the Kingdom's budget was assigned to the Department for Kingdom of Poland Affairs by the State Council[29]. Additionally, a new institution, that is the Committee for Auditing and Drafting Laws for the Kingdom of Poland, was established within the Second Section of His Imperial Majesty's Own Chancellery[30].

Further changes in functioning of the Council of State and the Administrative Council resulted from the margrave Alexander Wielopolski's reforms implemented between 1861 and 1862. Wielopolski reforms touched upon central and local administration, peasantry matters, education and equal rights for the Jews[31]. On many occasions did Wielopolski inform the tsar Alexander II on the absolute necessity of introducing reforms in the Kingdom of Poland. In March 1861, during the meeting with viceroy Michał Gorczakow, Wielopolski demanded restoration of the Council of State as a strictly administrative insti-

[18] Ibidem, p. 103; see more, too: W. Witkowski, *op. cit.*, pp.139–141.
[19] J. Grabiec, *Sto lat walki o prawa Królestwa Polskiego 1815–1915,* Warszawa 1917, p. 13; W. Witkowski, *op. cit.*, pp. 142.
[20] *Dzienniki Praw Królestwa Polskiego*, no. 54, vol.14, Warszawa 1832, pp. 173–249.
[21] A. Korobowicz, W. Witkowski, *op. cit.*, p. 101.
[22] *Dzienniki Praw Królestwa Polskiego*, no. 53, vol.13, Warszawa 1832, pp. 454–456.
[23] *Statut Organiczny dla Królestwa Polskiego z dnia 26 lutego 1832r.*, [in:] *Polskie konstytucje 1768–1990…*, p. 81; A. Korobowicz, W. Witkowski, *op. cit.*, p. 103.
[24] *Dzienniki Praw Królestwa Polskiego*, no. 56, vol.15, Warszawa 1833, p. 70.
[25] Ks. Szczerbatow, *Rządy księcia Paskiewicza w Królestwie Polskim 1832-1847*, Warszawa 1900, p. 46; A. Korobowicz, W. Witkowski, *op. cit.*, p. 105.
[26] *Statut Organiczny dla Królestwa Polskiego z dnia 26 lutego 1832r…*, p. 82.
[27] A. Korobowicz, W. Witkowski, *op. cit.*, p. 105.
[28] A. Chwalba, *Historia Polski 1795-1918*, Kraków 2000, pp. 281-283.
[29] A. Korobowicz, W. Witkowski, *op. cit.*, p. 105.
[30] Z. Stankiewicz, *Królestwo Polskie 1815–1863*, [in:] *Historia Państwa i Prawa Polski*, ed. J. Bardach, M. Senkowska-Gluck, vol. III, Warszawa 1981, pp. 192–194.
[31] D. Szpoper, *Aleksander Wielopolski i próba ustrojowej rekonstrukcji Królestwa Polskiego w latach 1861–1862*, [in:] *Próba ustrojowej rekonstrukcji Królestwa Polskiego w latach 1861–1862. W 150. rocznicę reform margrabiego Aleksandra Wielopolskiego*, ed. L. Mażewski, Olsztyn 2012, pp. 10–54.

tution[32]. The *ukase* on the organisation of relations within the Kingdom of Poland issued by Alexander II on March 14, 1861 marked the beginning of changes in the system of the Kingdom of Poland. It included a provision that the General Assembly of Warsaw Departments of the Governing Senate would be replaced with the Council of State whose chair would be the viceroy. The Council consisted of the managing directors of governmental committees and the General Auditor, appointed *ex-officio*, as well as bishops or higher clergymen appointed by the Russian authorities to permanently or temporarily sit on the Council's board, members of Landed Gentry Loans Association and guberniya councils. Among the competences of a newly established Council was reviewing the annual government revenue and expenditures of the Kingdom as well as the reports from directors of different administrative branches and the General Auditor's reports concerning accounts audit. It also reviewed the petitions sent in by guberniya councils and heard their requests and complaints filed about the abuses made by officials[33].

Simultaneously, an ukase On Organization of the Council of State, issued on May 24, 1861, gave a detailed definition of the scope of competence the institution had. Following the ukase, the reactivated Council of State (the Third Council of State) had a different composition than the one determined by the Organic Statute of 1832. Apart from the members of the Administrative Council and the General Auditor, who were the privy councilors *ex-officio*, new members were to be elected from the Episcopal and higher clergy circles, chairmen of institutions within the Landed Gentry Loans Association, chairmen and vice-chairmen of guberniya councils and other people[34]. In fifty two articles the ukase made a clear distinction into privy councilors (members of the Administrative Council, the General Auditor, and other officials appointed by the king who served not only in the General Assembly of the Council but also on board of its Departments) and members of the Council of State, both permanent and temporary who could only attend the sessions of the General Assembly. The Council of State was headed by the viceroy or a person fulfilling his duties. The Council of State had its own chancellery presided by the Secretary of State appointed by the king and who worked with undersecretary of state as his ancillary[35]. On July 3, 1861 there were elections to the Council of State and only Poles (with one exception) were appointed as privy councilors. They had been chosen among the officials who had been holding the offices when Paskiewicz was a viceroy[36].

That institution comprised the General Assembly and the following Departments: 1) Legislative 2) Disputes 3) Fiscal and Administrative 4) Requests and Complaints. They were in charge of gathering materials for the Council of State sitting in a joint session within the General Assembly[37]. Each department had its chair, two members, referendary and one vice-referendary. The Legislative Department was responsible for drafting bills and dispositions which were put forward to the Council by a given governmental committee which had a right of legislative initiative[38]. The Fiscal and Administrative Department was an institution of first instance to review budget and fiscal reports, while the Requests and Complaints Department processed applications and complaints referring to the abuses of the officials[39]. However, there were many limitations imposed on filing complaints concerning the officials. A request or a complaint could be filed either by individuals or by groups of private persons registered by their names[40]. Filing a complaint had to be preceded by addressing an appropriate governmental committee which issued a resolution or a certificate of lack of resolution enabling issuing the proceedings against the official. The joint Legislative, Fiscal and Dispute Departments formed a judging panel of the Council of State which was accompanied by three councilors not working for any department but having the right to motion prosecuting the official in the breach of law while holding the office. The Council of State, sitting jointly as the General Assembly, comprised all its members regardless of being on the board of the departments or not. The Council was supposed to hold sessions at least once a year on closed hearings. It was responsible for hearing the drafts of legal acts which supplemented or amended organic statutes issued by the sovereign or which concerned the changes in codes of Kingdom of Poland remaining in force. The Council of State also processed the motions regulating agrarian, industrial and trade relations as well as introducing new taxes and taking on new loans. On its sessions, the Council processed the drafts of budget, reports from the authorities as well as guberniya, district and city councils' demands. It passed its opinions on cases sent in by the emperor or viceroy. It adjudicated the bills which did not have to go through the Department for Polish Affairs (abolished by the *ukase* of January 13, 1862) in St Petersburg State Council. This did not exclude the possibility that the bills passed by the Council would be forwarded to a special committee of the State Council before they received the royal assent. Pursuant to law, the suggestions concerning the budget were forwarded to the viceroy who presented them to the sovereign. However, while processing the authorities reports and country-related requests of the guberniya councils the Council had the right to make suggestions and point to the necessity of introducing new solutions or amending the existing ones[41].

[32] *Margrabia Aleksander Wielopolski. Jego życie i działalność polityczna,* Warszawa 1912, p. 18; W. Tokarz, *Ustrój Królestwa Polskiego za czasów Wielopolskiego,* [in:] „Przegląd Wszechpolski", Kraków 1905, no. 11–12 (XI–XII) 1905, pp. 661–662.

[33] *Dzienniki Praw Królestwa Polskiego*, no. 173, vol. 57, Warszawa 1860, pp. 332-341.

[34] *Dzienniki Praw Królestwa Polskiego*, no. 176, vol. 58, Warszawa 1861, pp. 234-275; see too: *Dzienniki Praw Królestwa Polskiego*, no. 176, vol. 58, Warszawa 1861, pp. 276-293; W. Witkowski, *op. cit.*, pp. 142.

[35] D. Szpoper, *op. cit.*, p. 27.

[36] Ibidem, p. 29; W. Tokarz, *op. cit.*, p. 663.

[37] J.K. Janowski, *Pamiętniki o powstaniu styczniowym. Czasy przedpowstaniowe 1854–1862*, Warszawa 1931, vol. III, part 2, p. 276.

[38] W. Tokarz, *op. cit*., p. 664.

[39] D. Szpoper, *op. cit.*, p. 27.

[40] *Dzienniki Praw Królestwa Polskiego*, no. 176, vol. 58, Warszawa 1861, pp. 234-275.

[41] D. Szpoper, *op. cit.*, p. 28; *Dzienniki Praw Królestwa Polskiego*, no. 176, vol. 58, Warszawa 1861, pp. 234-275.

As indicated Korobowicz and Witkowski, Alexander Wielopolski, the Chairman of Civilian Government, presided the Administrative Council. The Council also comprised the managing director of a Governmental Committee of Religious Affairs and Public Enlightenment [42].

In point of view Artur Korobowicz and Wojciech Witkowski, the Council of State was eventually abolished in 1867 when the Russian authorities began adjusting the legal order in the Kingdom of Poland to the one of Russia. The competence of the Council was distributed among many different institutions. Drafting the bills was assigned to a section of His Imperial Majesty's Own Chancellery responsible for Kingdom of Poland issues. The budget became an integral part of Russian budget, while the competence judiciary was assigned to the Governing Committee (*Uczrieditelnyj Komitiet w Carstwie Polskom)* [43]. The unification process also influenced the Administrative Council. Its chair became the viceroy again. In the end, on June 15, 1867 it was totally abolished and the Governing Committee took over its competence [44].

[42] A. Korobowicz, W. Witkowski, *op. cit.*, p. 103; see more: *Dzienniki Praw Królestwa Polskiego*, no. 178, vol. 59, Warszawa 1861, pp. 411–495; *Dzienniki Praw Królestwa Polskiego*, no. 180, vol. 60, Warszawa 1862, pp. 5–17; A. Giller *Aleksander hrabia Wielopolski margrabia Gonzaga Myszkowski*, Lwów 1878, p. 23; L. Jenike, *Ze wspomnień*, part I, Warszawa [1910], p. 103; *Wydawnictwo materiałów do historii powstania 1863-1864*, Lwów 1894, vol. IV, pp. 38–39; Z. Stankiewicz, *Program ustrojowy Aleksandra Wielopolskiego*, [in:] „Zeszyty Naukowe Uniwersytetu Łódzkiego. Nauki Humanistyczno-Społeczne", z.111, Łódź 1975, p. 103.

[43] A. Korobowicz, W. Witkowski, *op. cit.*, p. 106.

[44] Ibidem, p. 104; W. Witkowski, *op. cit.*, pp. 142–143.

On the Universalist Heritage in the Codification of Private Law in Poland and Switzerland in the 19th and 20th Century

Maria Lewandowicz *

Abstract

The objective of this article is to attempt an explanation of the phenomenon which consisted in that in XIX and XX century Switzerland and Poland, whose existing body of legislation prior to the commencement of codification works was similar, took a significantly discrepant direction of developing their legal cultures. What was the reason for Switzerland, which remained in the sphere of influence of French, and Austrian law, to seek natively Swiss sources of law in the process of legal unification, while Poland, shortly after regaining independence, leaned heavily on norms drawn straight out of the civil codes of Germany, Austria and France and chose to avail itself of the old Polish law only to a very limited extent?

With the use of descriptive and comparative legal method I argue, that despite the obvious differences in the selection of sources, both Poland and Switzerland codified their private law in the universalist spirit. Differences in the national culture and circumstances preceding the codification works did not impede supporting both codifications on pillars of shared principles of private law.

Key words: *Codification; history; private law; Switzerland; Poland.*

In Switzerland, from the second half of the 19th century and until early 20th century, as well as in Poland in the first half of the 20th century, intensive works on the codification of private law were carried out. The resultant works, in the form of the 1881 Swiss law of obligations, 1912 civil code, and the Polish code of obligations of 1933 marked a breakthrough not only for the jurisprudence and practise of law in both countries, but also for the building of nation states, economic national cohesion and political stabilization. The codification of private law was an element of the process of development in Poland and Switzerland, which cemented these states on a number of planes. This process contributed to the crystallization of the subsequent direction of evolution of legal culture in both countries. In the case of Switzerland, it was the development of a legal system based on national standards, principles and customs, which drew from foreign models exclusively to the extent to which it was indispensable to draft a law suitable to the challenges of modern times. In the case of Poland, it was the building of a legal system which represented a creative compilation of Austrian, German, French and, to a very limited degree, Polish law.

The objective of this article is to attempt an explanation of the phenomenon which consisted in that these countries, whose existing body of legislation prior to the commencement of codification works was similar, took a significantly discrepant direction of developing their legal cultures. What was the reason for Switzerland, which remained in the sphere of influence of French, and Austrian law, to seek natively Swiss sources of law in the process of legal unification, while Poland, shortly after regaining independence, leaned heavily on norms drawn straight out of the civil codes of Germany, Austria and France and chose to avail itself of the old Polish law only to a very limited extent?

Although the objective of this work seems to evidently call for the employment of the comparative legal method, it will not rely on it substantially. As James Gordley rightly pointed out, if laws differ because people disagree about principles, comparatists can describe this disagreement. If laws differ because circumstances are different, comparatists can describe how the difference in circumstances makes each law appropriate. But if laws differ even though the principles and circumstances are the same, then comparatists have reached the limit of analysis. The only explanation can be historical: To describe the previous choices which are like this one and which made the societies what they are. Sometimes people's actions are due to their goals and principles and to the circumstances in which they are acting, including the natural abilities which they posses. But sometimes one can only explain what they are doing by telling the story of how they came to be who they are.[1]

The process of codification of private law in Switzerland and in Poland exhibits numerous analogies in terms of the condition of the state of the law which existed in both these countries prior to unification works. Firstly, Switzerland had been under the direct influence of French, and Austrian law, and the private law was codified on the canton level. Cantonal codes were largely based on these foreign codes. The exception were those

* Maria Lewandowicz, PhD, Department of History of Law, Faculty of Law and Administration, University of Gdańsk, Poland.

1 Gordley, James, *The universalist heritage,* [in:] *Comparative Legal Studies: Traditions and Transitions,* ed. Legrand, Pierre & Munday, Roderick, Cambridge 2003, pp. 44-45.

cantonal codes fashioned after the Zurich canton code of civil law, which, in turn, was based on norms drawn from the old Zurich law, although the creative process around this code was heavily influenced by the historic school of law originating in Germany. In Poland, the various districts were governed by the legal systems of the former annexing powers (Russian, Austrian, Prussian), by a mix of Polish and French legislation (in the territories of what had been Congress Poland) and by Hungarian legislation (in the small regions of Spis and the Oravas).[2] The absence of a unified legal system hindered the development of national trade and economy. Secondly, both countries were determined to homogenize their societies, which were to become unified nation states instead of collections of communities from different districts or cantons. The internal social diversity additionally hampered the legal codification works, as it was indispensable to work out solutions for laws with which the entire society could identify. Thirdly, the failure of the codification processes could have determined the future of both countries.[3]

Despite the obvious differences in the selection of sources, both Poland and Switzerland codified their private law in the universalist spirit. The analysis of legal norms in terms of principles (understood as a standard according to which we judge what is good or bad) which express these norms is not the same as indicating differences in values or culture. Had the principles been different, then the judgement on which rules are appropriate would not depend on circumstances. It would not be possible to analyze rules in response to different circumstances. In this case, we would evaluate the rules solely in terms of their compliance with the principles, regardless of the circumstances in which these rules are binding. If, however, both circumstances and principles on which the law is based are the same, then if two rules are equally consistent with these principles, none of these rules is better than the other one. It seems that the choice between the two would be of indifference.[4] It is not always so, however, and in order to understand why, it is necessary to account for how people make choices.

When people make choices, they exercise an ability called Prudence[5]. It allows them to recognize that certain choices are right for the way of life chosen by these people, while other choices are not and so may be considered wrong. If a certain action on the one hand serves a given way of life and on the other hand it harms it, then Prudence allows people to weigh the good and bad consequences of the actions taken. It does happen that even upon careful consideration of consequences, none of the choices seems better than the other, but the choice itself remains important (for example, should provisions of commercial law be included in the civil code, or should a separate commercial code be drafted instead?). These are important choices, yet none is better than the other. People have free will not only to chose between good and bad, but also to chose one of the many possible ways of life.[6]

The case of making law is similar. When the legislator exercises the element of Prudence, *synesis*, and weighs the good and bad consequences of law, sometimes only one choice is right. Other times, however, there are a few alternative choices. It even happens that "(...) not the thought, as a conclusion, but the manner of approaching a subject, the mental disposition which cannot be loaned, takes a similar form and leads to solutions similar in terms of premises but different in terms of conclusions, or vice versa".[7]

From this perspective, it seems expedient to explore whether the choices made by legislators in Poland and Switzerland were indeed choices driven by the differences in values and culture with the assumption of same principles and circumstances, which would come to the defence of the universalist heritage of codification (the case would be similar if we assumed same principles and different circumstances), or whether, perhaps, the differences in the rules of law stem from difference in principles, in which case the thesis on universalist heritage would not hold and we would have to assert nationalistic heritage in the codification of law in Poland and Switzerland, or in only one of these countries.

1. Existing legislation prior to the codification

1.1 Switzerland

Painting the fullest possible picture of the circumstances in which specific codifications were made requires at the very least a brief outline of the history of a given country. Social experience amassed throughout state development is of paramount significance for the shaping of legal culture of a given nation. It is important to consider the internal and foreign political landscape over the course of history and how they impacted the shaping of science and practice of law.

The building of Swiss statehood had tumultuous beginnings. In the first stage of its historical development, in the period of the so-called Old Confederacy (1291-1798)[8], Switzerland was the battlefield on which the warfare for broadening the sphere of influence was waged between the Habsburgs, Burgunds, German Empire and by the fratricidal Swiss cantons themselves. At the time, Switzerland was a loose union of cantons which regulated the political and legal system of their own territories and of those subject to them.

The period of Old Confederacy was also the time of shaping the laws specific for the territory of Switzerland, which

[2] Radwański, Zbigniew, *Kształtowanie się polskiego systemu prawnego w pierwszych latach II Rzeczpospolitej,* Czasopismo Prawno-Historyczne (CPH), Fasc. 1, 1969, p. 31.

[3] Bucher, Eugen, *Hundert Jahre schweizerisches Obigationenrecht: wo stehen wir heute im Vertragsrecht? Referat für den schweiz erischen Juristenverein*, Zeitschrift für Schweizerisches Recht (ZSR), neue Folge 102 II (1983), p. 260.

[4] Gordley, James, *The universalist heritage,* op. cit., p. 42.

[5] In reference to law, the ability of Prudence involves the element of *synesis* - good judgement in framing the law, and the element of *gnome* - good judgement in deciding a particular case. Quoted from: Gordley, James, *The universalist heritage,* op. cit., p. 33.

[6] Ibid, pp. 42-43.

[7] Makowski, Wacław, *O koncepcji prawa społecznego,* Ruch Prawniczy, Ekonomiczny i Socjologiczny (RPEiS), Fascicule 1 1933 r., p. 15.

[8] Aleksandrowicz, Maciej, *System prawny Szwajcarii. Historia i współczesność,* Białystok 2009, p. 25.

developed in the spirit of preserving and advancing the native Germanic law.[9] This occurred as a result of Switzerland's separation from the I German Reich following the Swabian War of 1499, which marked a fundamental turning point in the history of Swiss legal development. From then on, the resistance of the Confederacy against the academic law, that is in particular the widespread German law and the *doctores* educated at foreign universities, started to mount. The 16th century Swiss patriotism in the sphere of law was most evidently manifested by the strong resentment against *usus modernus pandectarum* and by a shift toward native sources of law.

In the 18th century, the circles of legal science once again rode into tailwind. The most important fruit of the changes in science and application of law in the Old Confederacy was the '*Eydgenössisches Stadt- und Land-Recht, darinn der XIII. und Zugewanten Lobl. Städt un Orten der Eydgenossenschafft Stadt- und Land-Gesetze vorgestellet und mit Anmerckungen erläutert warden*", written between 1727 and 1746 by Johann Jacob von Leu[10]. It was the first attempt in the history of Switzerland to collect and present as a whole all the private law legal norms binding in the Old Confederacy[11] (*alte Eidgenossenschaft)*.[12] Von Leu's work constituted the very first Swiss compilation of private law which showed certain signs of systematization of normative material and of its scientific elaboration. *Eydgenössisches Stadt- und Land-Rech,* however, was closer to the Renaissance pre-codifications in the form of compendia, compilations and law textbooks, whose main task was to reflect the existing legislation rather than to develop it, than to the codification works of the Age of Light.

The period of the French Revolution brought about a serious sociopolitical change. France, to which Switzerland had been a valuable strategic centre, having used the revolutionary ideas of banning serfdom and freeing the Swiss from the patricians as a convenient tactical slogan, devised a plan for taking over this country, which it then proceeded to pursue with success. On 19 February 1803, Napoleon issued the so-called Act of Mediation, by virtue of which Switzerland was to form a loose union of 19 cantons.[13] Upon Napoleon's coronation as Emperor in 1804, Switzerland was incorporated into a network of vassal states centered around the Great Empire and completely subordinate to it.[14]

Following Napoleon's demise at Leipzig, the Diet abolished the Act of Mediation. At the same time, works were taken up to organize the Federation anew. On 7 August 1815, by virtue of the Federation Treaty, Switzerland adopted the organizational form of sovereign canton-states (*Staatenbund*). Up until the '30 s of the 19th century, Switzerland was going through the so-called Restoration Period, which consisted in the striving to restore the organization of state from the times of Old Confederation. In the wake of the July Revolution of 1830, there followed a period of so-called Regeneration, which lasted until the 1847 decision to reform the Federation and to adopt the 1848 Constitution. This Constitution transformed the heretofore loose union of canton-states into a federal state with broadened prerogatives of the central authorities.[15]

The 19th century was for Switzerland, as for the majority of European states, a century of intensive development of the law and of its codification. Owing to system-related issues, the codification of private law occurred in Switzerland at the level of cantons. Most cantons drew from foreign legislative sources in drafting their codes, either imitating them in a straight forward manner, or adjusting their provisions to the local needs. In view of the employment of normative sources, the cantonal codifications of the 19th century may be classified in one of the three categories: based on the French code, based on the Austrian civil code and based on the sole purely autochthonous code of private Law of the Zurich canton.[16]

1.2 Poland

The beginning of Polish history may be traced back to the late 9th and early 10th century, yet for the purposes of considerations significant to this paper, it is best to sketch an overview of the history of Polish state and law starting from the 15th century. It was a period of particular importance for Poland. While the estate monarchies of European countries tended to transform into absolutist states, in Poland there developed a specific variety of estate monarchy in the form of Nobles' Commonwealth.[17] This had a significant impact on the development of court law.

Above all, there prevailed the estate character of the law, which was systematically reduced under absolute monarchies.

---

[9] Güggenbühl, Paul, *Die Entstehung des zürcherischen privatrechtlichen Gesetzbuches. Dissertation des rechts- und staatswissenschaftlichen Fakultät der Universität Zürich zur Erlangung der Würde eines Doktors beider Rechte,* Meilen 1924, p. 12.

[10] Johann (Hans) Jacob Leu (1689-1768) was the son of a protestant municipal Zurich councilman. In 1707, J.J. Leu took up studies at the University of Marburg. Upon graduation, he set out on the so-called Kavaliers-Tour (Grand Tour of Europe), during which he visited Samuel Stryck, a lecturer of *usus modernus pandectarum* at the universities in Frankfurt (Oder), Wittenberg and Halle, as well as Christian Thomasius, an outstanding theoretician of natural law. Leu continued his tour, visiting Heinrich Coccej, the author of *Juris publici prudentia,* and Gottfried Wilhelm Leibniz in Hanover. From Germany, he went to the Netherlands and to Paris, where he listened to lectures on the Institutes of Justinian. In early 1709 Leu returned to his home country, where he would take up a number of subsequent official posts.

[11] The Old Confederacy lasted from 1291 to 1798. The legislative area analyzed by Jacob von Leu entailed the territories of the so-called Confederation of Thirteen Cantons (*Bund der alten dreizehn Orte*), which existed in the period from 1513 to 1798 and comprised: Zurich, Bern, Lucerne, Uri, Schwyz, Unterwalden, Zug, Glarus, Basel, Fribourg, Solothurn, Schaffhausen and Appenzell. Aleksandrowicz, Maciej, *System prawny Szwajcarii. Historia i współczesność,* Białystok 2009, pp. 25-28).

[12] Soliva, Claudio, *Das Eidgenössische Stadt- und Landrecht der zürcher Bürgermeisters Johann Jakob Leu. Ein Beitrag zur Gechichte der Rechtswissenschaft in der Schweiz des 18.Jahrhunderts,* Wiesbaden 1969, p. 40.

[13] More: Kölz,Alfred, *Neuere schweizerische Verfassungsgeschichte,* Bern 1992, pp. 143-153.

[14] Wojtowicz, Jerzy, *Historia Szwajcarii,* op. cit. p. 150.

[15] Czeszejko-Sochacki, Zdzisław, *System konstytucyjny Szwajcarii,* Warsaw 2002, pp. 10-12.

[16] Huber, Eugen *System und Geschichte…,* op. cit., p. 186.

[17] Płaza, Stanisław, *Historia prawa w Polsce na tle porównawczym,* part I, Krakow 2002, p. 137.

In Poland of the Renaissance times, despite the postulates for developing universally binding laws, in reality the old laws were still applied: the old land law, town law, rural law, canon law and the law of ethnic and religious groups (Jews and Armenians).[18] Natively Polish law, originating from the early Piast period, was partially preserved in the noble estate law, while foreign law, especially the German one, transplanted onto the Polish soil, gave rise to certain system solutions regarding the estate laws governing the residents of towns and villages of Poland.[19] Throughout the entire 16th century, the legal order developed evenly within all estates. In the noble law, the employment of principles and rules elaborated by the old Polish law was continued. In the estate laws of town and village residents, the order of German law was first viewed as a legal instrument applied in court proceedings, but soon it started to be treated as native law, applied separately in towns and rural areas. The territorial development of Poland throughout the 15th and 16th century led to the emergence of particular laws, that is Lithuanian, Prussian and Mazovian laws.[20]

Statutes of Lithuania of 1529, 1566 and 1588 had a significant influence on the development of legal culture in Poland. These were legal codes pertaining to public, private and penal law. They were binding primarily in Lithuania[21], while the Crown territories were partially governed by the Second Statute of Lithuania - in the Volyn, Bratslav and Kiev voivodeships. The Third Lithuanian Statue functioned only as auxiliary law in the works of the Crown Tribunal and in Lesser Poland.

When Prussian territories, which formed part of the Teutonic state, were incorportated into the Crown of the Kingdom of Poland in 1454, Kulm law (Chełmno law), which remained in force in an uncodified form on the entire territory of Royal Prussia since 1474, gained particular importance. In 1598, the Kulm law was revised and then adopted by the Sejm under the name of Prussian Amendment. This law governed only the Prussian nobility. The Prussian Amendment, covering the court system, procedural law, family and succession law, was based on the provisions of Crown and Roman law and was employed in the Crown as auxiliary law until the early19th century.[22]

In the 18th century, codification works were taken up in Poland. They were to serve as a basis for the improvement of the existing legislation and for its further development. In the years 1732-1739, Stanisław Konarski and Józef Załuski drafted *volumina legum* (Volumes of Laws), a chronological compilation of the Polish laws in force. Owing to disagreements at the Sejm and to repeated interruptions of its sessions, the *volumina* ceased to be published. In 1782, the Piarist fathers published the 7th and 8th volume of legislation from the period of 1764-1780. All eight volumes of legislation where subsequently proclaimed the official source of Polish law, by virtue of a decree issued by the Duke of Warsaw on 10 October 1809. It was used at courts and in all other types of legal transactions. At a later time, the *volumina* were supplemented with the legislation of the period from 1782 to 1792, and with acts passed by the Grodno Sejm of 1793.[23]

The second seminal monument of the Polish law was the code of Andrzej Zamoyski. The code was constructed pursuant to the Justinian system: *personae*, *res*, *actiones*. The act covered provisions of public and private law, both substantive and procedural. This code was a typical interim body of laws, combining the principles of feudal estate system with legal ideas developed in the codifications of late 18th and early 19th century. And so it preserved the division into estates and maintained the principle of equality of rights, a concept still foreign to the Polish society. Faced with the social resistance of the nobility and of the clergy, this code was never enacted.

In 1791, another attempt was made at codifying the law, with the appointment of a special codification deputation for the Crown provinces. The code was to be based on Łaski's Statute, on the Statutes of the Grand Duchy of Lithuania and, if such need arose, additionally it were to draw from foreign legal science, foreign legislations and the principles of natural law. However, owing to the invasion of the Russian army, these codification works were interrupted in May 1702. The available historical documents indicate that the code was to rest on modern construction of rights originating from the postulates of natural law.[24]

In the years 1772-1795, Poland was partitioned by Austria, Prussia and Russia which led to the final collapse of the Polish state in 1795.

Soon thereafter in Galicia, which fell under the Austrian annexation, the West Galician Civil Code was introduced, replaced in 1812 with the Austrian Civil Code (ABGB).[25] The 1721 East Prussia Landrecht governed the territories of the Prussian annexation, and following the second and third partition of Poland, the Prussian Landrecht was also imposed on the lands newly incorporated into Prussia. At first it was of ancillary character, but on 1 September 1797 it was proclaimed the binding law on the territories of the second and third partition. Despite the introduction of the Landrecht into the legal structure on the territories of old Polish lands, the old canon marriage law, the provisions and customs relating to intestate succession, the institution of life annuities between spouses and serfdom in villages, were upkept in private towns. Levies for the Church were also maintained there.[26]

In the years 1807-1815, there existed an ersatz of the Polish state in the form of Duchy of Warsaw. It was established under

[18] Ibid.
[19] Makiłła, Dariusz, *Historia prawa w Polsce,* Warsaw 2008, p. 107.
[20] Ibid, pp. 107-109.
[21] In the years 1569-1795 Poland and Lithuania formed a bi-confederation.
[22] Makiłła, Dariusz, *Historia prawa w Polsce,* op. cit., pp. 319-321.
[23] Uruszczak, Wacław, *Historia państwa i prawa polskiego, Tom I 966-1795,* ed. 2, Warsaw 2012, p. 240.
[24] Ibid, p. 246.
[25] Płaza, Stanisław, *Historia prawa…,* part II, op. cit., 47.
[26] Ibid, p. 49.

the terms of the Treaties of Tilsit, signed by the French Empire, Russian Empire and the Kingdom of Prussia, from lands acquired by Prussia under second, third and partially first partition, as well as from all lands acquired by Austria under the third partition and some lands annexed by it under the first partition. On the territory of the Duchy of Warsaw, the Napoleonic Code was introduced, although not without resistance. Following the collapse of the Duchy and the subsequent establishment of the Kingdom of Poland which existed in the years 1815-1832, there emerged a specific law combining the French, Russian and Polish solutions. The territories of the Russian annexation, on the other hand, were governed by the Russian law. Within the scope of civil law, it was Volume 10 of the Collection of Laws of the Russian Empire.

2. Codifications

2.1 Foundations of codification works

2.1.1 Switzerland

While Poland was nearing its end, Switzerland initiated a process of state reforms aiming at a stronger unification of the country. 12 September 1848 marks the enactment of the federal constitution which transformed the loose confederation of cantons, functioning under the terms of the 1815 treaty as a contractual union of sovereign canton-states (*Staatenbund*) into a federal state (*Bundesstaat*).[27] Just as the system and the state organization underwent a deep transformation, the civil law, with few exceptions, remained *ein Kind des partikulären Volksgeistes* (a child of the particular spirit of the people - author's translation).[28] Even though voices about the legal unification of Switzerland could be heard already during the works on the 1848 constitution,[29] when representatives of Bern and Solothurn advanced a motion for the unification of the penal proceedings, of commercial legislation and private law proceedings,[30] in the end they were unable to put through this motion. This happened because a common code meant to the representatives of most cantons having to forgo everything that they knew and trusted for the benefit of an uncertain future.[31] Moreover, supra-cantonal law seemed to them a tool of partial constriction of cantonal sovereignty which, in the cultural context of Switzerland, would have implied a departure from the deeply rooted tradition of legal particularism.

The real chance for completing codification works for all of Switzerland first emerged following the revision of the Constitution of 29 May 1874, where the Confederation was granted the right to adopt provisions regarding economic transactions (*Verkehrsrecht*).[32] This umbrella term encompassed all "legal matters regarding trading and trade goods"[33] and so, in other words, it was about the right to codify the section of private law that dealt with the law of obligations, law concerning bills of exchange and commercial law.

The subsequent years saw the emergence of a number of acts regulating these issues, yet the dominant role was played by the Swiss code of obligations of 1881 (*Schweizerische Obligationenrecht*). In the wake of the success represented by the social acceptance of the national codification, it was decided that the time had come to endow the Confederation with the legislative power to regulate the remaining part of civil law, which happened on 13 November 1898 by virtue of an amendment of the Constitution.[34] On 10 December 1907, the Diet adopted the Swiss civil code (ZGB) which entered into force on 1 January 1912.[35]

2.1.2 Poland

On 11 November 1918 Poland regained independence and was faced by the necessity of restoring all of its structures. One of the most formidable tasks at hand was to unify and codify the law. As stated by Franciszek Ksawery Frierich, President of the Codification Commission in his speech delivered at the opening session of the Commission, "(…) the development of a uniform type of legislation is one of the main tasks of the uniform Poland. It is to become one of the strongest links binding our Homeland into a uniform whole.[36]

At first, unification and codification works were conducted as part of the operations of the Ministry of Justice. It was soon evident, though, that this task was beyond the staff capacity and competences of the Ministry. Postulates were made to appoint an "institute" or "unification committee", which would be institutionally linked to the government and made up of the most illustrious representatives of the science and practice of law, hailing from all districts of the country.[37] The task of this committee would be to conduct the unification works within the shortest possible time.

The finally enacted Act of 3 June 1919 on the Codification Commission[38] provided some very general frameworks of the scope of activities of the Commission, without laying down precisely its position within the system structures of the state. The appointed authority of 44 members nominated by the Chief

[27] Czeszejko- Sochacki, Zdzisław, *System konstytucyjny…,* op. cit. p. 12.
[28] Eugster, Richard, *Die Enstehung des schweizerischen Obligationenrechts vom Jahre 1883,* Zurych 1926, p. 9.
[29] Sójka-Zielińska, Katarzyna, *Stulecie kodeksu cywilnego szwajcarskiego*, Czasopismo Prawno-Historyczne, Vol. LXIV, 2/2012, p. 37.
[30] Huber, Eugen, *System und Geschichte des Schweizerischen Privatrecht,* T. IV, Basel 1893, p. 202.
[31] Bucher, Eugen, *Hundert Jahre…,* op.cit. p. 261.
[32] Gygi, Fritz, *Die Verfassungsgrundlagen des Schweizerischen Obligationenrecht,* [in:] *Das Obligationenrecht 1883-1983…*, op. cit, p. 9.
[33] Sójka-Zielińska, Katarzyna, *Stulecie kodeksu cywilnego…,* op. cit., p. 40.
[34] Tuor, Peter *Das Schweizerische Zivilgesetzbuch,* Zurich 1932., p. 4.
[35] Zweigert, Konrad, Kötz, Hein, *Einführung in die Rechtsvergleichung,* 3rd edition, Tübingen 1996, p. 131.
[36] Grodziski, Stanisław, *Komisja Kodyfikacyjna, Dział ogólny, vol. 1,* fasc. 1, Warsaw 1920, p. 13.
[37] Makowski, Wacław, *W sprawie ujednostajnienia ustawodawstwa,* Gazeta Sądowa Warszawska (GSW) 1919, no. 2-3, pp. 13-15.
[38] Journal of Laws No. 44, item 315.

of State (Art. 5) was ordered to draft uniform civil and penal legislation, as well as other legislative drafts (Art.2). The ready drafts were then to be directed to the Sejm via the Minister of Justice (Art.3). The purpose of the act, then, was to establish an authority which would enjoy broad autonomy in the scope of internal organization and the subject of its works; which would function as an advisory body to the Government and the Parliament[39] and which would prepare legislative drafts for them.[40] At the same time, the Commission did not have the right of legislative initiative and could not exert any influence on the amendments introduced in the drafts it prepared by the government or by the Sejm.[41]

The make-up of the Commission was to account for the necessity of representation of lawyers from individual districts[42], as well as the representation of various legal professions, both from the sphere of practice and theory of law. Members of the Codification Commission were allowed to work for it only in concurrence with their main professional duties,[43] which in retrospect was often pointed to as one of the reasons for the Commission's tardiness.[44]

The first fruit of the Civil Law Section of the Codification Commission was the 1921 draft on "compensation for damages resulting from unlawful acts". The next published draft was E. Till's "On Obligations. Part One. General Provisions" from 1922, and, a year later, "Polish Law of Obligations. (General Part). Preliminary Draft With Motives". In the same year, the Civil Law Section decided to write a separate code of obligations, fashioned after the Swiss model, as it was believed this could be done faster than drafting the remaining parts of the civil code.[45] Ernest Till expounded the reasons behind this course of action in his explanatory notes to the 1923 draft of Polish code of obligations, stating that "the part on obligations is the least dependent on the other parts of civil law. This opens up discussion on whether it would expedient to introduce this part as a separate code of obligations, even prior to the adoption of other parts, just like it was successfully done in Switzerland, where the code of obligations preceded the unification of the rest of civil law by whole thirty years". Finally, by virtue of an ordinance issued by the President of the Republic of Poland on 27 October 1933, the code of obligations entered into force on 1 July 1934.[46]

2.2 Drafting of the codes

2.2.1 Switzerland

The editing of the Swiss civil code was entrusted to a single man - professor Eugen Huber, who was to draft individual parts of the code in cooperation with experts indicated by the Federal Department of Justice and Police (*Das Eidgenössische Justiz- und Polizeidepartament*). In line with the initial assumptions of the codification's editor, the basic source material for the conducted works was to be drawn from the progressive cantonal legislations. Huber emphasized that although there existed codification models that accurately formulated the matters that were the object of regulation of the ZGB, they had one important shortcoming. Foreign codifications were not drafted with account of the Swiss legal relations, while the originally Swiss law certainly was. For this reason it was to become the main source of input material for the codification works.[47]

Tradition and national heritage were to be the source of not only the law's contents, but also of its structure. The division of text proposed by Huber was fashioned after the modern accomplishments of legal science regarding the systemization of normative material. The author of the ZGB thus rejected the possibility to imitate the structure of the Napoleonic Code or the older cantonal codifications. As he stated, what had been already introduced by the legislation of Zurich or Aargau in the scope of modern systematization could not be wasted.[48]

The most natural division of the code contents, resulting from the historical development of private law, was as follows: principles of the entire order of private law, law of persons and family law, and then law relating to property divided into two parts, that is property law and law of obligations. Since succession law is connected to the issues of family, as it mirrors the continuation of principles regarding generational order, it had to be placed directly after family law and before property law.[49] Thus the following order of the code was established: law of persons, family law, succession law, property law and law of obligations contained in a separate book (this was dictated by the fact that this branch of law was drafted in its coded form as the first one and from 1 January 1883 it entered into force as Law of Obligations - *Obligationenrecht*).[50]

---

[39] Czuma, Ignacy, *Stosunek Komisji Kodyfikacyjnej R. P. do artykułu 10 Konstytucji,* Ruch Prawniczy, Ekonomiczny i Socjologiczny (RPEiS) 1932, p. 107.

[40] Górnicki, Leonard, *Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919-1939, Wrocław 2000,* p. 15.

[41] Sójka- Zielińska, Katarzyna, *Organizacja prac nad kodyfikacją prawa cywilnego w Polsce międzywojennej,* CPH 2975, fasc. 2, p. 273.

[42] Litauer, J. J., *Na marginesie ustroju naszej kodyfikacji*, Lviv 1935, p. 3 and subs., Quoted from: Sójka Zielińska, Katarzyna, *Organizacja prac…,* op. cit. p. 274.

[43] Bukowiecki, Stanisław, *Na powitanie Kwartalnika Prawa Prywatnego,* Kwartalnik Prawa Prywatnego (KPP), fasc. 1, 1938, p. 10.

[44] Litauer, J. J.,*Na marginesie…,* op. cit. p. 4.

[45] Górnicki, Leonard, *Prawo cywilne w pracach Komisji Kodyfikacyjnej…,* op. cit., p. 397.

[46] Journal of Laws of 1933, no. 82, item 598.

[47] Huber, Eugen, *Confidentielle Mitteilung Über die Art und Weise des Vorgehens bei der Ausarbeitung des Entwurfes eines einheitlichen schweizerischen Civilgesetzbuches,* Bern 1893, p. 2 [in:] Berner Kommentar. Kommentar zum schweizerischen Privatrecht, Vol. I, Bern 2009, p. 36.

[48] Huber, Eugen, *Schweizerisches Zivilgesetzbuch. Erläuterungen zum Vorentwurf des Eidgenössischen Justiz und Polizeidepartaments, 2nd edition, part 1 (Einleitung, Personen-, Familien- und Erbrecht),* Bern 1914, p. 21 [in:] *Berner Kommentar. Kommentar zum schweizerischen Privatrecht*, Band II, Dr Reber,Markus, Dr Hurni, Christoph, Bern 2007, p. 23.

[49] Ibid.

[50] Eugster, Richard, *Die Enstehung des schweizerischen Obligationenrechts…,* op. cit., p. 117.

It also merits a mention that the Swiss law of obligations embodied the monistic theory of civil law, as provisions of civil and commercial law were collected in a single code. On the one hand, the idea of *code unique* followed from the Swiss Constitution of 29 May 1874, which vested the Confederation with the right to adopt provisions regarding economic relations (*Verkehrsrecht*)[51], that is solely "legal matters in connection with commerce and trading goods"[52]. It seems that the more accurate justification for collecting civil and commercial law provisions in a single code were the echoes of the stance taken by Walter Munziger, presented in the *Motives* to the draft of Swiss commercial law of 1864. He emphasized that the construction of the act may not be only a basis for scientific treaties; it's main purpose was to facilitate the use of act's contents by the society. A complex classification of commercial transactions, the introduction of which was to enable precise division between commercial and civil transactions, does not contribute to ordering private law relationships; instead it only solidifies the sensation of legal uncertainty in the society.[53] W. Munziger highlighted that a sale is still a sale, regardless of whether the object of the contract will be used for personal or commercial purposes.[54] Finally, the idea of unification of civil and commercial law provisions in ZGB only materialized in form, that is all the provisions were collected in the single volume of law of obligations. As to the contents of the provisions, however, it turned out impossible to sidestep or pass over some specific features of trade transactions and it proved necessary to lay down certain norms which only regarded merchants. This principle concerned the provisions governing companies, merchant accounting rules and commercial powers of attorney.[55] Thus, in the substantive sense, the law of obligations (OR) covered both commercial and civil law, while in the formal sense commercial law, included under law of obligations (OR), constituted a separate branch of civil law.

The Swiss legislators decided against the concept of introducing a separate general part in the Swiss Civil Code. Firstly because, as Eugen Huber stated in his *Erläuterungen,* none of the known cantonal codes had had a general part.[56] Secondly, it was decided that it would be easiest to describe the general order through the very legal institutions employed in the application of law. This is due to the fact that general provisions serve not legislation, but rather science. Forgoing the general part was in line with the legislative tradition of Switzerland and had its practical justification, as it fulfilled one of the most important codification goals, that is the one of transparency and ease of use.

2.2.2 Poland

The shape and contents of the Polish code of obligations of 1933 were certainly most influenced by professor Ernest Till, and following his death, by Roman Longchamps de Berier. The participation of discussant Ludwik Domański, attorney at law, in the codification works, was also invaluable.[57] It was primarily their partial drafts that the Commission drew from in the course of codification works. Out of all the most important sources which served as the basis for development of the 1933 code of obligations, particularly the following ones should be indicated: the preliminary draft of the general part of law of obligations, written by professor Ernest Till as the main discussant, with the participation of M. Allerhand, A. Doliński, R. Longchamps de Berier and K. Stefka; the counter-draft of the the general part on law of law of obligations, prepared by attorney Ludwik Domański as the co-discussant and the preliminary draft of the special part of the law of obligations, drafted by professor Ernest Till and Roman Longchamps de Berier, who took over the main treatise following the death of professor Till in 1926.[58]

From the very beginning of codification works, the maintenance of legal continuity was the constant priority. This meant that the codifiers attempted to avoid changes in the existing legal system to which the society had grown accustomed. The code was to introduce legislative changes only where it was indispensable to unify the law. As put by the President of Codification Commission Franciszek Ksawery Frierich in 1919, the task was not about "(…) forced originality in shaping our legal relations, but rather about basing our legislation on the instructive past experiences, accounting for our cultural needs, our national character, the system of our state, to ensure that it is not merely a response to the current needs, but also (…) a lasting solution for the future".

This thought was further developed by one of the authors of the code of obligations, Roman Lonchamps the Berier, who stated that the Codification Commission was to "relate to the needs and customs of the society and to lay the foundations of the future modern Polish law (…)"[59]. The understanding of the "current relations in our society" adopted by the codification jurists was further clarified by Ignacy Koschembahr-Łyskowski,[60] who said that the path toward codification may

[51] Gygi, Fritz, *Die Verfassungsgrundlagen des Schweizerischen Obligationenrecht,* [in:] *Das Obligationenrecht 1883-1983…*, op. cit, p. 9.
[52] Sójka-Zielińska, Katarzyna, *Stulecie kodeksu cywilnego szwajcarskiego*, Czasopismo Prawno-Historyczne, Vol. LXIV, 2/2012, p. 40.
[53] Muniziger, Walter, *Motive zu dem Entwurfe eines schweizerisches Handlesrechtes, im Auftrage des Tit. Schweiz. Justiz- und Polizeidepartements verfasst von dem Redaktor des Entwurfes*, Bern 1865, pp. 3-4.
[54] Ibid.
[55] Haab, Robert, *Einleitung und allgemeiner Überblick über der Revision,* [in:] *Sieben Vorträge über das neue Obligationenrecht - veranstaltet von der Basler Handelskammer,* ed. Koechlin C., Basel 1937, p. 11.
[56] Huber, Eugen, *Schweizerisches Zivilgesetzbuch. Erläuterungen zum Vorentwurf…,* op. cit. p. 22 [24].
[57] Kola, Jarosław, *80. Rocznica Kodeksu zobowiązań. Działalność Komisji Kodyfikacyjnej RP w obszarze prawa zobowiązań. Refleksje z okazji 80. Rocznicy Kodeksu zobowiązań.,* Palestra 9-10/2013, p. 254.
[58] Longchamps de Berier, Roman, *Zobowiązania,* [in:] *Polskie prawo cywilne. Podręcznik systematyczny,* edited by the members of the Codification Commission R. Longchamps de Berier, K. Przybyłowski, J. Wasilkowski, Vol.II, Lviv 1939, p. 1.
[59] Lonchamps de Berier, Roman, *Kodeks Napoleona,* Przegląd Prawa i Administracji (PPiA) 1921, p. 146.
[60] Dajczak, Wojciech, *Kodeks Zobowiązań jako lekcja metody prawnoporównawczej,* Kwartalnik Prawa Prywatnego (KPP) 2014 r., Fascicule 4, p. 831.

not lead through the legal collections and codification projects of the First Republic of Poland.[61] At the same time, as R. L. de Berier worded it, "the specific legal, social and economic relations in Poland did not allow for unaltered adoption of foreign legal institutions"[62]. Purely material factors and local unification needs, and not Polish political affiliations, were to weigh in on the choice of the codification basis.

As a result of these ground rules, codification works placed particular emphasis on drafting solutions as compliant with the heretofore existing legal status or practice as possible. According to the examples cited by professor Wojciech Dajczak, one of the crowning arguments justifying the introduction of individual solutions into the code was that they had been "adopted in all the former legislations passed in Poland", or the belief that, for example, the need to protect lessees "has already taken roots in the society".[63]

The Polish code of obligations was a synthesis of the old partition legislation with a certain degree of inclusion of the Polish national specificity. While drafting the code of obligations, the Codification Commission leaned on foreign legal heritage, believing that it represented a body of rational solutions. Where it introduced solutions motivated by national sentiments, it justified it with the argument of adequacy of such a solution for the national economic interests. After all, employing the models provided by legislations of the annexing powers represented the exercise of an important postulate of continuation and stability of the state.[64]

The division of code material adopted by the Codification Commission was a reflection of the division, as laid down by the Polish doctrine, into universal private law (civil law) and into special private law (specific law). Separate provisions regarding some social groups or specific legal relationships were isolated from the provisions of private law. Thus, there emerged commercial law, law of bills of exchange and cheques, mining law, maritime law, etc.[65] With account of this, the Codification Commission firmly rejected the monistic system and already in the early stages of its activities, it took on the task of drafting a separate commercial code, which was to constitute a *lex specialis* in relation to the civil code.[66]

2.3 Code contents

2.3.1 Switzerland

The main content-related preconceptions regarding the contents of the code were precisely expounded by Eugen Huber even before he started his works on ZGB. As rightly observed by him, in late 19th century and early 20th century, the individual, that is the main object of private law relationships, was liberated of the earlier limitations and could freely enjoy the advantages of private law. This freedom, however, was illusory in Huber's opinion. The development of social relationships and the cultural revolution brought about some significant changes in the situation of individuals, by subjecting their freedom to new, perhaps even more rigorous, limitations. This mainly concerned the limitations in disposal of property, the duties imposed on individuals by will of the society, limitations in disposal of property in the event of death or the rules resulting from labour law.[67] Unrestrained freedom of individuals had caused some negative consequences in other countries. The freedom of activities of an individual could no longer depend on this individual's entanglement in family relationships or stem from belonging to the local community; instead it was to follow from the relationship between the individual and the private law organization of the society.[68] The necessity to balance the individualistic tendencies and the social dimension of private law norms was the cornerstone of all of codification works in the scope of private law in Switzerland.

The fact that Swiss legislators decided against introducing a separate general part of the code was not tantamount to passing over the formulation of its general principles. Quite the opposite: Huber emphasized that it is in the general principles where the codifier sees the real power of the code. The legislator must always keep them in mind when taking on the task of regulating individual legal matters. The principles must be in tune with the institutions brought to life by them. The principles are the determinant of interpretation and act as support for the further development of law.[69]

The code was designed pursuant to the principle of freedom. Although it is not explicitly expressed on the pages of the act, it is nonetheless firmly rooted in the construction of individual legal institutions of all branches of civil law, family law, succession law and law of obligations and it is applicable as long as there are no express limitations to it resulting from public or private law.[70]

The second principle is the one of protection of legitimate legal interest, fulfilled through the recognition of a legal relationship even where customarily more stringent limitations used to be applied, for example in the case of certain easements, or through the ability to appeal at court against administrative decisions.[71]

---

[61] Koschembahr- Łyskowski, Ignacy, *W sprawie kodyfikacji naszego prawa cywilnego,* Warsaw 1925, p. 14; [quoted from:] Dajczak, Wojciech, *Kodeks Zobowiązań…,* op. cit., p. 831.
[62] Longchamps de Berier, Roman, *W dziesiątą rocznicę,* PPiA 1928, p. 420.
[63] Dajczak, Wojciech, *Kodeks Zobowiązań…,* op. cit., pp. 832-833.
[64] Ibid, p. 834.
[65] Górnicki, Leonard, *Zagadnienie systematyki kodyfikacji prawa cywilnego i handlowego w pracach komisji kodyfikacyjnej (1919- 1939),* Kwartalnik Prawa Prywatnego (KPP), 2004 r., Fascicule 3, p. 625.
[66] Ibid, p. 626.
[67] Huber, Eugen, *System und Geschichte…,* op. cit. p. 299.
[68] Ibid, p. 300.
[69] Huber, Eugen, *Schweizerisches Zivilgesetzbuch. Erläuterungen…,* op. cit. p. 25 [27].
[70] Ibid, p. 26 [27].
[71] Huber, Eugen, *Schweizerisches Zivilgesetzbuch…,* op. cit. p. 28 [29].

Another equally general principle embodied by the ZGB was (and still is) the principle of good faith (*Treu und Glauben*) or of interpretation of legal relationships in good faith. Huber indicated that this principle has its source in the rule of "nature of things" applied in the law of obligations and that it exceeds this "source rule". The principle of good faith should be materialized not only in the law of obligations, but also in relation to other institutions of civil law. This regarded primarily the law on mortgage registers, protection of possession, compensation liability in the event of unlawful change in the object of possession, legal consequences of absence of good faith in exercising family rights and obligations, etc. The protection of good faith should only reach as far as it is possible to expect actions in good faith from anyone exercising a given right.

These principles were fused with the principle on the application of law which states that judges should rule at their own discretion. A judge should not be bound or restricted by cantonal theories of evidence when making a decision on whether to treat something as admissible or not if his inclination is to do so. The aim of this principle was to ensure comprehensiveness of law in situations requiring judge's adjudication on matters with a state of facts which was unclear and impossible to clarify for lack of evidence. In such circumstances, the judge's evaluation of the consequences of the state of facts which most likely served as the basis for a given legal relationship could serve as grounds for adjudication. The main area of application of "judicial free discretion"[72] were decisions regarding the amount of compensation or the size of damages in obligation relationships, or in property law, for example whereas property objects are merged.

2.3.2 Poland

The code of obligations of 1933 did not introduce any novel, revolutionary principles which had not been already known in the contemporary systems of obligation law. Similarly to what took place in Switzerland, the main legislative focus was on two law-making thoughts which were mutually restrictive and at cross purposes. On the one hand, as a law dealing with transactions, the law of obligations was to ensure firm and strong protection of the individuals that participated in legal transactions, while on the other hand, it was to account for the good of the entire society. Provisions of the law on obligations, then, had a regulatory and protective function. The code was not only to "prevent obligations from becoming a tool for exploitation and harm of others, but in fact (it was to) strive for them to serve, whenever possible, as the medicine for certain pathological states in human relations".[73] The discussion of the individualistic and social dimension of law was, then, a topic of interest both in the case of Poland and Switzerland.

The Polish code of obligations exhibits numerous convergences with the principles expressed in the Swiss code and other contemporary civil codifications. The main such convergences have to do with the protection of safety of transactions, principle of protection of trust in transactions or the principle of redress of damages.[74]

The code placed particular emphasis on ensuring creditors' satisfaction of liabilities. Above all, for as long as it was possible, the creditor could always press claims for satisfaction of liabilities through legal action and enforcement, regardless of whether the performance consisted in giving, doing or not doing. This provision was an improvement of the heretofore existing legislation which, following the Napoleonic code, tied the legal remedies available to creditors to the character of the debtor's performance.

Regardless of the creditor's entitlements, there existed the debtor's obligation to redress all damages resulting from delays, improper performance or non-performance of an obligation. When pursuing claims for suffered damages, the creditor, unlike under Napoleonic Code, for example, did not have to officially put the debtor in default, as this happened automatically by virtue of law, as a result of the mere fact of failure to perform the obligation within the set deadline or, in the event of absence of a deadline, immediately upon the receipt of call from the creditor.[75]

Similarly to what occurred under the Swiss code, the code of obligations placed more emphasis than earlier legislation on the written form of acts in law for evidentiary purposes. The codifiers concluded that witness evidence is not sufficiently strong, as the outcome of proceedings is not certain in such cases, while the consequence of admitting witness evidence as the sole evidence in proving claims undermines the security of transactions. For this reason, in line with the Napoleonic Code, the code introduced a broad application of *ad probationem* written form. The requirement of the written form for a great number of acts in law was a novelty in the areas governed by the Austrian and German civil codes.[76]

The code of obligations not only adopted the existing solutions of other European codifications, but it also synthesized the accomplishments of contemporary legal science and jurisprudence. This is particularly well illustrated with the example of provisions regarding the influence of change in relationships on the obligation. The change in relationships which influences the performance of an obligation, pursuant to the provision of Art. 269 of the code of obligations, had to be an event of extraordinary nature, whose occurrence would significantly obstruct the performance of an obligation or which would cause excessive losses of the debtor or creditor. The necessary condition was for the parties to be unable to foresee such consequences at the time of entering into the contract. Only upon the satisfaction of all these conditions, the court could change the contents or the method of performing an obligation, having first considered the interests of both parties, if the court found it necessary as per the principle of good faith. Within this perspective, the provision of Article 296 of the code of obligations represented a synthesis of Windscheid's theory on *Voraussetzung*, of the *clausula*

[72] *Freie Ermessen.*
[73] Longchamps de Berier, Roman, *Zasady Kodeksu Zobowiązań,* Ruch Prawniczy, Ekonomiczny i Socjologiczny (RPEiS), Fascicule 2 1934, p. 77.
[74] Górnicki,Leonard, *Prawo cywilne w pracach Komisji Kodyfikacyjnej…,* op. cit., p. 438.
[75] Longchamps de Berier, Roman *Zasady…,* op. cit., p. 80.
[76] Ibid, p. 81.

rebus sic stantibus theory, of the French *théorie de l'imprévision* or of the German and Austrian *Unerschwinglichkeit der Leistung.*[77]

Some of the solutions contained in the code of obligations, however, represented a novelty in relation not only to the existing Polish legislation, but also to the foreign laws. The Polish code emphasized quite strongly the issues of socialization of certain obligation relationships, which is best illustrated by the example of provisions regulating employment contracts. The employee obtained the right to receive remuneration for periods of sickness, of conscription to military training or due to absence for other important reasons, although only up to two weeks. Another important provision of the code was the invalidity of advanced waiver of remuneration for work[78], which certainly strengthened the employee's position in relations with the employer. In this scope, the Polish code was evidently modelled after the rules contained in the Napoleonic Code, while rejecting the solutions of ABGB (§ 1152), BGB (Art. 612) and of the Swiss law of obligations (Art. 320).[79]

3. Conclusions

In an attempt to summarize all the foregoing considerations, it is legitimate to reiterate the introductory statement that codification of private law in Switzerland in late 19th and early 20th century and in Poland of the inter-war period was conducted in the universalist spirit. However, in order to elaborate on this thought, it is necessary to correct the remark that the circumstances surrounding codification were analogous in both countries. To assert an analogy in this case would be too far-fetched, as the differences in the social situation and in the existing legislation prior to the commencement of codification works were significant.

Although Switzerland had for centuries been an arena of tensions over spheres of influence between the House of Habsburg, House of Burgundy and the German Empire, this did not influence the method of regulating private law relations. Until the adoption of the Law of Obligations, the Swiss legislation was regulated in a sovereign manner by the Swiss canton authorities, and so, despite the complicated situation on the international political arena, the development of private law in Switzerland proceeded at a fairly uninterrupted pace. Even if cantonal law was based on foreign codification models, their use was merely form-related, as the old institutions of Swiss law were simply reworded in a new way.[80] This is why, at the moment of commencing codification works at the federal level, the authors of codification had at their disposal a broad spectrum of modern, native legal norms.

While in Switzerland the influence of foreign law was indirect, even purely formal, meaning that foreign patterns were only drawn from in regards to the broadly understood legislative techniques and not contents, in Poland the influence of foreign laws on the shaping of Polish legal relations was direct.[81] As an effect of the long period of the rule of non-native legal systems, the Polish society grew accustomed to them, and its legal consciousness was shaped by them. With the passage of time, the boundaries between foreign and native law became hazy.

In Poland, a uniform legal philosophy could not develop owing to the absence of a continued and dominating centre of Polish legal thought. In Switzerland, legal science continued to develop without any major disturbances. In the 17th century it experienced an intense boom in the sphere of legal science. This occurred mostly owing to the development of higher education (particularly at the Academies in Bern, Lausanne and Zurich), where law was taught as one of the courses. Particular emphasis was placed on lectures regarding native private law and its history.[82]

These differences in circumstances directly translated into the choice of sources in codification works of these two countries. This, however, did not bring about a dissonance between the principles which underpinned both codifications. Both the Polish code of obligations and the Swiss civil code constituted an outcome of balancing two concepts, that is the individualistic one and the social one.[83] On the one hand both codes subscribed to the principles of freedom and liberty of shaping private law relationships; on the other hand, this prevailed only up to the moment when it turned out necessary for the state to interfere in these relations to ensure that they do not warp into a source of harm and exploitation of the weaker party. Similarly, both acts allowed for judicial interference in the shaping of private law relationships if the protection of legitimate legal interests or the fairness of transactions so required. We may also identify parallels in the principles of good faith, safety and security of transactions or of redress of damages.

It is therefore valid to defend the thesis on the universalist concept of codification of private law in Poland in early 20th century and in Switzerland in late 19th and early 20th century. Differences in the national culture and circumstances preceding the codification works did not impede supporting both codifications on pillars of shared principles of private law.

---

[77] Ibid, p. 87.

[78] Art. 442 § 1 of the code of obligations.

[79] Górnicki, Leonard, *Prawo cywilne w pracach Komisji Kodyfikacyjnej…,* op. cit., p. 439.

[80] Tuor, Peter, *Das Schweizerische Zivilgesetzbuch,* Zurych 1932 r., p. 3.

[81] One might even say, that in a broader perspective, Polish private law had never been „inherently native". It seems that the Polish national tradition has always been to assimilate foreign legal orders into the national order. This tendency emerged as early as in the 16th century, when the territory of the Crown increased by Lithuanian lands. Poland did not impose its legal solutions on the Commonwealth; instead it adapted to the Lithuanian legal framework, introducing some adjustments in the scope of its application to match the social and economic needs. This was the same approach as in the case of Kulm law or Mazovian law.

[82] Soliva, Claudio, *Ein Beispiel zürcherischer Rechtsgelehrsamkeit im 18. Jahrhundert,* separate printout in *Zürcher Taschenbuch auf das Jahr 1968,* Zurich 1967, p. 29-30.

[83] Hofer, Sybille, *Die prinzipielle Konzeption des ZGB,* [in:] *Berner Kommentar. Kommentar zum schweizerischen Privatrecht,* Band I, Bern 2009, pp. 30-33; Longchamps de Berier, Roman, *Zasady Kodeksu …*, op. cit, p. 77.

„Causa legittimae absentiae“ in Legal Praxis of the Medieval Town Law in Moravia

Lenka Šmídová Malárová *

Abstract

Municipal books Liber negotiorum civitatis Hradisch and Liber informationum et sententiarum include a large amount of case law, which Moravian royal town Uherské Hradiště received from Brno in Middle Ages. Some of these cases were decided in accordance with the Roman law principle that did not allow to give the default judgement in the event that a party, which did not come to the court, correctly apologized for his or her absence. Town law of Brno was based on Roman law and it also applies to the case of causa absentia. The analysis of the relevant case law partly shows that Roman law procedural rules concerning the consequences of absence in the court were applied also in Brno and Uherské Hradiště legal practice.

Key words: *Legal Principles; Roman Law; Procedural Law; Absence; Legal Sentences; Middle Ages; Czech Lands; Municipal Law; Case Law; Brno; Causa Absentia; Uherské Hradiště.*

Introduction

The Moravian royal city Uherské Hradiště received town law of Brno quiet soon after its founding. Přemysl Otakar II from Bohemia set by the Deed from 23rd May 1258 that the inhabitants from Uherské Hradiště will be obeyed and ran by town law of Brno.[1] The first contact, between two cities, has grown soon into tight and regular cooperation. In the case of the insignificances and complicated disputes the aldermen from Uherské Hradiště asked Brno for legal sentences and informations. Given answers served after that as the binding basis for deciding disputable question itself. Single cases were later written down to the *Book of sentences* which was founded by the notary Jan in 1343 who continued since then. Although the *Book* wasn't kept till nowadays the *Law Book of Brno* from the second half of 14th century brings the testimony of its content. The *Law Book* is also the work of previously mentioned notary Jan.[2] The verdicts and sentences which Brno gave to the towns and villages which belonged to its legal area Jan wrote down directly to the text of the *Law Book* where they fulfilled the function of casuistic provisions.[3]

* Mgr. et Mgr. Lenka Šmídová Malárová, Department of the History of the State and Law, Faculty of Law, Masaryk University; Department of Auxiliary Historical Sciences, Faculty of Arts, Masaryk University; Brno, Czech Republic.

1 *Codex diplomaticus et epistolaris regni Bohemiae* V-1. Edd. ŠEBÁNEK, Jindřich – DUŠKOVÁ, Sáša. Pragae 1974, p. 245-248, no. 156.

2 Text of *Law Book of Brno* is available in the older Rössler's edition from the beggining of the second half of 19th century. See in RÖSSLER, Emil Franz (ed.)*, Deutsche Rechtsdenkmäler asu Böhmen und Mähren: eine Sammlung von Rechtsbüchern, Urkunden und alten Aufzeichnungen zur Geschichte des deutschen Rechtes. II. Band, Die Stadtrechte von Brünn aus dem XIII. und XIV. Jahrhundert: nach bisher ungedruckten Handschriften*, Prag 1852. Newly in modern critical edition of Miroslav Flodr, which was published at the beggining of 90th of last century. See in FLODR, Miroslav (ed.), *Právní kniha města Brna z poloviny 14. století. I. Úvod a edice,* Brno 1990. To the edition there belong two more books which contain the commentary to the content of *Law Book of Brno* and the registers with the summary of legal rules. See in FLODR, Miroslav (ed.), *Právní kniha města Brna z poloviny 14. století. II. Komentář,* Brno 1992; FLODR, Miroslav (ed.), *Právní kniha města Brna z poloviny 14. století. III. Rejstříky a přehledy,* Brno 1993.

3 Jan completed the rules and the principles by the articles with relevant judgements which he gained from *Book of sentences* and wrote down in united style. Because of that there are left the names of places and personal names of the parties in the text of adopted decisions we can imagine quiet well Brno's jurisdiction, significant disputes and what Brno's towns under the oath decided while asked by nearer or further villages. To the places which belonged to the circle of Brno's legal system in the Middle Ages and early Modern Age from literature see in ŠTARHA, Ivan, *Okruh brněnského městského práva,* in: ZŘÍDKAVESELÝ, František – PEŠA, Václav (reds.), Brno mezi městy střední Evropy – Sborník projevů, studií, úvah a sdělení z vědeckého sympozia konaného 29. – 30th November 1979, Brno 1983, p. 138-165. ŠTARHA, Ivan, *Naučení brněnského městského práva v 16. a poč. 17. stol,* Folia diplomatica 5, 1956-1957, p. 207-215. ŠTARHA, Ivan, *Městská práva na jihovýchodní Moravě,* Slovácko, 1966-1967, p. 125-132. ŠTARHA, Ivan, *Okruh brněnského městského práva v době předbělohorské*, Brno v minulosti a dnes, vol. 8, 1966, p. 172-188. ŠTARHA, Ivan, *K rozšíření brněnského práva na Vysočině: hrdelní soudnictví na Bystřicku*, Forum Brunense, 2007, p. 133-142.

For Uherské Hradiště there are 30 verdicts of different materia submitted in the *Law Book of Brno.*[4] We can of course supposed that the total amount of sentences concerning Uherské Hradiště which Brno's aldermen issued in the first half of 14th century was much higher nevertheless this fact cannot be authentically proved because of the lack of relevant source. There was founded a special agenda in town books for the purpose of evidence received legal sentences and informations in Uherské Hradiště. The copies of legal sentences in the oldest town book of Uherské Hradiště *Liber negotiorum civitatis Hradisch*[5] were kept for the period of time after issuing *Law Book.* This book precisely one of its parts with legal sentences keeps records about the cases from 1368 to 1389. In the first half of 15th century the people from Uherské Hradiště continued in *Liber negotiorum* by founding the book *Liber informationum et sententiarum* which contains Brno's legal sentences given between 1447 and 1509 including the supplements till 1540.[6] Both books, by their content I will deal with further in the contribution, represent significant source of legal-historical character important for the understanding of the former decision-making practice. Even though their importance is obvious both books miss the attention of legal historians or legal Romanist.[7]

1. Roman law in town law of Brno

Brno's *Law Book* is thanks to Jan's legal erudition characterized by elaborate material of homeland law enriched by the rules of Roman- canonical trial and the sentences of Romanist character. Jan's mature legal thinking affected fully the final form of *Law Book.* The simple reception of Roman law restricted to mere adoption of the quotes from *Corpus iuris civilis* moves Jan's work to the category elaborate legal texts of late Middle Ages thoughtfully connected with legal Roman law ideas. Just the fact that the notary Jan described significant verdicts and sentences by thematic legal Roman rule or definition which he incorporated to the particular case without stylistically corrupting final sense of relevant verdict is the evidence of his knowledge of Roman law and the interpretation of foreign law didn't make him any trouble.[8] The

[4] Summary of provisions which are connected to Uherské Hradiště are written in the opening part of editon by M. Flodr. These are art. 46, 62, 86, 136, 141, 167, 188, 195, 215, 260, 346, 367, 376, 402, 430, 432, 434, 436, 443, 465, 493, 525, 560, 570, 578, 642, 698, 702, 703, 711. Uherské Hradiště represents one of the most often receiver of Brno's sentences and legal informations in the comparison with other places which gained sentences from Brno. To other villages in *Law Book of Brno* compare FLODR, Miroslav (ed.), *Právní kniha města Brna z poloviny 14. století. I. Úvod a edice,* Brno 1990, p. 76-77. Chosen legal sentence taken from *Book of sentences* to *Law Book of Brno* were evaluated even in literature. Jiří Doležel dealt with the sentences which were sent to Tišnov by Brno. See in DOLEŽEL, Jiří, *Tišnov a tišnovští v právní knize města Brna z poloviny 14. století,* Sborník okresního muzea Brno-venkov, 2000, p. 7-29. František Čáda dealt with legal sentence reflecting the case of slaughter of the new born baby and the question of further punishment of the mother in the first half of last century. See in ČÁDA, František, *Sententia Brunensis 536,* in: Sborník prací k poctě šedesátých narozenin Jaroslava Kallaba. Praha 1939, p. 63-75. Stated legal sentence led to the discussion among Čáda's contemporaries which led to the disagreement about how to interpret this case. The opinion of Theodor Saturník is believed to be the most contradictory in the literature because he marked the slaughter of new born as the ritual known at older Slavs. Further see in ŠTACHOVÁ, Naďa, *Theodor Saturník – mediální hvězda? Několik poznámek k nejsledovanějšímu sporu meziválečné právní historie,* in: BUBELOVÁ, Kamila – FRÝDEK, Miroslav (eds.), Polemiky a spory v právní vědě, Olomouc 2010, p. 29-39. Further compare ŠTACHOVÁ, Naďa, *Inspirační zdroje Koldínových Práv městských. Výzvy kodikologie české romanistice,* Časopis pro právní vědu a praxi (Supplementum) 21, 2013, p. 262 and more.

[5] Manuscript *Liber negotiorum civitatis Hradisch* was published in two editions. The first part of the manuscript which content is made mainly from significant enrolments from legal hearings was issued in 2001 by Magdalena Čoupková. See in ČOUPKOVÁ, Magdalena, *Nejstarší uherskohradišťská městská kniha. Liber negotiorum civitatis Hradisch*, Uherské Hradiště 2001. The second part of manuscript which contains the set of legal sentences for Uherské Hradiště was made available recently in the edition of Miroslav Flodr. See in FLODR, Miroslav (ed.), *Nálezy brněnského městského práva. Svazek I. (-1389),* Brno 2007, p. 13-76 (edition), 90-123 (commentary).

[6] *Liber informationum et sententiarum* published in 2nd half of 19th century by Ignác Tkáč. See in TKÁČ, Ignác (ed.), *Liber informationum et sententiarum čili Naučení Brněnská Hradišťské městské radě dávaná od roku 1447 až do roku 1509 s dodatky do roku 1540,* Uherské Hradiště 1882.

[7] It is the surprise that the legal-historical potential of this material was not fully used so far even though the younger volume *Liber informationum et sententiarum* was available more than 130 years ago. Present literature which is mainly focused on the older book from Uherské Hradiště *Liber negotiorum civitatis Hradisch* brings only paleographic or diplomatic analysis of this source. The exception represents the article by Ivan Krška who stated that legal sentence in *Liber negotiorum* are not supported by the sentences contained in *Law Book*. The name of Krška's contribution is misleading because the content of manuscript and the analysis of particular legal sentence or even brief characteristics are not mentioned here. See in KRŠKA, Ivan, *Brněnská právní naučení Uherskému Hradišti ve druhé polovině 14. století,* Brno v minulosti a dnes 4, 1962, p. 200-209. Magdalena Čoupková returned to the manuscript *Liber negotiorum* few years later after publishing the edition. She repeated briefly key information about the first part of the book. The author didn't deal with the legal sentence. See in ČOUPKOVÁ, Magdalena, *Nejstarší uherskohradišťská městská kniha Liber negotiorum civitatis Hradisch*, in: FUTÁK, Peter – PLAČEK, Miroslav – VAŘEKA, Marek (reds.), Středověká města na Moravě a v sousedních zemích, Hodonín 2009 p. 11-21. Jiří Čoupek mentions briefly stated manuscript in his contribution about important sources concerning medieval history of Uherské Hradiště. See in ČOUPEK, Jiří, *Archivní prameny k dějinám města Uherské Hradiště ve 13. - 14. století*, in: GALUŠKA, Luděk (red.), Východní Morava v 10. až 14. století, Brno 2008, p. 207-211.

[8] Emil Franz Rössler pointed out the Roman law influences in *Law Book* in the opening part of the above quoted edition in half of 19th century. The study of Julius Weiske was issued not long after it in German magazine *Zeitschrift für deutsches Recht und deutsche Rechtswissenschaft.* He focused on the interpretation of chosen private law and law proceeding sentence in *Law Book.* See in WEISKE, Julius, *Bemerkunngen über das Brünner Schöffenbuch, privat und prozeßrechtlichen Inhalts,* Zeitschrift für deutsches Recht und deutsche Rechtswissenschaft 14, 1853, p. 113–154. Two studies from between the wars by Miroslav Boháček belong to key Roman law analysis of *Law Book*. See in BOHÁČEK, Miroslav, *Římské právní prvky v právní knize brněnského písaře Jana,* (Special print of the work from seminary of Czech law at Charles University in Prague), Praha 1924. BOHÁČEK, Miroslav, *Ještě k římskoprávnímu obsahu brněnské právní knihy,* in: Sborník prací z dějin práva československého, vol. I. (To 50th birthday of the professor Jan Kapras his students), Praha 1930, p. 34-49. Gertrude Schubart-Fikentscher later continued in Boháček's analysis. She worked out detailed Roman law analysis of *Law Book of Brno* and tried to refute some of Boháček's mistakes. See in SCHUBERT-FIKENTSCHER, Gertrude, *Römisches Recht im Brünner Schöffenbuch. Ein Betrag zur Rezeptionsgeschichte.* Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Rom. Abt. 65, 1947, p. 86-176. To that compare wide study of the same author about the influences of Roman and canonical law in the legal treatment of marital law. See in SCHUBERT-FIKENTSCHER, Gertrude, *Das Eherecht im Brünner Schöffenbuch*, Stuttgart 1935. Otto Ripka dealt with criminal law provisions in *Law Book* in the half of 20th century. See in RIPKA, Otto, *Verbrechen und Strafe im Brünner Schöffenbuch*, Erlangen 1950. The summary of the quotes taken from Roman law codification *Corpus iuris civilis* was compiled by Miroslav Flodr for the last time in the complementary volumes to the edition of *Law Book* (*II. Komentář, III. Rejstříky a přehledy).*

transcripts of Justinian's codification with glossaries which he had while working in Brno's town office and which his successors mainly Jan of Gelnhausen[9] used too after his death, helped Jan understanding Roman law and its system well. In the connection with the Roman law which is widely contained in the *Law Book of Brno* and in their later redactions there is the question whether the regulations taken from Roman law were used in Brno's legal practice. We can talk just about the study of Gertrude Schubart-Fikentscher who dealt with the corpus of the judgements for the town Ivančice in the older literature with legal historical character. The findings of G. Schubart-Fikentscher show the fact that Brno's under the oath one kept strictly the rules of Brno's town law contained in *Law Book* and older sources of normative character mainly in privilege *Iura originalia* and so called *Otakar's rights*[10] while formulating the answer for the plea giving the legal sentences. The answer for the question concerning the influences of Roman law on legal practice of Brno gives indirectly commented part of the edition of sentences from Uherské Hradiště and Ivančice which was published by Miroslav Flodr in 2007. M. Flodr described particular findings with brief commentary in which he referred to the relevant provisions in *Law Book* which are focused on stated problematics. Even though M. Flodr did not deal with prospective Roman legal influences in stated legal sentences his findings concerning Brno's legal rules in decisional practice can be considered as essential. The actual literature excepting the above mentioned work of G. Schubart-Fikentscher focuses on normative character of Brno's town law and practical aspect of the particular rules in legal reality of medieval Brno is neglected.[11]

2. „Causa legittimae absentiae" in town law of Brno

The term *„causa legittimae absentiae"* represents in Middle Ages legal term through which the legitimate reasons of the absence of the specific person who did not show up at the specific time at the place where she or he was called to. It is modified Roman law term which appeared in Justinian's codification in general character *„causa absentiae"* or in form *„causa rei publicae absentia"*, in the case that it expressed the absence in public interest. This term was mainly used in legal proceedings where in the case of unjustified absence during the trial or administrative hearing a negative result was brought to absent person. In *Law Book of Brno* there is separated section *De causis absentiae* focused on the consequences of the absence during the trial. The older redactions of Law Book, the manuscripts of this are stored in the archive of Brno, contain the same section including the same legal treatment. The exception represents the manuscript n. 2762 from the end of the 15th century which is supplied by interpretative glossaries on the margins in the case of some provisions.

Article 113 of *Law Book* names the reasons which were excusable for the absence. According to this provision the absence was excused in Brno's town law in virtue of public interest *(causa rei publicae),* illness *(infirmitas),* captivating of the party *(captivitas)* or by flood *(inundacio aquarum).*[12] So in general the absence, which the absent one couldn't influence by his own will, was excused. The court set aside the trial according to the article n. 114 of *Law* Book and stated a new term of the trial in the case of the absence of some of the parties. At the same time there was defined the condition that the trial can be set aside just twice after that the cause had to proceed. *(„Si pars termino prefixo ex impedimento legitimo iudicio astare non possit, per triduum est inducianda").*[13]

The circumstances of the absence because of public interest, describes closely the article 115 of *Law Book* which is one of the typical casuistic proposition. The notary Jan desribes there with the help of legal sentences taken presumably from the *Book of Sentences* real case of excusable absence at the trial which was solved by Bzenec's sworn ones in the 1st half of 14th century. They asked Brno how to solve the specific dispute between the

[9] Jan of Gelnhausen continued with *Law Book* in eighties of the 14th century. The original provisions of *Law Book* were shorten or divided to more paragraphs and described by new names of Rubrics. Gelnhausen added wide set of rules and legal definitions from 16th and 17th title of 50th book of *Digest* to the modified version of *Law Book*. Some provisions are supplemented by medieval commentary although we can eliminate Jan of Gelnhausen as the author. *Manipulus vel directorium iuris civilis* is strongly Romanized, it contains wide spectrum of Roman law rules which don't occur in many cases in *Law Book*. Despite this *Manipulus* stays out of attention of legal historians which can be caused by the fact that the book was made available 7 years ago. *Manipulus* was edited by FLODR, Miroslav (ed.), *Jan z Gelnhausenu. Příručka práva městského (Manipulus vel directorium iuris civilis),* Brno 2008. M. Flodr dealt with *Manipulus* before the edition itself where he pointed out in the studies focused on the genesis of Brno's town law after notary Jan's death, the fact that the regulations and definitions in the section *De regulis iuris et verborum significatione* were taken from two ending titles of the 50th book of Digest (see above). FLODR, Miroslav, *Brněnské městské právo v období po smrti notáře Jana,* Časopis Matice moravské 121, 2002, n. 1, p. 33–46*;* FLODR, Miroslav, *Brněnské městské právo po smrti notáře Jana (1359–1389),* Brno 2006, p. 71. Lenka Šmídová Malárová was dealing with the legal character of *Manipulus* during last few years. Firstly it was the contribution at the conference in which she focused on the acquisition from non-owner where she proved the Roman law influences in this problematics. See in MALÁROVÁ, Lenka, *Zásada „bonae fidei" a institut nabytí věci od nevlastníka,* in: ŽATECKÁ, Eva – KOVÁČOVÁ, Lucia – HORECKÝ, Jan – OMÁČKA, Vojtěch. (eds.), *Cofola 2011. Conference proceedings*, Brno 2011. p. 130-137. Later on by character of some definitions and interpretative rulesin Roman law part of *De regulis iuris et verborum significatione*. See in ŠMÍDOVÁ MALÁROVÁ, Lenka, *Pravidla výkladu legislativních zkratek a vybraných gramatických jevů v římskoprávním oddílu Příručky práva městského Jana z Gelnhausenu*, Studia historica brunensia, 2013, ed. 60, n. 1-2, p. 65-76. L. Šmídová Malárová dealt with the analysis of specific Roman law rule in *Manipulus* which lost its meaning after little modification. Added medieval comment was the proof that this deviation has not the character of written mistake but this treatment was meant to be. See in ŠMÍDOVÁ MALÁROVÁ, Lenka, *Omyl nebo záměr? Příspěvek k modifikaci jednoho římskoprávního pravidla v Příručce práva městského Jana z Gelnhausenu z 2. pol. 14. století*, Acta iuridica Olomucensia (Supplementum „Recepce římského práva v Evropě") 9, 2014, n. 3, n. 93–101.

[10] SCHUBART-FIKENTSCHER, Gertrude, *Neu Fälle zum Brünner Recht,* Deutsches Archiv für Geschichte des Mittelalters 3, 1939, n. 2, p. 430-496.

[11] FLODR, Miroslav (ed.), *Nálezy brněnského městského práva*. The set of legal sentence from Ivančice in Flodr's edition (p. 77-85) is the reedition of the same source which was made available by G. Schubart-Fikentscher in 1939, see the note above. The edition in Schubart-Fikentscher's edition can be found on the p. 484-496. The first part of the study is made by commented interpretation of particular judgements.

[12] Art. 113 *Law Book „D-e Pysentcz iuratis petentibus scriptum est, quod contra partem absentem causa rei publice, que aput vulgares dicitur herrennot, vel causa infirmitatis non ficte vel causa captivitatis vel causa inundacionis aquarum sentencia de iure ferri non debet."* FLODR, Miroslav (ed.), *Právní kniha města Brna. Úvod a edice,* p. 188. From literature to this compare FLODR, Miroslav, *Brněnské městské právo. Zakladatelské období (-1359)*, p. 371.

[13] FLODR, Miroslav (ed.), *Právní kniha města Brna. Úvod a edice,* p. 188.

creditor (plaintiff) and the debtor (defendant) who was absent at previously announced trial. From the further text we can find out that the debtor was absent because of the service which he had to do for the sake of his master what he proved by the document brought then to the trial *(„…Petrus venit cum littera patenti, in qua scriberatur, quod prepeditus causa legitima, videlicet servicio domini sui Ieskonis de Boskobicz, iudicio in predicto sabbato non potuerit comparere.")*[14] The excuse of the defendant was accepted as legitimate and the trial was set aside to different date without the respondent facing unfavourable consequences which threatened him otherwise. The relevant provision closes the rule which states the form on which basics the excuses for the absence could be made. We talk here about above mentoined written excuse but the message announced by proper courier was acceptable too *(„…per nuncium idoneum seu per litteras").*[15] If the defendant didn't attend the trial and he didn't submit one way or another his absence by three-day time the judge issued so called default judgement (judgement for the failure) which was made for the sake of present party. The exception was represented by the party being in captivity or in the area where it stayed there was flood. In this case wasn't probable that the time for delivering the excuse could be kept so it was up to the judge to extend the time according to the situation *(„Unde in causis huiusmodi pars absens gaudebit termino longiori.").*[16]

Legal treatment of Brno's town law concerning justified and excusable absence at the trial sprang from Roman law. Beside the character of significant reasons of the absence which excused the absent party[17] we can talk, except the obvious Roman law influences, about the fact that it was possible in Roman law in the case of absence of one party to act legally with the help of the document, deed or the message delivered by the courier. It means in the same way as in Brno's law later on. Both legal treatments admitted the defender to act on behalf of absent party.[18]

We will try to submit on the basics of thematic legal sentences, in which way was this problematics reflected in the findings written down in town books *Liber negotiorum civitatis Hradisch* and *Liber informationum et sententiarum* in the next chapter.

3. Analysis of legal sentences

The town books from Uherské Hradiště *Liber negotiorum civitatis Hradisch and Liber informationum et sententiarum* file four cases in total which are imminently applied to this problematic. Not dated legal sentence which can be found in *Liber negotiorum* and according which probably the defendant is obliged to prove in front of the sworn one that he couldn't get to the properly announced trial because of the service which had to be done on behalf of master Štěpán.[19] The text of the plea for the issuing of specific legal sentence is not written down in *Liber negotiorum.* Because of that we cannot found out what exactly people from Uherské Hradiště wanted to know from Brno's sworn ones the same as we cannot found out the circumstances how the dispute began. We can come to the conclusion, even when there is some information missing, on the basis of so formulated legal sentence that Brno's sworn ones while assessing the plea which they have decided according to the articles 113 – 114 and even 115 of the *Law Book.* They considered the fact that the absence of the party at the trial was caused by performing the service in the public interest or as M. Flodr said in his monograph about Brno's town law: performing the service for master's needs (literally: urgent service for the master).[20]

The aldermen from Uherské Hradiště solved similar case some years later again. Declared legal sentence is written down in *Liber informationum et sententiarum* and because it is placed among the addendums we can say that it can be from the 1st half of the 16th century. Like in the above mentioned case even here is transcription of the plea for legal sentence missing so we cannot define the circumstances of the specific case. It is obvious from the text of legal provision that the party excused its absence caused by performing manorial service with the help of the groom legitimately. Brno's sworn ones stated that the court shouldn't decide the case but the trial should be set aside to another date.[21]

---

[14] Ibid.

[15] FLODR, Miroslav (ed.), *Právní kniha města Brna. Úvod a edice,* p. 188-189.

[16] FLODR, Miroslav (ed.), *Právní kniha města Brna. Úvod a edice,* p. 189. To this compare interpretation in FLODR, Miroslav, *Brněnské městské právo. Zakladatelské období (-1359)*, p. 371.

[17] Inst. 4. 6. 5: *„Rursus ex diverso si quis, cum rei publicae causa abesset vel in hostium potestate esset, rem eius qui in civitate esset usuceperit, permittitur domino, si possessor rei publicae causa abesse desierit, tunc intra annum, rescissa usucapione, eam petere, id est ita petere ut dicat, possessorem usu non cepisse et ob id suam esse rem."*

[18] To this compare mainly Inst. 4.10: *„…Nunc admonendi sumus, agere posse quemlibet aut suo nomine aut alieno. alieno veluti procuratorio, tutorio, curatorio, cum olim in usu fuisset, alterius nomine agere non posse nisi pro populo, pro libertate, pro tutela. Praeterea lege Hostilia permissum est furti agere eorum nomine qui apud hostes essent aut rei publicae causa abessent quive in eorum cuius tutela essent. Et quia hoc non minimam incommoditatem habebat, quod alieno nomine neque agere neque excipere actionem licebat, coeperunt homines per procuratores litigare: nam et morbus et aetas et necessaria peregrinatio itemque aliae multae causae saepe impedimento sunt quo minus rem suam ipsi exsequi possint. 1. Procurator neque certis verbis neque praesente adversario, immo plerumque ignorante eo constituitur: cuicumque enim permiseris rem tuam agere aut defendere is procurator intellegitur. 2. Tutores et curatores quemadmodum constituuntur, primo libro expositum est."* The article n. 573 of *Legal Book* extracts from the text of this provision *(De procuratoribus in genere)*,according to which the person could be substituted in the trial by the defender, guardia nor curator in case of captivity, illness, low age, sudden travel and so onTo this compare. Dig. 3. 3. 1.1: *„Procurator autem vel omnium rerum vel unius rei esse potest constitutus vel coram vel per nuntium vel per epistulam: quamvis quidam, ut Pomponius libro vicensimo quarto scribit, non putent unius rei mandatum suscipientem procuratorem esse: sicuti ne is quidem, qui rem perferendam vel epistulam vel nuntium perferendum suscepit, proprie procurator appellatur. Sed verius est eum quoque procuratorem esse qui ad unam rem datus sit."* And too Dig. 3. 3. 71: *„Absens reus causas absentiae per procuratorem reddere potest."*

[19] To this compare original formo f the judgement: *„Item respondemus, quod si ille, pro quo dominus Stephanus clientem suum misit, adhuc probare potest per iuratos, quod ipsum inpedivit, neccessitas domini sui ipse utetur."* FLODR, Miroslav (ed.), *Nálezy brněnského městského práva,* p. 15. Srov. Flodr's commentary on p. 92.

[20] FLODR, Miroslav, *Brněnské městské právo. Zakladatelské období (-1359)*, p. 371.

[21] Compare.: *„Poněvadž ten, kterýž ku prvnímu právu nestál, skrze pacholka svého opověděl se, že státi nemohl pro potřeby panské, a potom sám také stál, tehdy ještě ku právu dobře připuštěn bejti může, protož když právo po druhé pojde, k tomu ať stane podle práva."* TKÁČ, Ignác (ed.), *Liber informationum et sententiarum,* p. 329.

*L*ast but one of the cases which is written down in the records of *Liber informationum et sententiarum* represents an exception because as the only one from the stated legal sentences from this area disposes of the verdict of the Brno's sworn ones but even of the text of the plea. The original nature of the dispute lay with the unpaid claim which the plaintiff had against the defender. But Brno's sworn ones didn't have to decide whether the claim is legitimate or not. They didn't have to make the verdict concerning further defendant's performance. The question of the aldermen from Uherské Hradiště led to the procedural area like in the previous cases concerning the absence at the trial. The creditor sued the debtor because he failed to respond to a complaint in the time set by law but one of the parties was absent at the trial (there isn't mentioned whether it was plaintiff or defendant in the plea). The court ordered a new trial because of that but one of the parties didn't arrive again. The court set aside the trial again and in the connection with Brno's town law ordered the 3rd so that means the last trial concerning this dispute. The defendant came to the final trial as the only party but the plaintiff asked for one more proceeding. So the people from Uherské Hradiště asked whether it is even possible to keep the proceedings concerning the same case for the fourth time. Brno's sworn ones kept the specific principles of the *Law Book* precisely its late redaction which allowed just three proceedings and they decided the dispute in favour of defendant who was freed from the obligation.[22] Last case concerning this problematics is just the brief recapitulation of above mentioned cases. In the text which contains just the legal sentence it is emphasized that in case that one party is absent to so called final trial (*zavitý rok*) it lost the dispute.[23]

Conclusion

Even though the question concerning the legal consequences arising from the absence at the trial didn't belong to the set of the frequent questions written down to the books *Liber negotiorum civitatis Hradisch* and *Liber informationum et sententiarum* which were rich with the questions and themes we can concern the presented legal sentences which deals with the stated problematics as the partial evidence of using these specific principles of the Brno's *Law Book* in the former practice. We cannot claim that the mentioned Roman law influences entered Brno's town law after finishing the *Law Book.* The principles of Roman law were undoubtedly applied in Brno's town law even sooner we can see the evidence in the findings taken to the *Law Book* from the *Book of sentences* which show the influences of Roman law quite clearly. The potential findings of Roman law influences in Brno's legal practice shouldn't be connected automatically just with the *Law Book* because it is highly probable that the legal society met the principles of Roman law sooner via south-German law and Viennese law. Above mentioned finding cannot be generalized and be connected to the different unrelated cases. We have to judge them *ad hoc* ideally in context with other source material so with town books of different areas of Brno's legal circle or with significant copies or originals of legal sentences if they are presumed to these times. We cannot eliminate that the study of further sources registering Brno's legal sentences can bring completely knew knowledge. At the end I would like to repeat what was written in the contribution. Legal sentences bring important testimony about the cases solved in the circle of early modern Brno's town law. In the connection with that it is necessary to hope that legal historical material and Romanist potential of this source material will be fully used.

[22] Compare: *„Na to vás naučujem, že odpovidatel z dvojí příčiny žalobníkovi vinovat nenie odpovídati, z jedné, že tu věc před se vzal žalobník právem, a to právem nedokonal, když zpráva šla v roce a ve dni; z druhé, že oběma stranama hyl rok položen zavitý a konečný a žalobník k tomu roku nestál. A z těch dvů již psaných příčin odpovidatel žalobníka prázden jest učiněn vedle práva etc.“* TKÁČ, Ignác (ed.), *Liber informationum et sententiarum,* p. 249.

[23] TKÁČ, Ignác (ed.), *Liber informationum et sententiarum,* p. 330.

The Expansion of so-called Reich Citizenship in the Czech Territories during the War Years and its Post-war Consequences*

*František Emmert***

Abstract

The gradual Nazi German occupation of the territories of pre-war Czechoslovakia, during the years of 1938 to 1945, resulted in an extraordinarily broad institution of German citizenship in the Czech lands. Approximately 3, 500, 000 pre-war Czechoslovakian citizens, mainly ethnic Germans, attained German citizenship. During the period of occupation the guiding legal provisions for attainment was based on Nazi ideology. As such, ethnic Germans, who were citizens of Czechoslovakia, became citizens of the Third Reich. Initially, the declaration of this new citizenship by those affected was a marked privilege.

Key words: *Citizenship; German legal; Czechoslovakia; ethnic Germans; Protectorate; race laws.*

Introduction

The gradual Nazi German occupation of the territories of pre-war Czechoslovakia, during the years of 1938 to 1945, resulted in an extraordinarily broad institution of German citizenship in the Czech lands. Approximately 3, 500, 000 pre-war Czechoslovakian citizens, mainly ethnic Germans, attained German citizenship. During the period of occupation the guiding legal provisions for attainment was based on Nazi ideology.

During the years 1938 to 1945, the inhabitants of the Czech lands, who had Czechoslovak citizenship before the 10th of October 1938, were divided into three categories: (1) privileged citizens of the German Reich (pertaining in the main to ethnic Germans), who were the only ones with political rights – at least formally in the conditions of the totalitarian state (2) citizens belonging to the Protectorate (ethnic Czechs) who were accorded almost no political rights. (3) subjects belonging to the Protectorate, who fell under the racist laws of Nazi Germany (Jews, ethnic Roma and so-called of Mixed ethnicities). From the perspective of the possible exercise of political rights of the subjects of the Protectorate in puppet organisations (for example in National Association) cannot be considered either as acknowledgment of even limited political rights, when in reality we realize that these organisations were in no way able to influence the development of the Protectorate politically or constitutionally.

As such, ethnic Germans, who were citizens of Czechoslovakia, became citizens of the Third Reich. Initially, the declaration of this new citizenship by those affected was a marked privilege. They were afforded the possibility of social advancement and material security in the nascent conditions of the war economy. However, very soon they started experiencing the extreme disadvantages of the situation. The new citizens were soon to realize that they were required to do compulsory military service. But even worse consequences following from the declaration of German citizenship was to occur after the war. More than 85 percent of the holders of interwar German citizenship were expelled and property confiscated after the re-establishment of the Czechoslovak Republic.

1913 Law pertaining to Reich and state citizenship

The term "Reich citizenship" first entered the German legal jargon in connection with the first all-German law regulating state citizenship: *Law pertaining to Reich and state citizenship* from the 22nd July 1913 (effective from the 1st January 1914).[1]

The unification of legal regulations was the main aim of that law because until that time German citizenship was attained according to the legislation of each constituent state, which was often different. The Law was based on the conception of the overriding principle *ius sanguinis*, which means it favoured the attainment of citizenship by birth exclusively from ancestry and not according to territorial birth. "Failure to do military service" according to the Law led to the forfeit of citizenship. Children born in wedlock acquire citizenship exclusively paternally, children born out of wedlock maternally (declaration of paternity was not considered). The wives took the state citizenship of their husbands. These basic standards were at that time governed by legal regulations of the majority of states favoured the principle *ius sanguinis,* including Austria and later Czechoslovakia.

* The article arouse in relation to a specific research in Masaryk University Brno, SV MUNI/A/1291/2014.

** JUDr. František Emmert, Department of the History of the State and Law, Faculty of Law, Masaryk University Brno; Institute of State and Law, Academy of Science CR, Czech Republic.

1 *Reichs-und Staatsangehörigkeitsgesetz.* Reichsgesetzblatt, 1913, p. 583.

The law established Reich citizenship but it did not cancel acquired state citizenship of individual states, which continued to exist despite losing international validity. The authority in the area of state citizenship remained in the ambit of each state administration. Only ethnic Germans born outside of Germany acquired Reich citizenship.

Decree about German state citizenship from the 5th February 1934[2] adopted in the time of the rise of the Nazi regime aiming for thoroughgoing centralization and unification of state administration and legal code eventually cancelled the state citizenship of individual states and introduced the principle of total unity and internal indivisibility of German citizenship. The authority for granting and revocation of the citizenship, however, was left to the lower administrative organs.

Changes in the time of Nazi regime

In Germany during the years 1933–1945 under the Nazi regime race laws and decrees were gradually enacted, where the most important expressly dealt with the institute of German state citizenship. In its essence they excluded a part of the then German inhabitants from political and public life and took away their political rights. Race laws, including those regulating state citizenship were based strictly on Nazi racist ideology, especially on the political programme of the *National Socialist German Workers' Party* (NSDAP) from the 27th January 1920.

Political programme of the NSDAP required not only the unity of all Germans in one state and the creation of Greater Germany *(point one)*, abolition of *Treaty of Versailles (point two)*, renewal of the colonial system (*point three)*, but also the narrowing of those eligible for state citizenship only to those of German origin *(point four),* with the possibility of expulsion of persons forfeiting state citizenship from Germany *(point five and seven),* and even immediate expulsion of persons of non-German origin, who moved to Germany after the 2nd August 1914, which was the day when the German Empire entered the first World War *(point eight).*

Law pertaining to the cancellation of naturalization and revocation of German citizenship[3] adapted on the 14th July 1933 was followed by respective implementing of decrees from the 26th July 1933[4], which took the German state citizenship away from certain people, who attained it in the time of the *Weimar Republic* (1919–1933) or even still in the time of the German Empire in the years from 1914 to 1918. The law affected so-called "eastern Jews" (according to Nazi terminology of that time).Citizenship was supposed to be revoked even in the case that such persons would end up totally without any citizenship. The exercise of this law later resulted in the violent expulsion of these persons from German territory.

However, more fundamentally and far-reaching changes came about with the *Law pertaining to Reich citizenship*[5] from the 15th September 1935 parallel with the enactment of the *Law pertaining to the defence of German blood and German honour,*[6] which represented the basis of the emerging race legislation, which excluded from political, public and social life people with Jewish origins. The *Law pertaining to Reich citizenship* contained in its second article certain "extensions" supplementing state citizenship[7] and since "Reich citizenship", which was supposed to belong to only people of "German or related blood" while only Reich citizen was according to this law "the sole holder of political rights by law.[8]

Real state citizenship at that time was only "Reich citizenship" because other forms of "state citizens" without Reich citizenship devoid of political rights. Implementing decrees relating to both laws from the 15th September 1935 specified precise criteria for determining of people with Jewish origin and opened them to discriminatory measures, which gradually became stricter. According to the 11th decree implementing *Law pertaining to Reich citizenship* from the 25th November 1941[9], people falling under race legislation were deported to eastern ghettos and extermination camps and were even deprived of their own "state citizenship".

Reich German citizenship in occupied Czech territories

In relation to the territories annexed by Nazi Germany during the years 1938–1945 the institute of German state citizenship extended to the Czech territories. In connection with the Munich Agreement from the 29th September 1938 pertaining to the cession of Czech border territories to Germany (Czechoslovakia was not a participant in the adoption of this Agreement but a day after was openly threatened with war contingent on the acceptance of its condition) *Treaty between the Czech-Slovak Republic and German Reich on the questions of state citizenship and option* was signed on the 20th November 1938[10] according to which all persons without consideration to nationality living in the occupied territories, providing that they were born there before the 1st January 1910 and further also their wives and descendants (children and grandchildren) attained the German citizenship up to the 10th October 1938. Approximately 3,100,000 inhabitants of the ceded Czechoslovakian border territories gained German citizenship.

Czech (or other non-German) nationals could up to the 29th March 1939 opt for the preservation of Czech-Slovakian citi-

[2] *Verordnung über die Deutsche Staatsangehörigkeit.* Reichsgesetzblatt I, 1934, p. 85.
[3] *Gesetz über den Widerruf von Einbürgerungen und die Aberkennung der Deutschen Staatsangehörigkeit.* Reichsgesetzblatt I, 1933, p. 480.
[4] *Verordnung zur Durchführung des Gesetzes über den Widerruf von Einbürgerungen und die Aberkennung der Deutschen Staatangehörigkeit.* Reichsgesetzblatt I, 1933, p. 1146.
[5] *Reichsbürgergesetz.* Reichsgesetzblatt I, 1935, p. 1146.
[6] *Gesetz zum Schutze des Deutschen Blutes und der Deutschen Ehre.* Ibid.
[7] State citizenship was to further be attained according to the Law from the year 1913.
[8] Provision § 2 Law about Reich citizenship.
[9] *Elfte Verordnung zum Reichsbürgergesetz.* Reichsgesetzblatt I, 1941, p. 722.
[10] Was published in Czechoslovak legal code like Treaty 300/1938 Statute but it never became valid Czechoslovakian law. It was published in the German legal code in *Reichgesetzblatt II,* 1938, p. 895.

zenship, which approximately 130,000 of them did.[11] German nationals living in Czechoslovakia outside the ceded territories could within the same deadline opt for German citizenship. The treaty in its 2nd article gave the ability to the German and Czechoslovak governments to expel the part of the inhabitants up to the 10th July 1939 from their territories. The German government could collectively expel Czechs, who had moved to the ceded territory after the 1st January 1910. Similarly, the Czechoslovak government could expel German nationals, who after the 1st January 1910 moved from ceded territory to different parts of Czechoslovakia. Both governments could expel people, who opted for citizenship. Eventually this ability was not used by either side[12]. Nevertheless a clear precedent was established for post-war resettlement of the German minority from the re-established Czechoslovakia.

After of the creation of the *Protectorate of Bohemia and Moravia* on the 15th March 1939 the institute of German citizenship was extended to the Czech interior. The *decree pertaining to the attainment of German state citizenship for the former Czechoslovakian state citizens of German origin (*literally *national citizenship)*[13] was published on the 20th April 1939 according to which, the inhabitants of the Protectorate "of German descent" acquired German citizenship. This descent was required to be proved by filling out a *Questionnaire investigating German national descent in the protectorate.* According to the decree from the 20th April 1939 Reich citizenship was not granted neither to women married to Czechs, nor to their children. But on the 6th June 1941 a second *Decree regulating the questions of state citizenship in the Protectorate of Bohemia and Moravia*[14] was adopted with validity from the 1st July 1941, which granted German citizenship also to those persons meaning that mixed married couples were able to have different citizenship in the protectorate.

The first decree from the 20th April 1939 took away the right to German citizenship for German nationals from Slovakia and Carpathian Ruthenia providing they did not opt for it up to that time according to the bilateral treaty from the 20th November 1938. At the same time it also opened the possibility for Germanisation to the willing part of the Czech inhabitants residing in the Protectorate. According to this decree the respective questionnaire could be filled also by persons of German origin, who had never claimed German nationality and even persons without German ancestry. A good 270,000 German state nationals (formerly Czechoslovakian citizens)[15] lived in the Protectorate in December 1941. From this merely half claimed German nationality before 1939. The second half consisted of persons, who welcomed the chance to be germanised, the majority falling back on German ancestry from previous generations.[16]

The status of Czechs and Jews

Czech inhabitants living under the Protectorate after the 15th March 1939 were considered by German occupation power as so-called *subjects of the Protectorate* without political rights or the possibility to apply to German state concerns or the Third Reich agencies. They found themselves in the position of mere inhabitants living on the territory of the German Reich, not in the position of citizens.

The decree of the 16th of March 1939 by itself assumed the division of the citizens of the Protectorate into two basic categories according to nationality. Ethnic Germans were supposed to acquire German Reich citizenship and become citizens of the German Empire, while the rest would become merely "subjects of the Protectorate"[17] without Reich citizenship benefiting from the "protection" of the German state. This point of the decree was a straight adoption of the usual exercise of power of colonial rulers in relation to the indigenous populations in colonies outside of Europe.[18]

The conditions for the recognition of the inhabitants as of the Protectorate were administered by Protectorate government decree Nr. 19/1940 Statute pertaining to *subjects of the Protectorate*[19]. There were 7,250,000 persons, who were considered subjects of the Protectorate that were living on its territory with an additional 290,000 Czechs from the ceded border territories. Race legislation was applied to 120,000 persons while also Czech Jews and so-called people of mixed raced origins (according to the then Nazi terminology) from 1942, as a result of deportation to eastern ghettos and extermination camps, were totally deprived of whatever form of state citizenship according to the *Decree pertaining to the loss of protectorate citizenship*[20] published on the 2nd November 1942 by the Reich minister of the interior.

Although marriages between the Reich citizens and the subjects of the Protectorate (with the exception of people prosecuted under the race laws) were not strictly prohibited, they required to be approved by the authorities, where the local German *oberlandrat* had the authority to determine the "suitability" of such marriages. According to a decree of the Reich minister of interior from the 3rd April 1941 mixed marriages were allowed only under the condition of a vow of the newly-weds that the children from such a union would attend German schools.

---

[11] BARTOŚ, J., *Okupované pohraničí a české obyvatelstvo 1938 – 1945.* Praha, 1986 (2nd ed.). pp. 60-69.

[12] Approximately 150,000 Czech nationals left the ceded border territory after 10th October 1938, a lot of them under open pressure.

[13] *Verordnung über den Erwerb der Deutschen Staatsangehörigkeit durch frühere Tschecho-slowakische Staatsangehörige Deutscher Volkszugehörigkeit.* Reichsgesetzblatt I, 1939, p. 815.

[14] *Verodnung zur Regelung von Staatsangehörigkeitsfragen gegenüber dem Protektorat Böhmen und Mähren.* Richsgesetzblatt I, 1941, p. 308.

[15] BRANDES, D., *Češi pod německým protektorátem.* Praha: Prostor, 1999. pp. 190–191.

[16] BRYAND, CH. C., *Praha v černém : nacistická vláda a český nacionalismus*. Praha: Argo, 2012. pp. 56-57 and 72-80.

[17] Nazi legislation used the word *Protektoratsangehörige* for them as a way of avoiding their designation as "citizens".

[18] SOBOTA, E., *Co to byl protektorát*. Praha: Nakladatelství Kvasnička a Hampl, 1946.

[19] According to the second article of the *Decree of the Fuehrer and the Reich Chancellor pertaining to the Protectorate of Bohemia and Moravia* from the 16th March 1939.

[20] *Verordnung über den Verlust der Protektoratangehörigkeit.* Reichsgesetzblatt I, 1942, pp. 637–638.

On the other hand, marriages with people from Jewish origins were totally prohibited and sexual relationship with them was criminalized.

The laws of both German and the Protectorate were in effect at the same time on the territory of the Protectorate, where German law was applied to German citizens and the Protectorate law to the rest of the inhabitants, but persons under racial persecution were also judged in many areas directly by German law.

Food coupons as well as other coupons of the economic system of quotas were distributed according to state nationality and under the race laws in the Protectorate. The greatest quotas were awarded to German citizens, to the lower subjects of the Protectorate and totally at the bottom of the pile were those persons officially registered as Jews or so-called mixed-race. In 1941 the amount of quotas for Germans and Czechs was about the same however food coupons were distributed differently, of course in favour of the Germans (until to the end of the war).

As it was, many times in practice, it was precisely food stamps, which were used to verify nationality, especially in conflicting situations. For example, in May 1945 all the holders of food stamps type D were automatically considered Germans. On the contrary, other people in the locality who were brandy as Germans, used the food stamps marked T (or J) in an effort to prove that they were at no time administratively, under the occupation, recorded as Germans.

The restriction of basic rights of the citizens of Czech lands according to nationality implemented and practised by the Nazi occupants, stood in stark contrast to existing traditions as well as the legal culture practised in Czech and Moravia in the times of the Austro-Hungarian Empire or in the Czechoslovak Republic. The discrimination of citizens according to nationality was never a part of adopted legislation in the first Czechoslovak Republic. As a matter of fact, not even in associations and social organisations was it allowed to discriminate citizens because of nationality.[21]

Special legal norms in Teschen Silesia

The institute of German citizenship penetrated into the Czech territories in three phases. After the Czech border territories and the Protectorate, German citizenship arrived in Teschen Silesia in the years 1939 – 1942. This small district went through a specific development. As a consequence of the Munich Agreement it was ceded to Poland on the 1st October 1938. Until September 1939 as a result of German aggression against Poland under German occupation it became a part of the Upper Silesia Reich district. Although the Czech inhabitants were in the majority, their nationality was not recognized by the occupying authorities. They were forced to declare themselves as Silesians. German legal norms administering state citizens of pre-war Poland began to come into effect. They were also applied to Czechs, who from the German laws of that time were not considered as former Czechoslovakian citizens but as former Polish citizens. *Decree pertaining to German national register and German state citizenship in incorporated eastern territories* from the 4th March 1941[22] and also the second *Decree pertaining to German national register and German state citizenship in incorporated eastern territories* from the 31st January 1942[23] was also applied to them. The majority of Czech inhabitants were forced to register into the *third national register*[24] in March 1942. Through this register they attained German citizenship with the possibility of its annulment from the side of German authorities within ten years.

Conclusion

The legislation of post-war Czechoslovakia dealt with the penetration of German citizenship in the Czech territory in a very uncompromising manner. According to the provisions of the constitutional decree Nr. 33/1945 Statute from the 2nd August 1945 pertaining to the *amendment of Czechoslovakian state citizenship of persons with German and Hungarian nationality* all persons with German nationality excluding those, who took part in anti-Nazi resistance or were arrested for political reasons, lost the right to Czechoslovakian citizenship retrospectively to the date when they acquired German citizenship. Whereas, persons of Czech nationality "forced to accept the citizenship of enemy states under mitigating circumstances" were able to further preserve Czech citizenship. This pertained mainly to Czech wives married to Germans and the children from mixed families and also to Czechs, who did not opt for Czech-Slovak citizenship after the 10th October 1938 in the area of ceded border territories (for example the district of Hlučín) and pertaining to those Czechs from Teschen Silesia registered in the *third national register*. The district of Hlučín in Silesia with over 90 percent Czech inhabitants was affixed to the Czechoslovak Republic as late as on the 10th January 1920 on the basis of article Nr. 83 of Treaty of Versailles. Before it belonged to German Empire. Majority of the local inhabitants, although of Czech origin, after Munich did not opt for Czech-Slovak citizenship and according to bilateral treaty from the 20th November 1938 they again became German Citizen.

The authorities showed a certain level of leniency in relation to those Czechs, who completed the *Questionnaire investigating German national descent in the Protectorate* during the occupation. The loss of Czech citizenship was also accompanied with the confiscation of property according to provisions of the constitutional decree Nr. 12/1945 Statute from the 21st June 1945 pertaining to the *confiscation and the expedition of the distribution of agricultural property of Germans, Hungarians, and all types of traitors and enemies of the Czech and Slovak nations.*

Mixed families were in the end exempted from the post-war resettlement of the German inhabitants. Persons of German origins living in these families (mainly husbands and fathers) were allowed to apply for renewal of Czech citizenship. Those, who did not apply or their applications were rejected, attained

[21] BUBELOVÁ, K., *Vztahy českého, německého a židovského obyvatelstva ČSR ve 20. – 30. letech 20. století v soudní praxi (case study).* In: Češi a Němci v meziválečném Československu. Eds. Jaromír Tauchen and Karel Schelle. Key Publishing: Ostrava 2013. pp. 35 – 32.

[22] *Verordnung über die Deutsche Volksliste und die Deutsche Staatsangehörigkeit in den eingegliederten Ostgebieten.* Reichengesetzblatt I, 1941, p. 118–120.

[23] *Zweite Verordnung über die Deutsche Volksliste und die Deutsche Staatsangehörigkeit in den eingegliederten Ostgebieten.* Reichengesetzblatt I, 1942, p. 51–52.

[24] *Volksliste III.*

Czechoslovakian citizenship on the 7th May 1953 by collective granting according to the law Nr. 34/1953 Statute from the 24th April 1953 of which *some persons attain Czechoslovakian state citizenship.*

While the post-war Czechoslovak legal code did not recognize German legal norms according to which those people, who were Czechoslovakian citizens before the war, acquired German citizenship[25] during the Nazi occupation; those acts of acquisition of German citizenship according the same norms were confirmed in German post-war legal code. At the first Federal Constitutional Court in Karlsruhe ruled in this way in its decision from the 28th May 1952. Subsequently the *Law pertaining to amendment of state-citizen questions*[26] in the Federal Republic of Germany was published on the 2nd February 1955, which confirmed the validity of the granting of German citizenship according to given norms. German legal authorities even started sending certificates pertaining to the enduring existence of German citizenship of some Czechoslovakian citizens, who had German citizenship during the war, to Czechoslovakia, understandably to the great dissatisfaction of the then Czechoslovakian government. The acceptance of these certificates was designed to facilitate eventual emigration to the Federal Republic of Germany.[27]

The Czechoslovak side did not raise objections against the incorporation of the Germans resettled from Czechoslovakia into German citizens at that time. On the contrary, just after the war it even intended to enforce into the considered peace agreement with Germany besides the nullity of the Munich Agreement also the obligation of Germany to take care of all the persons resettled after the year 1945 from Czechoslovakia like German state citizens (this was like insurance against their eventual return). But the Czechoslovak side refused to incorporate those not resettled in Germany as German citizens.

This issue was resolved very soon with German Democratic Republic. Already on the 23rd June 1950 the Czechoslovakian and East German governments accepted a joint declaration in which they renounced mutual territorial claims and declared "completed resettlement of Germans from the Czechoslovak Republic as unchangeable, just and definitely solved". Later they also condemned the Munich Agreement and they offered mutual support against "west-German revanchism". Both sides later even concluded a bilateral agreement on the prevention of the rise of double nationality[28], which totally excluded the possibility of any person having at the same time Czechoslovakian and East German citizenship.[29]

The questions concerning those persons not resettled in Germany, which according to German legal code still remained German citizens, was resolved with the Federal Republic of Germany by the signing of the *Agreement on mutual relationship between the Czechoslovak Social Republic and the Federal Republic of Germany* on the 11th December 1973 in Prague. After the signing a part of the German minority in Czechoslovakia was allowed by the Czechoslovakian side to legally emigrate to the Federal Republic of Germany.

[25] According to the provisions of the constitutional decree Nr. 11/1194 Statute from the 3rd August 1944 pertaining to renewal of legal order.
[26] *Gesetz zur Regelung von Fragen der Staatsangehörigkeit.* Bundesgesetzblatt I, 1955, p. 65.
[27] PETRÁŠ, R. : *Cizinci ve vlastní zemi.* Praha: Auditorium, 2012. pp. 155–156.
[28] Agreement between the Czechoslovakian Socialist Republic and the German Democratic Republic from the 10th October 1973 pertaining to *amendment of the double state citizenship.*
[29] ČERNÝ, J.– VALÁŠEK, M., *České státní občanství.* Praha: Linde, 1996. pp. 131–194.

The Fundamental Events within the Development of Central Banking in the Czech Lands*

*Johan Schweigl***

Abstract

The author has outlined the core events that occurred in the development of central banking in the territory of today's Czech Republic. Showing the foundations of central banking in the Austrian empire, the author followed to t many important legislative measures concerning central banking in Czechoslovakia, Protectorate Bohemia and Moravia, the communist era and the relatively recent regulation of central banking in the Czech Republic. Aside from underlining the core legislation regulating this area, the author tried to set the respective regulation into broader historical context.

Key words: *Central bank; central banking; Czech national bank; Privileged Austrian national bank; monetary policy.*

1. Foundation of Central Banking in Austrian Empire

The very beginnings of the central banking in the Czech lands may be traced to the Austrian empire, when the Privileged Austrian national bank („*privilegirte Oesterreichische National-Bank*") was established in 1816. This bank was founded in the form of a joint stock company, and due to the certain features it had, it might be considered to be the first central banking in the area of the monarchy. This bank was established by means of two legislative acts called patents; the first was named "Financial" patent („*Finanzpatent*" or also „*Hauptpatent*"), the second was named 'bank' patent („*Bankpatent*"). These acts were issued by the emperor France I on June 1, 1816.

The term "privileged" included in the name of the bank meant that this bank had been granted a special privilege (license) to issue banknotes, which could be anytime exchanged for silver.[1] The bank had not, been the only institution in the empire issuing notes, as this right was also granted to Ministry of Finance. Aside from this right, the bank was entitled to set discount rate. Although the Austrian central bank was similar to, for instance, the central banks in some other European countries,[2] it was unique that this bank the exclusive right to issue the notes, as in England, France or Germany, there were always more banks having this right.[3] The bank's role was also to ensure price stability and to help economy to grow (e.g. by buying bills of exchange).

The Austrian central bank was to be independent from the government. This approach was based on the belief that the government, including the emperor, should not interfere with the bank's monetary policy. The central bank was represented by famous bankers of that era, such as the Austrian political leader Adrian Nicolaus Freiherr von Babier, the Swiss banker Johann Heinrich Geymüller or the Austrian banker Bernhard von Eskeles.

The banks' independence from the government and the emperor was not automatic and both the governors and the directors of that bank had to keep fighting for it. In 1841, the central bank's independence was limited as the influence on the bank management was shifted from the shareholders to government. This change came to existence by means of a so-called 'second privilege' („*Zweites Privilegium*") of October 2, 1841. This act was followed by a so-called 'third privilege' („*Drittes Privilegium*") of 1862, which reconfirmed the banks right to issue notes and extend credit. There was, however, a limit on cash in circulation. The amount equal to the sum of the nominal value of the notes, which exceed 200 million florin had to be covered by pressure metal. Despite all the bank's exclusive rights, the government had often breached the exclusivity and issued own notes, the state notes, which might be considered as interfering with the bank's exclusive monetary powers. In 1867, more than half (54 per cent) of all the notes, were the state notes issued by the government.[4] The bank's exclusive right was reestablished

* This article is based on the author's entry "financial services – central banking" in Tauchen, J., Schelle, K. (ed.) *The Encyclopedia of Czech Legal History*, volume III, Plzen: Ales Cenek, 2016.

** Mgr. Johan Schweigl, Ph.D., Department of Financial Law and Economics, Faculty of Law, Masaryk University Brno, Czech Republic.

1 POHL, M. et al., *Handbook on History of European Banks*, 1994, p. 20.

2 For instance, the United Kingdom or France.

3 WIRTH, M. et al., *The History of Banking in Germany and Austria- Hungary*, 1896, p. 69.

4 JOBST, C. a SCHEIBER, T., *Austria-Hungary: from 1863 to 1914, 2008*, p. 71.

by the Act of March 18, 1872 („*Gesetz vom 18. März 1872, betreffend die Abänderung des § 14 der Statuten der privilegirten österreichischen Nationalbank*“).

In April 1873, there was a downturn on the Vienna stock exchange, which followed an enormous increase in the number of joint stock companies in the Austrian-Hungarian monarchy („*Gründerjahre*“). This downturn had also effected the national bank. Having felt that some of the central bank's powers should be limited, the emperor issued a decree by means of which a part of the legislation of 1863 regulating protection of banknotes and minimal reserves was repealed. This decree remained in force until October 11, 1874. This legislative measure was supposed to help conquer the lack of credit following the crisis.[5]

2. Central Banking after the Austro-Hungarian Compromise

During the negotiations connected with the so-called Austro-Hungarian compromise of 1867, the central bank was not the central topic and it was rather left aside. Solution came later, when the Privileged Austrian national bank was transformed into the Austrian-Hungarian bank („*Oesterreichsich-ungarische Bank*“, in Hungarian „*Osztrák-Magyar Bank*“). In the Act on Austrian-Hungarian bank of June 27, 1878 („*Gesetz vom 27. Juni 1878, betreffend die Errichtung und das Privilegium der Oesterreichisch-ungarischen Bank*“), it was stated that none of the parts of the monarchy was not allowed to establish any other central bank, which was a special privilege (called „*Erstes Privilegium*“), which had arisen from the negotiations between the representatives of Austria and Hungary. The daily issues of setting discount rate and credit expansion were dealt with by two independent offices (one in Vienna, and the other in Budapest). The general secretary the bank was in 1878 the Austrian banker Gustav von Leonhardt.

Following the 'first privilege', there was issued a so-called 'second privilege' („*Zweites Privilegium*“) in May 1887. This measure extended the monopoly of the Austrian-Hungarian bank, but introduced no changes. The monopoly of the central bank was later extended by a so-called 'third privilege' („*Drittes Privilegium*“), which was issued in September 1899. The Supreme Accounting and Controlling Court was entitled to review the books of the banks. The Act No 157 of August 8, 1911 is understood as a so-called 'forth privilege' („*Viertes Privilegium*“). This act again extended the exclusive status of the bank in both parts of the monarchy, but the period for which it was extended was shorter.

The World War I also reflected in the steps that were taken by the central bank. Although some of the generals first claimed that the war would not take longer than several months, the bank was not able to maintain price stability and just a few days after the war started it was clear that the Austrian currency would experience strong decline in value. About 40 per cent of the war expanse was financed via loans from the central bank (Oesterreichische Nationalbank, *The Austro-Hungarian Bank*, 2014).

3. Central Banking in Czechoslovakia after the World War I

The Czechoslovakian state, which had emerged after the collapse of the Austria-Hungary, was not ready for establishing its own central bank. First, it seemed that the best solution, with respect to the necessary continuity, would be to use the Austro-Hungarian bank. The young republic strived to have representatives in the General council of the bank and to establish a new central institute of the bank, which would have powers over the territory of the new state. This institute was established on December 2, 1918. Further efforts aimed at separation of the currency and establishing of its own independent authority to be in charge of monetary policy.

Hence, the next step that had to follow was monetary reform. The new currency was maintained by the Bank authority (in Czech: *Bankovní úřad*) at the Ministry of Finance. This authority was established by means of the governmental decree No 119/1919 and the Act 187/1919 of April 10, 1919. The Bank authority at the Ministry of Finance had existed from March 11, 1919 till March 31, 1926. This authority was granted powers which are typical for central banks although it was a part of the Ministry of Finance.

The abovementioned governmental decree No 119/1919 of March 6, 1919, also completely repealed any powers of the Austrian-Hungarian central bank in Czechoslovakia.

One of the problems connected with the Bank authority of Ministry of Finance was its unclear relationship with state administration. The abovementioned governmental decree stated (§ 2): *"The Bank authority of the Ministry of Finance aside from being a state office, it is also a public office which renders services related to extension of credit. The Bank authority, as a state office, is not obliged to be recorded (nor any of its branches) in the Business registry."* Although the Bank authority claimed to be a public independent body, some representatives of state administration, for instance the Supreme auditing and controlling authority (in Czech: *Nejvyšší účetní a kontrolní úřad*), contested the Bank authority's independence and claimed to have power of control over it. (ČNB, *Organizace Bankovního úřadu ministerstva financí*, 2014).

In respect to establishing a central bank, we should also mention the Act No 347/1920 of April 14, 1920 on the Joint Stock Central Bank (in Czech: *zákon o akciové bance cedulové*). This act granted the central bank an exclusive right to issue Czechoslovakian banknotes. Despite the fact that this Act had been passed in 1920, the National Czechoslovakian bank came into existence in 1926. The abovementioned Act was amended by the Act No. 102/1925. The central bank was established in the form of a joint stock company, in which two-thirds of stocks were hold by private shareholders and the remaining one-third was held by the state. It may be said that despite certain political attempts to limit the independent role of the central bank, the National Czechoslovakian bank laid down foundation for an independent central banking in Czechoslovakia.

[5] WIRTH, M. a kol., *The History of Banking in Germany and Austria- Hungary*, 1896, p. 82.

The central bank was of course influenced by the reality of the late 1930 s. In January 1939, there had been issued a governmental decree No 16/1939, which transformed the National Czechoslovakian bank into the Czech-Slovak National bank.[6] However, before this process was completed, the independent Slovakian state was established.

4. Central Banking in the Protectorate of Bohemia and Moravia

On the first day of occupation of the Czech lands by the German army, Dr. Friedrich Müller, as a representative of the German Reichsbank, came to the Czech central bank and announced that the Reichsbank now oversaw the bank. The Czech central bank's gold which was stored abroad had to be transferred to the Reichsbank. The Czech national bank was from then on titled National bank for Bohemia and Moravia.

The abovementioned Dr. Müller acted as a special representative of the Reichsbank and the Czech central bank had to inform him about any decisions to be taken. There had to be Germans engaged in the Nazi apparatus appointed in the bank's board of governors. (ČNB, *Národní banka pro Čechy a Moravu*, 2014). It should be mentioned that the National bank for Bohemia and Moravia was gradually stripped of its powers; it did not carry out the duties typical for the national banks.

There were a number of the Czech central banks employees who were engaged in the resistance group against Nazi occupation. For instance, we should mention the head of the department of administration of currency Václav Sadílek. As for the abovementioned transfer of the Czech central bank's gold to the Reichsbank in March 1939, the Czech central bank's employees František Blažek a Antonín Šourek informed three foreign embassies (United Kingdom's, French and Belgian) that the approval of the representatives of the bank (František Peroutka and Josef Malík) with the transfer of the Czech gold was made under duress. Aside from that Mr. Blažek and Šourek asked the Bank of England to refuse to carry out the transaction. The resistance activities of the bank's employees were increasing at the end of the war. In 1944, there was secretly established a group, whose role was to prepare to further reestablishment of independent central bank after the war ends. Some bank's representatives started to carry out steps that hindered financing of the German occupational administration, which later led to arresting of three high representatives of the bank: the Governor František Ladislav Dvořák, the supreme director František Peroutka and the director of the main institute of Prague, Karel Papoušek (ČNB, *Národní banka v odboji*, 2014).

The closer was the end of war, the more the Czech exile government had to consider the monetary issues in the territory of the Czech lands after the war would be over. In March 1944, the exile ministry of finance prepare basic points of a decree that was to deal with the monetary policy and issuance of notes. This decree was approved and signed by the president in November 1944, as a presidential decree of November 12, 1944, No 16. Based on this decree, the Czechoslovakian monetary authority, whose office was at the ministry of finance located in London). This monetary authority was in charge of issuing notes for civil administration, Czechoslovakian army, etc. This authority, however, could only carry out its powers in the liberated territories of the Czech lands. Aside from issuing these notes, this authority had some other powers typical for the central banks. After the war, the Czechoslovakian monetary authority was relocated to Prague and it set the exchange rates for the currencies circulating in the territory of the Czech lands. On May 19, 1945, there was issued a governmental decree No 7/1945 which stated that the legal tender (currency) in the Czech lands are the notes issued by the Czechoslovakian republic and the notes still used in the territory from the era of the Protectorate of Bohemia and Moravia. As of November 1, 1945, the Czechoslovakian koruna replaced the former currencies at the rate 1 : 1.

5. Central Banking in the Post-War Era in Czechoslovakia

Following the end of war, there were two central banks in Czechoslovakia, i.e. the National bank for Bohemia and Moravia and the Slovakian national bank. The authority of the Czech central bank was then extended (see the decree 139/1945) also to the Slovakian territory. The role of the Czechoslovakian monetary authority was then taken over by the restored National bank for Bohemia and Moravia. Although the new act on the National bank of Czechoslovakia, No 38/1948 granted the monetary powers to the bank, it should be emphasized that was the "state" who carried out the administration of currency, and the central bank was rather the state's tool.

A new central bank was established by means of the Act No 31/1950, on the State Czechoslovakian bank, which was passed on March 9, 1950. This new act completely eliminated any last remains of the bank's independence. This bank fall under the resort of Ministry of finance, as the bank's general director had to follow the orders of the minister of finance and report to him. General director of the central bank was appointed by the government. The banknotes issued by the National Czechoslovakian banks remained to be valid, but the State Czechoslovakian bank started to issue its own notes. Individuals were allowed to open cash accounts at the bank. The bank also acted as a clearing house and was in charge of placing bonds issued by the state, etc.

6. Central Banking in the Communist Era of Czechoslovakia

The State Czechoslovakian bank took over all assets and liabilities of four financial institutions that had existed before, i.e. the National Czechoslovakian bank, Živnostenska banka, national enterprise, Tatra banka, national enterprise and Poštovní spořitelna, national enterprise. These for banks thus *de facto* ceased to exist. The bank's dependency on Ministry of finance was even supported in December 1952 when the Act No 84/1952, on organization of money system, was passed. According to this act, the State bank of Czechoslovakia was subordinate to Ministry of finance. The role and powers of

[6] Bažantová, I. *Nestandardní právní zakotvení ČNB*, 2005, p. 75.

the bank change a little in 1965 when the general director was granted a right to attend the meetings of the government. The structure of the bank was affected and reorganized after the Act No 144/1970 was adapted. Although the bank still had its headquarters in Prague, it had now two main institutes, one in Prague and one in Bratislava.

Further changes in regulation of the central banking in Czechoslovakia appeared in late 1980 s. On November 15, 1989, there was passed the Act No 130/1989 on the State Czechoslovakian bank and, on December 13, 1989, the Act No 158/1989, on commercial banks and savings banks. This tandem of acts at least partially reestablished the classic two-level system of banking, i.e. commercial banking, on the one side, and central banking on the other. This 'split' was followed by establishing of two commercial banks: Komerční banka a Všeobecna úverova banka. The central bank only kept is powers to issue banknotes, maintain foreign-exchange reserves and carry out monetary policy.

7. Central Banking in the Czech Republic

The abovementioned Act on the State Czechoslovakian bank was soon replaced by a the Act No 22/1992, on the State Czechoslovakian bank. This new act fully recognized the principle that a central bank shall be independent. It was explicitly stated in the act that the central bank cannot be given orders by the government. Minister of finance could only give advice or recommendation to the bank representatives, but not order anything. The central bank was led by a bank board that consisted of seven members. The board members were appointed by the President. Following the split of Czechoslovakia, there was passed the Act No 6/1993 on the Czech National bank, which remains in force until now. Although having been amended several time over the last more than twenty years, it remains to be the core legal act outlining the powers and duties of the Czech central bank. This act embodied all the principles typical for modern central banking. Czech National bank is completely independent and may only be regulated by legislation. The banks main goals are to maintain price stability and financial stability. The former is carried out via monetary policy, whereas the latter via so-called macroprudential policy. The first goal we mentioned, i.e. maintaining price stability, is also set forth in the Czech constitution.[7] Maintaining price stability, as the primer goal of the Czech national bank, complies, for instance, with the main objective of the European central bank at the Eurozone level, or with the Federal reserve system in the US. The need to maintain financial stability arouse at the global level after the financial crisis of 2007-2009. Having been first seriously discussed at the Bank for International Settlements, and later becoming an integral part of central banks' roles around world. It has been embodied not only at the EU legislation and consequently into the Czech legislation. With respect to the two main objectives of the Czech national bank, the bank has been granted instruments for carrying out monetary policy (such as carrying out open market operations, or stimulating the foreign exchange rate of Czech koruna, etc) and relatively recently certain tools for carrying out macroprudential policy (such as the right to set capital buffer reserve, etc.).

As from May 1, 2004, the Czech national bank has become part of the European system of central banks, which consists of the European central bank and the central banks of all the member states of the European Union.

Bibliography:

KUNERT, J., *Centrální bankovnictví v českých zemích*. Praha: Česká národní banka, 2008, 183 p.

BAŽANTOVÁ, I., Nestandardní právní zakotvení ČNB. In: LOUŽEK, M. (ed.), *Postavení centrální banky v demokratickém státě*. Praha: CEP – Centrum pro ekonomiku a politiku, 2000, 118 p.

PALKOVSKÝ, B., *Národní banka československá a náprava měny*. Praha: Vesmír, 1925, 210 p.

NOVOTNÝ, J. Národní banka československá (1919-1950). In: HÁSKOVÁ, J. (ed.), *Československé bankovky, státovky a mince, 1919-1992*. Praha: Lunarion, v. o. s. in cooperation with ČNB, 1993, 128 p.

OESTERREICHISCHE NATIONALBANK, *The Austro-Hungarian Bank*, [15. 12. 2014]. Available here: http://www.oenb.at/en/About-Us/History/1878-1922.html.

OESTERREICHISCHE NATIONALBANK, *The Privilegirte Oesterreichische National-Bank*, [18. 12. 2014]. Available here: http://www.oenb.at/en/About-Us/History/1818-1878.html.

POHL, M.A. kol. *Handbook on History of European Banks*, Frankfurt am Main: Edward Elgar Publishing Limited, 1994, 1304 p.

WIRTH, M. The History of Banking in Germany and Austria- Hungary. In: Editor of JCCB (ed.), *A History of Banking in All the Leading Nations*, New York: The Journal of Commerce and Commercial Bulletin, 1896, 620 p.

JOBST, C. a SCHEIBER, T. Austria-Hungary: from 1863 to 1914. In: LAZARETOU, S. and SCHEIBER, T. (ed.), *South-Eastern European Monatery and Economic Statistics from the Nineteenth Century to World War II*, Athens: Bank of Greece. Sofia: Bulgarian National Bank. Bucharest: National Bank of Romania. Vienna: Oesterreichische Nationalbank, 2014, 410 p.

RUDOLPH, R. L. *Banking and Industrialization in Austria-Hungary*, Cambridge: Cambridge University Press, 2008, 304 p.

SCHAUMAYER, M. Central Bank Independence in Austria. In: DOWNES, P. a VAEZ-ZADEH, R. *The Evolving Role of Central Banks*, Washington, D.C.: International Monetary Fund, 1991, 192 p.

BONĚK, V. et al. *Historie Ministerstva financí, 1918-2004*. Praha: Ministerstvo financí, 2004, 98 p.

ČNB, Likvidace Rakousko-uherské banky, [11. 12. 2014]. Available here: http://www.historie.cnb.cz/cs/dejiny_instituce/bankovni_urad_ministerstva_financi/likvidace_rakousko_uherske_banky.html.

[7] See the Art. 98 of the Czech Constitution.

ČNB, *Organizace Bankovního úřadu ministerstva financí*, [21. 12. 2014]. Available here: http://www.historie.cnb.cz/cs/dejiny_instituce/bankovni_urad_ministerstva_financi/organizace_bankovniho_uradu_ministerstva_financi.html.
ČNB, *Národní banka pro Čechy a Moravu*, [21. 12. 2014]. Available here: http://www.historie.cnb.cz/cs/dejiny_instituce/narodni_banka_pro_cechy_a_moravu/.
ČNB, *Národní banka v odboji*, [19. 12. 2014]. Available here: http://www.historie.cnb.cz/cs/dejiny_instituce/narodni_banka_pro_cechy_a_moravu/narodni_banka_v_odboji.html.

Besondere Arbeitsbedingungen von Frauen im Hinblick auf den Schutz vom Wert der Mutterschaft auf dem Gebiet der Slowakei – Vergangenheit vs. Gegenwart*

(Special Working Conditions of Women with Regard to the Maternity in the Territory of Slovakia - History vs. Present Times)

*Miriam Laclavíková**, Andrea Olšovská****

Abstract

The study presents historical and legal point of view on the formation of the special legal status of women in the field of labour law and social security law during the 20th century in Slovakia. During this period, special working conditions for women and, in this context, a particular protection of maternity (on grounds of non-discrimination approach, the legislator currently uses the term „parenthood") showed a significant, but (in some respects) cyclic shift. The study refers especially to developing of the scope of maternity leave, protection of job position, arrangement of night work and restrictions and prohibitions of certain works of women, pregnant women and mothers, which are related to the regulations on health and safety at work.

Key words: *maternity; parenthood; special working conditions for women, pregnant women and mothers; maternity leave; night work of women; work restrictions for women; history of labour law.*

1. Einführung

Die Anerkennung von Notwendigkeit, den Wert der Mutterschaft (gegenwärtig im Rahmen vom Wert der Elternschaft) im Zusammenhang mit der besonderen Stellung von Frauen in arbeitsrechtlichen Beziehungen zu schützen, ist in der Slowakei mit Anfängen der Arbeits- und Sozialgesetzgebung in der zweiten Hälfte des 19. Jahrhunderts verbunden. Seit dieser Zeit erfuhren besondere Arbeitsbedingungen der Frauen einschließlich des besonderen Mutterschaftsschutzes eine erhebliche Wandlung bis hin zur Einführung von Sonderleistungen aus der Sozialversicherung, Zuerkennung einer garantierten Länge des Mutterschaftsurlaubs, Beschäftigungsschutz sowie Einschränkungen im Hinblick auf Sicherheit und Gesundheitsschutz bei der Arbeit u.Ä. Als interessant erscheint in diesem Zusammenhang Vergleich historischer Entwicklungen und gegenwärtiger gültiger Rechtsregelung im Gebiet der Slowakischen Republik.

Angesichts der besonderen Stellung und Aufgabe der Frau garantiert der Artikel 38 Abs. 1 in der aktuell gültigen Verfassung der Slowakischen Republik (Verfassung Nr. 460/1992 Smlg.) den Frauen das Recht auf erhöhten Gesundheitsschutz bei der Arbeit und besondere Arbeitsbedingungen, wobei die Einzelheiten durch Gesetz festzulegen sind (Artikel 38 Abs. 3). Der traditionelle Respekt vor der Familie, dem Wert der Mutterschaft bzw. Elternschaft [1] kommt im Art. 41 der Verfassung der Slowakischen Republik zum Ausdruck, wonach die Ehe, Elternschaft und Familie durch Gesetz geschützt, und den schwangeren Frauen besondere Fürsorge, Schutz in arbeitsrechtlichen Beziehungen sowie entsprechende Arbeitsbedingungen zugesichert werden. In Bezug auf die Arbeitsbedingungen ist das grundlegende Gesetz über arbeitsrechtliche Beziehungen momentan das Arbeitsgesetzbuch, Gesetz Nr. 311/2001 der Gesetzessammlung („GesSmlg.") in veränderter Fassung (in Kraft vom 1. April 2002), das der zweite arbeitsrechtliche Kodex im Gebiet der Slowakischen Republik ist.[2] Neben dem Arbeitsgesetzbuch werden und waren die arbeitsrechtlichen Bedingungen von Frauen – Müttern – durch verschiedene Rechtsvorschriften geregelt, was insbesondere auf Sicherheit und Gesundheitsschutz bei der Arbeit zutrifft.

* Diese wissenschaftliche Studie ist im Rahmen folgenden Projekts der Agentur für die Förderung der Forschung und Entwicklung entstanden: *„Dôstojnosť človeka a základné ľudské práva a slobody v pracovnom práve" - „Menschenwürde, Menschengrundrechte und Freiheiten im Arbeitsrecht"*, Projektnummer - APVV-0068-11, Projektleiter: Prof. JUDr. H. Barancová, DrSc.
Übersetzung: Mag. Karolína Šajánková.

** Doc. JUDr. Miriam Laclavíková, PhD., Lehrstuhl für Rechtsgeschichte, Juristische Fakultät, Universität Trnava, Slovakia.

*** Doc. JUDr. Mgr. Andrea Olšovská, PhD., Lehrstuhl für Arbeits- und Sozialversicherungsrecht, Juristische Fakultät, Universität Trnava, Slovakia.

1 Auf terminologischer Ebene erfolgte der Übergang vom Begriff des Mutterschaftsschutzes zum Begriff des Elternschaftsschutzes noch in der tschechoslowakischen Normgebung mit Verabschiedung des Verfassungsgesetzes der Föderalversammlung der Tschechischen und Slowakischen Föderativen Republik Nr. 23/1991 Smlg., wodurch die Charta der Grundrechte und -freiheiten eingeführt wurde; Art. 32 (1) *Elternschaft und Familie stehen unter dem Schutz des Gesetzes.*

2 Der erste tschechoslowakische arbeitsrechtliche Kodex war das Gesetz Nr. 65/1965 Smlg. Arbeitsgesetzbuch in veränderter Fassung.

2. Rechtsgrundlagen zum Schutz der Frau im Hinblick auf den Schutz vom Wert der Mutterschaft

Der Schutz und rechtliche Anerkennung vom Wert der Mutterschaft sind in der Slowakei mit sog. sozialen Schutzgesetzen[3] verbunden. Zu den ersten materiellen Rechtsvorschriften zum Schutz dieses Wertes gehört Bestimmung der ungarischen Gewerbeordnung aus dem Jahr 1884 über einen 4-wöchigen unbezahlten Urlaub nach der Entbindung.[4] Außer der genannten Regelung waren die besonderen Arbeitsbedingungen von Frauen praktisch in keiner anderen Norm (ausgenommen Beschränkungen in Bezug auf Arbeiten unter Tage) und auch nicht in Hinsicht auf die Arbeitszeitregelung[5] verankert (nach Verabschiedung des Gesetzesartikels XIII/1891 kam es mindestens zur allgemeinen Regelung der sog. Sonntagsruhe).

Aus einer breiteren historischen Perspektive kann die allmähliche Entwicklung von Schutzgesetzen über Frauen auch vor dem Hintergrund europäischer sozialer Bewegungen in der zweiten Hälfte des 19. Jahrhunderts gesehen werden. Typisch für diesen Zeitraum waren eine erhöhte Aktivität sozialdemokratischer Arbeiterparteien[6] und -verbände sowie die Formulierung von Forderungen nach einer besonderen Stellung der Frau in arbeitsrechtlichen Beziehungen (Forderungen nach dem Nachtarbeitsverbot für Frauen und Forderungen nach Arbeitszeitbeschränkung). An der Konferenz in Bern 1906 unter Beteiligung von 14 Staaten waren die ersten internationalen Abkommen über arbeitsrechtliche Fragen u.a. auch ein Übereinkommen über Nachtarbeitsverbot für Frauen in der Industrie geschlossen. Teilnehmer der folgenden Konferenz in Bern 1913 sprachen sich für Festsetzung einer maximalen Arbeitszeit für Frauen aus. Im Gebiet der Slowakei (als Teils von Ungarn) trat das Nachtarbeitsverbot für Frauen in der Industrie am 1. Januar 1912 aufgrund des Gesetzesartikels XIX/1911 in Kraft, der die Nachtarbeit von Frauen von 22.00 Uhr bis 5.00 Uhr morgen in Industriebetrieben mit mehr als 10 Beschäftigten (vorbehaltlich definierter Ausnahmen) verbot. Die Ausnahmen vom Nachtarbeitsverbot für Frauen und eventuelle Verkürzung der vorgeschriebenen Nachtruhezeit auf 10 Stunden waren durch Genehmigung der zuständigen Behörde für konkrete Betreibe und einen genau bestimmten Zeitraum von höchstens 14 Tagen (Nachtarbeit) oder 60 Tagen (Verkürzung der Nachtruhezeit) bedingt. Nach Gründung der Internationalen Arbeitsorganisation (ILO) im Jahr 1919 wurde der Mutterschaftsschutz im Zusammenhang mit dem Schutz von Frauen und ihren besonderen Arbeitsbedingungen[7] zu einer der grundlegenden Forderungen.

Nach Entstehung der Tschechoslowakischen Republik war der Mutterschaftsschutz im Hauptstück über Menschenrechte und Freiheiten[8] genau im § 126 der Verfassungsurkunde der Tschechoslowakischen Republik vom Jahr 1920 verankert, wonach *„Ehe, Familie und Mutterschaft unter dem besonderen Schutze der Gesetze stehen“*. Schlüsselbedeutung für die Anerkennung der besonderen Arbeitsbedingungen von Frauen (bzw. auch schwangeren Frauen und Müttern) hatte die Normgebung aus der Zwischenkriegszeit. Im Gewerbegesetz[9] Nr. 259/1924 der Sammlung von Gesetzen und Verordnungen („Smlg. v. Ges. u. Ver.“) für die Slowakei und Karpatenrussland war das Ausmaß unbezahlten Mutterschaftsurlaubs auf sechs Wochen festgesetzt (gemäß § 131 Abs. 4 dieses Gesetzes konnten die Frauen „einer regelmäßigen Beschäftigung im Gewerbe erst 6 Wochen nach der Niederkunft nachgehen“). Im Bereich der sozialen Sicherheit entstand die Grundlage für Regelung von Mutterschaftsleistungen (und eigentlich auch für die Regelung vom Recht auf Sozialversicherung) mit dem Gesetz Nr. 221/1924 der Smlg. v. Ges. u. Ver. über die Versicherung von Arbeitnehmern in Krankheit, Invalidität und Alter. Im Sinne seiner

---

[3] Mehr dazu siehe in LACLAVÍKOVÁ, M. – OLŠOVSKÁ, A.: *Dôstojná práca (Príspevok k vývoju bezpečnosti a ochrany zdravia pri práci na našom území) (Würdige Arbeit (Beitrag zur Entwicklung von Sicherheit und Gesundheitsschutz bei der Arbeit in der Slowakei)).* In: Europeizácia a transnacionalizácia pracovných vzťahov. (Europäisierung und Transnationalisierung von Arbeitsverhältnissen.) Olšovská, A. (ed.). Plzeň: Aleš Čeněk, 2009, S. 82 – 83.

[4] Mehr dazu siehe in CSIZMADIA, A.: *Sozialpolitische Tendenzen bei der Regelung der Arbeitsverhältnisse in Ungarn*. In: Die Entwicklung des Zivilrechts in Mitteleuropa (1848-1944). CSIZMADIA, A. - KOVÁCS, K. (Eds.). Budapest: Akadémiai Kiadó, 1970, S. 349. BIANCHI, L. et al.: Dejiny štátu a práva na území Československa v období kapitalizmu 1848-1945. (Staats- und Rechtsgeschichte der Tschechoslowakei während des Kapitalismus 1848-1945). I. Teil. Bratislava: SAV, 1971, S. 292.

[5] Die ersten gesetzlichen Beschränkungen von Tagesarbeitszeit und Nachtarbeit bezogen sich fast ausschließlich auf Kinder und Jugendliche. Allgemeine Regelung der Tagesarbeitszeit im Sinne des Gewerbegesetzes vom Jahr 1872 war zum Beispiel 16 Stunden pro Tag, d.h. von 5 Uhr in der Früh bis 21 Uhr am Abend. Zunehmende soziale Unruhen (sog. Arbeiterbewegung) brachten eine gewisse Verkürzung der Tagesarbeitszeit; der Gesetzesartikel XXXVI/1903 garantierte eine 10-stündige Ruhezeit. Vergleiche dazu LACLAVÍKOVÁ, M.: *Modernizácia právneho poriadku a počiatky pracovnoprávnej úpravy (vývoj pracovného zákonodarstva na našom území do roku 1918). (Rechtsordnungsmodernisierung und Anfänge arbeitsrechtlicher Regelungen (Entwicklung der arbeitsrechtlichen Gesetzgebung in der Slowakei bis 1918)).* In: Europeizácia a transnacionalizácia pracovných vzťahov. (Europäisierung und Transnationalisierung von Arbeitsverhältnissen). Olšovská, A. (Ed.). Plzeň: Aleš Čeněk, 2009, S. 40.

[6] SISKOVIČ, Š.: Dva prístupy k formovaniu sociálnej doktríny. (Zwei Ansätze zur Gestaltung der sozialen Doktrin). In: MOSNÝ, P. et al.: *Právnohistorická realita sociálnej doktríny 20. storočia. (Rechtsgeschichtliche Realität der sozialen Doktrin im 20.Jahrhundert).* Krakau: Slowakischer Verband in Polen – Towarzystwo Słowaków w Polsce, 2013, S. 264.

[7] Bereits 1919 nahm die Internationale Arbeitsorganisation in Bezug auf den Frauen- und Mutterschutz *„Maternity Protection Convention“ (Übereinkommen über den Mutterschutz)*, neugefasst in den Jahren 1952 (Übereinkommen Nr. 103) und 2000 (Übereinkommen Nr. 183) an. Das Ziel des Übereinkommens war der Schutz von Arbeitnehmerinnen während der Schwangerschaft und nach der Entbindung, Stabilisierung besonderer Arbeitsbedingungen für erwerbstätige Mütter sowie die Regelung von Sicherheit und Gesundheitsschutz von Mutter und Kind. Ein weiteres bedeutendes Dokument in Bezug auf die besonderen Arbeitsbedingungen von Frauen war *„Night Work (Women) Convention“* 1919 (Übereinkommen über die Nachtarbeit der Frauen) abgeändert in den Jahren 1934, 1948 und 1990.

[8] Ähnlicher Wortlaut findet sich auch in der Verfassung der Slowakischen Republik – im Verfassungsgesetz vom 21. Juli 1939 Nr. 185/1939 der Gesetzessammlung über die Verfassung der Slowakischen Republik; § 86 *Ehe, Familien und Mutterschaft stehen unter dem erhöhten Schutz der Rechtsordnung.*

[9] MOSNÝ, P. – HUBENÁK, L.: *Dejiny štátu a práva na Slovensku.* (*Staats- und Rechtsgeschichte in der Slowakei).* Košice: Aprilla, s. r. o., 2008, S. 245.

Bestimmungen wurde den Versicherungsnehmerinnen eine finanzielle Hilfe in der Mutterschaft für sechs Wochen vor (nur für vier Wochen für Ehefrauen der Versicherungsnehmer) und sechs Wochen nach der Entbindung gewährt (wobei eine gleichzeitige Auszahlung von Krankengeld ausgeschlossen war, und der Betrag auf die Hälfte bei Arbeitsantritt der Frau reduziert wurde). Diese gesetzliche Regelung sah auch einmalige Zuschüsse während der Schwangerschaft und bei der Entbindung (Geburtsgeld) sowie einen Zuschuss während der Stillzeit bis zu 12 Wochen nach der Entbindung und eine kostenlose Hebammen- oder Arzthilfe bei der Geburt vor. Die Leistungszahlung war durch Versicherungsbeiträge bedingt, die Versicherungsnehmerin oder ihr Ehemann mussten während der letzten 12 Monate vor der Entbindung mindestens für 180 Tage krankenpflichtversichert sein. Die genannte Rechtsregelung war erst 1948 durch das Gesetz über die staatliche Versicherung (Gesetz Nr. 99/1948 Smlg.)[10] aufgehoben. Das tschechoslowakische Gesetz über private Arbeitnehmer Nr. 154/1934 der Smlg. v. Ges. u. Ver. garantierte den Frauen nach Entbindung eine Gehaltszahlung bis zu sechs Wochen, wenn die Frau mindestens zwei Jahre bei demselben Arbeitgeber ununterbrochen beschäftigt war. Eine Besonderheit stellte auch der Schutz von Wöchnerinnen nach Räumung der Dienstwohnung dar, die Räumung durfte nämlich nicht ihre Gesundheit beeinträchtigen. Aus dem Genannten ergibt sich, dass das System von Beihilfen und Mutterschaftsleistungen bis zur Reorganisation der Sozialversicherung 1948 eine sehr klare Struktur in Abhängigkeit von Art der verrichteten Arbeit hatte, und der Anspruch auf Leistungen an Pflichtbeiträge zur Sozialversicherung gebunden war. Angesichts der sozialen Schichten in der Slowakei blieb das Gesetz ohne jegliche Auswirkungen auf die Mehrheitsbevölkerung, d.h. Landbevölkerung, wo die Hilfe für eine schwangere Frau und Mutter auch weiter in persönlicher und materieller Unterstützung von ihrem Ehemann und näheren Verwandten bestand.[11]

In Verbindung mit Gesetzgebung der Zwischenkriegszeit muss auch die Regelung besonderer Arbeitsbedingungen von Frauen genannt werden, die in Form einer allgemeinen Bestimmung in Gesetzen und Rechtsvorschriften über Sicherheit und Gesundheitsschutz bei der Arbeit festgehalten war, und *„die Ausübung körperlich weniger anstrengender Arbeiten, die der Physiologie und biologischen Beschaffenheit sowie Möglichkeiten des weiblichen Organismus entsprechen"* empfiehlt (z.B. § 11 Abs. 1 des Gesetzes Nr. 91/1918 der Smlg. v. Ges. u. Ver. über 8-Stunden-Arbeitszeit[12]). Ein Beschäftigungsverbot von Frauen gab es bei Untertagearbeiten[13] und Arbeiten mit Bleifarben.[14] Besonderer Schutz von Frauen, insbesondere von Schwangeren, war in Sondergesetzen und Sondervorschriften verankert (Regierungsverordnung Nr. 116/1925 Smlg. mit Beschäftigungsverbot von Frauen im fortgeschrittenen Stadium der Schwangerschaft)[15]; Regierungsverordnung Nr. 117/1925 der Smlg. v. Ges. u. Ver., die die Beschäftigung von Frauen im fortgeschrittenen Stadium der Schwangerschaft nur mit leichteren Arbeiten erlaubte und Arbeiten auf Leitern und Hebezeugen untersagte[16]; Regierungsverordnung Nr. 53/1931 der Smlg. v. Ges. u. Ver., die das Beschäftigungsverbot von Frauen[17] nach dem sechsten

[10] HALÍŘOVÁ, G.: *Historický vývoj dávek v mateřství na našem území. (Historische Entwicklung von Mutterschaftsleistungen in unserem Gebiet).* Olomouc: Acta Universitatis Palackianae Olomucensis – Facultas Iuridica, 2003, Nr. 5-6, S. 213.

[11] In diesem Zusammenhang ist auf eine interessante ethnologische Studie zu verweisen, die sich u.a. auch mit Stellung der Frau – Mutter in slowakischen Familien beschäftigt: BOTÍKOVÁ, M. – ŠVECOVÁ, S. – JAKUBÍKOVÁ, K.: *Tradície slovenskej rodiny*. (*Traditionen der slowakischen Familie*). Bratislava: VEDA, Vydavateľstvo Slovenskej akadémie vied, 1997.

[12] § 11 Abs. 1 des Gesetzes Nr. 91/1918 der Smlg. v. Ges. u. Ver. über 8-Stunden-Arbeitszeit: *„Jugendliche Arbeitnehmer männlichen Geschlechts bis zum 16. Lebensjahr und weiblichen Geschlechts bis zum 18. Lebensjahr können nur mit leichteren Arbeiten beschäftigt werden, die weder ihre Gesundheit beeinträchtigen noch ihre körperliche Entwicklung verhindern"*. Mehr dazu siehe in VOJÁČEK, L. – SCHELLE, K.: *Právní dějiny na území Slovenska. (Rechtsgeschichte im Gebiet der Slowakei).* Ostrava: KEY Publishing, s. r. o., 2007, S. 274; VOJÁČEK, L.: Sociální doktrína první Československé republiky a její odraz v právu. (Soziale Doktrin der ersten Tschechoslowakischen Republik und ihre Auswirkungen auf Recht). In: MOSNÝ, P. et al.: *Právnohistorická realita sociálnej doktríny 20. storočia*. (*Rechtsgeschichtliche Realität der sozialen Doktrin im 20. Jahrhundert).* Krakau: Slowakischer Verband in Polen – Towarzystwo Słowaków w Polsce, 2013, S. 21; SCHELLE, K.: *Vývoj kodifikace pracovního práva. (Entwicklung von Arbeitsrechtskodifikation).* In: Vývoj právních kodifikací. Sborník z mezinárodní vědecké konference. (Entwicklung der Rechtskodifikation. Sammelband zur internationalen wissenschaftlichen Konferenz). SCHELLE, K. (Ed.) Brno: Masaryk-Universität 2004, S. 111.

[13] § 11 Abs. 2 des Gesetzes Nr. 91/1918 der Smlg. v. Ges. u. Ver. über 8-Stunden-Arbeitszei: *„Mit Untertagearbeiten einschließlich Arbeiten in Abräumen sind nur Arbeiter männlichen Geschlechts zu beschäftigen"*.

[14] § 3 Abs. 1 des Gesetzes Nr. 137/1924 der Smlg. v. Ges. u. Ver., wodurch die Vorschriften über den Schutz von Leben und Gesundheit von Beschäftigten im Anstreicher-, Lackierer- und Malergewerbe erlassen werden: *„Sofern der Einsatz von Bleiweiß und sonstigen Bleifarben und Kitten bei Anstrich-, Lackier- und Malerarbeiten zulässig ist, so können mit solchen Arbeiten keine Arbeiter unter 18 Jahren und Frauen beschäftigt werden"*.

[15] § 52 der Regierungsverordnung Nr. 116/1925 der Smlg. v. Ges. u. Ver., wodurch die Vorschriften über den gewerblichen Betrieb von Steinbrüchen, Ton-, Sand- und Schottergruben erlassen werden: *„Personen, die bekanntermaßen an Epilepsie, Krämpfen, gelegentlichen Ohnmachtsanfällen, Schwindeligkeit, Schwerhörigkeit oder sonstigen Körpermängeln leiden, sodass sie bei Bergbauarbeiten einer außergewöhnlichen Gefahr ausgesetzt wären, dürfen mit diesen Arbeiten nicht beschäftigt werden. Betrunkene dürfen zur Arbeit gar nicht zugelassen werden. Für Frauen im fortgeschrittenen Stadium der Schwangerschaft gilt Beschäftigungsverbot"*.

[16] § 40 Abs. 2 der Regierungsverordnung Nr. 117/1925 der Smlg. v. Ges. u. Ver., wodurch Vorschriften über Unfallvermeidung und Gesundheitsschutz von Arbeitern bei gewerblichem Betrieb von Bauwerken erlassen werden: *„Frauen im fortgeschrittenen Stadium der Schwangerschaft dürfen nur mit leichteren Arbeiten niemals jedoch mit Arbeiten auf Leitern oder Hebezeugen beschäftigt werden."*

[17] § 68 Abs. 4 der Regierungsverordnung Nr. 53/1931 über den Schutz von Gesundheit und Leben von Arbeitern bei gewerblichem Betrieb von Bauwerken: *„Frauen dürfen nur mit leichteren Arbeiten niemals jedoch mit Arbeiten auf Hebezeugen oder Maschinen beschäftigt werden. Frauen nach dem sechsten Schwangerschaftsmonat ist die Arbeit mit Lasten jeglicher Art untersagt. Bei Fensterputzen in höheren Etagen sind Sicherheitsgurte zu verwenden"*.

Schwangerschaftsmonat bei Arbeiten mit Lasten jeglicher Art enthielt.[18]

Nachtarbeitsverbot für Frauen war in der ersten Tschechoslowakischen Republik erneut im Gesetz über die 8-Stunden-Arbeitszeit verankert, dessen § 9 besagte[19], dass „die Frauen mit Nachtarbeit nicht beschäftigt werden dürfen".[20] Die vorgeschriebene ununterbrochene Wochenruhezeit garantierte das Gesetz im Umfang von 32 Stunden pro Woche, wobei diese Ruhezeit für Frauen in Fabriken bereits am Samstag spätestens um 14.00 Uhr begann (§ 5 des Gesetzes über 8-Stunden-Arbeitszeit).

Nach Veränderung der politischen Verhältnisse und Gründung eines neuen sozialistischen Rechtssystems war die Lösung der sog. Frauenfrage mit der Erklärung „von Gleichberechtigung zwischen Mann und Frau in der neuen Gesellschaft"[21] verbunden (Verfassung vom 9. Mai 1948, Familiengesetz aus den Jahren 1949 und 1963, Verfassung der ČSSR aus dem Jahr 1960). Neben der Gleichberechtigung setzte sich auch die Forderung nach Schutz der Frau und ihrer Sendung als Mutter durch. Das Interesse an Erhöhung der Geburtenrate trug wesentlich zur breiteren Verankerung und Durchsetzung besonderer Arbeitsbedingungen von Frauen, Schwangeren und Müttern bei. Das neue Krankenversicherungssystem (Gesetz Nr. 99/1948 Smlg. über staatliche Versicherung) sah Geburtsgeld sowie eine finanzielle Hilfe während der Mutterschaft von maximal 18 Wochen vor, ohne einen bestimmten Zeitraum vor und nach der Entbindung zu definieren. Die Spezifikation obligatorischer Inanspruchnahme des Mutterschaftsurlaubs (4 Wochen vor der Entbindung/14 Wochen nach der Entbindung) geht auf das Jahr 1957 und das Inkrafttreten des Gesetzes Nr. 54/1956 Smlg. über die Krankenversicherung der Arbeitnehmer zurück. Eine Sonderregelung stellte das Gesetz Nr. 58/1964 Smlg. über die Verbesserung von Fürsorge für Schwangere und Mütter dar, wodurch das Ausmaß vom Mutterschaftsurlaub auf 22 Wochen verlängert wurde und es möglich war, einen weiteren unbezahlten Mutterschaftsurlaub bis zum ersten Lebensjahr des Kindes in Anspruch zu nehmen. Das oben genannte Ausmaß des Mutterschaftsurlaubs blieb gleich auch nach Verabschiedung des Arbeitsgesetzbuchs im Jahr 1965 (Gesetz Nr. 65/1965 Smlg.). Eine Verlängerung auf 26 Wochen brachte jedoch bereits das Gesetz Nr. 88/1968 Smlg. über die Verlängerung des Mutterschaftsurlaubs, Mutterschaftsleistungen und Kindergeld aus der

[18] Im Vergleich zur Vergangenheit enthielten das Arbeitsgesetzbuch aus dem Jahr 1965 sowie das Arbeitsgesetzbuch aus dem Jahr 2001 eine strengere Regelung einiger Aspekte in Bezug auf das Beschäftigungsverbot von Frauen. Für Frauen, Schwangere und Mütter im Allgemeinen galt das Verbot von Beschäftigung mit Untertagearbeiten, schweren Arbeiten und Arbeiten, die die Gesundheit und gesunde körperliche Entwicklung von Mutter und Kind mit erhöhtem Schutz von Schwangeren beeinträchtigen. Konkrete Arbeiten, die allen Frauen, Schwangeren, Müttern bis 9 Monate nach Entbindung und stillenden Frauen untersagt waren, waren in Rechtsvorschriften – Erlassen zentraler Staatsverwaltungsbehörden aufgelistet. Der letzte Erlass war der Erlass vom 22. Mai 1998 Nr. 647/M-1998, der eine Liste von Arbeiten und Arbeitsplätzen enthält, die den Frauen, Schwangeren, und Müttern bis neun Monate nach der Entbindung untersagt waren (die Liste wurde durch Mitteilung des Ministeriums für Verkehr, Post und Telekommunikation der SR Nr. 315/1998 GesSmlg. über die Erlassverabschiedung veröffentlicht). Der klare Vorteil von Konzentration auf und Präzisierung von dieser Problematik bestand darin, dass die voneinander deutlich abweichenden und unterschiedlichen Regelungen zur Frauenarbeit, die es seit 1965 gab, vereinheitlicht waren. Durch die Arbeitsgesetzbuchnovelle – das Gesetz Nr. 348/2007 GesSmlg. (mit Kraft vom 1. September 2007) – war das allgemeine Beschäftigungsverbot von Frauen aufgehoben, und momentan ist im Arbeitsgesetzbuch nur verankert, dass Schwangere, Mütter bis zum Ende des neunten Monats nach der Entbindung und stillende Frauen nicht mit Arbeiten beschäftigt werden können, die für ihren Körper unangemessen oder schädlich sind (§ 161 Abs. 1 Arbeitsgesetzbuch). Gemäß § 161 Abs. 2 Arbeitsgesetzbuch darf eine schwangere Frau mit keinen Arbeiten beschäftigt werden, die nach einem ärztlichen Befund ihre Schwangerschaft aus solchen gesundheitlichen Gründen gefährden, die in Person der Schwangeren bestehen. Das gilt auch für stillende Frauen und Mütter bis zum Ende des neunten Monats nach der Entbindung. Rechtliche Regelung des Beschäftigungsverbots gewisser Kategorien – von Frauen, Schwangeren, stillenden Frauen und Müttern bis neun Monate nach der Entbindung geht von dem Bedarf aus, die Sendung von Frauen als Müttern zu schützen, und stellt in ihrem Wesen eine berechtigte Ausnahme von Gleichbehandlung in arbeitsrechtlichen Verhältnissen dar. Die Listen von Arbeiten und Arbeitsplätzen, die mit einem Beschäftigungsverbot von Schwangeren, Müttern bis zum Ende des neunten Monats nach der Entbindung und stillenden Frauen belegt sind, sowie die Liste von Arbeiten und Arbeitsplätzen, die mit einem spezifischen Risiko für Schwangere, Mütter bis zum Ende des neunten Monats nach der Entbindung und stillende Frauen verbunden sind, wodurch auch einige Verpflichtungen der Arbeitgeber bei Beschäftigung dieser Frauen festgelegt sind, werden von Verordnung der Regierung der Slowakischen Republik Nr. 272/2004 GesSmlg. geregelt.
Siehe BOGNÁROVÁ, V. In: BĚLINA, M.: *Zákoník práce. Komentář.* (Arbeitsgesetzbuch. Kommentar). 2. Auflage. Prag, C.H. Beck 2010, S. 628.

[19] Eine Ausnahme davon stellten Betriebe dar, wo schnell verderbliche Rohstoffe verarbeitet waren, in denen die Nachtarbeit von Frauen über 18 Jahren in Einzelfällen und vorübergehend erlaubt war (§ 9 Abs. 2 des Gesetzes Nr. 91/1918 der Smlg. v. Ges. u. Ver. über 8-Stunden-Arbeitszeit). Eine weitere Ausnahme war die Nachtarbeit von Frauen im Dauerbetrieb oder im öffentlichen Interesse unter der Bedingung, dass die Arbeit körperlich nicht anstrengend war (§ 9 Abs. 3 des Gesetzes Nr. 91/1918 der Smlg. v. Ges. u. Ver. über 8-Stunden-Arbeitszeit).

[20] Als Nachtarbeit im Sinne von § 98 Abs. 1 des derzeit gültigen Arbeitsgesetzbuchs (Gesetz Nr. 311/2001 GesSmlg.) gilt Arbeit von 22.00 Uhr bis 6.00 Uhr in der Früh. Aufgrund besonderer physiologischer Gegebenheiten waren Frauen vor der Nachtarbeit geschützt, und im Vergleich zur Entwicklung anderer arbeitsrechtlicher Institute in Bezug auf die Stellung der Frau scheint es, dass die Regelung zum Nachtarbeitsverbot für Frauen nicht so viele Änderungen durchmachte. Das Nachtarbeitsverbot für Schwangere und Frauen, die ein Kind unter einem Jahr betreuten, blieb bis zum 1. Dezember 1999 aufrechterhalten (Arbeitsgesetzbuch vom Jahr 1965). Das Arbeitsgesetzbuch regelte zwar die Bedingungen von Nachtarbeit der Frauen, aber Schwangere und Frauen, die ein Kind unter einem Jahr betreuten, waren ausdrücklich vor der Nachtarbeit geschützt. Durch die Arbeitsgesetzbuchnovelle – Gesetz Nr. 297/1999 Smlg. (mit Kraft vom 1. Dezember 1999) war die besondere Regelung zur Nachtarbeit von Frauen sowie das oben genannte Nachtarbeitsverbot aufgehoben. Von dem Nachtarbeitsverbot für Frauen blieb den Schwangeren, Müttern bis zum Ende des neunten Monats nach der Entbindung und stillenden Frauen gegenwärtig nur die Möglichkeit von Umsetzung von Nachtarbeit offen, wenn sie einen Antrag auf solche Umsetzung stellen (§ 55 Abs. 2 Lit. f) Arbeitsgesetzbuch). Der Arbeitgeber hat dem Antrag auf Umsetzung auf andere Arbeit (Frühschicht gegebenenfalls Nachmittagsschicht) stattzugeben.

[21] HAVELKOVÁ, B.: *Genderová rovnost v období socialismu. (Gendergleichheit im Sozialismus)*. In: Komunistické právo v Československu. Kapitoly z dějin bezpráví. (Kommunistisches Recht in der Tschechoslowakei. Kapitel aus Geschichte der Rechtlosigkeit). BOBEK, M. – MOLEK, P. – ŠIMÍČEK, V. (Eds.). Brno: Masaryk-Universität, 2009, S. 188.

Krankenversicherung. Die letzte Änderung vom Ausmaß des Mutterschaftsurlaubs im sozialistischen Staatssystem war seine Verlängerung auf 28/37 Wochen (Gesetz Nr. 52/1987 Smlg.).

Es lässt sich feststellen, dass die rechtliche Regelung vom Ausmaß des Mutterschaftsurlaubs bis 1987 stabil blieb; zu einer bedeutenderen Änderung kam es im Jahr 2011 infolge der Novellierung vom derzeit gültigen Arbeitsgesetzbuch durch das Gesetz Nr. 48/2011 GesSmlg. Gemäß der jetzigen Regelung stehen der Arbeitnehmerin Frau im Zusammenhang mit der Entbindung und Pflege um das geborene Kind 34 Wochen, einer alleinstehenden Frau 37 Wochen und einer Frau nach Zwillings- oder Mehrlingsgeburt 43 Wochen Mutterschaftsurlaub zu (§ 166 Abs. 1 Arbeitsgesetzbuch). Angesichts der Garantie von Gleichbehandlung und Gleichstellung der Eltern hat auch der Arbeitnehmer – Vater im Zusammenhang mit der Betreuung des geborenen Kindes einen Anspruch auf Elternurlaub nach Kindesgeburt im gleichen Ausmaß, wenn er die Pflege um das Neugeborene übernimmt. Nach Mutterschaftsurlaub hat der Arbeitgeber der Frau und dem Mann – sofern diese einen Antrag darauf stellen – Elternurlaub zur Fortsetzung der Pflege um das Kind bis zum Tag von Vollendung seines dritten Lebensjahrs zu gewähren. Bedarf das Kind aufgrund von einem langfristig ungünstigen Gesundheitszustand einer besonderen Pflege, so ist der Arbeitgeber verpflichtet der Frau und dem Mann – sofern diese einen Antrag darauf stellen – Elternurlaub bis zum Tag der Vollendung vom sechsten Lebensjahr des Kindes zu gewähren (§ 166 Abs. 2 Arbeitsgesetzbuch). Dieser Urlaub wird in dem beauftragten Ausmaß mindestens jedoch für die Dauer eines Monats zugesprochen.

Die Novelle des Arbeitsgesetzbuchs (Gesetz Nr. 257/2011 GesSmlg.), die am 1. September 2011 in Kraft trat, ermöglicht es, die Inanspruchnahme des Elternurlaubs (bis zum dritten oder sechsten bzw. achten Lebensjahr des Kindes) mit Zustimmung des Arbeitgebers zu modifizieren, um das Berufs- und Familienleben in Einklang zu bringen (z.B. wird die Inanspruchnahme von Elternurlaub in den Ferien vereinbart, wo die Betreuung von Kindern in Kindergärten nicht gesichert ist u. Ä.).

Angesichts der Tatsache, dass die Frauen (Eltern) nach Mutterschafts- oder Elternurlaub mit dem Verlust ihres ursprünglichen Arbeitsplatzes konfrontiert werden, garantiert ihnen das Arbeitsgesetzbuch Rückkehr an ihren Arbeitsplatz nach Beendigung des Mutterschafts- oder Elternurlaubs. Solche Garantie war schon in Bestimmung (§ 147) des Arbeitsgesetzbuchs aus dem Jahr 1965 verankert, wonach der Arbeitgeber verpflichtet war, die Frau nach dem Ende des Mutterschaftsurlaubs mit der ursprünglichen Arbeit am ehemaligen Arbeitsplatz zu beschäftigen. War das nicht möglich, weil diese Arbeit wegfiel oder der Arbeitsplatz abgeschafft war, so hatte der Arbeitgeber der Arbeitnehmerin eine ihrem Arbeitsvertrag oder mindestens ihrer Qualifikation entsprechende Position anzubieten.

Mit der Zeit begann es bei der Wiederbeschäftigung der Arbeitnehmerinnen eine Rolle zu spielen, ob die Arbeitnehmerin vom Mutterschaftsurlaub oder erst dem darauf folgenden Mutterschaftsurlaub (derzeit Elternurlaub) zurückkehrt. Diese Regelung wurde durch Novelle des Arbeitsgesetzbuchs aus dem Jahr 1965 – Gesetz Nr. 98/1987 Smlg. eingeführt, das am 1. Januar 1988 in Kraft trat. Wenn die Arbeitnehmerin von ihrem Mutterschaftsurlaub zurückkam, war der Arbeitgeber verpflichtet, ihr dieselbe Arbeit und denselben Arbeitsplatz zuzuweisen. Falls aber die Arbeitnehmerin erst vom darauf folgenden Mutterschaftsurlaub zurückkehrte, hatte der Arbeitgeber sie nur mit einem der ehemaligen Arbeit entsprechenden Aufgabenbereich zu beschäftigen. War solche Beschäftigung nicht möglich, weil die vereinbarte Arbeitsart wegfiel, so musste der Arbeitgeber der Arbeitnehmerin eine andere ihrer Qualifikation entsprechende Arbeit einräumen.

Im neuen Arbeitsgesetzbuch aus dem Jahr 2001 blieb diese Rechtsregelung de facto unverändert. Angesichts der Probleme mit der praktischen Anwendung, wo die vom Mutterschaftsurlaub (oder Elternurlaub) zurückkehrenden Arbeitnehmerinnen nicht dieselben „Vergünstigungen" hatten wie Arbeitnehmer, die bei dem Arbeitgeber ununterbrochen beschäftigt waren, wurde diese Rechtregelung durch die Novelle des Arbeitsgesetzbuchs (Gesetz Nr. 48/2011 GesSmlg.) mit Kraft vom 1. April 2011 zugunsten dieser Arbeitnehmerinnen geändert.[22]

Was die Auflösung vom Arbeitsverhältnis betrifft, sind Schwangere, Mütter bis neun Monate nach der Entbindung und stillende Frauen vor Kündigung des Arbeitgebers geschützt (bei fristloser Kündigung durch den Arbeitgeber bezieht sich darüber hinaus ein besonderer Schutz auf Schwangere)[23], und

[22] Wenn die Arbeitnehmerin vom Mutterschaftsurlaub in die Arbeit zurückkehrt, hat ihr der Arbeitgeber nach der aktuellen Rechtslage die ehemalige Arbeit und den ursprünglichen Arbeitsplatz einzuräumen. Ist das nicht möglich, so ist der Arbeitgeber verpflichtet, sie mit einer anderen dem Arbeitsvertrag entsprechenden Arbeit zu beschäftigen. Der Arbeitgeber hat die Pflicht, die Arbeitnehmerin nicht unter für sie ungünstigeren Bedingungen zu beschäftigen, als sie zum Zeitpunkt vom Antritt ihres Mutterschaftsurlaubs hatte. Die Arbeitnehmerin hat Recht auf Vergünstigung aus jeder Verbesserung der Arbeitsbedingungen, auf die sie Anspruch hätte, wenn sie den Mutterschaftsurlaub nicht antreten würde.
Wenn die Arbeitnehmerin vom Elternurlaub (d.h. nach Vollendung vom dritten oder sechsten Lebensjahr des Kindes) in die Arbeit zurückkehrt, hat ihr der Arbeitgeber die ehemalige Arbeit und den ursprünglichen Arbeitsplatz einzuräumen. Ist das nicht möglich, so ist der Arbeitgeber verpflichtet, sie mit einer anderen dem Arbeitsvertrag entsprechenden Arbeit zu beschäftigen. Auch nach dem Ende dieses Elternurlaubs hat jedoch die Arbeitnehmerin Anspruch auf die Bewahrung aller Rechte, die sie zum Zeitpunkt vom Antritt des Elternurlaubes hatte oder die ihr zu dieser Zeit entstanden, und das in ihrem ursprünglichen Umfang; diese Rechte werden einschließlich der Änderungen geltend gemacht, die sich aus den Rechtsvorschriften, dem Kollektivvertrag oder herkömmlichen Vorgehensweisen des Arbeitgebers ergeben.

[23] Gemäß § 68 Abs. 3 des aktuellen Arbeitsgesetzbuchs ist eine fristlose Auflösung des Arbeitsverhältnisses durch den Arbeitgeber nicht möglich bei einer schwangeren Arbeitnehmerin, einer Arbeitnehmerin im Mutterschaftsurlaub oder einer Arbeitnehmerin und einem Arbeitnehmer im Elternurlaub, einer alleinstehenden Arbeitnehmerin oder einem alleinstehenden Arbeitnehmer, die/der ein Kind unter drei Jahren betreut, oder bei einem Arbeitnehmer, der persönlich eine verwandte schwer behinderte Person betreut. Wenn Gründe für eine fristlose Auflösung des Arbeitsverhältnisses mit besonderen Arbeitnehmerkategorien vorliegen, kann der Arbeitgeber das Arbeitsverhältnis durch Kündigung beenden, außer wenn es um eine Arbeitnehmerin im Mutterschaftsurlaub oder einen Arbeitnehmer im Elternurlaub gemäß § 166 Abs. 1 Arbeitsgesetzbuch geht. Arbeitnehmerin im Mutterschaftsurlaub oder Arbeitnehmer im Elternurlaub, die ihren Urlaub gemäß § 166 Abs. 1 Arbeitsgesetzbuch in Anspruch nehmen, genießen besonderen Schutz, weil ihr Arbeitsverhältnis auch nicht durch Kündigung laut § 64 Abs.3 Lit. b) Arbeitsgesetzbuch beendet werden kann.

nach der Arbeitsgesetzbuchnovelle (die am 1. September 2011 in Kraft trat) kann das Arbeitsverhältnis in Probezeit (§ 72 Arbeitsgesetzbuch) mit solchen Frauen sogar nur schriftlich und in solchen Sonderfällen aufgelöst werden, die nicht mit ihren Schwangerschaft oder Mutterschaft zusammenhängen. Die Auflösung vom Arbeitsverhältnis hat der Arbeitgeber ausreichend zu begründen. Sollten die genannten Bedingungen nicht eingehalten werden, ist die Beendigung vom Arbeitsverhältnis in der Probezeit nichtig.

Angesichts der Tatsache, dass sich die arbeitsrechtliche Regelung um einen familienfreundlichen Ansatz bemüht, und dass der Umfang außerberuflicher Tätigkeiten und der Zeit, die für Betreuung der Familie bestimmt ist, von der Arbeitszeit abhängig sind, ist der Arbeitgeber laut § 164 Abs. 1 Arbeitsgesetzbuch verpflichtet, bei Einsatz von Arbeitnehmern in Arbeitsschichten Rücksicht auch auf Bedürfnisse schwangerer Frauen sowie Frauen und Männer zu nehmen, die Kinder betreuen. Gleichzeitig wird der Anspruch von Schwangeren sowie Frauen und Männern, die dauerhaft ein Kind unter 15 Jahren betreuen, auf eine kürzere Arbeitszeit oder eine andere geeignete Regelung der Wochenarbeitszeit verankert. Beantragt solcher Arbeitnehmer eine Arbeitszeitregelung, so hat der Arbeitgeber diesem Antrag stattzugeben, wenn dem keine schwerwiegenden betrieblichen Gründe entgegenstehen (§ 164 Abs. 2 Arbeitsgesetzbuch).[24] Ablehnung des Arbeitnehmerantrags auf Arbeitszeitregelung hat der Arbeitgeber ausreichend zu begründen.[25]

Außer den typischen Instituten, die mit der Schwangerschaft und Elternschaft zusammenhängen, ist es erforderlich, über die Möglichkeiten der Teilnahme, insbesondere von Frauen (und im Allgemeinen von Eltern) mit minderjährigen Kindern an dem Arbeitsprozess nachzudenken. In letzter Zeit war man bemüht, die Beschäftigung von Frauen mit minderjährigen Kindern attraktiver zu machen, was seinen Niederschlag in der letzten bedeutenden Arbeitsgesetzbuchnovelle fand. Als eines dieser Instrumente gilt Institut der Arbeitsplatzteilung, die im § 49a Arbeitsgesetzbuch geregelt ist. Als aufgeteilter Arbeitsplatz laut § 49a Abs. 1 Arbeitsgesetzbuch gilt Arbeitsplatz, wo sich die teilzeitbeschäftigten Arbeitnehmer die Arbeitszeit sowie die Arbeitsaufgaben unter sich aufteilen, die mit diesem Arbeitsplatz verbunden sind.

3. Fazit

Abschließend lässt sich feststellen (unter Berücksichtigung der historischen Entwicklung und der sich verändernden Stellung der Frau in der Familie und Gesellschaft[26]), dass es einerseits Tendenzen zum erhöhten Schutz von Frauen – Müttern wie z.B. die Verankerung eines längeren Mutterschafts- und Elternurlaubs gibt, andererseits zeichnet sich im Arbeitsrecht (im Allgemeinen) aber auch eine Verringerung des Frauenschutzes ab, was insbesondere durch allmähliche Aufhebung der Beschäftigungsverbote für Frauen (Nachtarbeit, Arbeitsbeschränkungen) deutlich wird. Solche Verringerung vom Frauenarbeitsschutz ist vor allem durch Bemühungen um Einhaltung des Gleichbehandlungsgrundsatzes beeinflusst (z.B. Aufhebung von Nachtarbeitsverbot für Frauen). Gegenwärtig befinden wir uns in einer Situation, wo in einer optimalen arbeitsrechtlichen Regelung sowohl der Gleichbehandlungsgrundsatz als auch die Stellung und Sendung von Frau in der Gesellschaft zu berücksichtigen sind. Wie angeführt, wird wegen Einhaltung des Diskriminierungsverbots eine besondere Rechtsregelung nicht nur für Arbeitnehmerinnen – Mütter, sondern im gleichen Umfang auch für alle Arbeitnehmer – Eltern im Allgemeinen (seien es biologische oder adoptive Eltern u.Ä.) garantiert, und das insbesondere im Hinblick auf Regelung von Arbeitszeit und Elternurlaub.

Da es als nachgewiesen gilt, dass es in Ländern mit einer hohen Geburtenrate gleichzeitig eine Vielzahl an Frauen gibt, die einer Beschäftigung nachgehen, und im Hinblick auf die unumstrittene Tatsache, dass die europäische Bevölkerung immer älter wird, sollten – auch unter Berücksichtigung des neuen Flexicurity-Konzepts – ein gewisser Schutz und Respekt gegenüber der Sendung von Frau – Mutter in der Familie auch bei Einhaltung des Gleichbehandlungsgrundsatzes im Arbeitsrecht beibehalten werden. Richtungsweisend dabei könnten auch die Traditionen und historische Entwicklung in dem jeweiligen Land oder der jeweiligen Rechtskultur sein.

[24] Da die Arbeitnehmer außer der „normalen" Arbeitszeit oft auch Überstunden oder Bereitschaftsdienst leisten, ist es nicht möglich, einer schwangeren Frau, einer Frau oder einem Mann, die dauerhaft ein Kind unter drei Jahren betreuen, einer alleinstehenden Frau oder einem alleinstehenden Mann, die dauerhaft ein Kind unter 15 Jahren betreuen, die Leistung von Überstunden anzuordnen, aber der Arbeitgeber kann sie für Überstunden nur mit ihrer Zustimmung beschäftigen. Ähnlich ist auch der Bereitschaftsdienst Gegenstand einer Vereinbarung und kann nicht einseitig angeordnet werden.

[25] Vgl. BARANCOVÁ, H.: *Zákonník práce. Komentár*. (*Arbeitsgesetzbuch. Kommentar*). Prag, C.H. Beck 2010, S. 546.

[26] Im 20. Jahrhundert kann die Frauenarbeit in der Slowakei aus wirtschaftlicher Sicht großteils als Notwendigkeit verstanden werden. Es lässt sich auch eine neuere Auffassung von Frauenarbeit als Form von Selbstverwirklichung in der Gesellschaft beobachten.

Einfluss der deutschen Willens- und Erklärungstheorie auf europäische zivilrechtliche Kodifikationen und Theorie über die Willensgeschäfte - mit besonderer Berücksichtigung des serbischen Privatrechts

(The Impact of the Intention Theory and Expression Theory in the German Doctrine of Juridical Acts on the European Civil Law Doctrine and Codifications, with special Consideration of Serbian Law)

József Szalma *

Abstract

The author analyses the intention theory and expression theory emerged in the German doctrine of civil law in the first, and second half of the 19th century, and their impact on the European doctrine and codifications of civil law. They are most relevant in respect of formation of contract, its legal effect and construction. Special attention is accorded to the differentiation between general and special intention theory. The latter, due the methods and standards it proposes, offers applicable solutions to specific issues even today, such as mistake and deceit, simulation, mental reservation, fiduciary transactions (trust) and contracts, etc. The author puts special emphasis on the impact of the German intention theory and expression theory on the Serbian doctrine of civil law and legislation.

***Key words**: intention theory; expression theory; simulation; deceit; duress; mental reservation; fiduciary contracts.*

I. Über die Willens- und Erklärungstheorie im deutschen Privatrecht

1. Tendenzielle Entwicklungsstufen

Eine der weittragendensten Theorien über die Tatsachen, welche die Rechtsgeschäfte konstituieren, ist die deutsche Theorie über Willensgeschäfte, welche insbesondere von der ersten bis zur Ende der zweiten Hälfte des XIX. Jahrhunderts eine entscheidende Rolle in der europäischen zivilistischen Literatur hatte, und sie übte auch einen bestimmten (pandektistischen) Einfluss auf die Kodifikationen aus, die am Ende des XIX. (BGB-1896[1], Schweizerisches Obligationengesetz - 1881[2], 1911[3]) und im XX. Jahrhundert (z. B. italienisches Zivilgesetzbuch-1942[4]) in Kraft getreten sind.[5]

* Prof. Dr. József *Szalma*, ordentliches Mitglied der Akademie der Wissenschaften und Künste der Woywodina, Novi Sad (Újvidék), ordentlicher Professor und Lehrstuhlleiter (2012-2014) des Bürgerlichen und Römischen Rechts der Rechtswissenschaftlichen Fakultät der Reformierten Universität Károli Gáspár, Budapest, Ungarn.

1 *Szalma* József, Ismertetés a Hundert Jahre BGB című tanulmánykötetről (Buchbesprechung des Buches: Hundert Jahre des deutsches BGB), Acta Fakultatis Politico-Juridicae Universitatis Scientiarium Budapestiensis, 2006, S. 257-265; ibid, Németország kereskedelmi (vállalkozói) jogáról (Über das deutsche Handelsrecht), Jogtudományi Közlöny (Zeitschrift der UAW für Rechtswissenschaften, Budapest), No 12/1999, S. 549-557.

2 S. zB. Gábor *Hamza*, Origine e sviluppo degli ordinamenti giusprivatistici moderni in base alla traditione del diritto Romano, Andavira Editora, S. 234.

3 S. *Szalma* József, A svájci kötelmi törvényről, a kódex és a kódexen kívüli törvények kapcsolatáról (Über das schweizerische Obligationengesetz – Das Verhältnis zwischen Kodex und Neben- und Sondergesetzen, im Konferenzbuch: Új kihívások Európában - a jogtudomány válaszai, Miskolc, ME ÁJK, 2008, S. 125-147; *ibid*, A svájci kötelmi jogról (Über das schweizerische Obligationenrecht), Magyar Jog, Budapest, Nr. 1/2008, S.10-15; ibid, Publicationes Universitatis Miskolciensis, Sectio Juridica et Politica, 2008, S. 693-720; ibid, A svájci Kt (1912. évi kötelmi törvény) kodifikációs jellegzetességeiről és szabályozási módszeréről (Über Kodifikationseigenschaften des schweizerischen Obligationengesetzes), Magyar Jog, Budapest, Nr. 3/2008, S. 168-178.

4 S. zB. Gábor *Hamza*, Origine e sviluppo degli ordinamenti giusprivatistici moderni in base alla tradizione del diritto Romano, Andravira editora, 2013, S. 287-288.

5 Aufgrund der Forschungsaufenthalte in Heidelberg und Regensburg (1977 und später in nochmahls in Regensburg), als er die deutsche Willens- und Erklärungstheorie erforschte, hat der Autor mehrere Veröffentlichungen (Bücher und Artikel in Fach- und wissenschaftlichen Zeitschriften) in ungarischer, serbischer und kroatischer Sprache, überwiegend in Serbien (Belgrad, Novi Sad- Újvidék-Neusatz) veröffentlicht: Jožef *Salma* (= *Szalma* József, József Szalma) Simulovani ugovori (Scheingeschäfte), Diss., Universität in Belgrad, Pravni fakultet u Beogradu (Fakultät der Rechtswissenschaften der Universität in Belgrad), 1979, S. 476, später veröffentlicht mit kleineren Änderungen und Erweiterungen, seitens Savremena administracija (Belgrader Verlag für Rechtswissenschaftliche Veröffentlichungen) und Institut za uporedno pravo (Institut für Rechtsvergleich, Belgrad), 1987; Jožef *Salma*, Zaobilazni ugovori (Umgehungsgeschäfte), Glasnik Advokatske Komore SAPV (Fachzeitschrift der Rechtsanwaltskammer von der Autonomen Provinz Woywodina, Novi Sad, Nr. 1,2/1982, (Nr.1) S. 33-60, und Fortsetzung (Nr. 2) S. 21-40; Jožef *Salma*, Načelo savesnosti i poštenja (Grundsatz von Treu und Glauben), Glasnik Advokatske komore Vojvodine, Nr. 5/1982, S. 1-31; *Szalma* József, Kötelmi jog (Obligationenrecht), Újvidék/Novi sad, Forum, 1985; Jožef *Salma*, Obligaciono pravo (Obligationenrecht), Naučna Knjiga (ehemaliger wissenschaftlicher Verlag in Belgrad), Belgrad, 1988, mit späteren mehreren (6) Auflagen als Lehrbuch und systematische Darstellung, Universität im Novi Sad, Fakultät der Rechtswissenschaften, letzte im Jahre 2009, S. 695. In dieser Auflage insbesondere S. 152-160 (die Theorie über Treu und Glauben), S. 226-232 (Entstehung des Vertrags, Willenseinigung; S. 230-232: –Willens und Erklärungstheorie; S. 258-260: Übergabe des Willens und Dissens); S. 260-262: Scheingeschäfte; S. 361-363: – Auslegung des Rechtsgeschäfts, usw. Diese Arbeiten des Autors lehnten sich unter anderem an die nachfolgend zitierten Werke der deutschen Literatur an.

Die *tendenzielle Entwicklung* des Kerns, der Quellen und der Konstituenten des Rechtsgeschäfts in der römischrechtlichen Tradition (Pandectenlehere, usus modernus Pandectarum wie z. B. Wächter[6] - auf welcher die deutsche Willens- und Erklärungstheorie basiert) hat drei „Stufen".

Die erste Stufe war die Auffassung, welche schon im ursprünglichen Römischen Recht bestand, nach welcher die Obligationenverträge und andere *Rechtsgeschäfte aus Form entstehen*, also als Ergebnis von Form (forma dat esse rei). Die Wirkungen der verschiedenen rechtsgeschäftlichen Formen waren vorgeschrieben, wie z. B. beim stipulatio poene. Die Erfüllung der bestimmten Form seitens der Vertragsparteien (z. B die Wörter: Spondeo – spondesne, vor der Libripens) verursachte automatisch die entsprechende, vorgeschriebene rechtsgeschäftliche Wirkung, frei vom wahren Willen der Parteien. Diese Auffassung spielt auch heute noch eine bestimmte Rolle bei sogenannten formbedürftigen Geschäften. Mit dem Unterschied, dass die kreative Quelle der Geschäftswille ist, aber ohne eine pflichtmäßige Form entsteht keine Obligation (Nuda pacta non fit obligatio).

Die zweite tendenzielle Entwicklungsstufe war die *Verkehrstheorie*. Gemäß dieser sind Rechtsgeschäfte nur jene, bei denen ein subjektives Recht von einem an ein anderes Rechtssubjekt übergeben wird, regelmäßig mit Entgelt, wie z. B. Kauf.

Die dritte Tendenz ist eigentlich die *Willenstheorie* im weiteren Sinne des Wortes, wenn ohne rechtsgeschäftlichen Willen ein Rechtsgeschäft nicht entstehen kann, also die kreative Tatsache der Rechtsgeschäfte ist der Einklang der Willen der Parteien. Die Wirkung und der Inhalt des Rechtsgeschäftes stammt von den wahren Willen der Parteien. Der rechtsgeschäftliche Wille hat die Besonderheit, dass die Parteien beiderseitig einen Vertrag schließen wollen (animus contrahendi), wobei das Rechtsgeschäft von ihnen ernsthaft gewollt[7] ist (insbesondere bei zweiseitig verbindlichen, oder empfangsbedürftigen Geschäften).[8] So zum Beispiel fehlt beim Scheingeschäft oder fiktiven Geschäft ein solcher Geschäftswille und daher hat dieses zwischen den Parteien keine rechtsverbindliche Wirkung.

2. Allgemeine und besondere Lehre über Willensgeschäfte

Die *allgemeine Lehre über Willensgeschäfte*[9] betrachtete die Willenstheorie oder den rechtsgeschäftlichen Willen im Lichte von zwei Aspekten. Einerseits als den innerlichen Willen, im psychologischen Sinne des Wortes, das heißt, eine Entscheidung, einen Vertrag mit bestimmtem Inhalt zu schließen. Andererseits stehen die rechtlichen Modalitäten der Willensäußerung (mündlich, schriftlich, konkludent-stillschweigend[10], etc.), des geäußerten Willens.[11] Es entstand eine relative *Präsumtion über den Einklang* der innerlichen oder geäußerten Geschäftswillen, weil dies im Interesse der Parteien ist.

Aber der rechtsgeschäftliche Willen und die Erklärung der Parteien könnten wegen verschiedenen, aber *typischen Umständen* und Ursachen, *bewusst* oder *unbewusst* zu einander in *Diskrepanz (Widerspruch)* stehen. Mit dieser Frage befasste sich in der deutschen Willenstheorie die *besondere Theorie* über Willensgeschäfte. Es wurde die Frage gestellt, welcher Wille - der innere oder der geäußerte - der entscheidende bei der Entstehung des Rechtsgeschäftes und für die Feststellung seines Inhalts ist. Die „Rechtsfiguren", oder Rechtsinstitute, zu denen die bei den Parteien oder einer der Parteien *bewusste* Diskrepanz zwischen dem innerlichem und dem geäußerten Willen gehört, zählen: Scheingeschäfte[12], fiktive Geschäfte (bloße Simulation des Geschäftes ohne dissimuliertes, gedecktes oder wahres Geschäft), fiduziarische Rechtsgeschäfte (Treuhandgeschäfte), geheimer Vorbehalt[13], Drohung[14]; oder die als *unbewusste* - wie

[6] S. z. B., *Föld*i András, *Hamza* Gábor, A római jog története és institúciói (Geschichte und Institutionen des Römischen Rechts), Nemzeti Tankönyvkiadó, Budapest, 2010, mit weiteren späteren Auflagen), S. 136, Randnummer 463, 464.

[7] S. Par. 118. des BGB – Nichtigkeit wegen Mangel der Ernstlichkeit, in: *Prütting*, *Wegen*, *Weinreich*, BGB Kommentar, 7. Auflage, Luchterhand, 2007, S. 107.

[8] S. Par. 130-132. des BGB, in: *Prütting*, *Wegen*, *Weinreich*, BGB Kommentar, 7. Auflage, Luchterhand, 2007, S. 103.

[9] *Hartmann*, Gustav, Wort und Wille im Rechtsverkehr, Iherings Jahrbücher, 1882, S.1; *Hölder,* E., Das Wesen der rechtswirksamen Willenserklärung, Iherings Jahrbücher, Bd. 55, 1909, S. 414; ibid, Willenstheorie und Erklärungstheorie, Iherings Jahrbücher, Bd. 58, 1911; *Henle*, Rudolf, Vorstellungs- und Willenstheorie, Leipzig, A. Deichert - Georg Böhne, 1910; *Isay*, Die Willenserkärung im Tatbestande des Rechtsgeschäfts, in: Abhandlungen zum Privatrecht und Zivilprozess, II. 2.; *Düssel*, Georg August, Die Lehre von den Willensgeschäften (eine Kritik), Diss. Köln, Orthen,1936.

[10] S. z. B. *Ehrlich,* Eugen, Die Stillschweigende Willenserklärung, Berlin, Carl Haymann, 1893, ibid, Aalen, Stientia, 1970.

[11] S. *Schall*, Der Parteiwille im Rechtsgeschäft, 1877;*Scheiff*, Divergenz zwischen Wille und Erklärung, Diss. 1879.

[12] S. Par. 117. des BGB in: Prütting, Wegen, Weinreich, BGB Kommentar, 7. Auflage, Luchterhand, 2007, S.105-107. Lit.: *Oertmann*, Paul, Scheingeschäft und Kollusion, Das Recht, Nr. 9,10/1923, S.74-75.

[13] S. Par. 116. des BGB, in: Prütting, Wegen, Weinreich, BGB Kommentar, 7. Auflage, Luchterhand, 2007, S. 104.

[14] S. Par. 123. des BGB, in: Prütting, Wegen, Weinreich, BGB Kommentar, 7. Auflage, Luchterhand, 2007, S. 116-123. Lit.: *Enneccerus-Kipp-Wolff*, (*Lehmann*), Lehrbuch des bürgerlichen Rechts, Der Schuldverhältnisse, fünfzehnte Bearbeitung, J.C. B. Mohr, Tübingen, 1958, S. 846/b.

Irrtum[15], Täuschung[16], falsche Vermittlung des Willens,[17] falsche Nominierung des Geschäftes (falsa demonstratio non nocet),[18] Missverständnis.[19] Die mögliche Diskrepanz zwischen dem Willen und der Erklärung hat auch eine weitgehende Bedeutung bei der Methode der Auslegung[20] des Geschäftes (ob der Wille, oder die Erklärung von Relevanz ist für die Entdeckung des wahren Willens, der zugrunde liegt). Zu der bewussten Diskrepanz zwischen dem Willen und der Erklärung zählt man auch die Gesetzesumgehung (agere in fraudem legis, oder in fraudem partis).[21]

3. Rechtliche Modalitäten, welche die Diskrepanz zwischen dem Willen und der Erklärung auflösen könnten – Willens- und Erklärungstheorie, gemischte Theorien

Hinsichtlich der rechtlichen Auflösung der Diskrepanz zwischen dem Willen und der Erklärung sind zwei Grundtheorien entstanden. Die erste ist die sog. *Willenstheorie*[22] (im engeren Sinne des Wortes), welche den innerlichen, psychisch vorausgesetzten Willen als entscheidend bei der Entstehung des Rechtsgeschäftes bestimmt. Seitens dieser Theorie ist nur das wichtig, was die Vertragspartei zum Zeitpunkt der Entstehung des Geschäftes meint und will, und nicht, was sie geäußert hat. Die zweite Grundtheorie war die *Erklärungstheorie*[23], welche als kreative rechtsbindende Tatsache beim Rechtsgeschäft nur den erklärten Willen betrachtet, mit der Begründung der Rechtssicherheit.

Inzwischen sind aber verschiedene Auffassungen entstanden, die als *gemischte Theorien* benannt wurden, welche grundsätzlich eine Kombination der beiden Grundtheorien enthalten, oder welche bei verschiedenen Typen der Rechtsgeschäfte ausschließlich die Willens- oder die Erklärungstheorie anwandten. Einige von ihnen nennen in Anlehnung an die zwei Grundtheorien stärker den Willen, andere die Erklärung als entscheidend bei der Entstehung des Rechtsgeschäftes.

---

[15] S. Par. 119., Par 158. Par. 661, Par. 2027, beiderseitiger, Par. 313 Kalkulationsirrtum, Par 433. des BGB, in: *Prütting*, *Wegen*, *Weinreich*, BGB Kommentar, 7. Auflage, Luchterhand, 2007, S.107-116. Weitere klassische Lit.: *Zitelmann* Ernst, Irrtum und Rechtsgeschäft, Leipzig, 1879; *Manigk*, Irrtum und Auslegung, 1918; *Schlossmann*, Siegmund, Der Irrtum über wesentliche Eigenschaften der Person und der Sache, 1903; ibid, Der Vertrag, Leipzig, Breitkopf und Härtel, 1876; *Simonius* August, Wandlung der Irrtumslehre in Theorie und Praxis, Festgabe zum Fritz Goetzinger, Basel,1935; Tietze, Vom sogenannten Motivirrtum, Festschrift für Ernst Heymann, 1940, S.75; *Zweigert* Konrad, Irrtümer über den Irrtum, Zeitschrift für Rechtsvergleichung, Nr. 1-2/1965, S. 12-22.; *Rothoeft*, Dietrich, System der Irrtumlehre als Metodenfrage der Rechtsvergleichung, Tübingen, 1968; *Lenel*, Irrtum und wesentliche Eigenschaften, Archiv für die zivilistische Praxis, Bd. 123, S.161; *Haupt*, Die Entwicklung der Lehre vom Irrtum beim Rechtsgeschäft, seit Rezeption, 1941; *Henle*, Rudolf, Der Irrtum über die Rechtsfolgen,1911; *Flume*, Werner, Eigenschaftsirrtum und Kauf, Münster, 1948; *Brix* Hans, Einschränkung der Irrtumsanfechtung, Karlsruhe, 1960; *Dieter* Heinrich, Die unbewusste Irreführung, Archiv für die zivilistische Praxis, Nr.1-2/1963. S. 88-104; In der schweizerischen Literatur: *Kuoni* Andreas, Die einseitige Unverbindlichkeit des unter Irrtum, Betrug und Furchterregung geschlossenen Vertrages nach Schweiz, Diss. Bern, Chur, 1897. In der serbischen Literatur: *Perović*, Slobodan, Zabluda o svojstvima predmeta i odgovornosti za skrivene mane (Irrtum über Eigenschaften des Vertragsgegenstandes und die Haftung für versteckte Mängel), Pravni život, Belgrad, 1/1972, S. 13. S. Berufung auf diese Arbeiten: *Salma*, J., Obligaciono pravo, Novi Sad, 2009, S. 251-252, Fn. 812. Die serbische Irrtumslehre lehnte sich auch an die französische Literatur an, wie *Descouts*, René, L'erreur de droit, thèse; Paris; 1917; *Célice*,Raymond, L'erreur dans les contrats, Paris, 1924; *Fammy*, L'erreur, vise des contrats en droit Française et en droit Anglaise, thčse, Lyon 1926; *Gaudeffroy*, Paul, L'erreur – obstacle, Paris, 1924; *Ghestin*, Jacques, La notion d'erreur dans le droit positiv actuel, Paris, 1963; in Hinsicht deutsch - französische Rechtsvergleichung: *Rieg* Alfred, Le role de la volonté dans acte juridique en droit Française et Allemand, Strassburg, 1960.

[16] S. Par. 119 des BGB in: *Prütting*, *Wegen*, *Weinreich*, BGB Kommentar, 7. Auflage, Luchterhand, 2007, S.107-116.

[17] S. Par. 120. des BGB in: *Prütting*, *Wegen*, *Weinreich*, BGB Kommentar, 7. Auflage, Luchterhand, 2007, S.113-116.

[18] *Bang*, Falsa demonstratio, Diss., Heidelberg- Jena, Gustav Fischer, 1916. In römisch-rechtliche Tradition, -Ulpianus, Pomponius, Servius und Celsus: D.30/1.4; D. 33,10/1. 7. 2.

[19] *Titze,* Heinrich, Die Lehre vom Missverständnis, 1910.

[20] S. Par. 157 des BGB: Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern. S. z. B. die Kommentare in: *Prütting*, *Wegen*, *Weinreich*, BGB Kommentar, 7. Auflage, Luchterhand, 2007, S. 200-205. Nach dem Par. 133. des BGB bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks haften. S. *Prüttting*, etc., op. cit., S. 140-145., bzw. nach dem Normzweck auszulegen.

[21] S. z. B. *Teichmann*, Arndt, Gesetzesumgehung, Verlag vom Otto Schwarz, Göttingen, 1962. Im schweizerischen Recht: *Maday* Denis, Die sogenannte Gesetzesumgehung, Bern, Stämpfli,1941.Die Gesetzesumgehung ist eine besondere Art von Widerrechtlichkeit, die Parteien umgehen willentlich mit ihrem Geschäft eine imperative Norm, z. B. sie simulieren das Geschenk und dissimullieren den Kauf, z. B. wegen leichteren fiskalischen Verpflichtungen. Das simulierte Geschäft ist nichtig, weil die Parteien nicht seine Wirkung wollen, umgekehrt ist das dissimulierte Geschäft gültig, aber wenn die Parteien die Operation des simulierten Geschäfts mit dem Umgehungsmotiv verknüpfen, dann sind die rechtlichen Folgen des umgangenen Gesetzes auf das dissimulierte Geschäft anzuwenden, z. B. nicht die fiskalische Verpflichtung für das Geschenk sondern für den Kauf. Die Umgehungsgeschäfte teilt man als solche, welche gegen die allgemeinen Interessen (z. B. imperative Normen, gute Sitten) – agere in fraudem legis, oder rechtlich geschützte Privatinteressen geschlossen wurden – agere in fraudem partis. In der Literatur bemerkt man, dass die Ungehungsgeschäfte keine eigene Sanktion haben, sie folgt aus der Sanktion der umgangenen imperativen Norm. Dann auch, dass z. B. die Simulationsoperation nicht immer ein Umgehungsgeschäft ist, ebenso wie auch die Treuhandgeschäfte, also sie sind nicht aus allgemeiner Sicht gegen die guten Sitten.

[22] Die deutsche Literatur rechnet den größten Verdienst für die Willenstheorie Savigny zu, s. *Savigny*, Friedrich, System des heutigen römischen Rechts, Bd. III., Berlin, 1840. S. 184-258, 237-242. Aber neben ihm wurde die Willenstheorie auch von *Windscheid* bearbeitet, in seiner Arbeit: Wille und Willenserklärung, Archiv für die zivilistische Praxis, Jahrgang 1880, Bd. 63, S.72-73, und *Zitelmann* in der Arbeit: Die juristische Willenserklärung, Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts, Bd. XVI., Jena, Jahrgang 1878, S.357-436.

[23] Der erste und wichtigste Teoretiker, der ursprüngliche Autor der Erklärungstheorie, war Josef *Kohler*, in den folgenden Werken: Studien über Mentalreservation und Simulation, Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts, Bd. XVI., Jena, 1878, S. 91-158; ibid, Noch einmal über Mentalreservation und Simulation, gleicher Bd., S. 325; ibid, Ungehorsam und Vollstreckung im Zivilprozess, 1., Vollstreckungsgegenklage und Simulation, Archiv für die zivilistische Praxis, Jahrgang 1893, Bd. 80, S. ad 141. Kohler entwickelte die sogenannte *allgemeine* und *besondere* Theorie über Willen und Erklärung. Die erste umfasste die allgemeine Lehre über den Geschäftswillen, die zweite seine Anwendung bei gesonderten Rechtsinstituten, wie Simulation, Mentalreservation, Fiducia cum creditore contracta, usw.

Beim *geheimen Vorbehalt* (Mentalreservation) verfolgte man am Anfang (erste Hälfte des XIX. Jahrhunderts) die Willenstheorie. Beispielsweise hatte Geltung der innerliche suspendierende Vorbehalt bei einem positiv, affirmativ geäußerten Angebot, d. h. es wurde das positiv geäußerte Angebot suspendiert. Wegen der Rechtssicherheit des Willensadressaten bei empfangsdürftigen Rechtsgeschäften, nimmt man in der weiteren Entwicklung, in der deutschen Doktrin in der zweiten Hälfte des XIX Jahrhunderts, beim geheimen Vorbehalt nicht die innere Wille an, sondern man strebte die Anwendung der Erklärungstheorie an, also den Vorbehalt als wahren Willen kann man nicht annehmen, sondern nur den geäußerten Willen, bzw. beim Angebot hatte nur der geäußerte Geschäftswille Geltung. In der deutschen Literatur betont man auch die Wichtigkeit des inneren Willens durch animus contrahendi, also der Geschäftswille sollte ernsthaft sein, geäußert mit der Vertragsabschluss-Absicht, was nach konkreten Umständen bewertet wird. Die Willensäußerung zum *Scherz* hat keine Gültigkeit.

Beim *Scheingeschäft* wurde die Kombination der Willens- und Erklärungstheorie angenommen, das heißt, für den simulierten Teil des Geschäftes nimmt man gegen den Dritten, nach Drittwirkung, die Erklärungstheorie an, und dadurch können die gutgläubigen Dritten keine negativen Folgen erleiden. Für den verdeckten Teil, das dissimulierte Geschäft, hinsichtlich der Wirkung zwischen der Parteien, nimmt man die Willenstheorie an, mit der Begründung, dass die Parteien beiderseitig bewusst und absichtlich die Wirkung des Scheingeschäftes nicht gewollt haben. Dieses Geschäft zwischen ihnen ist nur ein fiktives Geschäft ohne Wirkung. Aber das verdeckte Geschäft zwischen ihnen (Parteien) bekommt seine Wirkung deswegen, weil die Parteien die Wirkung gewollt haben. Bei fiduziarischen oder *Treuhandgeschäften*[24] (Übereignung wegen Sicherung einer Forderung) zeigt sich bei der Gültigkeit des Vorbehalts über der weiteren Übereignung bis zur Zeit der Erfüllung der gesicherten Forderung der Einfluss der Willenstheorie. Die weitere Abtretung, Übereignung des Sicherungsgutes, vor der Fälligkeit der Erfüllung der gesicherten Forderungen, wurde als Benehmen gegen gute Sitten bewertet.

Die *Verkehrstheorie*[25], gesondert für die *Handelsgeschäfte,* empfahl die Anwendung der Erklärungstheorie. Insbesondere deswegen, weil in Handelsgeschäften die beiden Parteien auf professioneller Basis teilnehmen, und bei der Willensäußerung beim Handel die üblichen Begriffe nutzen.[26] Diese Begriffe bekommen wegen Handelsgebräuchen[27] oder Verkehrssitten[28] nach einer längeren Zeit einen objektiven Inhalt, und können damit die Rechtssicherheit anstreben und ihr dienen. Diese Theorie empfiehlt aber für nicht entgeltliche Geschäfte (z. B. Geschenk) zwischen Bürgern, die ihre Geschäfte außerhalb einer wirtschaftlichen Tätigkeit schließen, eher die Anwendung bzw. die Folgen der Willenstheorie, weil hier die Motive ausnahmsweise Teile des rechtsgeschäftlichen Willens- oder Erklärung sind.

Die *Erkenntnistheorie* oder *Vorstellungstheorie*[29] wurde grundsätzlich als eine Variante der Erklärungstheorie bewertet. Demnach ist das rechtsgestaltende Element (Tatsache) die Willensäußerung, aber mit dem Inhalt, den sich der Adressat der Willensäußerung darunter vorgestellt hatte.

Die *Vertrauenstheorie*[30] widmete sich auch erst der Erklärung und behauptete, dass zwischen den Parteien wegen ihren Interessen ein *beiderseitiges Vertrauen* bestand, und deswegen sollte man den Einklang der Willen und der Erklärung präsumieren. Falls dieser Einklang nicht besteht, hat die Erklärung den Vorteil.

In der ersten Hälfte des XIX. Jahrhunderts dominierten in der deutschen juristischen Literatur die Willenstheorien, aber in der zweiten Hälfte des XIX. Jahrhunderts die Auffassungen über die Erklärung, und auch im BGB (1896) kam überwiegend die Erklärungstheorie zum Ausdruck. Nicht nur beim Handels- sondern teilweise auch beim Nichthandelsgeschäft, weil bei der Auslegung des Geschäftes der objektive oder übliche präsumierte gemeinsame Wille für die Feststellung des Geschäftsinhalts diente. Aber trotzdem bleibt der (wahre) Wille das ursprüngli-

---

[24] S. z. B, *Dreyer*, Das fiduziarische Rechtsgeschäft, Gruchot's Beiträge, Bd. 40/1896, S. 233-449; *Peusqens,* Max, Simulation und fiduziarisches Rechtsgeschäft, Diss., Jena; Borna, Leipzig, 1912, S. 37-38; *Fuchs*, Wilhelm, Über fiduziarische Berechtigung, Diss., Theodor Willisch, Marburg, 1915, Kleine Schriften, Bd. 29, 2. Heft; ibid, Pseudonyme Rechtsgeschäfte, Archiv für die zivilistische Praxis, Nr.117/1917, S. 84-125; *Goltz* Fritz, Das fiduziarische Rechtsgeschäft mit besonderer Berücksichtigung des Wechsel- und Konkursrechts, Rohstocker Diss., Marburg, 1901.

[25] Der Begründer dieser Theorie in Hinsicht der Willenstheorie war *Kulenbeck*, in seiner Arbeit: Von Pandecten zum BGB, 1903. Die weiteren Arbeiten über die rechtliche Rolle des Vertrauens, s. *Hedemann,* Flucht in die Generalklauseln, 1933; A. *Hueck*, Der Treugedank im modernen Privatrecht, 1947; *Eichler*, Die Rechtslehre von Vertrauen, 1950; *Hamburger*, Treu und Glauben im Verkehr, 1930; *Weber*, Treu und Glauben,1961; *Strätz*, Treu und Glauben, I., 1974; *Wieacker*, Zur rechtstheoretische Präzisierung des Par. 242. BGB, ibid, Juristenzeitung, 1956, S. 555. Die Teorie über das Vertrauen wurde insbesondere in dem Werken von Kohler als Vertreter der Erklärungstheorie weiter entwickelt. Nach einer Interpretation der Verkehrstheorie teilt man die Geschäfte in zwei Gruppen, die erste sind die sog. Verkehrs-Geschäfte (Handelsgeschäfte), die andere sind die Nichthandelsgeschäfte. Bei der ersten ist das gemeinsame Ziel der Parteien die Übereignung der Rechte gegen Entgeld, oder Gewinn, bei der anderen sind die Geschäfte, die den Bedürfnissen der Bürger dienen, entgeltlich oder nichtengeltlich. Bei der ersten dominieren die Regel über objektive, bei der zweiten auch die subjektive Bewertung des Geschäftswillens. S. z. B. Salma, J., Obligaciono pravo, Novi Sad, 2009, S. 231-232.

[26] S. z. B. INCOTERMS 2000 der ICC, mit standardisierter Klausel beim Handelsgeschäft.

[27] S. z. B., Peter *Bülow*, Handelsrecht, 3. völlig neubearbeitete und erweiterte Auflage, C. F. Müller Verlag, Heidelberg, 1999, s. 97; *Cannaris*, Claus-Wilhelm, Handelsrecht, Lehrbuch, 22. Auflage, 1995., S. 323-324; BGH (Bundesgerichtshof), Neue Juristische Wochenschrift, 77, 385; *Prütting*, *Wegen*, *Weinreich*, BGB Kommentar, 7. Auflage, Luchterhand, 2007, S. 201, Randnummer 10.

[28] S. *Schmidt*, Karsten, Handelsrecht, Lehrbuch, 4. Auflage, 1994, S. 24. In der älteren deutschen Literatur verwies zuerst Zitelmann auf die Rolle der Erklärung, aber man sollte sie objektiv verstehen, wie die Verkehrssitten empfehlen (*Zitelmann*, Rechtsgeschäfte im Entwurf des BGB, Bd I. S. 98, Bd. II. S. 14).

[29] S. Rudolf *Henle*, in: Vorstellungs - und Willenstheorie, A. Deichert-Georg Böhne, Leipzig, 1910.

[30] Der Begründer der Vertrauenstheorie war *Dernburg* und weiterhin *Lothmar;* S. *Brinz-Lothmar*, Lehrbuch der Pandecten, Leipzig, 1895, Bd. IV, 2. Auflage, S.25.

che rechtsgestaltende Element des Rechtsgeschäftes, insbesondere im Bereich der besonderen Willenstheorien, wie bei der Scheingeschäftslehre und auch auf dem Gebiet der Auslegung. Bei der Auslegung erforscht man, was die Parteien während des Vertragsabschlusses *gemeinsam gewollt* haben, dann auch, was Sie geäußert haben.[31]

II. Einfluss der deutschen Willens – und Erklärungstheorie im serbischen Privatrecht

1. Einfluss in der zivilistischen Literatur

Mehrere Autoren aus Serbien befassten sich in verschiedenen systematischen Darstellungen oder anderen Werken wie Monografien und Artikeln, unmittelbar oder mittelbar, mit der deutschen Doktrin über Willensgeschäfte, oder lehnten sich an sie an, vor und insbesondere nach dem Inkrafttreten des Gesetzes über Obligationen (1978), z. B. an der Belgrader Rechtswissenschaftlichen Fakultät, und am Institut für vergleichendes Recht. So z. B. Prof. Dr. Andrija Gams, insbesondere in Hinsicht der fiduziarischen Rechtsgeschäfte[32], der allgemeinen Lehre von Rechtsgeschäften,[33] später auch Prof. Dr. Vladimir Vodinelić, auf dem Gebiet der Umgehungsgeschäfte. Von der Fakultät der Rechtswissenschaften in Niš (Naissus) ist Prof. Dr. Dragoljub Stojanović zu erwähnen, insbesondere mit seinen Werken über den allgemeinen Teil des bürgerlichen Rechts, in dem die positiven Einflüsse der Willenstheorie bemerkbar sind.[34] Prof. Dr. Jakov Radišić hat in seinem systematischen Werk (Lehrbücher) über Obligationenrecht die deutsche Literatur verwendet.[35] Mehrere Arbeiten des Autors der vorliegenden Arbeit sind auch der deutschen Willens- und Erklärungstheorie gewidmet, und mehrere wurden in serbischer und kroatischer Sprache in Serbien veröffentlicht.[36]

2. Einfluss in der Gesetzgebung

Die Einflüsse der Willens- und Erklärungstheorien sind insbesondere im *Gesetz über Obligationenverhältnisse* (in weiteren Text: GO), welche anfangs, zur Zeit seines Inkraftretens (1978) im ganzen ehemaligen Jugoslawien Geltung hatte[37], aber heute ist es, mit Veränderungen, noch in Serbien in Geltung. Dessen Reform in Serbien wurde schon im Jahre 2007 begonnen, seit der Formierung der Kodifikationskommission seitens des serbischen Parlaments zur Kodifikation des Ganzen des Zivilrechtes.[38] Der erste Entwurf der Fachkommission, entstand im Gebiet der Obligationsverhältnissen im Jahre 2009. Das ursprüngliche Gesetz über Obligationsverhältnisse (1978) war überwiegend unter dem Einfluss des schweizerischen Obligationengesetzes. Das serbische BGB (SBGB) aus dem Jahre 1844 war unter dem Einfluss des Österreichischen Allgemeinen Bürgerlichen Gesetzbuches (1811); es war fast dessen Übersetzung.[39] Das SBGB ist im Bereich der nicht geregelten besonderen Teile des Vertragsrechts (Einzelne Verträge) seitens des Gesetz des Obligationsverhältnisse Serbiens /in weiterem: GO/ (z. B. Geschenk) noch in Geltung, als sog. Rechtsregel.[40] Doch der neue Entwurf des GO (2009) plant im Teil über Obligatio-

[31] S. *Fickentscher*, Wolfgang, Schuldrecht,
Walter de Gruyter, Berlin-New York, 1976 (mit späteren Auflagen), S.95. Fikentscher behauptete zu Recht, dass bei der Auslegung, neben verschiedenen Diskussionen, der Hauptausgangspunkt der gemeinsame Wille der Parteien ist, bzw. welche Verpflichtungen sie beiderseitig annehmen wollten. S. auch *Lüderitz*, Auslegung von Rechtsgeschäften nach anglo-amerikanischen und deutschen Recht, 1960; *Larenz*, Karl, Die Methode der Auslegung des Rechtsgeschäfts, Zugleich ein Beitrag zur Theorie der Willenserklärung, Diss. I. Auflage, 1930, s. auch die weitere Auflage von Alfred Metzner, Frankfurt am Main – Berlin, 1966, S. 10-88 (über die Rolle des Willens und Erklärung), 34-69 (subjektive Aspekte bei der Auslegung), 70-106 (der objektive Inhalt der Vertragstermine, sog. geknüpfter Inhalt).

[32] *Gams* Dr. Andrija, Nešto o fiducijarnim pravnim poslovima (Über fiduziarische Rechtsgeschäfte), Anali Pravnog fakulteta u Beogradu, Nr. 1-2/1960.

[33] *Gams* Dr. Andrija, Uvod u građansko pravo (Einführung in das Bürgerliche Recht), opšti deo (Allgemeiner Teil), Naučna knjiga, Beograd, 1970.

[34] S. z. B., Prof. Dr. Dragoljub D. *Stojanović*, Uvod u građansko pravo (Einführung in das Bürgerliche Recht), 9. Izd. (9. Auflage), Hrsg. Dr. Dragoljub Stojanović, Srđan Stojanović, Belgrad, Auflage Color Press, Lapovo, 1996, in díesem: Der Sinn und Begriff der Rechtsgeschäfte, S. 235; Fiduziarische Rechtsgeschäfte, S. 256; Willenserklärung, S. 263; Mentalreservation, S. 264; Auslegung der Geschäfte, S.268; Willensmängel, wie Irrtum (S.347), Täuschung (S. 360), Bedrohung (S. 367; Scheingeschäfte und fiktive Geschäfte (S.367), Scherz (S. 375).

[35] Jakov *Radišić*, Obligaciono pravo, Opšti deo (Obligationenrecht, Allgemeiner Teil), Beograd, 1979, spätere Auflagen; SA, Beograd, 1988, 5. Auflage seitens S. A.M. Consalting centar, Beograd, 1993, Nomos, 2000.

[36] S. z. B. Salma J. Obligaciono pravo (Obligationenrecht), 6. Auflage, Novi Sad, Fakultät der Rechtswissenschaften der Universität Novi Sad, 2009, deo IV (IV. Teil, Der Vertrag), Par. 2. Volja i izjava volje (Der rechtsgeschäftliche Wille und dessen Erklärung), S. 232-262.

[37] S. József Szalma, Geltung und Bedeutung der Kodifikationen Österreichs, Serbiens und Montenegros im ehemahligen Jugoslawien, Zeitschrift für neuere Rechtsgeschichte, Wien, Nr 4/1994, S. 341-349; ibid, Az ABGB (OÁPtk) továbbélése a Monarchia utódállamaiban, különös tekintettel a volt Jugoszláviára (Das Weiterleben des ABGB in den Nachfolgstaaten Österreichs – Ungarische Monarchie, mit besonderer Berücksichtigung des ehemaligen Jugoslawien), in: A német-osztrák jogterület klasszikus kodifikációi (Klassische Kodifikationen des deutschen und österreichischen Rechtraums), Red. Rácz Lajos, Budapest, Martin Opitz Kiadó, 2011, S. 103-108; ibid, Rész- és teljes kodifikációk (volt) Jugoszláviában (Teil- und Vollkodifikationen im ehemaligen Jugoslawien), in: *Bíró* György (Hrsg), A magyar magánjog az európai jogfejlődés áramában, A Miskolci Egyetem ÁJK Jubielumi Konferenciájának Kiadványa (Konferenzbuch der Fakultät der Rechtswissenschaften der Universität Miskolc gewidmet den europäischen Kodifikationstendenzen), Miskolc, 2000, S. 220-254.

[38] S. József *Szalma*, Reformtendenzen in der Zivilgesetzgebung Serbiens, in: *Welser* (Hrgs), Privatrechtsentwicklung in Zentral- und Osteuropa, Veröffentlichungen der Forschungsstelle für europäische Rechtsentwicklung und Privatrechtsreform an der Rechtswissenschaftlichen Fakultät der Universität Wien, Wien, Manz'sche Verlags- und Universitätsbuchhandlung, 2008, S. 159-183.

[39] S. József *Szalma*, Serbische und kroatische Übersetzungen des ABGB, in: Rechtssysteme in Donauraum, Nomos Verlagsgesellschaft, Baden-Baden - Andrássy Universität, Budapest, 2014, S. 98-119.

[40] S. z. B. József *Szalma*, Der Einfluss des ABGB auf Serbien, in: *Berger* (Hrsg) Österreichisches Allgemeines Bürgerliches Gesetzbuch (ABGB): Eine europäische Privatrechtskodifikation, Bd. 3, Das ABGB außerhalb Österreichs, Berlin, Duncker und Humblot, 2010, S. 399-412; ibid, Srpski Građanski zakonik (SGZ, 1804) (Serbisches Zivilgesetzbuch aus dem Jahre 1804), Zbornik radova Pravnog fakulteta u Novom Sadu (Sammelband der Fakultät der Rechtswissenschaften in Novi Sad), Nr 2/2004, S. 311-335.

nen neben dem allgemeinen Teil über Obligationen auch die Ganzheit der einzelnen Verträge regeln. /Nota bene: Der Autor war im Jahre 1987 seitens des serbischen Parlaments ernanntes Mitglied der Kodifikationskommission für den besonderen Teil – Einzelne Verträge, des Gesetzes über Schuldverhältnisse Serbiens/.

(a) Äußerung des Geschäftswillens beim Angebot

Nach GO[41] sollen die *Vertragsverhandlungen* (als sukzessive Reihe von Angeboten bis zum Vertragsabschluss) im Ziele des Vertragsabschlusses geführt werden, und die Parteien sind in den Grenzen der Vertragsfreiheit[42] frei, aber sie sind gebunden an die vorvertragliche Verpflichtung an Treu und Glauben, demnach sollten sie die Vertragshandlungen mit einer ernsthaften Absicht antreten. Falls sie aber die Vertragshandlungen ohne diese Absicht antreten, oder am Anfang eine solche Absicht haben, aber später nicht mehr, und die Vertragshandlungen weiterführen lassen, ist die treue Partei zu Schadenersatz seitens der untreuen Partei berechtigt, in Höhe der Kosten ihrer Vertragsverhandlungen (culpa in contrahendo).[43] Damit die Angebote oder Vertragshandlungen ernsthaft sind, sollten sie mit der Absicht geführt werden, einen Vertrag zu schließen. Es bestehen aber keine Schadenersatzfolgen, falls der Vertrag unter beiderseitig treuem Verhalten nicht als Ergebnis von Vertragsverhandlungen geschlossen wurde. (Hier wurde das GO an die Lehre von Ihering, Ermann, Leonhard, Larenz angelehnt).[44]

Nach der Auslegung des GO behauptete die Doktrin und die Rechtsanwendung zu Recht, dass durch *Schweigen*[45] der Angebotswille nicht geäußert werden kann, umso mehr, weil die Regelung des Angebots im GO ua. die wichtigsten Elemente des Geschäfts enthalten soll. Ausnahme ist das konkludente Angebot an der Kaufstelle mit Ausstellung der Ware zusammen mit dem Preis.

Die *Annahme des Angebots* durch Schweigen zählt im Prinzip nicht als rechtsgeschäftlicher Wille.[46] Aber das GO schreibt die Ausnahmen[47] vor, in Situationen, in welchen die Geschäftsparteien in *ständigen gemeinsamen Geschäftsverbindungen* stehen, und falls der Angebotsadressat nicht gleich ausdrücklich die Angebot verweigerte.[48] Weiterhin wird geregelt[49], dass bei einem *Auftrag*, falls jemand jemandem versprochen hat, dass er zur Erfüllung seines Auftrags bereit ist, im Ziele der Verwirklichung bestimmter Geschäfte, und falls diese Geschäfte zur wirtschaftlichen Tätigkeit des beauftragen Auftragerfüllers gehören, soll auch der Auftrag erfüllt werden, falls der Auftrag nicht gleich ausdrücklich verweigert wurde, z. B. falls jemand seinen Rechtsstreit beim Rechtsanwalt vorgelegt hat. (Diese Lösung wurde aus dem schweizerischen Obligationengesetz übernommen). Weiter, in dem GO wird der Fall von *tacita conductio rei* geregelt, die stillschweigende Verlängerung des Geschäftes, bei dem die Dauer des Mietgeschäftes mit begrenzter Frist geschlossen wurde, und der Mieter nutzt nach dem Ablauf der Frist stillschweigend weiterhin die vermieteten Sachen, und der Vermieter hat dagegen keinen ausdrücklichen Einwand.[50] Nach der Rechtsprechung zählt man zu den Fällen der konkludenten Verlängerung des Geschäfts den Fall, wenn der Vermieter die Miete *nicht ausdrücklich verweigerte*, und in den Fällen, wenn die *Geschäftsbräuche* dies vorsehen, und in den Fällen, wenn man das Schweigen des Adressaten so auslegen kann, dass der Verlängerung des Geschäftes das *Interesse des Adressaten* zugrunde liegt. Nach dem GO[51] ist beim befristeten *Lizenzvertrag* die Verlängerung möglich, falls der Lizenzgeber keinen ausdrücklichen Einwand hat, dann wurde die Lizenz ipso facto in eine unbefristete modifiziert.[52]

(b) Willensmängel, Arten und Rechtsfolgen

Unter Willensmängel versteht man den Irrtum,[53] die Täuschung,[54] die Bedrohung,[55] die Übergabe des Willens und Dissens,[56] weiterhin die Simulation,[57] und die Normen über die Auslegung des Geschäftes (Art. 99-102. des GO).[58]

Nach der Regelung des GO ist die Anfechtung des Vertrags wegen *Irrtum* nur im Fall der sog. *wesentlichen* Elemente des Vertrags möglich, insbesondere in Hinsicht der *Sache – Gegenstand* des Vertrags (error in objecto), Eigenschaften der *Person* (aber nur, wenn der Vertrag intuitu person ist), dann nach dem Einfluss des französischen Causa – Doktrin,[59] die Error in *causa*

---

41 GO, Art. 30.
42 GO, Art. 10.
43 S. z. B. József *Szalma,* Culpa in contrahendo (unter besonderer Berücksichtigung der Doktrin und Rechtsprechung in Serbien, in: Hrsg. *Welser*, Haftung aus Verschulden beim Vertragsabschluss in Zentral- und Osteuropa, Wien, Manz Verlag, 2012, S. 167-206.
44 S. *Salma*, J., Obligaciono pravo (Obligationenrecht), Novi Sad, 2009, S. 233. Fn. 740 und dort zitierte deutsche Literatur.
45 S. z. B., *Salma* J. Obligaciono pravo, Novi Sad, 2009, S. 240 (Über die Arten von Willenserklärungen, bzw. des Angebots und der Annahme des Angebots).
46 So ausdrücklich Art. 33 der Allgemeinen Usancen (aus dem Jahre 1954).
47 GO, in Art. 421, 596 und 709.
48 GO, Art. 42. Absatz 3.
49 GO, Art. 42. Absatz 4.
50 GO, Art. 596. Absatz 1.
51 GO, Art. 709.
52 S. *Salma*, J., Obligaciono pravo (Obligationenrecht), Novi Sad, 2009, S.240-242.
53 GO, Art. 61.
54 GO, Art. 65. Absatz 1,2,3.
55 GO, Art. 65. Absatz 4.
56 GO, Art.64.
57 GO, Art. 66. Absatz 1,2,3.
58 S. *Salma*, J., Obligaciono pravo (Obligationenrecht), Novi Sad, 2009, S.251-262, S. 361-366.
59 S. zB., József Szalma, Causa (Rechtsgrundlage) bei den Obligationsverträgen, Annales Universitatis Scientiarium Budapestiensis de Rolando Eötvös nominatae, Budapest, ELTE ÁJK, 2007, S.257-283.

(Rechtsgrundlage), der Irrtum über *Art* und *Form* des Vertrags, und laut dem Gesetz in anderen ähnlichen Fällen. Diese Lösung nach der Regelungsmethode ist vergleichbar mit bestimmten Regeln des BGB,[60] wo auch die wesentlichen Irrtümer geregelt werden, wie Irrtum über Eigenschaften der Person, oder der Sache, die im *Verkehr* als *wesentlich angesehen* werden.[61] Es besteht keine einheitliche Auffassung in der serbischen, wie auch in der vergleichenden Literatur, über alle Fälle des wesentlichen Irrtums, und diese sollten nach der tiefgreifenden Umständeprüfung bestimmt werden. Selbst das GO nennt durch offene Enumeration (exempfli causa) nur die wichtigsten Irrtumsfälle. Der Irrtum über wesentliche Elemente führt zum Anfechtungsrecht zugunsten der Partei, welche den Irrtum erleidet. Der Irrtum über unwesentliche Elemente des Vertrags (z. B. Erfüllungsfrist – mit Ausnahme der sog. Fixverträge, wo die Frist ein wesentliches Element des Vertrags ist) gestattet kein Anfechtungsrecht zugunsten der geirrten Partei. In der serbischen Doktrin, wie auch in der deutschen Theorie, werden die Irrtumsfälle als *einseitiger* oder *beiderseitiger* Irrtum klassifiziert, *bewusste* und *unbewusste* Irrtum, aber wenn auf der Seite der geirrten Partei ist es ein *unbewusster* und auf der Seite der anderen Partei ein *bewusster* Irrtum, eigentlich schon ein Fall von *Täuschung* ist. Im Falle des wesentlichen Irrtums ist im GO die Sanktion der *relativen Nichtigkeit* vorgeschrieben, es scheint uns, ebenso wie im deutschen Recht. Beim Ausfall der Anfechtung nach Ablauf der kurzen gesetzlichen Anfechtungsfrist wird der Vertrag ex lege konvalidiert.[62]

Nach der Willenstheorie ist die *Täuschung* ein hervorgerufener Irrtum.[63] Das GO regelt in Art. 65 Absatz 1 die Täuschung, falls sie vom anderen Geschäftspartner verursacht wurde, in der Absicht, den Geirrten dadurch zum Vertragsschluss zu führen, die Anfechtung ist auch im Falle des nicht wesentlichen Irrtums gestattet. Neben der Nichtigkeit des Vertrags kann der Geirrte, als treue Partei, von dem Irreführenden, als untreue Partei, auch Schadenersatz erhalten.[64] Falls der Irrtum seitens einer Drittperson verursacht wird, ist die Anfechtung des Vertrags nur dann gestattet, wenn eine von den Parteien von der Täuschung gewusst hatte.[65] Im Falle des unentgeltlichen Geschäfts ist die Anfechtung des Vertrags auch dann möglich, wenn keine der Parteien von der Täuschung gewusst hatte.[66]

Die Theorie über die *Bedrohung* kennt zwei Unterarten, die absolute (vis apsoluta) und die relative (vis compulsiva), und diese Klassifikation hängt davon ab, ob bei der Bedrohung irgendeine Möglichkeit einer verschiedenartigen bzw. negativen Willensäußerung seitens der bedrohten Partei gegenüber dem von der drohenden Partei suggerierten Willen besteht oder nicht.[67] Wegen dem ordnungsverstoßenden (Ordnungsgegenden) Charakter im Falle der vis absoluta besteht in der deutschen Literatur die Auffassung (Kreationstheorie), dass die Anfechtung vor Gericht nicht nur seitens des Bedrohten, sondern auch seitens Drittpersonen, und gegen irgendeinen Inhaber vor Gericht erfolgen könnte.[68] Es wird also nicht die relative (wie beim Willensmangel die regelmäßige Sanktion), sondern die absolute Nichtigkeit des Vertrags empfohlen. Gemäß den Vertretern der Vertragstheorie[69] ist die Anfechtung nur gegen den ersten Erwerber möglich. Es wurde auch die Frage gestellt, ob bei der absoluten Drohung der Vertrag wegen der Verfehlung des freien Willens entstanden ist oder nicht, und falls die Antwort negativ ist, sollte man nicht über nichtige, sondern über nicht bestehende Geschäfte reden.[70] Bei der relativen Drohung wird, wegen der Möglichkeit einer anderen Willensäußerung als die Bedrohungsuggestion, über die Anfechtbarkeit als Sanktion die relative Nichtigkeit empfohlen.[71,72] Das GO regelt nur die Sanktion für die relative Bedrohung, aber nicht die Rechtsfolge bei der absoluten Bedrohung. Dies wurde in der Literatur wurde so erläutert, dass der Gesetzgeber wahrscheinlich meinte, dass die absolute Bedrohung kein klassischer Willensmangel ist, sondern es ist hier die Rede von einem nicht bestehenden Geschäft, bei dem die analoge Anwendung der Regelung über die absolute Nichtigkeit in Betracht kommt[73] in Verbindung mit der Regel über die Grenzen der Vertragsfreiheit.[74] Im letzten wird neben die Vertragsfreiheit, auch die Ordnungsgrenzen vorgeschrieben. Aber bei nicht bestehenden Geschäften (wie bei der absoluten Bedrohung) haben die Parteien keine Möglichkeit für die Konversion des Geschäftes, welche die Rechtsliteratur und Rechts-

[60] Vrgl. mit dem Par. 119. Absatz 2. des BGB.
[61] S. *Prütting*, *Wegen*, *Weinreich*, Kommentar, op. cit.,S. 107-108.
[62] S. *Salma*, J., Obligaciono pravo (Obligationenrecht), Novi Sad, 2009, S.251-254. S. Theo *Guhl*, Das schweizerische Obligationenrecht, 5. Auflage, Zürich, 1956, 7. Auflage, Schulthess Poligrafischer Verlag, Zürich, 1980, und die weiteren Auflagen, S. 127 -129; *Fikentscher*, Wolfgang, Schuldrecht, W. Gruyter, Berlin- New York, 1976 u. weitere Auflagen, S. 499/5.
[63] S. *Salma*, J., Obligaciono pravo (Obligationenrecht), Novi Sad, 2009,S. 255.
[64] GO, Art. 65. Absatz 2.
[65] GO, Art. 65. Absatz 3.
[66] S. *Salma*, J., Obligaciono pravo (Obligationenrecht), Novi Sad, 2009,S. 256.
[67] S. *Salma*, J., Obligaciono pravo (Obligationenrecht), Novi Sad, 2009,S. 256, mit Hinweis auf *Guhl* Dr. Theo, Schweizerisches Obligationenrecht, op. cit., S. 113/c.
[68] *Ennecerus*, *Kipp*, *Wolff*, (Lehmann), Lehrbuch des Bürgerlichen Rechts, der Schuldverhältnisse, Fünfzehnte Bearbeitung, J.C. B. Mohr, Tübingen, 1958., S. 846/b. Nota bene, diese berühmten Autoren teilweise bestritten die zwei Hundert Jahre entwickelte und diskutierte praktische Ergebnisse der Willens- und Erklärungstheorie.
[69] *Jacob*i, Ernst, Handbuch des gesamten Handelsrechts von Victor Ehrenberg IV/1, S. 306; ibid, Die Theorie der Willenserklärungen, München, Oskar Beck, 1910.
[70] Noch *Paulus* behauptete, falls jemand jemandem die physische Freiheit berührt, wegen Zwang an einem Vertrag, ist alles daraus nichtig (nicht existierend): Qui in carceremquem detrusit, ut alliquid ei extorqueret, quiquid ob hanc causam factum est nullius est momenti (Paulus, 1. 7. 10).
[71] GO, Art. 60, Abs. 1. und 2.
[72] S. *Salma*, J., Obligaciono pravo (Obligationenrecht), Novi Sad, 2009, S. 257.
[73] GO Art. 104.
[74] GO, Art. 10.

anwendung bei nichtigen Geschäften unter besonderen Voraussetzungen ausnahmsweise gestattet.[75]

Die *schlechte Übergabe des Geschäftswillens* (z. B. beim Postgeschäft - Telegrammsendung) rechnet man im Prinzip als Irrtum[76], der von Dritten verursacht wurde. Bei *Dissens* sind die Parteien nicht über die Existenz oder den Inhalt des Vertrags einig.[77]

Bei der *Simulation* (Scheingeschäfte) hat das GO in Art. 66. Absatz 1-3 die klassische Lösung übernommen, nach welcher das simulierte Geschäft keine Wirkung zwischen den Vertragsparteien hat. Diese Wirkung (zwischen den Parteien) hat das dissimulierte Geschäft, aber die Parteien können gegen den gutgläubigen Dritten den Simulationseinwand nicht erfolgreich einreichen. Die Kommentare dieser Regelung bemerkten, dass bei simulierten und dissimulierten Geschäften das GO die Willenstheorie affirmierte, weil die Parteien ihren wahren Geschäftswillen nicht der Simulation sondern der Dissimulation gewidmet haben.[78]

Bei der Regelung über die *Auslegung des Geschäfts*[79] mit bestimmtem Anwendungsbereich wurden die Folgen der Willens- und Erklärungstheorie, Vorstellungs- und Verkehrstheorie angenommen. Nach dem Grundregel,[80] sollte man die Bestimmungen des Vertrags im Einklang mit der Bedeutung auslegen, aber bei strittigen Bestimmungen sollte man die Ausdrücke nicht nach der wörtlichen Bedeutung verstehen, sondern es ist notwendig, *den gemeinsamen Willen* der Parteien zu erforschen und die Bestimmung so zu verstehen, dass es dem Grundsätze des Gesetzes entspricht. Nach der Regelung über die Auslegung, die Interpretation des Geschäftswillens sollte man auch bezüglich des *Typs des Vertrag* aufmerksam sein. So, nach dem Regel des GO[81], falls die Bestimmungen des Vertrags strittig sind, sollte man die strittigen Bestimmungen bei *entgeltlichen* Geschäften so auslegen, dass es dem *gerechten Verhältniss* zwischen der beiderseitigen Prästationen entspricht. Bei nicht entgeltlichen, *wohltätigen* Geschäften enthält das Gesetz[82] eine gesonderte Regelung: bei diesen Geschäften sind die unklaren Bestimmungen so auszulegen, dass es *leichter für die Verpflichteten* ist. Bei *Adhäsions-Verträgen* (bei denen der Vertragstext von einer der Parteien vorgelegt wurde), oder bei Formular-Verträgen (bei denen der Vertragstext von einem Dritten vorgelegt wurde) sollte man nach der Regelung GO[83] die unklaren Bestimmungen *zugunsten der anderen Partei* auslegen.[84]

Die einheimische Literatur verweist auf verschiedene *Arten der Auslegung* von Geschäften nach dem Kriterium der Ausleger (gerichtliche, parteiliche, Auslegung seitens Drittperson), dann nach der Wirkung als deklarative oder konstitutive, nach der Auffassung des Auslegers als subjektive oder objektive, dann die objektive als logische, grammatische (sprachliche), sog. historische und systematische Auslegung, mit Verweisung u.a. auf die deutsche zivilistische Literatur.[85]

Die *rechtliche Bedeutung der Auslegungsregel,*[86] insbesondere bei der *Parteiauslegung* ist relevant bei der Realisierung (Erfüllung) des Geschäfts. Die *gerichtliche* Auslegung kommt bei strittigen Teilen des Geschäfts zum Ausdruck. Die Parteien können in ihrem Vertrag mit einer besonderen Vertragsklausel die Deutung des Vertrags einem *Dritten* anvertrauen,[87] und dann wäre dessen Vertragsinterpretation für die Parteien bindend. Diese Drittperson sollte von den Parteien unabhängig sein, das heißt, kein eigenes Interesse mit dem Recht einer von den Parteien verbinden. Nach der Regelung des GO,[88] falls eine Interpretationsklausel zugunsten von Dritten im Vertrag besteht, dürfen sich die Parteien nicht direkt an das Gericht wenden, ohne dass sie sich vorher an die Drittperson gewandt haben, mit der Ausnahme, wenn die Drittperson die Interpretation des Geschäfts verweigert hat. Die Art der Interpretations-Verpflichtung seitens eines Dritten ist nämlich eine obligation moiyen, also eine

---

[75] S. *Salma*, J., Obligaciono pravo (Obligationenrecht), Novi Sad, 2009,S. 257-258. Art. 10 des OG schreibt die Vertragsfreiheit vor, nach welcher die Vertragsparteien beim Vertragabschluss frei sind, aber nicht gegen die öffentliche Ordnung, imperative gesetzliche Normen und gute Sitten. Über der Konversion ist ein Rechtsinstitut der einzige ist bei absolut nichtigen Verträge aufrecht zu halten, aufgrund des Willens der (gutgläubigen) Partei vor dem Gericht ein nichtiges Geschäft könnte man unter Ordnungskontrolle des Gerichtes, vor dem der Nichtigkeitprozess geführt wurde,"wechseln" mit einem erlaubten Geschäft, z. B. verbotener Kauf in gestattene Miete, mit Änderung der Verpflichtungen der Parteien, z. B. Kaufpreis in Miete. S. in: *Salma*, J. Obligaciono pravo, Novi Sad, 2009, S. 432. mit Berufung auf Philippe *Simmler* (La nullité partielle des actes juridique, Pichon, Durand- Auzias, Paris, 1969) und Theo *Guhl* (Schweizerisches Obligationenrecht, Schulthess Verlag, Zürich 1980, S. 109-110.

[76] Nach Art. 64. GO.

[77] S. *Španović*, Stevan, Telegram sa sravnjenjem kod ugovora o PTT uslugama (Telegramm mit schriftlicher Bestätigung seitens der Post bei Postleistungen), Pravni život, Nr. 6-7/1982, S. 771-778; *Salma*, J., Obligaciono pravo (Obligationenrecht), Novi Sad, 2009, S. 258-259.

[78] S. *Salma*, J., Obligaciono pravo (Obligationenrecht), Novi Sad, 2009; Verweisung u. a. *Zitelman*, Die juristische Willenserklärung, Jahrbücher für die Dogmatik des heutigen römischen und deutscher Privatrechts, Jena Bd. XVI, 1878, S. 401.

[79] GO, Art. 99-103.

[80] GO, Art 99 Absatz 1,2.

[81] GO, Art. 101.

[82] GO, auch in Art. 101.

[83] GO, in Art. 100.

[84] S. z. B. dazu: *Blagojević* T. Borislav, Ugovori po pristanku, formularni ugovori (Verträge nach Zustimmung, Formular-Verträge), Beograd, 1934, S. 193; *Salma*, J., Obligaciono pravo (Obligationenrecht), Novi Sad, 2009, S. 149.

[85] S. z. B. *Salma*, J., Obligaciono pravo (Obligationenrecht), Novi Sad, 2009, S. 362-366, mit Verweis auf *Lüderitz*, Auslegung von Geschäften, 1960; *Bidlinsky* (A), Privatautonomie und objektive Grundlage des verpflichtenden Geschäfts, 1967; *Reinhardt*, Die Vereinigung subjektiver und objektiver Gestaltungskräfte im Vertrag, Festschrift für Schmidt-Rimpler, S. 115; *Savigny*, System des heutigen Römischen Rechts, Berlin 1840, Bd.I. S.206; *Larenz*, Methode der Auslegung des Rechtsgeschäfts, 1930, 1966, S. 34, 92-106;

[86] S. z. B. *Perović*, Slobodan, Tumačenje obligacionih ugovora (Die Auslegung der Obligationenverträge), Pravni život (Rechstsleben), Beograd, Nr. 6/1966.

[87] Nach Art. 102. Absatz 2. GO.

[88] GO in Art. 102. Absatz 2.

sog. Mittelobligation, keineswegs eine Zweck- oder Ergebnis-Obligation, und deswegen steht ihm (dem Dritten) im Prinzip frei, ob er später zur endgültigen Interpretation bereit ist, oder nur zum Versuch.[89]

Bei „echten" Willensmängeln, wie bei Irrtum, Täuschung, der relativen Bedrohung schreibt das GO, wie es in anderen Rechtssystemen[90] üblich gewesen ist, als *Grundrechtsfolge* die Anfechtbarkeit *(relative Nichtigkeit)* vor. Zur Anfechtung ist jene Partei berechtigt, bei welcher der Willensmangel bestand (so z. B. der Geirrte).[91] Die Nichtigkeitsklage im Falle des Willensmangels kann demnach diejenige Partei erheben, zugunsten deren Interesse das Gesetz die relative Nichtigkeit, Anfechtbarkeit vorgeschrieben hat.[92] Die Vertragspartei, zugunsten welcher die Anfechtbarkeit steht, könnte von der anderen Partei auf die Anfechtungsmöglichkeit verwiesen werden. In diesem Falle kann die vom Willensmangel berührte Partei in der präklusiven Frist von 30 Tagen entscheiden, ob sie den Vertrag beibehalten will, falls sie nicht erwidert oder erklärt, dass sie den Vertrag nicht beibehalten will, wird der Vertrag als nichtig erachtet. Die Anfechtung vor dem Gericht nicht eingelegt hatte der Vertrag wurde ex lege als gültige rechnen, also wurde konvalidiert. Das praktische Ergebnis, die Rechtsfolge der Anfechtung ist die gerichtliche Nichtigkeitserklärung mit der Wirkung ex nunc, und die Restitution in den vorigen Stand. Falls aber in der Anfechtungsfrist die Nichtigkeitsklage seitens der ermächtigsten Partei nicht eingereicht wurde,[93] ist die Rechtsfolge, ex lege, die *Konvalidation* des Vertrags. Bei relativ nichtigen Verträgen kann nur die ermächtigte Vertragspartei eine Nichtigkeitsklage erheben, bei absolut nichtigen – ordnungswidrigen Verträgen können neben den Parteien auch Drittpersonen eine Nichtigkeitsklage erheben.[94] Bei absolut nichtigen Geschäfte besteht keine Anfechtungsfrist wie bei Willensmängeln. Bei absolut nichtigen Verträgen ist die Konvalidation ausgeschlossen, mit Ausnahme, wenn das Gesetz etwas anderes vorgeschrieben hat,[95] oder in besonderen Fällen, wie beim Wucher,[96] unter der Voraussetzung der Verminderung der Verpflichtungen der ausgenützten Vertragspartei.[97]

III. Zusammenfassung

Obwohl das geltende Gesetz über Obligationenverhältnisse Serbiens (GO) grundsätzlich unter dem Einfluss des schweizerischen Obligationengesetzes entstanden ist, zeigt es in mehreren Normen und Rechtsinstituten den Einfluss des österreichischen Allgemeinen Bürgerlichen Gesetzbuches, besonders auf dem Gebiet der Willensäußerung. Beim Vertragsabschluss sind die Einflüsse der deutschen zivilistischen Literatur zu erwähnen. Bemerkbar sind die Einflüsse der allgemeinen und der besonderen Theorie über die Willensgeschäfte, und auch der Regelung des BGB über Willensgeschäfte. Diese Einflüsse sind in den Regelungen des GO bei culpa in contrahendo (Vorvertragliche Willenserklärungen) erwähnt, beim Angebot und seinem Empfang, beim Willensmangel (wie Irrtum, Täuschung, Bedrohung, Scheingeschäfte usw.). Aber diese Theorie beeinflusste auch die Regelung des GO über die Auslegung des Rechtsgeschäftes, bzw. des Vertrags. Nach dem GO soll bei der Auslegung das Gericht den wahren gemeinsamen Willen der Parteien berücksichtigen, falls dieser nicht besteht, hat dann den Vorteil die Willensäußerung, möglicherweise mit dem objektiv bestimmbaren Inhalt der Geschäftsausdrücke. Bei Handelsgeschäften sind die im Handel üblichen Ausdrücke maßgeblich für die Auslegung. Wie im deutschen Recht (BGB), dominieren bei diesen Rechtsinstituten die Auffassungen der Erklärungstheorie, aber mit der Beachtung des wahren Willens der Parteien. Aber bei nicht entgeltlichen Geschäften soll man auch den innerlichen Willen (Motive) als rechtsgestaltendes Element des Geschäftes in Betracht nehmen, und dieser soll der Auslegung des Geschäfts zugrunde liegen.

---

89 S. zB. *Salma*, J., Obligaciono pravo (Obligationenrecht), Novi Sad, 2009, S. 364.S. auch im selben Buch des Autors, - die vergleichendrechtliche Literatur: in Fn 1155, 1156, inklusive die deutsche Literatur in Fn. 1157.

90 S. z. B. *Eisele*, Über Nichtigkeit obligatorischer Verträge wegen Mangels der Willensübereinstimmung der Contrahenten, Gustav Fischer, Jena, 1887, in der serbischen Literatur, *Živković* Sreten, Rušljivost ugovora (posebno o manama volje) – (Relative Nichtigkeit des Vertrags, insbesondere über Willensmängel) nach der Regelung des GO, in: Ugovorno i odštetno pravo po ZOO (Vertrags- und Schadenersatzrecht nach dem G0), Zbornik radova (Sammelband), Beograd, 1979, S. 134-147). S. auch, *Salma* J., Obligaciono pravo, Novi Sad, 2009, S. 413-416.

91 GO, Art.111.

92 GO, Art. 112 Absatz 1.

93 Die Anfechtungsfrist ist ein Jahre nach dem Wissen über die Willensmängel – subjektive Anfechtungsfrist, und drei Jahre nach Entstehen des Willenmangels – objektive Anfechtungsfrist, nach Art. 117. Absatz 1. GO.

94 Nach Art. 109. GO.

95 Nach Art. 103. des GO.

96 GO, Art. 141.

97 S., *Blagojević,* Borislav, Da li je moralnost ugovora praktično ili pravno pitanje (Moral als praktische oder Rechtsfrage bei Verträgen), Pravosuđe, Beograd, Nr.19/1939; *Perović*, Slobodan, Zabranjeni ugovori, Službeni list SFRJ, Beograd, 1975, S. 231; ibid, Nevažeći ugovori prema Zakonu o obligacionim odnosima (Die Nichtigkeit des Vertrags nach dem GO), Privreda i pravo, Nr. 10/1978, S. 38-39; ibid, Teorija nedozvoljene kauze u praktičnoj primeni prava (Theorie über die nicht gestattete Rechtsgrundlage in der Rechtsanwendung), Anali Pravnog fakulteta u Beogradu (Annallen der Belgrader Fakultät für Rechtswissenschaften), Nr. 3/1972; ibid, Granice slobode ugovaranja (Über die Grenzen der Vertragsfreiheit), Anali Pravnog fakulteta u Beogradu, Nr. 5-6/1971; *Salma* J., Obligaciono pravo, Novi Sad, 2009, über relative Nichtigkeit, S. 248-249, 413-416; über Absolute Nichtigkeit, S. 399-416; Über Anfechtungsrechte bei der absoluten Nichtigkeit, ibid, op. cit., S. 403-408; Restitution, S. 408-413; *Janković*, Milke, Ništavost ugovora i posledice ništavosti (Nichtigkeit des Vertrags und die Rechtsfolgen), Ugovorno i odštetno pravo, Zbornik radova, Beograd, op. cit., S. 132-133.

"Defect of Sex": Exclusion of Women from Jury Service in Istria 1873 – 1918*

*Dunja Pastović***

Abstract

Upon adopting the institution of jury from English Common Law, European continental legislation also took the view according to which jury service was reserved exclusively for men. The exclusion of women from jury service was also adopted by the Austrian legislator who explicitly prescribed male sex among the prerequisites for performing jury service. Legal theorists did not offer any explanation for such a decision. Only with the expressing of demands for the introduction of jury service for women at the beginning of the twentieth century did the opponents of these demands start to express arguments against the idea of female jurors. This paper will give a brief overview of the legal and social status of women in Istria and their potential impact on the ability to perform jury duty. Emphasis will be placed on showing the reasons and opinions (expressed in legal literature, parliamentary debates and the press) why women were considered incapable of performing jury service until the collapse of the Austro-Hungarian Monarchy.

Key words: *women; jury service; Istria; Austrian legal system; criminal procedure; period from 1873 to 1918.*

1. Introduction

The history of women and jury service is one of the systematic exclusion, reflecting the exclusion of women from civic and political life and dating back to the English common law. Sir William Blackstone, in his famous eighteenth century *Commentaries* on the common law of England, gave his famous rationalization for women's disqualification as jurors. Blackstone defined a jury as consisting of "twelve free and lawful men" (*liberos et legales homines*) and continued to explain that: "Under the word *homo* also, though a name common to both sexes, the female is however excluded, *propter defectum sexus*".[1] Accordingly, women were disqualified from jury service "on account of the defect of sex", that is, their sex was a legal defect that made them intrinsically ineligible for jury service. The exception to women's exclusion from the jury was the "jury of matrons" which could be empanelled when a possible pregnancy affected an inheritance claim or the scheduling of a female prisoner's execution.[2]

During the period of Austro-Hungarian rule, the Margraviate of Istria was part of the Austrian Littoral (together with Princely County of Gorizia and Gradisca and the city of Trieste) and encompassed the Istrian peninsula as well as the islands of Krk, Cres and Lošinj. The October Diploma of 1860 and February Patent of 1861 granted Istria a separate diet (the Istrian Provincial Diet) that elected representatives for the Imperial Council in Vienna until 1873, after which representatives were elected directly. After the introduction of the jury into the criminal procedure in 1873, only one jury court was active in Istria – the one at the Regional court in Rovinj. It had jurisdiction over the entire territory of Istria save for four northern districts which were under the jurisdiction of the jury court in Trieste. The requirements for performing jury service were prescribed in the § 1 Jury List Compiling Law of 23 May 1873[3], which directly stated that only literate men at least 30 years of age with local citizenship in one of the municipalities of the Austrian part of the Monarchy and at least one year of domicile were fit for jury service. The last two requirements were determined alternatively: paying a certain amount of direct taxes (tax census) or possessing a certain level of education and belonging to a certain profession (intellectual census).[4]

Since the Austrian legislator explicitly excluded women from performing jury service without providing any explanation for it, the goal of this paper will be to determine the reasons for

* This paper is written as the result of participation in the scientific research project funded by Faculty of Law, University of Zagreb.

** Dunja Pastović, PhD, Chair of Croatian History of Law and State, Faculty of Law, University of Zagreb, Republic of Croatia.

1 BLACKSTONE, William, *Commentaries on the Laws of England. Book the Third*. The fifteenth edition, with the last corrections of the author; and with notes and additions by Edward Christian, London, 1809, pp. 351, 362.

2 FORBES, Thomas R., A Jury of Matrons, *Medical History*, Vol. 32, Iss. 01, January 1988, pp. 23-33; OLDHAM, James, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries*, 2006, New York, pp. 80-114.

3 Gesetz vom 23. Mai 1873, betreffend die Bildung der Geschwornenlisten, *Reichsgesetzblatt für die im Reichrathe vertretenen Königreiche und Länder*, Jhrg. 1873., St. XLII., Nr. 121., Wien, 1873, pp. 503-508.

4 The mentioned intellectual census determined that jury service, regardless of the amount of taxes paid, can be performed by attorneys, notaries, professors and high- and middle-school teachers as well as people who have attained a PhD at one of the universities in the Monarchy.

such a decision and to show the influence this exclusion had on the position of Istrian women regarding their intellectual, economic, legal and political capabilities in the period from 1873, when jury was introduced as a general institution into criminal procedure, until the Italian occupation of Istria in November 1918. The first part of this paper will present the legal and social framework which determined the position of women in Istria with emphasis on the prospects of their education and employment, taking into account literacy as well as the tax and intellectual census as the prescribed requirements of performing jury service. The second part of this work will present a detailed analysis of the position of women envisioned in the criminal procedure and the rights and roles which could be afforded to them despite their exclusion from jury service. Here we shall also touch upon certain characteristics of the functioning of the Istrian jury in cases when the accused was a woman. The third and central part of the paper is devoted to a discussion of women's jury service within the Austrian legal system from the beginning of the 20th century. By analyzing legal literature, stenographic records of parliamentary debates and newspaper articles, we reveal the main arguments presented by the supporters and opponents of women's jury service. In addition, we shall try to draw conclusions on the effect the debate over women's jury service had within the frame of the traditional Istrian society.

2. The limitations on women's legal and social position in Istria

The legal status of women in Istria was more precisely defined by the Austrian Civil Code, which came into force there in June 1815.[5] The Austrian Civil Code was the most progressive of its time, securing women a high degree of economic independence, which they had already enjoyed since the late Middle Ages thanks to the Istrian marriage pattern.[6]

According to the Austrian Civil Code there was no fundamental guardianship of men over women, married women didn't lose their legal capacity, and there was no difference in legal status between married and unmarried women. The Austrian Civil code conferred married women full legal rights, separately from those of their husbands. In addition, Istrian women retained property rights over estates upon marriage. Married women also had the legal capacity to contract and to take legal action. Despite personal legal subjection to her husband regarding herself and matters of mutual concern (the Austrian Civil Code declared the husband to be head of the family, with full rights of guardianship over the children), a wife did not hand her property over to her husband when she married. An unmarried woman enjoyed, for the most part, the same rights and responsibilities in the private sphere as men; she was an independent legal actor who could manage her possessions by herself and was capable of suing or being sued.[7] Despite the general legal equality of women and men according to Austrian Civil Code, this Code also contained discriminatory provisions: for example, women couldn't be the guardians of their children or witnesses in wills, land registry documents, and to the simplest legal documents.[8] To conclude, the Austrian Civil Code, in its treatment of women, was unsurpassed in contradictions and presupposed a world split into gendered domains, where the husband was the family's public representative, while his wife was constricted to the boundaries of their home.

In continental Europe women also suffered from a restriction regarding what were called "virile offices". These were activities that might involve a person if not in public life then at least in life outside the domestic sphere.[9] According to this line of thinking, the political nature of the jury helps explain why women could appear in court as litigants and as witnesses, but not as judges, attorneys, or jurors. All the offices in the judicial branch of the public service formed an immediate delegation of sovereignty and their holders were direct representatives of the monarch, in whose name they dispensed justice. Consequently no judicial office could be accessible to women. The question of the admissibility of women to a jury received the same answer as the question of their appointment to the judicial office.[10]

It should be noted that some Istrian women possessed the right of municipal vote and the right to vote for the Istrian Provincial Diet. In accordance with the laws relating to municipal councils (from 1849 on) and provincial diets (from 1861 on), which based representation by curiae on property, income and higher education, women were allowed to vote, although only by male proxy, if they paid a certain amount of taxes on real estate. Indeed, Istrian women of full legal age and capacity could vote for the curia of great landowners in the Istrian provincial

[5] Patent vom 21ten Januar 1815., *Seiner Majestät des Kaisers Franz Gesetze und Verfassungen im Justiz-Sache. Für die Deutschen Staaten der Oesterreichischen Monarchie. Von dem Jahre 1812 bis 1817*, Nr. 1126, Wien, 1819, p. 257.

[6] The Istrian marriage pattern had considerable influence on the position and role of women in marriage, family, and society in general. The Istrian marriage pattern considered women to be equal to men regarding economic rights, which meant that women were protected after the husband's death: the woman was the owner of one-half of the house and one-half of the goods, and thus her basic existential needs were guaranteed. A woman was protected in such a marriage, although her legal competence was only partial; she could decide what to buy or sell only with her husband's agreement. However, the husband could not sell without his wife's agreement either (not even his own property which he had inherited from his parents) so that his wife could not have ended up in debt because of his extravagance. MOGOROVIĆ CRLJENKO, Marija, The Position of Woman in «Istrian Mariagge Pattern» (Istria in the 15th and 16th Centuries), in: BELLAVITIS, Anna; FILIPPINI, Nadia Maria; PLEBANI, Tiziana (ed.), *Spazi, poteri, diritti delle donne a Venezia in etŕ moderna*, Verona-Bolzano, 2012, pp. 21-30.

[7] DERENČIN, Marian, *Tumač k občemu austrijskomu gradjanskom zakoniku*, Knjiga I., Zagreb, 1880, pp. 137-138, 142-144, 167-168; UNGER, Joseph, *System des österreichischen allgemeinen Privatrechts*, Erster Band., Leipzig, 1856, pp. 279-281.

[8] For more information on the position of women according to the Austrian Civil Code, see: PITTER, Viktor, *Die rechtliche Stellung der Frau in Österreich. Eine Zusammenstellung der wichtigsten, die besondere Stellung der Frau im privaten und öffentlichen Rechte betreffenden Vorschriften*, Wien und Leipzig, 1911.

[9] FRAISSE, Genevičve; PERROT, Michelle (ed.), *A history of women in the West. IV. Emerging Feminism from Revolution to World War*, Belknap Press of Harvard University Press, 2000, p. 87.

[10] OSTROGORSKI, Moisei, *The Rights of Women*. A Comparative Study in History and Legislation. Translated under the author's supervision, London, 1893, pp. 131, 136-138.

diet.[11] This curia was founded upon the old-fashioned conceptions which considered property as the principal source of all rights whilst almost ignoring the personality of its possessors. So the enjoyment of the electoral right was recognised in the class of great landowners as belonging to all its representatives, whoever they were, corporations as well as individuals, and especially women as well as men. It means that the legislator was far from regarding this electoral right as a first instalment of the political suffrage for women.[12]

3. Educational and employment opportunities for Istrian women

When considering the question of women's participation in trials by jury, the intellectual capability of women was also brought into question. The intellectual capabilities of a person were mostly judged on the basis of their education. Especially from the nineteenth century on, the importance of education grew since it became the prerequisite for advancement and the attainment of a desirable social status. For women, education, or better said the lack of it, became the precondition for the resolution of the so-called women's question, especially because the promotion of education represented an important step towards the attainment of political rights for women; that is, educated women achieved a certain degree of economic and social independence.

The level of education required for jury service was the ability to read and write and, even were they able to be jurors in spite of their sex, it is doubtful that Istrian women could have fulfilled this prerequisite. Namely, illiteracy was one of the basic problems of the Istrian populace; for example, in 1880 it encompassed as much as 77% of the population. The numerical data points to the fact that illiteracy was higher among women than among men which can be seen from the following table.[13]

Year	Can read and write		Can only read		Cannot read or write	
	men	women	men	women	men	women
1880	28,03 %	18,34%	2,87%	3,07%	69,10%	78,59%
1890	37,27%	27,05%	2,16%	3,00%	60,57%	69,95%
1900	49,53%	39,14%	1,63%	2,05%	48,84%	58,81%
1910	65,18%	51,80%	1,06%	1,57%	33,76%	46,63%

Data on the literacy of the population from 1880, 1890 and 1900 encompassed all inhabitants of Istria over 6 years of age, since compulsory school attendance was introduced for all children at that time. However, since it was difficult to expect that 6-year-old children would know how to read and write at the very beginning of their education, the minimum age for the census was raised to 10 years in 1910. Therefore, the significant increase of literacy among Istrians should also be ascribed to this factor. Should we also take into account the national component, it becomes apparent that more than half the illiterate women in Istria in 1910 were Croats (58.82%), followed by Italians (24.65%), and finally by Slovenians (14.82%), who were also the least numerous in Istria.[14]

The causes of the illiteracy of female children in Istria include the neglect of a large number of parents, who regarded the need for their children to regularly attend school indifferently and with a lack of enthusiasm, the fact that schools were usually far away from the homes of children, and the loss of manpower in agriculture. Education was not seen as economically productive for girls but rather as a luxury only the rich could afford. For example, in the school year 1904/1905, only 18,827 of 25,865 girls for whom school attendance was compulsory actually went to school.[15] The main reason for this was the lack of schools in many settlements, mostly those inhabited by Croats. Another factor was the Provincial School Council in Istria, which interpreted § 59 of the Imperial Elementary School Law of 1869 as relieving children who lived over 4 km from the school from compulsory school attendance, rather than encouraging the construction of necessary schools.[16] Consequently, illiteracy was highest in the inland part of Istria, which was populated by Croats, as opposed to the littoral area, which was populated by Italians and which had a more extensive network of primary schools. Therefore, ethnicity played a significant role in the educational and employment opportunities for women in Istria.[17]

In Istria, all children of both sexes from the ages of six to twelve had to attend public primary school, followed by evening repetition classes until the age of 14 („Abend-

[11] BARBALIĆ, Fran, *Prvi Istarski sabori (1861.-1877.)*, Rad Jugoslavenske akademija znanosti i umjetnosti, knjiga 300, Zagreb, 1954, p. 286.
[12] OSTROGORSKI, 1893, pp. 70-76, 196.
[13] Table created according to: *Oesterreichische Statistik*, XXXII. Band, 1. Heft, Wien, 1892, pp. XXI-XXII; *Österreichische Statistik,* LXIII. Band, 2. Heft, Wien, 1903, pp. XLV-XLVI; *Österreichische Statistik. Neue Folge,* 1. Band, 2. Heft, Wien, 1914, pp. 40-41.
[14] *Österreichische Statistik. Neue Folge,* 1. Band, 3. Heft, Wien, 1914, pp. 88-89.
[15] *Die Unterrichtsanstalten für die weibliche Bevölkerung der im Reichsrate vertretenen Königreiche und Länderder österreichisch-ungarischen Monarchie,* Verlag des Bundes österreichischer Frauenvereine, Wien, 1908, p. 4.
[16] In accordance with the provisions in effect, attendance was compulsory if the school was within 4 km of one's place of residence. DEMARIN, Mate, *Hrvatsko školstvo u Istri*, Zagreb, 1978, p. 60; WIGGERMANN, Frank, *K. u. K. Kriegsmarine und Politik. Ein Beitrag zur Geschichte der italienischen Nationalbewegung in Istrien*, Studien zur Geschichte der Österreichisch-ungarischen Monarchie, Band XXVIII., Wien, 2007, p. 127.
[17] BEUC, Ivan, *Istarske studije*. Osnovni nacionalni problemi istarskih Hrvata i Slovenaca u drugoj polovini XIX i početkom XX stoljeća, Zagreb, 1975, pp. 41-42.

Wiederholungsschule").[18] The minimum eight-year school education encompassed five grades of public primary school („Volksschule"), which were followed by three more grades of junior secondary school, that is, „citizens' school" („Bürgerschule"). The "citizens' school" was conceived as the terminal school for the great majority and was designed to blend in with the first years of apprenticeship in a craft. Rural primary schools frequently offered mixed classes without arousing much protest because poor rural Istrian municipalities could barely afford the expense of even one school.[19] Separate schools for boys and girls could be found only in lager towns populated by an Italian minority. For example, there were a total of 265 public primary schools in Istria at the end of 1914, including 23 boys' schools, 21 girls' schools and as many as 221 mixed schools. There were four junior secondary schools: one for boys (145 pupils) and three for girls (216 pupils).[20]

Gender differences were probably less significant at the level of elementary education than at the level of secondary or higher education. Minimal public support was given to secondary education for girls. Girls' education beyond the elementary level relied on parental self-help. It is clear that girls were not expected to attend public school beyond the elementary level.[21] This can also be seen from the fact that there was only one girls' lyceum on the entire territory of Istria, founded in Pula in 1902 and at which classes were held in Italian.[22] The establishment of a girls' lyceum which aimed at the higher and broader education of women and which covered almost the same ground as the boys' gymnasiums represented a big step forward. In the school year 1913/1914, this lyceum was attended by only 181 pupils.[23] In addition, certain boys' gymnasiums in Istria (there was a total of six of them) started accepting girls as guest students ("Hospitantinnen") during the first decade of the 20th century. For example, there were 20 female guest students enrolled at the Croatian gymnasium in Pazin in 1912[24], and 19 female guest students at the German gymnasium in Pula in 1913.[25]

A very important achievement was the admission of girls to higher education institutions and, finally, universities: in 1897 to the humanities and in 1900 to medicine and pharmacy, but to legal studies only in 1919. The schools where matriculation examination for Istrian girls could be held included the state gymnasium in Trieste (in German) and the state gymnasium in Koper (in Italian).[26] In 1914, the percentage of female students at the universities in the Austrian part of the Monarchy was only 8.19%, or 2,275 students. Since the demands for founding a university in Trieste with Italian where classes would be held in Italian were not met, Istrian students (who were few in number) attended universities in the Austrian part of the Monarchy, which led to increased studying expenses. For example, in the summer semester of 1914, only 233 Istrian students attended university, most of them in Graz, followed by Vienna, then Prague, and finally Innsbruck.[27] In addition, there existed the possibility of attending the university in Zagreb – there were 37 Istrians studying in Zagreb in 1907/1908.[28] These numbers should make it clear that it was very difficult to obtain a university education, not only for Istrian women, but also for the entire population in Istria at the beginning of the 20th century. Therefore, the number of women possessing a university education in Istria was negligible.

As follows from the above, the opportunities for girls to gain higher or even basic education were so much less than those for boys so that the proportion of women among the educated population of Istria was quite low. So, it should be noted at the outset that the number of women who were, as practical matter, excluded from jury service solely because of their sex was probably very small when we take in consideration the other legal requirements for it.

Regarding employment opportunities, Istria was, according to occupational statistics from 1910, a mostly rural province where as much as 61.81% of the population worked in agriculture.[29] While the developed European countries were by 1910

[18] Gesetz vom 4. April 1870, wirksam für die Markgrafschaft Istrien, womit auf Grund des Artikels 75 des Reichsgesetzes vom 14. Mai 1869 die Absätze 1 und 3 des Artikels 21, der Absatz 2 des Artikels 22 und die Artikel 28 und 38 des bezogenen Gesetzes abgeändert werden. *Gesetze und Verordnungen der Landesbehörden für das österreichisch-illirische Küstenland*, Jhrg. 1870., St. XI., Nr. 23., Triest, 1870, pp. 88-89.

[19] In the observed period, mixed education was perceived as a threat to morality even when boys and girls had plenty opportunity to mingle outside the classroom. There was compulsory gender segregation in junior secondary school. However, an effort was made already in public elementary school to separate boys' and girls' classes, if the availability of teaching staff made it practical. Coeducation, i.e. the simultaneous education of girls and boys in the same classroom, was allowed in smaller and poorer municipalities. *Die Unterrichtsanstalten für die weibliche Bevölkerung der im Reichsrate vertretenen Königreiche und Länder…*, 1908, pp. 2-3.

[20] *Österreichische Statistik. Neue Folge*, 17. Band, 3. Heft, Wien, 1919, pp. 173, 175.

[21] JACOBI, Juliane, The Influence of Confession and State: Germany and Austria, in: ALBISETTI, James C.; GOODMAN, Joyce; ROGERS, Rebecca (ed.), *Girls' Secondary Education in the Western World: From the 18th to the 20th Century*, New York, 2010, pp. 41-58.

[22] MILANOVIĆ, Božo, *Hrvatski narodni preporod u Istri, Knjiga II (1883-1945)*, Pazin, 1973, p. 384.

[23] *Österreichische Statistik. Neue Folge*, 17. Band, 3. Heft, Wien, 1919, p. 180.

[24] Sa hrvatske gimnazije u Pazinu, *Naša sloga*, No. 42, Pula, 17 October 1912, p. 2.

[25] *Programm des k. k. Staatsgymnasiums in Pola für das Schuljahr 1913/14.*, XXIV. Jahrgang, Pola, 1914, pp. 55-57.

[26] A notable circumstance was that there was no possibility of holding matriculation exams in Croatian on the territory of the Austrian Littoral, despite the fact that Croatian was the native language of two-thirds of the population of Istria. Therefore, the candidates had to travel to Split, Dalmatia to take the exam in Croatian, as a state gymnasium was situated there. MARTINAK, Eduard, Frauenstudium, in: MISCHLER, Ernst; ULBRICH, Josef (ed.), *Österreichisches Staatswörterbuch. Handbuch des gesamten österreichischen öffentlichen Rechtes*, Zweite wesentlich umgearbeitete Auflage, Zweiter Band. F-J., Wien, 1906, pp. 146-147.

[27] *Österreichische Statistik. Neue Folge*. 17. Band, 3. Heft, Wien, 1919, p. 5,

[28] Statistika istarskog sveučilištnog djaštva 1907-08., *Naša sloga*, No. 8, Pula, 20 February 1908, p. 3.

[29] Only 16.22% of the population worked in the industry and crafts, 9.08% in trade and transportation, while 12.89% were employed in public and military service or free professions. *Österreichische Statistik. Neue Folge*. 3. Band, 6. Heft, Wien, 1915, pp. 2-6.

already undergoing or had completed the main phases of the Second Industrial Revolution, the major part of Istria had only begun to experiencing significant effects brought about by modernization, industrialisation, and urbanisation. The objective economic backwardness of the rural population of Istria was aggravated by its social backwardness and reflected the economic and political dependency of the Croatian element upon the economically more advanced Italian element.[30]

According to occupational statistics from 1910, agriculture in Istria accounted for the employment of 63.17% of all economically active women. The percentage of women employed in industry was only 15.73%. On the eve of the First World War, there were around 20 factories in Istria, where women worked mostly as cheap unqualified workers in fish processing, the manufacture of textiles, wax, soap, alcoholic beverages, construction materials, or in the tobacco factory in Rovinj.[31] A total 9.58% of economically active women employed in trade and transportation, while 11.52% were employed in public and military service or free professions. In Istria as well as in the rest of Europe, the career of teacher in girls' schools was the first to become open to women. Later this was extended to boys' primary schools, and partly also to the first forms of schools for intermediate education. In 1910 the percentage of women employed in the educational system was as high as 62.04%. Outside the sphere of public education, women obtained access to subordinate situations in the postal, telegraph, and railway departments.

All the above mentioned facts about the employment opportunities of Istrian women suggest that property-ownership requirements (concretely the payment of a certain amount of direct taxes) also disqualified a great majority of the adult female population from becoming jurors.

4. Gender and crime: the position of Istrian women in criminal procedure law 1873–1918

Although doubts about their capacity were expressed in many areas, women were generally not considered incapable of committing crimes and answering for them in court.[32] The Austrian Criminal Code of 1852 was in force in Istria during the examined period, and it classified crimes into three categories: felonies, misdemeanours, and petty offenses.[33] Felonies and misdemeanours committed through the press, political felonies and misdemeanours and severe felonies punishable by more than five years in a dungeon were under the jurisdiction of jury courts.

The provisions of the Criminal Procedure Law of 23 May 1873,[34] which came into force in Istria on 1 January 1874, same as in the other kingdoms and principalities represented in the Imperial Council, were principally formulated to be gender neutral. In contrast to civil procedure, women in criminal procedure had the same rights as men. The legal institution of legal guardianship of women by a male did not exist in criminal procedure. However, a more detailed analysis of its provision allows one to notice certain deviations from the principle equality of men and women.

Therefore it is possible to argue that a woman's legal status within the framework of criminal procedure was twofold because, on one hand, she could represent herself during the procedure in cases of facultative formal defence, where it is important to note that a formal defence was mandatory in cases which were within the purview of the jury.[35] Furthermore, in cases of offences that were not prosecuted *ex officio*, a woman could act as a private plaintiff.[36] A woman could act as a private plaintiff in cases of felonies and misdemeanours committed through the press. At

[30] DUKOVSKI, Darko, Uvod u procese i procesi modernizacije u Istri na prijelomu stoljeća (1880.-1910.), *Acta Histriae*, Vol. 16, Iss. 3, 2008, pp. 241, 257.

[31] BENUSSI, Bernardo, *Storia documentata di Rovigno*, Trieste, 1888, p. 10-11, 248-250, 387; *Die österreichisch-ungarische Monarchie in Wort und Bild. Das Küstenland.* (Görz, Gradiska, Triest und Istrien.), Wien, 1891, pp. 348-355.

[32] FRAISSE; PERROT, 2000, p. 92.

[33] Kaiserliches Patent vom 27. Mai 1852, wodurch eine neue, durch die späteren Gesetze ergänzte, Ausgabe des Strafgesetzbuches über Verbrechen und schwere Polizeiübertretungen vom 3. September 1803, mit Aufnahme mehrerer neuer Bestimmungen, als alleiniges Strafgesetz über Verbrechen, Vergehen und Uebertretungen für den ganzen Umfang des Reiches, mit Ausnahme der Militärgrenze, kundgemacht, und vom 1. September 1852 angefangen in Wirksamkeit gesetzt wird, *Allgemeines Reichs-, Gesetz- und Regirungsblatt für das Kaiserthum Oesterreich*, Jhrg. 1852., St. XXXVI., Nr. 117., Wien, 1852, pp. 493-591.

[34] Gesetz vom 23. Mai 1873, betreffend die Einführung einer Strafproceß-Ordunung., *Reichsgesetzblatt für die im Reichsrathe vertretenen Königreiche und Länder*, Jhrg. 1873, St. XLII, Nr. 119, Wien, 1873, pp. 397-501.

[35] § 39-41 of Criminal Procedure Code of 23 May 1873.

[36] § 46 of Criminal Procedure Code of 23 May 1873.The Criminal Code on Felonies, Misdemeanours and Petty Offenses of 27 May 1852 prescribed which misdemeanours could be prosecuted only on the basis of a private lawsuit of the injured party. These were the following offences: thefts and fraud made between spouses, parents, children, brothers and sisters who live in the same household, only on the demand of the head of the family („das Haupt der Familie"; § 463); misdemeanours against literary and artistic property, on the demand of the injured party (§ 467); defamation of character, on the demand of the injured party (§ 495); public insults and abuse, on the demand of the injured party (§ 496); reproach for a served or commuted sentence, on the demand of the injured party (§ 497); adultery, on the demand of the injured party (§ 503); fornication of a female servant with a minor son or cousin who lives in the house of the employer's family, on the demand of a parent, relative, or guardian (§ 505); and the drunken behaviour of craftsmen or wage earner who works on roofs or scaffolds and work with items which can cause fires as well as servants due to whose negligence a fire could easily break out, on the demand of the artisan or employer (§ 524). MITTERBACHER, Julius, *Die Strafproceßordnung für die im Reichsrathe vertretenen Königreiche und Länder der österreichisch-ungarischen Monarchie vom 23. Mai 1873 und deren Einführungsgesetz*, Wien, 1882, pp. 82, 87.

the main hearing before a jury court, a private plaintiff was particularly entitled to peremptory challenge of the same number of jurors as the accused, to demand a change of question or the posing of an additional second question to the jurors, and to demand the legal instruction the presiding judge gave the jurors be noted in the records of proceedings.[37] Research has shown that there were no cases where a woman appeared as private plaintiff or accused in press-related offences heard before the jury court in Rovinj in the period from 1873 until 1918.[38] Here it should be stressed that, according to the Austrian Press Law of 17 December 1862, women were capable of holding the office of responsible editor of periodicals and therefore there were no barriers to women appearing as the accused before the jury.[39]

In cases of felonies or misdemeanours which were prosecuted *ex offo*, a woman as the injured person could file a private law application and thus become a "private participant". A private participant had the following rights: providing the state attorney and investigating judge the information which served to sentence the defendant or to determine the compensation claim; the right to access the court files during the investigation; the right to attend the main hearing and freely pose questions to the accused, witness and judicial expert; the right to speak during the main hearing for the purpose of making other remarks. Furthermore, at the end of the hearing, after the closing argument made by prosecution, a private participant immediately received the word to point out his claims and to justify them, and also to file those applications which he wanted to be co-decided in the main sentence.[40]

In the part where it standardized investigation and expertise, the Criminal Procedure Code of 1873 also explicitly prescribed that, in cases where it is necessary to examine the body of a female person and in line with the circumstances, that assignment could be entrusted only to male midwives ("Geburtshelfer") or, in less important cases, female midwives ("Geburtshelferinnen") instead of physicians or surgeons.[41] This allowed women to perform the service of judicial expert, albeit in a very limited capacity. In § 16 of the Instruction for Midwives of 1874 it was determined that a midwife who was called upon by the judicial authority to perform an examination is always obliged to do so according to her best knowledge and to precisely state what she had determined by her examination in that specific case.[42] However, due to the significantly lower level of medical and surgical knowledge among midwives, judges were advised to avoid using the mentioned option if possible. It was considered more acceptable to appoint a midwife as a second judicial expert, where a physician, as the first judicial expert, could give her instructions, pointers, and supervision.[43]

Naturally, a woman could also act as a witness during criminal procedure, where the probative value of a female witness's testimony wasn't brought into question, nor did it differ from the probative value of male witnesses. Consequently, the testimony of a woman in criminal procedure was equal to that of a man's.

On the other hand, we can also find some discriminatory provisions. For example, in cases where the defendant was underage or under guardianship, only the father or male guardian could appoint a defence lawyer against his will[44] – the exclusion of the woman as mother is readily apparent here. However, the legislator wasn't consistent in this matter because he then prescribed that a nullity appeal in favour of an accused minor can be filed against his will only by his or her parents or guardian,[45] where the word "parents" clearly included the mother. The mentioned provisions were justified by the need for taking special care of accused persons who were not of adult age or who were mentally or physically handicapped, and therefore the law allowed their legal representatives to perform acts for protecting the interests of the will of the accused.[46]

Further, women could not be court witnesses who were supposed to be present during certain enquiries, such as conducting judicial inspections or searching homes or people, because the law explicitly prescribed that only respectable adult men ("Männer") uninvolved in a given criminal case could fill this role.[47] Accordingly, the following could not appear as court witnesses: all female persons; men younger than 24; people who due to their criminal records or currently being the subject of a court investigation, or who due to other facts from their private or family lives weren't held as respectable in the municipality; persons who were involved in a given criminal case; and persons who were not allowed to be sworn in as a witness according to § 170 of the Criminal Procedure Code of 1873. The duty of court witness was to be performed by inhabitants of the municipality where the investigation was being conducted.[48]

---

37 § 308, 316, 325 of Criminal Procedure Code of 23 May 1873.

38 PASTOVIĆ, Dunja, *Porotno suđenje u Istri od 1848. do 1918. godine* (Unpublished doctoral dissertation), Zagreb, 2012, pp. 273-288.

39 OSTROGORSKI, 1893, p. 175.

40 § 47 of Criminal Procedure Code of 23 May 1873.

41 § 133 of Criminal Procedure Code of 23 May 1873.

42 Verordnung des Ministeriums des Innern vom 25. März 1874, mit welcher eine Instruction für Hebammen erlassen wird, *Reichsgesetzblatt für die im Reichsrathe vertretenen Königreiche und Länder*, Jhrg. 1874, St. IX, Nr. 32, Wien, 1874, pp. 31-33.

43 Normally, two judicial experts were supposed to participate in the judicial inspection. Exceptionally, in cases of lesser importance or when it was dangerous to wait for the arrival of the second judicial expert for the purpose of examination, the judicial inspection could be performed by only one judicial expert. MAYER, Solomon, *Commentar zu der Oesterreichischen Strafproceß-Ordnung vom 23. Mai 1873. Des Handbuches des österreichischen Strafproceßrechtes II. Band. Zweite Lieferung und Schluß des ersten Theiles des Commentars. § 42-206.*, Wien, 1881, pp. 460-461.

44 § 39, Section 2 of Criminal Procedure Code of 23 May 1873.

45 § 282 of Criminal Procedure Code of 23 May 1873.

46 MAYER, Solomon, *Commentar zu der Oesterreichischen Strafproceß-Ordnung vom 23. Mai 1873. Des Handbuches des österreichischen Strafproceßrechtes III. Band. Zweiter Theil §. 207-296.*, Wien, 1884, pp. 579-580; MITTERBACHER, 1882, pp. 68, 463-464.

47 § 102 of Criminal Procedure Code of 23 May 1873.

48 MAYER, 1881, pp. 382-384.

Permission to be present at the execution of a death penalty could, aside from those persons whose presence was necessary according to law, also be granted to honourable male persons ("achtbaren Männern").[49] The death penalty was performed by hanging within prison walls or in another closed space, in the presence of a court commission (which consisted of three court members and a clerk), a state attorney, a legal physician, and a priest. The condemned's attorney and the head and representatives of the municipality where the execution was to take place were informed about the place and time of the execution so that they could be present. Besides them, the execution could be attended by court functionaries, representatives of the state attorney's office and law enforcement authorities, and the condemned's closest relatives. If there was adequate space, the execution could also be attended by distinguished male persons.[50] Therefore, women were excluded from being present at the execution of a death penalty. Namely, by the turn of the eighteenth century, the presence of women at the execution of a death penalty was beginning to clash uncomfortably with an idea that was gaining currency at that time, according to which women were naturally more sensitive and sympathetic than men, and that they were inherently incapable of taking pleasure in the suffering of others.[51] This was in accordance with the then-popular perception of women as the embodiment of domesticity and sentimentality, as keepers of morality and virtue. It was believed that women's attendance at executions could harm their female delicacy.

Regarding the death penalty, the official statistics note that the number of death sentences rose significantly from 1874, i.e. when jury courts were introduced in Austria.[52] The main reason for this significant increase of death sentences isn't the increased number of crimes that were punishable by death, but the fact that the Criminal Procedure Law of 1873 introduced the principle of free evaluation of evidence and more verdicts were pronounced solely according to the evaluation of the jurors, which was based on conscientious assessment of all evidence. Accordingly, when deciding on the defendant's guilt, there existed a greater possibility that they would interpret the facts as the characteristics of a crime punishable by the death penalty. On the basis of their verdict, the court would issue the prescribed death penalty. Official statistics of the jury court in Rovinj reveal that 49 death penalties were issued from 1881 until 1912, of which only five were applied to women. This isn't surprising since the total number of women brought before the court was generally significantly lower than the total number of women among the population. This can also be seen in the fact that only 28 women were sentenced for felonies in Istria in 1912, compared to 261 men.[53] Although women committed far fewer murders than men, there was less variation regarding the circumstances in which the crime was committed. In all cases, the victim was a person from the convict's family (e.g. spouse, illegitimate offspring, mother-in-law, father-in-law) and the murders were committed under a strong situational pressure. The following table contains data on female convicts sentenced to death by the jury court in Rovinj during the 1881 – 1912 period.[54]

Year	Crime for which female convict was sentenced to death penalty	Age of female convict	Marital status and occupation of convict	Previous criminal record	Replaced by imprisonment for period of
1883	spousal murder	22	married, farmer's wife	without previous criminal convictions	18 years
1896	murder by suffocation (by holding victim's nose and mouth closed); victim was perpetrator's illegitimate child born after her marriage and whom she considered a barrier to a happy married life	22	married, peasant woman	without previous criminal convictions	8 years
1897	murder (by obstructing the airway); victim was perpetrator's illegitimate child which had been born the day before	29	unmarried, wage earner	offence of concealment of birth, insult of honour	12 years
1899	murder qualified as treacherous or by stealth (by cutting arteries of victim's neck); victim was a 65 year old mother-in-law hated by the perpetrator	38	married, hairdresser's wife	without previous criminal convictions	18 years
1901	incitement to murder qualified as treacherous or by stealth; victim was perpetrator's father-in-law and the motive was to prevent changes to a will	34	widow, landowner	without previous criminal convictions	life imprisonment

[49] § 404 of Criminal Procedure Code of 23 May 1873.

[50] RULF, Friedrich, *Der österreichische Strafprocess unter Berücksichtigung der Rechtsprechung des Cassationshofes*. Dritte durchgesehene Auflage., Prag-Wien-Lepizig, 1895, pp. 244-245.

[51] FRIEDLAND, Paul, *Seeing justice done. The age of spectacular capital punishment in France*, Oxford, 2012, p. 157.

[52] For example, while only 836 criminals were sentenced to death in the period from 1854 until 1873 (104 of these sentences were executed), 2169 people were sentenced to death in the period from 1874 until 1898, and 74 of these sentences were executed. *Oesterreichische* Statistik, L. Band., 3. Heft, Wien, 1898, p. XXXIII; *Oesterreichische* Statistik, LXI. Band., 3. Heft, Wien, 1902, p. XXXIII. The same conclusion can be found in: *Österreichische Statistik,* LXIX. Band., 3. Heft, Wien, 1903, p. XXV.

[53] *Österreichische Statistik. Neue Folge*, 13. Band., 2. Heft., Wien, 1916, pp. 84, 130.

[54] Table created according to: *Oesterreichische Statistik*, XI. Band., 3. Heft., Wien, 1887, p. XX; *Oesterreichische Statistik*, LIII. Band., 3. Heft., Wien, 1900, p. XXIX; *Oesterreichische Statistik*, LVIII. Band., 3. Heft., Wien, 1902, p. XXVIII; *Österreichische Statistik*, LXIX. Band., 3. Heft., Wien, 1903, p. XXXIX; *Österreichische Statistik*, LXXI. Band., 3. Heft, Wien, 1904, p. LXXIX.

Furthermore, if the convict was pregnant at the time the death penalty or a prison sentence was to be executed, the execution of the sentence would take place when the condition ended. However, even a pregnant woman could be sentenced to jail in the case that her time in custody would be longer than the duration of her sentence.[55] The exemption of pregnant women from the death sentence was in line with earlier legislation and was justified by the desire to avoid ending another innocent life. It was not normally permissible to strip a pregnant woman of her freedom since it was believed that the physical state of a woman during pregnancy was abnormal and made her more susceptible to serious physical or mental ailments, with portentous consequences to the unborn child.[56]

Some historians argue that juries acquitted a far higher proportion of accused women than of accused men because jurors were all males. This traditional male gallantry or chivalry towards women was reinforced by new "scientific" ideas that females, because of their peculiar psychological and biological weakness, were less often responsible for their crimes than were men. This led to the assumption that a woman should be treated more leniently than a man. Accused women were frequently seen as having acted from feminine emotions that were beyond their control, especially when they committed "crimes of passion".[57] Attitudes of chivalry and paternalism towards female offenders can be seen in the following criminal case: on 6 December 1898 a court hearing against Marija Smocovich was held before the jury court in Rovinj. She was 22, from the village of Galižane, resident in Pula, who made a living by ironing clothes. She was accused for attempted murder qualified as treacherous of her long-time lover Ferdinand Triches. The facts can be surmised as follows: the convict and her victim had been having a liaison for five years, during which a child was born and died soon after birth. During this entire time, the victim was promising the accused he would marry her, but kept putting it off due to military service. In addition, the perpetrator was giving financial support to the victim during this entire time. After the victim broke off the liaison, the perpetrator decided to take revenge and fired three shots at him using a revolver, but missed. After that, she drank acid in an attempt to kill herself, but was saved through medical attention. In this case, despite the fact that the perpetrator completely admitted her deed and guilt, the jury acquitted her. It is obvious that the jury were influenced by sentimentality and the prevailing image of the female offender as a "fallen woman" who was physically and emotionally weak and erratic, naive and easily manipulated. This is also visible from the fact that Smocovich's attorney held a brief but touching speech after the main hearing ("una breve ma commovente arringa").[58] The mentioned case is also an example of an unjust jury verdict ("ungerechtfertigte Freisprechung") which was delivered against the expectations of the professional legal public and in a case where the guilt of the accused had been proven beyond doubt at the main hearing, even when the accused had confessed to her crime. The reasons for ungrounded acquittals can be ascribed to the jury's uncertainty as to the sentence the court would pronounce in case the accused was found guilty, as well as to the jury's belief that the penalty prescribed for the committed crime is too strict. Therefore, the jury would acquit the accused even though it believed her guilty, because it believed the sentence pronounced by the court would be unjust and too harsh.[59]

5. Debate over women's jury service in the Austrian legal system

While the initiative to secure women the right to perform jury service was exceptionally strong in England and the USA and was in the manifestos of numerous suffragette movements, Austrian suffragettes didn't give much attention to this matter. Therefore, we can conclude that the early debate over women's jury service was part of a more general discussion of women's participation in the public sphere which focused on the issue of women's suffrage. Women's suffrage first became an issue in the lands of the Austrian crown during the revolution of 1848-49, in which demands for a democratic constitution respecting civil liberties as well as social and national rights were voiced. A period of political repression followed the revolution, until a constitution was developed in the 1860 s. In this following "liberal era", issues of social reform and women's employment began to be discussed. The year 1866 saw the emergence of the women's movement, which at first involved itself only in the question of adequate education and occupational opportunities for women of all classes, and did not begin to discuss the right to vote until the late 1880.[60] The Social Democrats were the only party represented in the central parliament in Vienna which embraced women's political rights as part of their platform. In 1892 they included the demand for women's suffrage in their program, and began to introduce appropriate bills regularly from 1907 on, after universal and equal parliamentary suffrage for men had been introduced.[61]

---

55 § 398 of Criminal Procedure Code of 23 May 1873.

56 MAYER, Salomon, *Commentar zu der Oesterreichischen Strafproceß-Ordnung vom 23. Mai 1873. Des Handbuches des österreichischen Strafproceßrechtes IV. Band. Dritter Theil §. 297-494. (Schluß des Commentars.)*, Wien, 1884, pp. 544-546.

57 DONOVAN, James M., *Juries and the transformation of criminal justice in France in the nineteenth and twentieth centuries*, Chapel Hill, The University of North Carolina Press, 2010, pp. 17-18, 178; CURRY, Theodor, The benefits and penalties of gender for criminal justice processing outcomes among adults and juveniles, in: GARTNER, Rosemary; McCARTHY, Bill (ed.), *The Oxford Handbook of Gender, Sex and Crime*, Oxford, 2014, pp. 552-554.

58 Sessione d' Assise, *Idea Italiana*, No.102, Rovinj, 10 December 1898, pp. 3-4.

59 BAYER, Vladimir, *Problem sudjelovanja nepravnika u savremenom kaznenom sudovanju*, Zagreb, 1940, pp. 146-147; Zur Anwendung der Strafproceßordnung. LVIII. (J.v.W.) Wo liegt die Gefahr für die Zukunft der Schwurgerichte?, *Allgemeine österreichische Gerichts-Zeitung*, Jhrg. XXVIII, Neue Folge Jhrg. XIV, Nr. 4, Wien, 12 January 1877, pp. 13-14.

60 BADER-ZAAR, Brigitta, Gaining the Vote in a World in Transition: Female Suffrage in Austria, in: RODRIGUEZ RUIZ, Blanca; RUBIO-MARÍN, Ruth (ed.), *The Struggle for Female Suffrage in Europe: Voting to Become Citizens*, Leiden, 2012, p. 191.

61 BADER-ZAAR, Brigitta, Women in Austrian Politics, 1890-1934. Goals and Visions, in: GOOD, David F.; GRANDNER, Mary; MAYNES, Mary Jo (ed.), *Austrian Women in the Nineteenth and Twentieth Centuries: Cross-disciplinary Perspectives*, Providence-Oxford, 1996, pp. 62-63.

The first serious discussions on whether women should be allowed to perform jury service in Austrian legal circles can be found in the first decade of the twentieth century. We shall examine newspaper articles, legal-professional journalistic discussions and parliamentary debates from the early twentieth century in order to investigate the understanding of women jurors. These sources are a solid basis for analyzing the gendered assumptions and impressions of the public and legal profession about women as jurors. For example, in 1901 the magazine *Dokumente der Frauen*, the official organ of the General Austrian Women's Association, published the translation of a French article entitled "Women and Jury".[62] The writing of this article was inspired by a court hearing before a French jury when a victim unexpectedly also took on the role of the accused, while the actual accused was eventually acquitted. This caused great discontent, especially among women, since the victim was a woman and the accused a man who was acquitted by a jury which consisted exclusively of men. The feminist movement therefore demanded the introduction of a mixed-gender jury consisting of men and women of proven competence and equal powers. The drafting of this law was to be entrusted to Gustav Adolf Hubbard, a French politician, freemason, and freethinker. The question was raised whether such a mixed jury is even possible and will it contribute towards the better execution of justice. It is stated that there exists no valid reason why women should be excluded from the jury, and that women have the same intellectual capacity of answering the factual question on the guilt of the accused as men. Another prominent argument for including women in juries was that every criminal defendant must be tried by a jury of his peers. Without women jurors, female defendants could not face a jury of their peers and would, therefore, be treated differently from male defendants. Women were needed in the criminal justice system in order to make it representative of the community.[63]

The legal-professional journal *Gerichtshalle* clearly stated its opposition to the possibility of women becoming jurors or lawyers in 1906.[64] Women's capability to serve as jurors challenged discourses of separate spheres for women and men, with the central assumption that a woman's sphere was the home. This dominant ideology of separate spheres, according to which the public sphere and politics were the preserve of men, was advocated by the powerful Catholic Church and had proved to be a major impediment for the suffrage movement.[65] Because most women were confined to the domestic sphere of the household during the eighteenth and nineteenth centuries, opponents of women's jury service argued that women lacked the worldly experience necessary to make informed decisions as jurors. There was also an apparent fear that a public woman would no longer have time for the domestic duties that were her higher and finer calling. Time spent in performing jury duty would, moreover, be a pollutant for women who were supposed to inhabit an ideal world of nurturance and tenderness; it was considered that women should be kept apart from contact with the rough and brutal phases of life. The reasons for excluding women from jury service reflected a male-dominated system that sought to protect women. Reasons ranged from the practical (that the court simply did not have accommodations for both men and women) to the protective – that the offences were violent and repulsive.

In May 1908 Bohemian Social Democrat representative Leo Winter filed a bill in the House of Representatives of the Imperial Council concerning the compilation of jury lists, according to which "persons" ("Personen") over 30 years of age and who had domicile rights in one of the Austrian crown lands could be called to perform jury service.[66] It was considered that the term "persons" also encompassed women, so this bill actually included women in the jury service. Those explicitly deemed unfit for jury service were persons who couldn't perform the duties of a juror due to a mental or physical handicap as well as all those who had been sentenced for a crime motivated by gain or against morality. The only requirement regarding education was the ability to read and write. The rationale behind the draft of this bill was that the exclusion of broader segments of the population from performing jury service represents the greatest flaw of the Austrian jury system, and which therefore needed to be removed. Winter's proposal that women should be allowed to perform jury service was fully approved by attorney Isidor Ingwer, another social democrat, who believed that in cases where the accused or victim is a woman, the jury should be at least partially comprised of women because they could judge more competently and with more understanding in cases of certain crimes such as rape or infanticide. The aforementioned bill was not adopted.[67]

The outbreak of the First World War produced an important shift in the political and cultural landscape and provided a discursive opportunity for some jury activists. These jury activists came to understand that arguments for women on juries could be linked to the war.[68] It is important to note here that the

[62] PRÉVOST, Marcel, Die Frauen und die Jury, Deutsch von Laura Feil, in: FICKERT, Auguste; LANG, Marie; MAYREDER (ed.), *Dokumente der Frauen*, Bd. 6, Nr. 16, Wien, 1901, pp. 460-465.

[63] PRÉVOST, 1901, p. 462.

[64] DOLENC, Method, Die Verfassung der österreichischen Strafgerichte und das Laienrichtertum, in: MITTERMAIER, W.; LIEPMANN, M., (ed.), *Schwurgerichte und Schöffengerichte. Beiträge zu ihrer Kenntnis und Beurteilung*, Band II., Heft 4., Heidelberg, 1910, p. 577.

[65] BADER-ZAAR, 1996, pp. 61, 66.

[66] Antrag der Abgeordneten Dr. Winter, Dr. Renner, Dr. Diamand, Pittoni, Wityk und Genossen, betreffend die Abänderung des Gesetzes vom 23. Mai 1873, R. G. Bl. Nr. 121, in: *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten des österreichischen Reichsrathes im Jahre 1908*. XVIII. Session. VI. Band. 63. bis 82. Sitzung (S. 4217 bis 5442), Wien, 1908, pp. 5082, 5270; 955 der Beilagen zu den stenogr. Protokollen des Abgeordnetenhauses. - XVIII. Session 1908.

[67] DOLENC, 1910, pp. 577-578.

[68] „Die Frauenfrage hat durch den Krieg an Wichtigkeit und Bedeutung gewonnen, und das Verständnis für die Notwendigkeit politischer Berechtigung ist in allen Schichten der Bevölkerung erwacht. In Staat, Land und Gemeinde verlangen die Frauen ihren Anteil an allen staatsbürgerlichen Rechten und Pflichten. Nicht nur in die Geschworenenlisten, auch in die Wählerlisten in Staat, Land und Gemeinde…" E. v. F., Frauen als Geschworene, in: *Zeitschrift für Frauen-Stimmrecht. Organ für die politischen Interessen der Frau*, Jg. 7, Nr. 8, Wien, 1917, p. 3.

central government suspended the activities of jury courts on the entire territory of the state, including Istria, on 29 August 1914, due to the outbreak of the First World War.[69] The suspension of jury courts would be extended by imperial decree three times and would last until 6 July 1917.[70] The formal justification for the suspension was given only in 1917, when the Imperial Council convened after being postponed due to the war. On this occasion the government requested the Imperial Council to sign the mentioned decree on the suspension of jury courts, but it declined. One of the reasons mentioned in the government's suspension of the jury courts is the shortage of men available for jury panels which emerged because men were required to fight in the war.[71] Jury proponents argued that this problem could be easily solved by allowing women to serve on juries because that would mean having the requisite number of jurors.[72]

An article published in 1916 in the Viennese journal *Neues Frauenleben* was dedicated entirely to women's capability to be judge and juror. Referring to the two forms of judicial office (jurors and professional judges), the article stated that the jury embodies commonsense justice and reflects what ordinary people think is just and fair; it is both the symbol and institution of social legal will and as such it does not require finished legal studies. On the other hand, professional judges in no way represent the community of individual comrades-in-the-law ("Rechtsgenossen"), but, on the contrary, represent state sovereignty. It was stressed that legal areas related to the family, women and children require special female knowledge. Healing and child-rearing occupations have been women's jobs since time immemorial, so women's entry into the medical profession actually represented the reclaiming of what was considered women's innermost and most ancient area of work. Therefore, allowing legally educated women to perform the duty of judge in cases of guardianship, fosterage and juvenile criminal law would be accepted as something reliable and necessary by the male part of the population. It is claimed that there will certainly be no shortage of harsh critics of the introduction of jury service for women, since they will see the feminisation of criminal justice as a threat to society. These complaints could be addressed by noting that even the current institution of the jury consisting exclusively of men is affected by sentiment and non-uniformity of verdicts. The expansion of jury duty onto new social strata, including women, is in line with democratic principles and would contribute towards the desired blood renewal and strengthening of the jury. In addition, in order to secure a more appropriate space for tougher and stricter members, there existed the right to exercise peremptory challenges by prosecution, which was to be limited only in those cases where the perpetrators were women and youths. In addition, it was stated that women were to be guaranteed a broad right to decline jury service by making it voluntary for them, rather than required.[73]

The question of the reasons for women's exclusion from performing jury duty was also posed while analysing a specific case in which the Court of Cassation sentenced a poor woman from a Galician village to death for killing her own four-day-old child, where the circumstances of the crime were completely ignored (the poverty and unemployed status of the mother as well as action arising from a state of extreme necessity due to inability to feed the child). On that occasion it was stressed that the spiritual life of a woman who is a mother or about to become one can best be understood by women who are themselves mothers. This applies to all cases concerning women, children, and youths. Next, it is stated that women can be more susceptible to the influence of emotions and can therefore affect the working of the jury court. However, apart from this danger, one should take into account the benefits of including women in juries: the women would bring to the juries an element of sincerity, honesty and righteousness which was not present before to the same extent.[74]

The reactivation of jury courts prompted an intense discussion on the ability and capacity of women to serve as jurors. On 14 July 1917 Lower Austrian representative in the Imperial Council's House of Representatives Julius Ofner (who was lawyer and a notable supporter of women's emancipation and served as an important link to the parliament) while speaking on the need for the democratization of jury composition demanded that women be allowed to perform jury service. He went on to state that the constantly present fear that the admission of women would cause disruption in the administration of justice and public life is completely baseless. He considered that jury service should be a woman's right rather than a duty. He also emphasized the importance of women's role in the family and household: a woman was still regarded as the centre of the home and family life. Since women's jury service would not bring only harm to domestic life and children (because jury service could require women to be away from home for long periods of time) he suggested that the law on compiling lists of jurors include married women and their spouses among those who can request exemption from performing jury service in cases when the woman's presence was indispensable at home. The rationale for this proposal was that women's family responsibilities should not make jury service a hardship. According to Ofner, the inclusion of women on jury lists does not necessarily result

[69] Verordnung des Gesamtministeriums vom 29. August 1914 über die Einstellung der Wirksamkeit der Geschwornengerichte, *Reichsgesetzblatt für die im Reichsrate vertretenen Königreiche und Länder*, Jhrg. 1914, St. CXXVI, Nr. 228, Wien, 1914, p. 973.

[70] Verordnung des Gesamtministeriums vom 6. Juli 1917 über die Außerkraftsetzung der kaiserlichen Verordnungen vom 25. Juli 1914, R. G. Bl. Nr. 156, vom 4. November 1914, R. G. Bl. Nr. 307, und vom 27. Dezember 1916, R. G. Bl. Nr. 427, *Reichsgesetzblatt für die im Reichsrate vertretenen Königreiche und Länder*, Jhrg. 1917, St. CXIX, Nr. 284, Wien, 1917, p. 701.

[71] HOKE, Rudolf, Strafrechtspflege und Terrorismus im alten Österreich. Betrachtung zum Gesetz betreffend die zeitweise Einstellung der Geschwornengerichte vom Jahre 1873, in: VALENTINITSCH, Helfried (ed.), *Recht und Geschichte. Festschrift Hermann Baltl zum 70. Geburtstag*, Graz, 1988, pp. 336-337.

[72] BEER, Richard, Die Frau als Richterin und Geschworene, *Neues Frauenleben*, XVIII. Jahrg., Wien, May 1916, No. 5, p. 106.

[73] BEER, 1916, pp. 104-107.

[74] OFNER, Julius, Ein Todesurteil, *Neues Frauenleben*, Jhrg. XVIII., Wien, August-September 1916, No. 8-9, pp. 170-174.

in their representation on jury panels. It would only mean that women should be included at each stage of the jury selection process, from the drawing up of the annual list, to the session list, and finally selecting the jury box. At the end of this process, after the selection was made, there would remain an adequate number of women. Even if only one or two women would be in the jury box, this would in no way threaten the security of the judiciary; on the contrary, women would bring „a new vivid impact into the minds of jurors".[75] Namely, in addition to arguments about the potential effects of women's jury service on the household, there was also debate over what effects women's different nature would have on their service as jurors.[76] The earliest arguments promoting jury service for women were premised on the notion that women, as a gender class, have something to offer that is different from what men bring to the jury room, so that female jurors were portrayed as contributing a valuable perspective to the process of jury deliberations.[77]

The proposal that women be allowed to perform jury service was denied by the judiciary committee. The reasons behind such a decision are included in a report that was read out in the Imperial Council's House of Representatives in the name of the judiciary committee and will be presented in more detail further on. The report states that the committee did not disregard that equal rights should correspond to equal duties and responsibilities, so one of the important goals of social development is to achieve as broad equality between female and male citizens as possible. It is further noted that the sexes had already been made equal in matters of private law a long time ago, and that the novelties of the Austrian Civil Code introduced during the war had got rid of the backwardness related to guardianship, participation in will-making etc. However, family law provisions are based on the principle that the husband is the head of the family and therefore the legal position of women is subject to various limitations. It is stated that political equality of female and male citizens hasn't yet been introduced and that allowing women to perform the very responsible duty of juror would mean skipping the first step. This first step should entail women acquiring the knowledge necessary to act as jurors and decide upon the guilt of the accused in political and other offences by first participating in the political life of the state. Due to their upbringing and the fact that they primarily perform household tasks, women are naturally poorly acquainted with precisely those areas of life which are usually the subject of criminal offences. In contrast, men possess a more complete insight into the way human society functions. To the objection that the aforementioned doesn't apply in cases of infanticide and similar crimes which was voiced by one of the representatives, it was replied that men are usually well-acquainted with all aspects of life and that women, in line with the "traditional concept of true womanhood", cannot, as a rule, better understand infanticide and similar crimes than an experienced man.[78] Furthermore, it is stated that experience is one of the most important qualities of a judge and that jury service doesn't serve to give a right to the invited jurors, but to secure a more reliable basis for the trial.[79] It was stressed that women, due to their constitution, weren't up to the strains of jury hearing, which can sometimes last up to several weeks and lead to the loss of the equanimity necessary for performing judgeship. As it is well known, the mental life of woman is not always completely uniform. Therefore, it is impossible to sort according to individual status groups which women are capable of performing jury service and which aren't since several factors come into play, including upbringing, customs, etc. So, in order to make women capable of performing the taxing jury duties, it is first necessary to change the position of women in society in general. It was believed that allowing women to become jurors without prior preparations would present a risk and an experiment, which cannot be allowed because of the need to protect the interests of the accused. It is also emphasized that there exists no practical necessity to extend jury service to women and that it actually presents a hardship for most of them. Finally, it is claimed that the foundation of the existing social order is the family, which is based on a certain sort of idealism and views of life. It is impossible to reconcile this idea with a woman being separated from her family for a longer time due to her jury duties and exposed to profanity, obscenity and the detailed narration of the immoral acts and doings of the lowest type of humanity as well as the possibility to contribute towards the issuing of a death penalty and thus the destruction of a person's existence. It was then concluded that the goal of almost every female person is to enter into married and family life, and the belief that the woman was fitted for the private or domestic sphere and the man for the public or civic and political arena was expressed.[80] Many experts of the time wrote about how such a division was natural; rooted in the nature of each gender. Those women who sought places in the public sphere often found themselves identified as unnatural. It was difficult for women to express themselves in the public domain because

[75] Stenographisches Protokoll. Haus der Abgeordneten. XXII. Session. 20. Sitzung. Samstag, den 14. Juli 1917., *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten des österreichischen Reichsrates im Jahre 1917*, XXII. Session, I. Band, Wien, 1917, pp. 1035-1036.

[76] WEISBROD, Carol, Images of the Woman Juror, *Harvard Women's Law Journal*, Vol. 9, 59 (1986), p. 68.

[77] FOWLER, Lucy, Gender and jury deliberations: the contributions of social science, *William & Mary Journal of Women and the Law*, Vol. 12 (2005-2006), Iss. 1, October 2005, pp. 4, 14. Available at http://scholarship.law.wm.edu/wmjowl/vol12/iss1/2/

[78] The cult of true womanhood, also known as the cult of domesticity, is a term identifying a nineteenth-century ideology which posited that women's nature suited them especially for tasks within the home. It sought to assert that womanly virtue resided in piety, purity, submissiveness, and domesticity: these values assigned women to specific behaviour and roles in the society, which were restricted to the domestic sphere. The private sphere of domesticity was peddled as the true realm for women. In European societies the cult began to gain influence at the turn of the twentieth century. TIERNEY, Helen (ed.), *Women's Studies Encyclopedia*. Revised and Expanded Edition. A-F, Westport, 1999, pp. 321-324.

[79] From this it is evident that the judiciary committee explicitly rejected the principle that jury duty was a right of the citizen. Rather, it was regarded as a public function that should be confined to those with absolute independence and sufficient intelligence. DONOVAN, 2010, p. 112.

[80] Stenographisches Protokoll. Haus der Abgeordneten. XXII. Session. 20. Sitzung. Samstag, den 14. Juli 1917., *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten…,* 1917, pp. 1037-1038.

the very notion of the public woman was becoming incompatible with respectability. Namely, notions of respectability rested upon a woman's reputation within the private sphere, as a wife and mother.[81]

After rejecting the proposal to allow women to perform jury service, one of the representatives proposed (as a sort of compensation to women) that the government secures the participation of women as guardians, orphanage nurses, representatives, and assistants as well as their participation in the protective supervision and preservation of youth in the bills on youth welfare and juvenile criminal law.[82] This shows the belief that women were considered essential for certain cases, such as those involving children as victims or offenders, because of their maternal care and moral superiority, so often displayed in the domestic sphere.[83]

Among the arguments used as justification for excluding women from jury service was the claim that jury service presents a very heavy and delicate burden, both on a psychological and physical level; it was claimed that participation in jury hearings cannot be considered easy because such hearings are complex and last much longer than normal hearings (they normally lasted for several days, sometimes stretching long into the night) [84]; the subject of hearings were usually felonies, and their outcome was of the greatest importance for the accused. In addition, the contribution of women as jurors in jury courts was considered problematic since women were more prone to passing judgement under the effect of mood or emotion than men. Trial by jury was supposed to represent the voice of lively sense of justice of the people, and it was claimed that there was a great difference between a lively sense of justice and sentimental empathy. The proponents of jury service for women answered by emphasizing that women would comprise a minority at the jury box and thus their influence would not be a decisive factor.[85]

Among the proponents of jury service for women in the House of Representatives of the Imperial Council was the Bohemian representative Oswald Hillebrand, also a member of the Social Democrat Party. In his speech he referred to the main arguments of the opponents of jury service for women, whom he described as "voices from the grave, arguments which were more appropriate to a period several hundred years in the past".[86] To claims that women had until then been kept away from public life and were therefore insufficiently mature for jury service, he answered that this is a standard complaint which can be heard regarding every democratic advancement. He posed the question about whether the fact that women had been kept away from public life until now was their own fault and whether they should continue to be punished for an injustice that was done to them. He then warned that there existed a duty to correct this old injustice and introduce legal equality for all. He stressed that men and women can be comparably competent in any given matter, on the condition that they are allowed to participate on equal terms. Therefore, if they wish to have competent female jurors, it is necessary to allow them to perform jury service under the same conditions as men. He then cautioned about the irrationality of the existing system, according to which a man with only one year of completed primary school education can be a juror provided he can read and write, but the same position is not available even to women with a university education. Regarding the arguments that women are more susceptible to emotions and that they lack the sense for statutory law, he referred to the general function of the institution of jury courts: their founding was meant to guarantee the independence of the judiciary from the executive government, but also to provide for the natural accommodation of the rigor of a law through public feeling and community awareness that lies in the jury. To the objection that women are too soft-hearted, he replied that perhaps it is precisely female jurors who would have more of an ear for the voice of humanity in offences against property committed in circumstances of poverty or desperation, in contrast to peasant jurors who showed severe tenacity and heartlessness in cases of arson. On the other hand, the objection that some women would judge too strictly in cases of certain offences, he replied that the same could be said of all members of court martials, since they usually gave harsh judgements. According to Hillebrand, jury service was not just a woman's right, but primarily a duty, but also the right of a female accused to have women among the jurists, in order to better assess the motives of her act. Furthermore, he answered the complaint that women are the weaker sex and thus unable to endure the great physical demands of jury service by pointing out that women are nonetheless considered strong enough to work in factories, to drag heavy ammunition and to work as unskilled labourers, endure hunger and grief. Regarding the argument that women should be excluded from jury service due to their psychological peculiarity and nervousness (which was considered a typically female ailment), Hillebrand brought into question its seriousness and pointed out there were also nervous men who could then be excluded from performing jury service. He then addressed the final argument mentioned during the judicial committee's discussion: men pay the state "blood tax". Not wishing to compare this blood tax with the tax "paid" by every woman

[81] ABRAMS, Lynn, *The Making of Modern Woman: Europe 1789-1918*, London, 2002, pp. 152, 214.

[82] Stenographisches Protokoll. Haus der Abgeordneten. XXII. Session. 20. Sitzung. Samstag, den 14. Juli 1917., *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten…*, 1917, p. 1036.

[83] LENTZ, Susan L., Without Peers: A History of Women and Trial by Jury. Part Two - The Law of Jury Service in the Twentieth Century, in: *Women and Criminal Justice*, Vol. 11 (4), 2000, p. 87.

[84] For example, in 1901, 34 days were needed to hold 13 main hearings at the jury court in Rovinj. We can also find cases where jury hearings continued into the weekend, even the small hours on Sunday. *Österreichische Statistik*, LXXI. Band, 3. Heft, Wien, 1904, pp. 138, 166; Sessione d' assise, *Idea Italiana*, No.103, Rovigno, 17 December 1898., p. 3.

[85] Stenographisches Protokoll. Haus der Abgeordneten. XXII. Session. 20. Sitzung. Samstag, den 14. Juli 1917., *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten…*, 1917, pp. 1040-1041, 1049-1051.

[86] Stenographisches Protokoll. Haus der Abgeordneten. XXII. Session. 20. Sitzung. Samstag, den 14. Juli 1917., *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten…*, 1917, p. 1055.

at birth, Hillebrand concluded that all men unfit for military service should then also be excluded from jury service. Currently, by being excluded from jury service, women were treated the same as persons with mental handicaps, spendthrifts, alcoholics, users of the financial support for the poor, and convicts: all categories of persons who were excluded from performing jury service by law.[87]

After the House of Representatives rejected Ofner's proposal to allow women to perform jury service, the women of Vienna staged two big protests, organized by The League of Austrian Women's Associations and Social Democratic Women.[88] In addition, the question was posed about what is more appropriate for judicial, and therefore jury service: „military discipline" or „feminine sentiment" and it was demanded that half the jury be composed of women in cases where the accused was a woman or in offences where the victims were women or children.[89]

It should be noted that none of the six Istrian representatives in the Imperial Council's House of Representatives participated in the mentioned discussion.[90] Apart from their lack of interest for this matter, the reasons for this can be found in the fact that the suspension of juries in Istria had remained in force due to the state of war and the significant number of Italians in the entire population.[91] The question of female jury service wasn't explored even in the Istrian press. However, since the political nature of the jury helps explain why women could appear in court as litigant and as witness, but not as judge, attorney, or juror (all three roles were viewed as public, i.e., political offices),[92] a conclusion on the dominant attitude in Istria towards women as jurors can be extrapolated from the attitude towards another important political right that was being considered: women's suffrage. In 1905, the Istrian politician Ivan Zuccon, an attorney by profession, while speaking about the movement to introduce universal and equal suffrage which spread throughout all the Austrian lands claimed that all men should be given the right to vote, but not every woman. He claimed that this was "an area of exclusively male activity, while women were accorded the role of good wife, mother and housekeeper and that they have the right to be the helpers, consolers, and supporters of men in all aspects of life".[93] A similar attitude towards the participation of women in politics was expressed in a newspaper from Pula, which claimed that "political life represents a hell for men and it is frightening to think what would happen should women enter into it." In addition, it was claimed that the inclusion of women in politics would harm their marital and family life due to their inability to perform household tasks.[94] These negative attitudes towards women's suffrage were in line with the rural character of Istria and the traditional way of life which was still dominant there.

In August 1917 an article titled "Women as Jurors" was published in the legal journal *Juristische Blätter*, written by already mentioned Julius Ofner. He stressed that there exist no further barriers for women to become jurors, especially since women could now be physicians, clerks, professors, artists and artisans. However, his proposal met with harsh criticism and opposition. As was already mentioned, the exclusion of women from performing jury service was justified through "psychological barriers" that made women more susceptible to outside influences due to their more developed sense of empathy; it was claimed that there was a danger that women would, upon giving a verdict, be guided by their emotions rather than exclusively by the guidelines given by the law. Under the separate spheres ideology, women were suspect reasoners because they were seen as overly emotional ("emotional" representing the opposite of "reason"). Aside from this, domestic duties represented a further obstacle for married women, since they would necessarily be neglected during the performance of jury service.[95]

Changes would only take place after the collapse of the Austro-Hungarian Monarchy, when at the beginning of 1919 the Austrian provisional National Representative Assembly revised the Jury List Compiling Law of 23 May 1873 in several points. The most significant change was that women were for the first time allowed to perform jury service.[96] This change would not however affect Istria since that area was occupied by the Italians in November 1918. The multinational character of the Habsburg Empire can be considered one of the reasons why women achieved political rights and full equality with men relatively late. According to this interpretation, ethnic conflict made cooperation among feminists of different nationalities ex-

---

87 Stenographisches Protokoll. Haus der Abgeordneten. XXII. Session. 20. Sitzung. Samstag, den 14. Juli 1917., *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten…*, 1917, pp. 1056-1058.

88 Rundschau, *Neues Frauenleben*, Jhrg. XIX., Wien, August - September 1917, No. 8-9, p. 184.

89 KULKA, L., „Militärische Disziplin" oder „weibliches Gefühl", *Neues Frauenleben*, Jhrg. XIX., Wien, August - September 1917, No. 8-9, pp. 161-166.

90 The Istrian representatives at the Imperial Council's House of Representatives were: Italian liberals Viktor Candussi-Giardo and Lodovico Rizzi, Italian Peoples' Party member Pietro Spadaro, and Croato-Slovenian Club members Matko Laginja, Matko Mandić and Vjekoslav Spinčić. I. Teil, Personenregister, 2. Abteilung, Mitglieder des Hauses der Abgeordneten, *Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten…*, 1917, pp. 89, 207, 233, 287, 322, 324-325.

91 This follows from § 4 of the Order on Compiling Jury Registers for the rest of 1917 and 1918, in which it is specified that this order doesn't apply to the Princely County of Gorizia and Gradisca, the Margraviate of Istria, the Free Imperial City of Trieste with its surroundings, and the areas of jurisdiction of the county courts in Trient and Rovereto. Verordnung des Ministers des Innern und des Leiters des Justizministeriums vom 27. Juli 1917 über die Bildung der Geschwornenlisten für den Rest des Jahres 1917 und für das Jahr 1918., *Reichsgesetzblatt für die im Reichsrate vertretenen Königreiche und Länder*, Jhrg. 1917., St. CXXXIII., Nr. 317., Wien, 1917, p. 762.

92 CORNETT, Judy M., Hoodwink' d by Custom: The Exclusion of Women from Juries in Eighteenth-Century English Law and Literature, *William & Mary Journal of Women and the Law*, Vol. 4 (1997-1998), Iss. 1, 1997, p. 13. Available at http://scholarship.law.wm.edu/wmjowl/vol4/iss1/2/

93 Skupština političkog družtva za Hrvate i Slovence u Istri. (Konac.), Prilog broju 51. „N.S.", *Naša sloga*, No. 51, Pula, 22 December 1905, p. 3.

94 „La vita politica é un inferno per uomini - immaginiamo che sarebbe se ci entrassero le donne! É orribile solo il pensarlo." Il votto alle donne, *Il Giornaletto di Pola*, No. 2091, Pula, 1 April 1906, p. 2.

95 OFNER, Julius, Frauen als Geschworene, *Juristische Blätter*, Jhrg. XLVI, Nr. 33, Wien, 19 August 1917, pp. 385-386.

96 SADOGHI, Alice, *Thesen zur Geschworenengerichtsbarkeit - historische Aufarbeitung und Perspektiven*, Linz, 2007, p. 76.

tremely difficult and caused non-German feminists to subordinate their goals to the nationalist movements.[97] Bitter ethnic antagonism also existed in Istria between the powerful Italian urban minority and the more numerous Croatian peasantry, so the national political question occupied this entire period and all of its social structures. Therefore, although the beginning of the 20th century was marked by an increasingly intensive struggle for women's basic economic and political rights, Istria was all but completely excluded from this process. At the beginning of the 20th century, there were no noteworthy women's professional associations in Istria.[98] One exception was the activity of the socialist Giuseppine Martinuzzi, according to many the most renowned Istrian woman of this period, whose political work was mostly related to the issue of women in that time's society.[99]

6. Conclusion

The Austrian Jury List Compiling Law of 23 May 1873 named male sex as being one of the conditions for performing jury service, thereby explicitly excluding women. The inability of not only Istrian women, but women from the entire Austrian legal area to become jurors should therefore come as no surprise. Even in states with a long tradition of trial by jury, such as England, women remained barred from the jury until the 20th century.

The basic characteristic of Istria in the examined period is its low level of economic development, which was closely related to its social backwardness. The consequence of this was the domination of the rural, traditional and patriarchal life in Istria, which had a strong effect on the position of women in society and their professional opportunities. Most women were of peasant origin, illiterate, employed in agriculture or as unqualified workers in one of the few Istrian factories. Therefore, even if we disregard the exclusion of women from jury service on basis of their sex, the vast majority of Istrian women couldn't fulfil the remaining prescribed requirements for performing jury service, such as literacy and the tax and intellectual census. The exclusion of women from jury service actually represented a natural consequence of the position of women in the society of that time, which was characterised by political inequality, the lack of economic emancipation, that is, absence of complete equality for a woman before civil law in the disposal of her person and property, the free use of all her abilities and means as well as the lack of intellectual emancipation – in other words, failure to provide a woman equal opportunities for basic and higher education as a man.

Regarding the position of woman in the criminal procedure law, it was determined that the provisions of the Criminal Procedure Law of 23 May 1873 were principally formulated to be gender neutral, and that women had the same rights as men in criminal procedure. However, a more detailed analysis of its provision showed certain deviations from the principle equality of men and women: in cases where the defendant was underage or under guardianship, the woman as mother could not appoint him a defence lawyer against his will; women could not be court witnesses who were supposed to be present during certain enquiries; women could not get permission to be present at the execution of a death penalty; if a female convict was pregnant at the time the death penalty or a prison sentence was to be executed, the execution of the sentence would take place when the condition ended. Some historians even argue that juries acquitted a far higher proportion of accused women than of accused men because jurors were all males. This was explained by traditional male gallantry or chivalry towards women, and substantiated by providing examples from the working of the jury court in Rovinj.

The early debate over women's jury service in the Austrian legal system was part of a more general discussion of women's participation in the public sphere which focused on the issue of women's suffrage. The first serious discussions on whether women should be allowed to perform jury service in Austrian legal circles can be found in the first decade of the twentieth century. In 1901 the magazine *Dokumente der Frauen*, the official organ of the General Austrian Women's Association, published the translation of a French article entitled "Women and Jury", referring to the question of introducing mixed juries. The legal-professional journal *Gerichtshalle* clearly stated its opposition to the possibility of women becoming jurors or lawyers in 1906. In May 1908 Bohemian Social Democrat representative Leo Winter filed a bill in the House of Representatives of the Imperial Council concerning the compilation of jury lists, according to which "persons" over 30 years of age and who had domicile rights in one of the Austrian crown lands could be called to perform jury service. It was considered that the term "persons" also encompassed women, but the aforementioned bill was not adopted. The outbreak of the First World War produced an important shift in the political and cultural landscape and provided a discursive opportunity for jury activists, who came to understand that arguments for women on juries could be linked to the war. An article published in 1916 in the Viennese journal *Neues Frauenleben* was dedicated entirely to women's capability to be judge and juror.

The reactivation of jury courts prompted an intense discussion on the ability and capacity of women to serve as jurors. On 14 July 1917 Lower Austrian representative in the Imperial Council's House of Representatives Julius Ofner while speaking on the need for the democratization of jury composition demanded that women be allowed to perform jury service. This proposal was denied by the judiciary committee. Among the proponents of jury service for women in the House of Repre-

[97] ALBISETTI, James C., Female Education in German-Speaking Austria, Germany, and Switzerland, 1866-1914, in: GOOD, David F.; GARDNER, Margarete; MAYNES, Mary Jo (ed.), *Austrian Women in the Nineteenth and Twentieth Centuries: Cross-Disciplinary Perspectives*, Providence - Oxford, 1996, p. 40.

[98] HAINISCH, Marianne, Die Geschichte der Frauenbewegung in Oesterreich, in: LANGE, Helene; BÄUMER, Gertrud (ed.), *Handbuch der Frauenbewegung*, I. Teil: Die Geschichte der Frauenbewegung in den Kulturländer, Berlin, 1901, p. 185.

[99] DUKOVSKI, Darko, *Svi svjetovi istarski ili još-ne-povijest Istre prve polovice XX. stoljeća*, Pula, 1997, p. 118; VORANO, Tullio, Martinuzzi, Giuseppina (Maria Sandra), in: *Istarska enciklopedija*, Zagreb: Leksikografski zavod Miroslav Krleža, 2005, p. 473.

sentatives of the Imperial Council was also the Bohemian representative Oswald Hillebrand. The separate spheres ideology represented a dominant cultural force in the debate over the women's jury service. According to this ideology, the home was regarded as a private, affective, female sphere that should be set apart from the public, economically productive male sphere of life. Actually, the debates over suffrage and jury service represented part of the debate over the extent to which gender differences and family obligations influenced women's entrance into the public sphere.

Bibliography

ABRAMS, Lynn, *The Making of Modern Woman: Europe 1789-1918*, London, 2002.

ALBISETTI, James C., Female Education in German-Speaking Austria, Germany, and Switzerland, 1866-1914, in: GOOD, David F.; GARDNER, Margarete; MAYNES, Mary Jo (ed.), *Austrian Women in the Nineteenth and Twentieth Centuries: Cross-Disciplinary Perspectives*, Providence - Oxford, 1996.

BADER-ZAAR, Brigitta, Gaining the Vote in a World in Transition: Female Suffrage in Austria, in: RODRIGUEZ RUIZ, Blanca; RUBIO-MARÍN, Ruth (ed.), *The Struggle for Female Suffrage in Europe: Voting to Become Citizens*, Leiden, 2012.

BADER-ZAAR, Brigitta, Women in Austrian Politics, 1890-1934. Goals and Visions, in: GOOD, David F.; GRANDNER, Mary; MAYNES, Mary Jo (ed.), *Austrian Women in the Nineteenth and Twentieth Centuries: Cross-disciplinary Perspectives*, Providence-Oxford, 1996.

BARBALIĆ, Fran, *Prvi Istarski sabori (1861.-1877.)*, Rad Jugoslavenske akademija znanosti i umjetnosti, knjiga 300, Zagreb, 1954.

BAYER, Vladimir, *Problem sudjelovanja nepravnika u savremenom kaznenom sudovanju*, Zagreb, 1940.

BEER, Richard, Die Frau als Richterin und Geschworene, *Neues Frauenleben*, XVIII. Jahrg., Wien, May 1916, No. 5.

BENUSSI, Bernardo, *Storia documentata di Rovigno*, Trieste, 1888.

BEUC, Ivan, *Istarske studije*. Osnovni nacionalni problemi istarskih Hrvata i Slovenaca u drugoj polovini XIX i početkom XX stoljeća, Zagreb, 1975.

BLACKSTONE, William, *Commentaries on the Laws of England. Book the Third*. The fifteenth edition, with the last corrections of the author; and with notes and additions by Edward Christian, London, 1809.

CORNETT, Judy M., Hoodwink' d by Custom: The Exclusion of Women from Juries in Eighteenth-Century English Law and Literature, *William & Mary Journal of Women and the Law*, Vol. 4 (1997-1998), Iss. 1, 1997. Available at http://scholarship.law.wm.edu/wmjowl/vol4/iss1/2/

CURRY, Theodor, The benefits and penalties of gender for criminal justice processing outcomes among adults and juveniles, in: GARTNER, Rosemary; McCARTHY, Bill (ed.), *The Oxford Handbook of Gender, Sex and Crime*, Oxford, 2014.

DEMARIN, Mate, *Hrvatsko školstvo u Istri*, Zagreb, 1978.

DERENČIN, Marian, *Tumač k obćemu austrijskomu gradjanskom zakoniku*, Knjiga I., Zagreb, 1880.

Die österreichisch-ungarische Monarchie in Wort und Bild. Das Küstenland. (Görz, Gradiska, Triest und Istrien.), Wien, 1891.

Die Unterrichtsanstalten für die weibliche Bevölkerung der im Reichsrate vertretenen Königreiche und Länder der österreichisch-ungarischen Monarchie, Verlag des Bundes österreichischer Frauenvereine, Wien, 1908.

DOLENC, Method, Die Verfassung der österreichischen Strafgerichte und das Laienrichtertum, in: MITTERMAIER, W.; LIEPMANN, M., (ed.), *Schwurgerichte und Schöffengerichte. Beiträge zu ihrer Kenntnis und Beurteilung*, Band II., Heft 4., Heidelberg, 1910.

DONOVAN, James M., *Juries and the transformation of criminal justice in France in the nineteenth and twentieth centuries*, Chapel Hill, The University of North Carolina Press, 2010.

DUKOVSKI, Darko, *Svi svjetovi istarski ili još-ne-povijest Istre prve polovice XX. stoljeća*, Pula, 1997.

DUKOVSKI, Darko, Uvod u procese i procesi modernizacije u Istri na prijelomu stoljeća (1880.-1910.), *Acta Histriae*, Vol. 16, Iss. 3, 2008.

E. v. F., Frauen als Geschworene, in: *Zeitschrift für Frauen-Stimmrecht. Organ für die politischen Interessen der Frau*, Jg. 7, Nr. 8, Wien, 1917.

FORBES, Thomas R., A Jury of Matrons, *Medical History*, Vol. 32, Iss. 01, January 1988.

FOWLER, Lucy, Gender and jury deliberations: the contributions of social science, *William & Mary Journal of Women and the Law*, Vol. 12 (2005-2006), Iss. 1, October 2005. Available at http://scholarship.law.wm.edu/wmjowl/vol12/iss1/2/

FRAISSE, Genevičve; PERROT, Michelle (ed.), *A history of women in the West. IV. Emerging Feminism from Revolution to World War*, Belknap Press of Harvard University Press, 2000.

FRIEDLAND, Paul, *Seeing justice done. The age of spectacular capital punishment in France*, Oxford, 2012.

Gesetz vom 23. Mai 1873, betreffend die Bildung der Geschwornenlisten, *Reichsgesetzblatt für die im Reichrathe vertretenen Königreiche und Länder*, Jhrg. 1873., St. XLII., Nr. 121., Wien, 1873, pp. 503-508.

Gesetz vom 23. Mai 1873, betreffend die Einführung einer Strafproceß-Ordunung., *Reichsgesetzblatt für die im Reichsrathe vertretenen Königreiche und Länder*, Jhrg. 1873, St. XLII, Nr. 119, Wien, 1873, pp. 397-501.

Gesetz vom 4. April 1870, wirksam für die Markgrafschaft Istrien, womit auf Grund des Artikels 75 des Reichsgesetzes vom 14. Mai 1869 die Absätze 1 und 3 des Artikels 21, der Absatz 2 des Artikels 22 und die Artikel 28 und 38 des bezogenen Gesetzes abgeändert werden. *Gesetze und Verordnungen der Landesbehörden für das österreichisch-illirische Küstenland*, Jhrg. 1870., St. XI., Nr. 23., Triest, 1870, pp. 88-89.

HAINISCH, Marianne, Die Geschichte der Frauenbewegung in Oesterreich, in: LANGE, Helene; BÄUMER, Gertrud (ed.), *Handbuch der Frauenbewegung*, I. Teil: Die Geschichte der Frauenbewegung in den Kulturländer, Berlin, 1901.

HOKE, Rudolf, Strafrechtspflege und Terrorismus im alten Österreich. Betrachtung zum Gesetz betreffend die zeitweise Einstellung der Geschwornengerichte vom Jahre 1873, in: VALENTINITSCH, Helfried (ed.), *Recht und Geschichte. Festschrift Hermann Baltl zum 70. Geburtstag*, Graz, 1988.

Il votto alle donne, *Il Giornaletto di Pola*, No. 2091, Pula, 1 April 1906.

Istarska enciklopedija, Zagreb: Leksikografski zavod Miroslav Krleža, 2005.

JACOBI, Juliane, The Influence of Confession and State: Germany and Austria, in: ALBISETTI, James C.; GOODMAN, Joyce; ROGERS, Rebecca (ed.), *Girls' Secondary Education in the Western World: From the 18th to the 20th Century*, New York, 2010.

Kaiserliches Patent vom 27. Mai 1852, wodurch eine neue, durch die späteren Gesetze ergänzte, Ausgabe des Strafgesetzbuches über Verbrechen und schwere Polizeiübertretungen vom 3. September 1803, mit Aufnahme mehrerer neuer Bestimmungen, als alleiniges Strafgesetz über Verbrechen, Vergehen und Uebertretungen für den ganzen Umfang des Reiches, mit Ausnahme der Militärgrenze, kundgemacht, und vom 1. September 1852 angefangen in Wirksamkeit gesetzt wird, *Allgemeines Reichs-, Gesetz- und Regirungsblatt für das Kaiserthum Oesterreich*, Jhrg. 1852., St. XXXVI., Nr. 117., Wien, 1852, pp. 493-591.

KULKA, L., „Militärische Disziplin" oder „weibliches Gefühl", *Neues Frauenleben*, Jhrg. XIX., Wien, August - September 1917, No. 8-9.

LENTZ, Susan L., Without Peers: A History of Women and Trial by Jury. Part Two - The Law of Jury Service in the Twentieth Century, in: *Women and Criminal Justice*, Vol. 11 (4), 2000.

MAYER, Solomon, *Commentar zu der Oesterreichischen Strafproceß-Ordnung vom 23. Mai 1873. Des Handbuches des österreichischen Strafproceßrechtes II. Band. Zweite Lieferung und Schluß des ersten Theiles des Commentars. § 42-206.*, Wien, 1881.

MAYER, Solomon, *Commentar zu der Oesterreichischen Strafproceß-Ordnung vom 23. Mai 1873. Des Handbuches des österreichischen Strafproceßrechtes III. Band. Zweiter Theil §. 207-296.*, Wien, 1884.

MAYER, Salomon, *Commentar zu der Oesterreichischen Strafproceß-Ordnung vom 23. Mai 1873. Des Handbuches des österreichischen Strafproceßrechtes IV. Band. Dritter Theil §. 297-494. (Schluß des Commentars.)*, Wien, 1884.

MILANOVIĆ, Božo, *Hrvatski narodni preporod u Istri, Knjiga II (1883-1945)*, Pazin, 1973.

MISCHLER, Ernst; ULBRICH, Josef (ed.), *Österreichisches Staatswörterbuch. Handbuch des gesamten österreichischen öffentlichen Rechtes*, Zweite wesentlich umgearbeitete Auflage, Zweiter Band. F-J., Wien, 1906.

MITTERBACHER, Julius, *Die Strafproceßordnung für die im Reichsrathe vertretenen Königreiche und Länder der österreichisch-ungarischen Monarchie vom 23. Mai 1873 und deren Einführungsgesetz*, Wien, 1882.

MOGOROVIĆ CRLJENKO, Marija, The Position of Woman in «Istrian Mariagge Pattern» (Istria in the 15th and 16th Centuries), in: BELLAVITIS, Anna; FILIPPINI, Nadia Maria; PLEBANI, Tiziana (ed.), *Spazi, poteri, diritti delle donne a Venezia in etŕ moderna*, Verona-Bolzano, 2012, pp. 21-30.

Oesterreichische Statistik, L. Band., 3. Heft, Wien, 1898.

Oesterreichische Statistik, LIII. Band., 3. Heft., Wien, 1900.

Oesterreichische Statistik, LVIII. Band., 3. Heft., Wien, 1902.

Oesterreichische Statistik, LXI. Band., 3. Heft, Wien, 1902.

Oesterreichische Statistik, XI. Band., 3. Heft., Wien, 1887.

Oesterreichische Statistik, XXXII. Band, 1. Heft, Wien, 1892.

Österreichische Statistik, LXIII. Band, 2. Heft, Wien, 1903.

Österreichische Statistik, LXIX. Band., 3. Heft, Wien, 1903.

Österreichische Statistik, LXXI. Band., 3. Heft, Wien, 1904.

Österreichische Statistik. Neue Folge, 1. Band, 2. Heft, Wien, 1914.

Österreichische Statistik. Neue Folge, 1. Band, 3. Heft, Wien, 1914.

Österreichische Statistik. Neue Folge. 3. Band, 6. Heft, Wien, 1915.

Österreichische Statistik. Neue Folge, 13. Band., 2. Heft., Wien, 1916.

Österreichische Statistik. Neue Folge. 17. Band, 3. Heft, Wien, 1919.

OFNER, Julius, Ein Todesurteil, *Neues Frauenleben*, Jhrg. XVIII., Wien, August-September 1916, No. 8-9.

OFNER, Julius, Frauen als Geschworene, *Juristische Blätter*, Jhrg. XLVI, Nr. 33, Wien, 19 August 1917.

OLDHAM, James, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries*, 2006, New York.

OSTROGORSKI, Moisei, *The Rights of Women*. A Comparative Study in History and Legislation. Translated under the author's supervision, London, 1893.

PASTOVIĆ, Dunja, *Porotno suđenje u Istri od 1848. do 1918. godine* (Unpublished doctoral dissertation), Zagreb, 2012.

Patent vom 21ten Januar 1815., *Seiner Majestät des Kaisers Franz Gesetze und Verfassungen im Justiz-Sache. Für die Deutschen Staaten der Oesterreichischen Monarchie. Von dem Jahre 1812 bis 1817*, Nr. 1126, Wien, 1819, p. 257.

PITTER, Viktor, *Die rechtliche Stellung der Frau in Österreich. Eine Zusammenstellung der wichtigsten, die besondere Stellung der Frau im privaten und öffentlichen Rechte betreffenden Vorschriften*, Wien und Leipzig, 1911.

PRÉVOST, Marcel, Die Frauen und die Jury, Deutsch von Laura Feil, in: FICKERT, Auguste; LANG, Marie; MAYREDER (ed.), *Dokumente der Frauen*, Bd. 6, Nr. 16, Wien, 1901.

Programm des k. k. Staatsgymnasiums in Pola für das Schuljahr 1913/14., XXIV. Jahrgang, Pola, 1914.

RULF, Friedrich, *Der österreichische Strafprocess unter Berücksichtigung der Rechtsprechung des Cassationshofes*. Dritte durchgesehene Auflage., Prag-Wien-Lepizig, 1895.

Rundschau, *Neues Frauenleben*, Jhrg. XIX., Wien, August - September 1917, No. 8-9.

Sa hrvatske gimnazije u Pazinu, *Naša sloga*, No. 42, Pula, 17 October 1912.

SADOGHI, Alice, *Thesen zur Geschworenengerichtsbarkeit - historische Aufarbeitung und Perspektiven*, Linz, 2007.

Sessione ď Assise, *Idea Italiana*, No.102, Rovinj, 10 December 1898.

Sessione ď assise, *Idea Italiana*, No.103, Rovigno, 17 December 1898.

Skupština političkog družtva za Hrvate i Slovence u Istri. (Konac.), Prilog broju 51. „N.S.“, *Naša sloga*, No. 51, Pula, 22 December 1905.

Statistika istarskog sveučilištnog djaštva 1907-08., *Naša sloga*, No. 8, Pula, 20 February 1908.

Stenographische Protokolle über die Sitzungen des Hauses der Abgeordneten des österreichischen Reichsrathes im Jahre 1908. XVIII. Session. VI. Band. 63. bis 82. Sitzung (S. 4217 bis 5442), Wien, 1908.

TIERNEY, Helen (ed.), *Women's Studies Encyclopedia*. Revised and Expanded Edition. A-F, Westport, 1999.

UNGER, Joseph, *System des österreichischen allgemeinen Privatrechts*, Erster Band., Leipzig, 1856.

Verordnung des Gesamtministeriums vom 29. August 1914 über die Einstellung der Wirksamkeit der Geschwornengerichte, *Reichsgesetzblatt für die im Reichsrate vertretenen Königreiche und Länder*, Jhrg. 1914, St. CXXVI, Nr. 228, Wien, 1914, p. 973.

Verordnung des Gesamtministeriums vom 6. Juli 1917 über die Außerkraftsetzung der kaiserlichen Verordnungen vom 25. Juli 1914, R. G. Bl. Nr. 156, vom 4. November 1914, R. G. Bl. Nr. 307, und vom 27. Dezember 1916, R. G. Bl. Nr. 427, *Reichsgesetzblatt für die im Reichsrate vertretenen Königreiche und Länder*, Jhrg. 1917, St. CXIX, Nr. 284, Wien, 1917, p. 701.

Verordnung des Ministeriums des Innern vom 25. März 1874, mit welcher eine Instruction für Hebammen erlassen wird, *Reichsgesetzblatt für die im Reichsrathe vertretenen Königreiche und Länder*, Jhrg. 1874, St. IX, Nr. 32, Wien, 1874, pp. 31-33.

Verordnung des Ministers des Innern und des Leiters des Justizministeriums vom 27. Juli 1917 über die Bildung der Geschwornenlisten für den Rest des Jahres 1917 und für das Jahr 1918., *Reichsgesetzblatt für die im Reichsrate vertretenen Königreiche und Länder*, Jhrg. 1917., St. CXXXIII., Nr. 317., Wien, 1917, p. 762.

WEISBROD, Carol, Images of the Woman Juror, *Harvard Women's Law Journal*, Vol. 9, 59 (1986).

WIGGERMANN, Frank, *K. u. K. Kriegsmarine und Politik. Ein Beitrag zur Geschichte der italienischen Nationalbewegung in Istrien*, Studien zur Geschichte der Österreichisch-ungarischen Monarchie, Band XXVIII., Wien, 2007.

Zur Anwendung der Strafproceßordnung. LVIII. (J.v.W.) Wo liegt die Gefahr für die Zukunft der Schwurgerichte?, *Allgemeine österreichische Gerichts-Zeitung*, Jhrg. XXVIII, Neue Folge Jhrg. XIV, Nr. 4, Wien, 12 January 1877.

The Flip Side of Freedom. The Attitude towards Pro-Hungarians in Banal Croatia in 1848/49*

*Arijana Kolak Bošnjak***

Abstract

This study examines the stance of the members and supporters of the Croatian political movement towards their political opponents, pro-Hungarians, in the context of proclaimed and promoted civil and political rights during the revolutionary year 1848/49. The stance of the Croatian public towards pro-Hungarians and the legal provisions implemented against them, which violated these so much advocated and proclaimed freedoms, are described. Finally, the context in which these violations of freedoms occurred and were justified by the supporters of the Croatian political movement is explained.

Key words: *Freedom; Pro-Hungarians; Banal Croatia; 1848/1849; legal provisions against pro-Hungarian; Croatian political movement.*

1. Introduction

The term freedom, adopted from the parole of the French Revolution of 1789, predominated in the demands made by the Croatian political movement and Croatian liberal journalism during the revolution of 1848/49. Related to the Enlightenment tradition, it generated demands for the introduction of civil rights and freedoms such as the right to personal freedom, freedom of ownership, freedom of thought, freedom of expression, freedom of the press, freedom of teaching and learning, freedom of assembly and association, equality before the law, religious and national equality, the right to cultivate one's language, nationality and identity, personal safety and safety of property, etc.[1] These were all individual natural rights, whose legalisation was demanded by the Croatian political movement, the dominant political force on the territory of Banal Croatia[2] in that time, in order to oppose the feudal and absolutist society of estates based on privileges and inequality between the people which existed in Banal Croatia until 1848, and to lay the groundwork for building a modern, civil society.[3] However, since the effort to build a civil society in Banal Croatia overlapped with the effort to establish a nation-state, individual rights or 'fundamental rights', as they were usually called in the Croatian liberal press, were linked to the collective – the national community, and were often transferred from the individual to the nation, which resulted in freedom becoming the central term linked to the Croatian nation and its national tendencies rather than to each individual human being.[4] Thus freedom which signified the self-determination of man was interpreted as the right of a nation to self-determination, while civil and political rights and freedoms that were supposed to affirm man were interpreted as a platform for the affirmation of a nation.[5] Croatian liberals also believed that civil rights weren't above the state, but are derived from it, and believed one of the most important functions of the state was to secure the legal protection of civil and political rights and individual freedoms. In other words, since the bearer of these rights and freedoms was the national community, they believed the main interest of the state was to protect and develop the community, which consists of individuals, so in this context the interest of the national community was placed above the interest i.e. the rights and

* The main idea of this article was presented at the 4th Congress of Croatian Historians in october 2012.

** Arijana Kolak Bošnjak, Ph.D., Croatian Institute of History, Republic of Croatia.

1 ŠVOGER, Vlasta, "Slobodni pojedinac u slobodnom narodu. Građanske i političke slobode i prava u hrvatskom tisku sredinom 19. stoljeća", *Ascendere historiam. Zbornik u čast Milana Kruheka*, eds. Marija Karbić, Hrvoje Kekez, Ana Novak, Zorislav Horvat, Zagreb, 2014., p. 575. KORUNIĆ, Petar, "Osnovice građanskog društva u Hrvatskoj za revolucije 1848-49.godine", *Radovi – Zavod za hrvatsku povijest*, 32-33 (1999.-2000.), p. 77., 88. FETSCHER, Iring, "Ljudska prava/Politika ljudskih prava", *Politološki rječnik: država i politika*, ed. Dieter Nohlen, Osijek-Zagreb-Split, 2001., p. 193. "Sloboda", *Politička enciklopedija*, Beograd, 1975., p. 981.

2 Banal Croatia is name for the Croatian territory in the 19th century consisting of Civil Croatia and Civil Slavonia. Banal refers to the title of ban.

3 KORUNIĆ, P., "Osnovice građanskog društva u Hrvatskoj", p. 79. FETSCHER, I., "Ljudska prava", p. 192. "Sloboda", Politička encikolopedija, 981. BENDA, Ernst "Pravna država", Politološki rječnik: država i politika, p. 342. *Hrvatski državni sabor 1848.*, sv. I, eds. Iskra Iveljić, Josip Kolanović, Nikša Stančić, Zagreb, 2001., p. 97., p. 117. ČEPULO, Dalibor, *Prava građana i moderne institucije: europska i hrvatska pravna tradicija*, Zagreb, 2003., p. 18.

4 ŠVOGER, V., "Slobodni pojedinac u slobodnom narodu", p. 576-577. KORUNIĆ, P., "Osnovice građanskog društva u Hrvatskoj", p. 93-94. MARKUS, Tomislav, "Between Revolution and legitimacy: The Croatian Political Movement of 1848-1849 and the Formation of the Croatian National Identity", *Review of Croatian History*, 1 (2009)", p. 41-43.

5 NEUMANN, Franz, "Temeljne vrednote", *Politološki rječnik: država i politika*, p. 456.

freedoms of the individual.[6] This allowed them to create new national bases, and later to form the modern Croatian nation.[7]

The term freedom, therefore, had a dominant role at that time, and the demand for its realisation was presented not only on the level of propaganda, but there were also demands for its legalisation i.e. introducing freedom as one of the most important legal elements of the new constitutions and laws, and it was supposed to become the main driving force of the emerging society. Similarly, the term freedom was also advocated through the principle of 'national sovereignty' i.e. through the right of every nation to govern itself, to have supreme authority over itself, and this was used to justify Croatian national demands.[8]

2. The political situation in Banal Croatia in 1848

Two political forces were active in Banal Croatia in 1848: the Croatian political movement and the Croatian-Hungarian Party, which ceased to be active in May 1848, when its members joined the pro-Hungarian movement if possible.

The Croatian political movement was the dominant political option and quickly managed to assert its control over most of the territory of Banal Croatia, suppressing its political opponents. It came into conflict with the pro-Hungarian movement due to its stance on the national question and the political demands stemming from its national ideology. Namely, the pro-Hungarian movement on the territory of Banal Croatia rejected the Croatian ideology in the form that was being promoted by the supporters of the Croatian political movement, the (south-) Slavic ideology which was a component of that Croatian national ideology, and the idea of Austro-Slavism as a political solution to the Slavic Question within the Monarchy.[9] Its national/ethnic identity was rooted in regionalism, with its supporters from civil Croatia identifying as Croats (*Horvati*) and those from Slavonia as Slavonians (*Slavonci*). Their political identity was based on the fact that they were members/citizens of the Hungarian state, and thus identified as Hungarians in the political sense. Their national idea was contrary to the national idea of the Croatian political movement and a fierce conflict broke out between their promoters and supporters since both national ideas had pretensions to the same territory.

Freedom was the common denominator around which both movements rallied their supporters, but since the Croatian political movement was quicker to promote its ideology and ideas at the beginning of the revolutionary movements and then gradually took political power on almost the entire territory of Banal Croatia, its understanding of freedom dominated the Croatian public space.

During the opening phase of the revolution, the realisation of the freedom of the peoples of the Monarchy was welcomed, and the freedom achieved by the Hungarians to have their independent government was greeted enthusiastically by the Croatian public. However, since the forming of an independent Croatian government was one of the main political goals of the Croatian political movement, which the Hungarians neither approved of nor allowed to be achieved, the freedom of the Hungarians soon came to be presented as a major threat to the Croats, and the Hungarians were labelled as enemies of Croatian nationality and freedom.[10] This was the logical consequence of a clash of two national ideologies which pretended to the same territory.

Pro-Hungarians on the territory of Banal Croatia linked the achieved freedoms with the Hungarian revolution in their propaganda activities, from the forming of an independent Hungarian government that they recognized and associated with national/ethnic freedom, to the abolishment of serfdom, which they considered an exclusive achievement of Hungarian liberal politics.[11] Since they were the supporters of the Hungarian national ideology on the territory of Banal Croatia, they were considered and publically presented as enemies of freedom, which actually served as an excuse to strip them of their political and civil freedoms and rights by calling for the complete suppression of their political activities.

3. The flip side of freedom

Members of the Croatian-Hungarian Party and pro-Hungarian movement in Banal Croatia were politically active until May 1848. Their political activity was expressed in several ways. First of all, it should be noted that they controlled the Zagreb County, the largest and most influential local administration in the political life of Banal Croatia, which was exceptionally important in the political wrangling of that time since it was precisely there that two existing political forces were concentrated: the Croatian political movement and the Croatian-Hungarian Party. Therefore, the Croatian-Hungarian Party represented political power on the local level. However, since the Zagreb County was the largest county by area and population, it should have sent the largest number of representatives to the Croatian Parliament, which means the members of the Croatian-Hungarian Party could have had a much greater significance on a broader level. But since the ruler had forbidden a part of its membership from participating in the working of the parliament back in 1845, the members of the Croatian-Hungarian Party didn't participate at the parliamentary sessions, conducting their political activities through the county, directing it towards the Hungarian Parliament and Hungarian counties.

They were also active through agitating for their political ideas among the populace, having no other means to promote

[6] ŠVOGER, V., "Slobodni pojedinac u slobodnom narodu", p. 577. ČEPULO, D., *Prava građana i moderne institucije*, p. 11., 36., 42. KORUNIĆ, P., "Osnovice građanskog društva u Hrvatskoj", p. 93.

[7] KORUNIĆ, P., "Osnovice građanskog društva u Hrvatskoj", p. 84, 86.

[8] KORUNIĆ, P., "Osnovice građanskog društva u Hrvatskoj", p. 95.

[9] MARKUS, T., "Between Revolution and legitimacy", p. 19-21. MARKUS, T., *Solidarnost i sukob interesa na slavenskom jugu. Južni Slaveni u hrvatskoj političkoj misli 1844.-1918.*, Zagreb, 2012., p. 20-26. ŠIDAK, Jaroslav, "Austroslavizam i Slavenski kongres u Pragu", *Studije iz hrvatske povijesti za revolucije 1848-49.*, Zagreb, 1979., p. 95-114.

[10] *Novine dalmatinsko-hčrvatsko-slavonske*, 30. 3. 1848., nr. 28, p. 110. and 22. 4. 1848., nr. 38, p. 149.

[11] ŠOKČEVIĆ, Dinko, *Hrvati u očima Mađara, Mađari u očima Hrvata. Kako se u pogledu preko Drave mijenjala slika drugoga*, Zagreb, 2006., p. 111-112.

themselves, such as a newspaper through which they would promote their political idea.[12]

Apart from that, they also cooperated with the Hungarian revolutionary movement and its promoters in various ways, such as direct contact between individuals and publishing articles in the Hungarian press.[13]

Until May 1848 members of the Croatian-Hungarian Party continued to gather in their society, the Zagreb Casino, where they discussed amongst themselves their political ideas and the actions they should take against their political opponents, and where they hosted politically like-minded people from Hungary.[14]

Their political activity, most of all their agitation, was very successful because already in late March 1848 the members and supporters of the Croatian political movement put forth the first ideas on how to limit it. Namely, the consequences of their successful political activity could have had a very negative effect on the Croatian political movement, i.e. they could have caused the destabilisation of the Croatian political movement's power, so that the Croatian-Hungarian Party's members' freedom of assembly and association became more and more loudly disputed, and measures on how to suppress them were proposed.

The so-called *magyarons* (pro-Hungarians) i.e. the members of the Croatian-Hungarian Party and pro-Hungarians were subjected to ridicule in the political press as early as March 1848. They were presented in a very negative light, accused of impeding the development of freedom and the common good, of being a threat to personal safety, and most of all of being traitors to their own nation and homeland, which they actively undermined.[15] Therefore, they were stigmatized by having a public image of those who threaten the freedom of others and there were calls to stop their activities by any means necessary.[16] This was a prelude to and justification for much more concrete violations of the advocated freedom of opinion, assembly and association, which began in April and escalated in early May 1848. Since pro-Hungarians in Banal Croatia could articulate their political opinion and achieve communication with the broader public as well as mobilise a part of the population in their support only through these forms of free activity, such portrayals were aimed towards suppressing their political activity.[17]

Even the promoted idea of personal freedom and safety became questionable at a very early date. Namely, when a deputation of the Security Committee from Pest arrived at the Zagreb Casino on 17 April in order to clarify the proclamations the Committee had directed towards the Croats and Slavonians in March 1848 and win them over for a common struggle against the 'Viennese bureaucracy', they were met by an angry mob which demanded not only the expulsion of the members of the Hungarian deputation, but also the harsh sanctioning of the members of the Casino. Although the investigators of the Zagreb City Security Committee didn't find anything incriminating in their meeting, the members of the Hungarian deputation were forced to leave the next day and the consequences of this meeting for the members of the Casino i.e. the Croatian-Hungarian Party were very inconvenient. Namely, accusations were raised against several of them and they were subject to investigations. Dragutin Diković was accused of encouraging Hungarian emissaries when they were leaving Zagreb by proclaiming that they would certainly receive compensation for the insults they had been subjected to and that their mission would be more successful in this way. Dragutin Laslović was accused of threatening the ban that he wouldn't remain ban much longer, while Josip Černolatec was accused of swearing at the National Guard when they passed by his house on one occasion.[18]

All accusations were proven false by the investigations, but their consequences, together with the constant vilification of the pro-Hungarians in the political press, were such that there was a concern for their personal safety. This wasn't without reason, since cases of physical assaults on members of the Hungarian-Croatian party soon began occurring. Attacks on political opponents were conducted both by individuals and the National Guard. Josip Čubeković testified about this in his protest addressed to the Zagreb City Government, in which he condemned the behaviour of the National Guard towards him. He protested against his arrest in the Casino on 5 May 1848, where he had been dining in the company of several 'true Croats', and the violence that had been done to him on that occasion. Although Čubeković requested protection from the City Government, it was denied, and he appeared on a list of emigrants soon after. Other Croatian emigrants also later left the country claiming fear for their personal safety as their reason for leaving.[19]

Such an attitude towards members of the Croatian-Hungarian Party was the result of political rivalry and fear of the success of the Croatian-Hungarian Party that was present among the members of the Croatian political movement, and which led to the introduction of legal provisions on courts-martial. Item 2 of the Provision of 27 April 1848 states that all those who mislead the rural nobility telling them that the 'Illyrians' (supporters of the Illyrian Party, renamed the People's Party in 1843., the leading party in the Croatian political movement) are to blame for their obligation to pay taxes, those who mislead the peasants by telling they are Hungarians rather than Croats or Slavonians, or that the Hungarian nobility have freed them from corvée, which the Croatian nobility want to reintroduce, and those who spread lies that the Croatian nobility had kept silent about the

[12] KOLAK BOŠNJAK, Arijana, *Horvatsko-vugerska stranka 1841.-1848.*, Zagreb, 2012. (unpublished, Ph.D. Thesis), p. 185-189.
[13] ŠOKČEVIĆ, D., *Hrvati u očima Mađara, Mađari u očima Hrvata*, p. 96.
[14] KOLAK BOŠNJAK, A., *Horvatsko-vugerska stranka 1841.-1848.*, p. 188-190.
[15] KOLAK, Arijana, *O Mađarima i mađarskoj politici u javnosti banske Hrvatske 1848.-49.*, (unpublished Master's Thesis), Zagreb, 2006., p. 96-97.
[16] KOLAK, A., *O Mađarima i mađarskoj politici*, p. 100-101.
[17] ČEPULO, D., *Prava građana i moderne institucije*, p. 120., 131.
[18] HR-DAZ (Croatia, State Archives in Zagreb), PGZ (Zagreb City Government), f. 1, Upravni spisi (Administrative records), box 1634, nr. 1471
[19] HR-HDA (Croatia, Croatian State Archives), Ban Kraljevina Hrvatske, Dalmacije i Slavonije (Ban of The Kingdoms of Croatia, Dalmatia and Slavonia), f. 10, box 156., nr. 592.

fact that the peasants had already received rights and freedoms many years ago.[20] These parts of the Provision referred to the members and supporters of the Croatian-Hungarian Party because the aforementioned was part of their political propaganda rhetoric, i.e. agitation.

That was the first legal provision which violated, one could say annulled, the achieved freedom of speech, most of all the freedom to promote one's own political idea, which was later most loudly demanded by members of the Croatian political movement.[21] This is visible from the part of that provision that prescribes court-martialling for those who spread the Hungarian national idea at the expense of the Croatian national idea among the peasantry.

Violence towards members of the Croatian-Hungarian Party became increasingly strong, escalating on 8 May 1848 when their Casino was closed and the Zagreb County officials were forcibly sacked due to their pro-Hungarian orientation. This resulted in the breakup of the Croatian-Hungarian Party and the Croatian political movement taking complete control of Civil Croatia. Since the Croatian political movement then entered into a more radical phase when it refused to allow its political opponents freedom of activity, believing them to be a threat to their political goals, most members of the Croatian-Hungarian Party – also fearing for their personal safety – left the country, emigrating to Hungary or the Austrian hereditary lands. Most of those who remained in Banal Croatia became politically passive, save for a few individuals who continued to act in secret.[22] The advocated and proclaimed ideas on the freedom of speech, association and assembly were therefore completely defeated.

All these actions that deprived the members of the Croatian-Hungarian Party of their freedom of political action were justified by national/ethnic interests, i.e. the fear that national/ethnic freedoms may be compromised, and were legitimised by accusations of anti-national activity. Such behaviour was the consequence of the simultaneous process of building a civil society and a Croatian national community on the territory of Banal Croatia, in which civil liberties such as freedom i.e. its various aspects, were transferred to a new form of 'imagined' community – the nation – which then received precedence over the rights of the individual and gave rise to the interpretation that the freedom of the individual can only be achieved in a free nation.[23] As the nation received precedence over the individual, the freedom of the nation / ethnic community was also put before the freedom of the individual, i.e. the freedom of the individual was sacrificed in the name of the freedom of the nation / ethnic community.

The emigration of pro-Hungarians resonated very negatively in Banal Croatia. It was seen as proof that the so-called *magyarons* are traitors to their homeland and nation. Both they and those pro-Hungarians who hadn't left the country were denounced even more harshly in the political press. New proposals on how to suppress their activities were made and some legal measures were introduced in an effort to sanction their political activity. Local authorities were quicker to introduce measures for the suppression of pro-Hungarians and punishment of émigrés than state organs.[24] For example, a conclusion titled 'On General Security' was adopted at the grand assembly of the Zagreb County in May 1848 in which it was specified that all those who had left the homeland should – through the press – be invited to return and join the Croatian political movement with guarantees of personal safety and the safety of their property, with a deadline set for 5 June 1848 (the day when the Croatian Parliament was supposed come into session).[25] The Conclusion also stated that, should the émigrés fail to return by the mentioned deadline, they will be considered enemies of the nation and betrayers of the homeland, and that severe measures would be taken against them. It is precisely from this Conclusion that the pressure the Croatian political movement exerted against its political opponents, curtailing their civil and political rights and freedoms, can best be seen. It clearly shows that the advocated and proclaimed freedom of speech, association and assembly as well as personal safety didn't apply in practice and that the freedom of the nation / ethnic community was put above the freedom of the individual. Namely, even though the émigrés were invited to return to their homeland, personal safety and safety of their property was guaranteed only should they join the Croatian political movement and embrace its ideology. Therefore, they were denied the opportunity to continue expressing their political views.

A conclusion against pro-Hungarians was adopted at a session of the Zagreb City Council on 23 June 1848, by which it was determined that the Security Committee is to take away the weapons possessed by all pro-Hungarians, and that those who dared to speak out against the ban should be questioned and severely sanctioned. Despite these local authorities' conclusions, the Croatian Parliament enacted only one law article aimed against pro-Hungarians – art. 32§ 9, which determined that emigrants must pay double war taxes.[26]

For a long time ban Jelačić put off his approval of individual local authorities against pro-Hungarians, which caused some friction between him and the Banal Council on the one hand and the local authorities on the other. I believe the motive behind Jelačić's behaviour can be found in his tactic of waiting for signals from Vienna rather than acting in line with ideas of freedom and equality. Thus, until the outbreak of war against the Hungarians, i.e. when the Hungarians were still acting law-

[20] *Hrvatski državni sabor 1848.*, sv. I., p. 179-180.
[21] KORUNIĆ, P., "Osnovice građanskog društva u Hrvatskoj", p. 98-99.
[22] About Croatian emigrants 1848 see KOŠĆAK, Vladimir, "Madžaronska emigracija 1848.", *Historijski zbornik* nr. 1-4 (1950.), p.
[23] ŠOKČEVIĆ, D., *Hrvati u očima Mađara, Mađari u očima Hrvata*, p. 117.
[24] State government was represented by the Ban's Council, which existed as the Croatian government; ban Jelačić, who was given dictatorial powers at the Parliament of 1848; and the Croatian Parliament, which in June 1848 had the form of a modern representative body. Local government was represented by the counties, which were very active in introducing measures against pro-Hungarians, and city administrations.
[25] "Iz skupštine Zagrebačke županije", *Novine dalmatinsko-hčrvatsko-slavonske*, 27. 5. 1848., nr. 53, p. 214.
[26] *Hrvatski državni sabor 1848.*, sv. I, p. 576. KOLAK BOŠNJAK, A., *Horvatsko-vugerska stranka*, p. 206-207.

fully and had the official backing of the court in Vienna, Jelačić refused to take harsher measures against pro-Hungarians, such as those prohibiting the return of émigrés or introducing the sequestration of their property, not wishing to infringe on the king's authority or call into question the existing social order by his actions. He therefore used milder methods against the pro-Hungarians both at home and abroad. In August 1848 he ordered that all of them have to sign a so-called *revers* or *zavez*, a written pledge of loyalty to the homeland that they shall not act against it or its people. The pledge read as follows: 'I, N, give my firm and honest word, I pledge before God and the Fatherland, that I shall neither by word or by deed do anything against my people and Homeland, and thus anything that would be harmful to the supreme government or the governments of our individual kingdoms; indeed I promise I shall in every way and everywhere act as an honest and loyal son of this homeland. And should I break this pledge and my promise, may the homeland put me before the court and sentence me according to the extant standing and emergency laws as a breaker of my honest word and my pledge sworn before God and my homeland.'[27] That same month he also introduced surveillance of the post with the goal of catching suspicious letters by émigrés and local political opponents,[28] so that neither the right to privacy nor the right to private correspondence were respected.

However, increasingly harsher measures against emigrants were introduced following the outbreak of war with Hungary in September 1848. In late September / early October 1848, the Virovitica and Zagreb Counties enacted a decision which forbade the return of émigrés to their homeland. Under their pressure, and also due to the change of the Viennese court's stance towards the Hungarians and under the influence of the events in Vienna in October 1848, the Banal Council finally enacted a decision prescribing measures against the émigrés, the most important of which was that they were banned from returning to their homeland.[29]

Certain measures against pro-Hungarians in the country were also introduced. They were first placed under surveillance as suspicious persons, i.e. their activities and behaviour were monitored with special care, and anyone accused of or caught spreading pro-Hungarian propaganda or acting against the Croatian political movement would be arrested and jailed until proven guilty. No other provisions against them were prescribed, most likely because they were believed to be under sufficient surveillance, but some measures prescribed against émigrés also affected the pro-Hungarians who had remained in the country. These included the sequestration of property and paying double war taxes.[30]

New violations of the advocated freedoms became apparent in the decision to sequester the property of émigrés. The decision to temporarily take away the right to control one's own property was introduced in individual cases as early as May 1848.[31] The Banal Council resisted this idea for a long time, calling upon the rights of individuals and the need to protect private property, but eventually legalized it amid the changing circumstances in December 1848. According to the decision of the Banal Council, the provisions on sequestration were to apply only to those émigrés who could be proved to have left their homeland for Hungary in order to join the Hungarian army and thus act not only against their homeland, but also the king. However, this decision of the Banal Council wasn't respected and all émigré property ended up being sequestered, even that belonging to their family members who hadn't left the country.[32]

4. Concluding remarks

The first half of the 19th century in Hungary and Banal Croatia was a time of strong national fervour, in which national movements took to the political scene and became elements which would both advocate the freedom of the individual and bring it into question. Namely, the national movements in Central Europe saw the new state frameworks they advocated primarily in accordance with nations as collectives marked by a specific language and culture, which was in contrast to similar movements in Western Europe, which based theirs on the idea of the totality of the citizen-individual. They therefore gave precedence to the nation rather than the individual when advocating civil and political freedoms and rights. So, in the context of the national struggle of individual ethnic communities, the freedom of the individual was subordinated to the idea of national freedom, meaning the individual could only achieve his freedom as part of a collective – the nation / ethnic community.[33] This partially led to a discrepancy between the theory and practice of what was being advocated and the attitude towards, for example, political dissidents who were, for the most part, condemned as anti-national elements.[34] This relationship can be very clearly seen in the case of Banal Croatia. Its consequences were most strongly felt during the revolutionary period from 1848 – 1849, i.e. during the war between the Croats and Hungarians from September 1848 until August 1849. It was then that the demanded and proclaimed freedoms advocated by the Croatian

[27] HR-HDA, Banska vlada (Banal Government), f. 68, Presidium, box 38, nr. 65.

[28] HR-HDA-68, Presidium, box 38, nr. 72, nr. 76, nr. 80. Abuse of this decision was so great that, in February 1849, Jelačić demanded the Banal Council issue an order for the protection of the secrecy of those letters which weren't suspicious i.e. those which didn't originate from Hungry and those which weren't addressed to suspicious persons, and even those could only be opened in the presence of an appointed supervisor. MARKUS, T., *Korespondencija bana Jelačića i Banskoga vijeća 1848.-1850.*, Zagreb, 1998., p. 142.

[29] KOLAK BOŠNJAK, A., *Horvatsko-vugerska stranka 1841.-1848.*, p. 212-215.

[30] KOŠĆAK, V., "Madžaronska emigracija", p. 49-50.

[31] KOLAK BOŠNJAK, A., *Horvatsko-vugerska stranka*, p. 208.

[32] KOLAK BOŠNJAK, A., *Horvatsko-vugerska stranka*, p. 208-211.

[33] STANČIĆ, Nikša, *Hrvatska nacija i nacionalizam u 19. i 20. stoljeću*, Zagreb, 2002., p. 29, 40, 111.

[34] WANDYCZ, Piotr S., *Cijena slobode. Povijest Srednjoistočne Europe od srednjega vijeka do danas*, Zagreb, 2004., p. 9. STANČIĆ, N., *Hrvatska nacija i nacionalizam*, p. 30.

political movement were brought into question through its attitude towards political opponents, pro-Hungarians. Such actions against the pro-Hungarians received support in official policy, through legal provisions which not only violated the loudly advocated and proclaimed ideas about the freedom of thinking, speech, assembly and association, but also those about equality and the rights of individuals, individual freedom and the safety of property. In addition to the mentioned explanation for such treatment of political opponents in Banal Croatia i.e. through defining and understanding freedom according to the political goals of the Croatian political movement, the most important of which was the affirmation of the Croatian national identity and statehood in the context of the dominant role of the collective – nation over the individual – citizen, we can also find the causes of the actions of the Croatian political movement in the abnormal circumstances, which led to the introduction of a state of emergency. Despite the fact that there were no military conflicts on the territory of Banal Croatia, there existed a powerful war psychosis since soldiers were conscripted from its population, military units from the Military Frontier moved through it, and the constant threat that the Hungarians would attack Banal Croatia – regardless of its plausibility – strengthened this psychosis. The efforts of individuals who in the Croatian press advocated war against the Hungarians as a solution to Croatian-Hungarian disagreements should also not be forgotten in this context. War psychosis was present on the territory of Banal Croatia as early as April 1848, and only grew by September, to reach its peak in February 1849, which was reflected in the Croatian press. Its influence on those who were considered not only political enemies, but also traitors to the homeland and ethnic community, could be disastrous.

Such an attitude towards political opponents was the result of the stance of the bourgeoisie intelligentsia gathered around the Croatian political movement towards those they labelled as representatives of the old regime. Namely, supporters of the Croatian political movement accused the members of the Croatian-Hungarian Party and other pro-Hungarians that they were fighting for the preservation of the feudal system. These claims were substantiated by the fact that, even in the 1840 s, the leadership and most of the members and supporters of the Croatian-Hungarian Party was composed of nobles, who were interested in preserving their estate-related freedom, i.e. those freedoms that the nobility possessed in relation to the ruler, in contrast to the civil and political liberties that were supposed to apply to all individuals.[35] Of course, the old feudal system was also labelled as illiberal, despotic, marked by the political arbitrariness of the ruler, his bureaucracy and privileged estates, and the same applied to the proponents of that system. Accordingly, the measures taken against pro-Hungarians in Banal Croatia in 1848 were justified by opposition to the old society of estates and the struggle against its reestablishment.[36]

Regarding the achieved level of political culture as defined by Tomislav Markus,[37] we can conclude that, taking into account the achieved level of tolerance, political and individual freedom, there was no real progress regarding the right or freedom to promote a 'different opinion' i.e. the right to freedom of speech and expression. Although this can be justified and explained by the wartime circumstances, it should of course be noted that war between Croatia and Hungary broke out only in autumn 1848, while the mentioned freedoms of political opponents of the Croatian political movement were violated much earlier, during the spring and summer of that same year, not only through the behaviour towards them, but also through legal provisions. Individual rights in Banal Croatia and among most national movements in the Habsburg Monarchy – even among the Hungarians who had emphasised these rights in their idea of a political nation – were (albeit only partially among the Hungarians) subordinated to the collective rights of the community,[38] while the measures taken against political dissidents were the reflection of a well-ingrained model of behaviour, which was implemented by both Austrian and Hungarian authorities and from which the Croatian political movement didn't deviate with its violations of the sought and proclaimed freedoms.[39]

Although the issue of civil and political rights and freedoms was constantly discussed in Banal Croatia – especially in the liberal press, but also in the legislative bodies – and political and social changes were implemented to a certain degree, it appears that we can fit the Croatian political movement's stance towards its political opponents i.e. pro-Hungarians into the syntagm 'unfinished revolution',[40] since the introduction of civil and political rights and freedoms in this context was not achieved.[41]

[35] About social structure of Croatain-Hungarian Party see KOLAK BOŠNJAK, A., "Društvena struktura Horvatsko-vugerske stranke", *Povijesni prilozi*, nr. 48 (2015), p. 153-174.

[36] MARKUS, T., *Hrvatski politički pokret 1848.-1849. godine*, p. 394-395, 397. ČEPULO, D., *Prava građana i moderne institucije*, p. 18.

[37] '(…) a certain value which applies to the level of achieved tolerance, political and individual freedom and freedom of thought of a certain conception of society, i.e. the actual (non-)realisation of these values.' MARKUS, T., *Hrvatski politički pokret*, p. 379.

[38] ŠOKČEVIĆ, D., *Mađari u očima Hrvata, Hrvati u očima Mađara*, p. 70.

[39] MARKUS, T., „Between Revolution and Legitimacy", p. 31.

[40] STANČIĆ, N., „Hrvatski pokret i godina 1848. u hrvatskoj povijesti 19. stoljeća: epohalni proboj, dometi, ograničenja", *Hrvatska 1848. i 1849.: Zbornik radova*, ed. Mirko Valetić, Zagreb, 2001., p. 11-34.

[41] MARKUS, T., „Between revolution and legitimacy", p. 43-44. ČEPULO, D., *Prava građana i moderne institucije*, p. 92-94.

Some Reflections on the Delicts of the First Criminal Code of the Republic of Albania

Engjëll Likmeta *

Abstract

The Criminal Code of 1928 or Zog's Criminal Code has been initially published in 1929, about two years after the decree of June the 3d, 1927. The Code entered into force on January 1, 1928, together with the relevant appendixes. With the adoption of the Code, the Albanian state had thus as the main source of the criminal justice its own criminal law, replacing thus once and for all the Turkish Criminal Code of 1858. This was the first Criminal Code of the period of post–independence of Albania. In this paper work will be taken into analysis the 1928 Code and the way offences were qualified, including: offenses against the state security, offenses against freedom, offenses against the public administration, offenses against the justice administration, offenses against the public order; offenses against religion; offenses against the public property, offenses against the family order and good habits, offenses against the person, offenses against the property. For weach group of these offenses, will be taken into analysis the objective and subjective side of the offences, as well as the sanctiones provided by the code. This paper aims to show that the Criminal Code of 1928 was a positive effort to bring the Western experience of the time in our country, in the legal field, which back then was still under the dictate of the Ottoman laws.

Key words: *Delicts; Criminal code; Offences.*

1. Introduction

The initiative for writing this working paper was born thanks to a request for publication of scientific articles coming from the scientific journal: The *Journal on European History of Law*. Aiming the participation with a paper, it came to my mind the first Criminal Code of the period of post–independence of Albania. This code was a positive effort to bring the Western experience of the time in our country, in the legal field, which back then was still under the dictate of the Ottoman laws, even though years had been passed on since the secession from the Ottoman Empire.

During the years of the Albanian Kingdom a series of legislative reforms were conducted. The King Zog I, since he was the governor of the Republic, had asked for a deep reform of the legislation [1]. Thus, in the framework of the general legislative reform that took place from 1926 to 1929, we can mention: the new law of justice organization submitted for review and approval in the Parliament [2], The Criminal Code, the entry into force of the Albanian Civil Code on April the 1st, 1929, which replaced the Ottoman law of 1876, as well as the new Commercial Code which came into force in 1932 [3].

The Criminal Code has been initially issued in 1929, about two years after the decree of June the 3d, 1927. The Code entered into force on January 1, 1928, together with the relevant appendixes [4]. The Code is otherwise known as the Criminal Code of 1928 or Zog's Code. With the adoption of the Code, the Albanian state had thus as the main source of the criminal justice its own criminal law, replacing thus once and for all the Turkish Criminal Code of 1858. The Albanian Criminal Code of 1928 was divided into three parts. The first book, with 10 titles predicted the guilts and sanctions. The second book, with 10 titles and 65 chapters predicted the delicts. The third book with 4 (four) titles and 25 chapters predicted the contraventions [5].

The Albanian legal doctrine and the Criminal Code of 1928 since the first provisions defined that: "[...] no one could be punished for an act under which the law did not provide as a criminal act. Criminal acts were divided into offences and contraventions" [6]. The main penalties for offences under the Criminal Code of the Albanian Kingdom were: death penalty; sentence to life imprisonment; severe imprisonment; imprisonment; deportation; severe fines; as well as prohibition from high posts [7]. Whereas for contraventions penalties were: mild

* Engjëll Likmeta, PhD., Department of Criminal Law, Faculty of Law, University of Tirana, Albania.

1 DERVISHI, Kastriot., *The history of the Albanian state,* Publishing house "55", Tirana, 2006, p. 285.

2 ANASTASI, Aurela, *Political institutions and constitutional rights in Albania*, "Luarasi" Publishing house, Tirana, 1998, p. 247.

3 DERVISHI, Kastriot, *The history of the Albanian state,* Publishing house "55", Tirana, 2006, p. 285.

4 DERVISHI, Kastriot, *The history of the Albanian state,* Publishing house "55", Tirana, 2006, p. 285.

5 ELEZI, Ismet, & ELEZI, Ela, *The history of criminal law*, University Book Publishing House, Tirana, 2010, p. 120.

6 ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 12.

7 ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 12.

imprisonment; mild fines and suspension from a profession or skill. The Criminal Code in its provisions defined as well the meaning and penalties for crimes against personal freedom. Within penalties against the personal freedom were included all types of imprisonment (from life- to mild imprisonment) and deportation[8]. In the Criminal Code of 1927, was emphasized that the age of criminal responsibility was 10 years old. Furthermore, the Code sanctioned that no person could be punished if he/she had reached the age of 10 years, and was irresponsible. Thus, it was proved that there had not been a evaluative mental strength. The Code accepted and recognized the sense of cooperation in fault. According to the Code, each of the collaborators was penalized with the punishment set for the committed offence[9].

The 1928 Code qualified offences in several main types including: offenses against the state security, offenses against freedom, offenses against the public administration, offenses against the justice administration, offenses against the public order; offenses against religion; offenses against the public property, offenses against the family order and good habits, offenses against the person, offenses against the property.

2. Offences against state security

Offences against state security did include offences against homeland, against state power, against foreign states, as well as against state's heads and representatives.

The group object of provisions against the state security was the protection of the territorial security, the progress and the normal functioning of the albanian state, which could be violated by illegal actions and nonactions.

As far as the objective side is concerned, offences against the state could be made by active actions which violated the territorial sovereignty partially or completely. In these active actions were included the capitulation of vital or military and strategic locations of Albanian State in time of war, capitulation of the albanian military logistics, favoring the military operations of the enemy, giving or disclosing military information to the enemy, as well as the destruction of the fortifications and means of rail, air and maritime transport. Certain inactive actions such as delay or detention in conducting military operations against the enemy, opposition of the ordinances or promulgated decisions in time of war, enemy's agent housing, were also included in the objective side view of these offences.

The Criminal Code made no distinction as far as the birth of criminal responsibility is concerned for the subjects of these criminal offences. Subjects were not only the Albanian citizens but also foreigners who ran their criminal acts against our country in wartime or peacetime. Penal norms of the Code of 1928 spread their defense effects even on other states' national interests as well, which were allied with our state[10].

In this group of penal offenses it draws our attention the assiduity that the Albanian legislator of that period showed, offering and guaranteeing legal – penal protection of the public interest. Thus, Article 120 of the Code stated that: "Anyone who is in charge of the Albanian government for making an agreement with a foreign government, and is noted unfaithful while performing the duties in such a way that can harm the public interest, is punished by severe imprisonment or imprisonment from three to fifteen years". Likewise, the penal norms took in defense even the Albanian state symbols from the public desecration that could be done by different individuals. The culprit in such a case was punished with imprisonment from three to twenty months and severe fine from one hundred to two thousand gold francs (CHF). Furthermore, to ensure national security protection, the lawmaker went even further. Thus, the Albanian citizens were sentenced to severe fines from one hundred to three thousand gold francs in case of benefits such as pensions, decorations, etc. from a country that was at war with the Albanian state.

3. Offenses against freedom

Offenses against freedom were provided in the second title of the second book of the Criminal Code of 1927. They included: offenses against political freedom, against freedom of religion and conscience, offenses against personal freedom; offenses against privacy which included in itself even offences against nonvilolence of residence; and offenses against the freedom of labor.

Through these penal legal provisions was intended the defense of every normal practise of any public right, as could be: practising of political activities, religious ceremonies, personal freedoms, the right of residence, the right of a private life, confidentiality of correspondence, the right to exercise commercial activities, etc. The penal norms also used to protect human dignity, places of worship, cemeteries, etc.

In view of the objective side, these offenses were committed with active actions such as: the use of acts of violence, threats, insults, humiliation, fraud, damage, destruction of places of worship by dissemination or damage, destruction of personal data by restricting the freedom of exercising industrial and commercial activities etc. Such delicts were executed even by inaction as well, as may be the case for the inaction or delay of the release of prisoners in institutions of punishment from the responsible person who had become aware of an illegal imprisonment, nonreference of the concrete case to the competent authority organ, the refusal to obey the command of executing a release in penitentiary institutions, etc. The means used in these cases by the perpetrator could be different. The Albanian lawmaker at that time, in article 171 of the Code defined the meaning of the term "gun". According to it, with the term gun were understood the secret weapons, and all the tools that could be used for an attack and were held in a way that frightened people.

Even in this group of penal offenses, the subject, the perpetrator of the offense could also be particular, that person who, by law had knowledge of the secret correspondence, due to qualities as a public official, and used to violate the rights

[8] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 12.
[9] LIKMETA, Engjëll, *The Legal-Criminal protection of property*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor" scientific degree topic, Tirana, 2014, p. 109.
[10] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 70.

and fundamental freedoms protected by the Code. Similar to offenses against state security, even for this group of penal offences, the motive did not have importance for the purposes of legal responsability.

The legal-penal norms of that time also protected the person's residence from criminal actions. The culprit was punished with severe imprisonment ranging from one to six years and a fine not less than two hundred gold francs, if the offense took place in view of the objective side at night, with violence, with weapons, and by an organized group [11]. While in article 174 of the same Code was stated that subject of the offense was even the state officialdom. This means that for offenses regarding residence violation the penal law provided as a subject of crime not only a general subject, but even particular subject as well. General subjects were sanctioned according to article 173 of the Code.

The provisions on criminal acts directed against the freedom of the person were provided in the first parts of the Code. This attracts our attention and shows the particular importance given by the lawmakers in protecting liberty in general as well as the private correspondence in particular as a form where personal freedom finds a way [12]. This group of rights, as mentioned and seen above, in an analytical overview, was reserved a special place, not only on the Criminal Code but also on the Basic Statute of the Albanian Kingdom. Thus, in its articles, the Statute sanctioned freedom as one of the natural rights for everyone. Home and secrecy of the telephone and telegrapphic correspodence was inviolable (Fundamental Statute of the Albanian Kingdom).

4. Offenses against public administration

Offenses against public administration were sanctioned in the third title of the second book of the Criminal Code. These offenses included: Speculation of personnel of public administration; violence, bribery, abuse of the authority given to the public personnel and breach of duties relating thereto; embezzlement of public and honor signs; violence and rejection of a state functionary, whether be a legislator, offenses against persons who had a public authority; the breaking of seals and removal from places of public deposits; bounce to have influence at public officials; default of obligations or fraud with public supplies [13].

Abusing of powers from the personnel was envisaged in the first chapter of this title of the Code.

The group object of these penal offenses was the protection of public and private asset (property) from criminal action or inactions.

The subject in these offenses was particular, the civil official. The latter, impinged the movable and immovable property through criminal actions and inactions such as: concealment, acquisition of movable property, maintaining economic balance – irregularly or falsely, delay or negligence in the performance of duty by the person who was charged by law etc. Penalties for the culprit, for this group of offenses, were penalty by fine and prohibition of exercising public functions. The punishment of imprisonment was applicable to some of these offenses as it was conducting illegal actions in public procurements, embezzlement of revenues from employees's payments, or the use of labour force in favor of private interests and not of the public one by the public official.

The Criminal Code, punished not just the public official, who benefited unfairly for himself or for others, cash or other benefits, but also the person who mediated and persuaded the giving of benefits (bribery). The culprit in such a case, referred to Article 196 of the Code, was punished with imprisonment from one to six months, was fined, as well as was prohibited to exerce public functions for a certain time. The punishment was greater if from the criminal act had come these consequences: profitting of a job, a honorary title, pension etc. In offenses against public administration were involved even the misuse of duties by the clergy in the exercise of their functions. Thus, it was forbidden and punishable by the penal law, that in the exercise of his functions, the cleric publicly and globally violated the institutions or state laws. For such an act he could be punished with imprisonment up to one year and a severe fine of one thousand gold francs [14]. The Criminal Code took also under protection even the public authority in exercise of its functions. Thus, the penal norms used to protect from the criminal acts, such as threat or use of violence in order to benefit unfairly, the employees of state, member of the legislative chamber, members of judicial, political or administrative bodies.

The culprit in these cases was punished with severe imprisonment. This punishment for the guilty meant a sentence of six months to five years if the offense was committed intentionally by more than three persons in possesion of weapons, and a sentence from three to fifteen years inprisonment if the crime was carried out by an organized criminal group, regardless of whether or not they were armed [15]. With its norms, the Criminal Code, defended even the subjects treated above, even in case of breach of honor or dignity due to exercise of their functions. An interesting fact was that the Code under article 233 punished even the person who said to have an impact on a public functionary, in order to benefit for himself or others.

5. Offenses against the administration of justice

Rejection of a function defined by law; fault and person's simulation; defamation, lying before a judicial authority; abuse of the attorneys and other representatives; supporting of a guilty person and ensuring shelter to him; escapes and negligences in suffering the punishment; self-justice, were a series of penal offenses figures established by the Criminal Code, that were part of the offences against the administration of justice. Penal norms

[11] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 92.
[12] KAMBELLARI, Evisa, *Protecting the security of communications in the traditional context and reality of information technology*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor" scientific degree topic, Tirana, 2014, p. 16.
[13] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 97-123.
[14] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 109.
[15] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 112.

punished the person who opposed, refused participation in a trial as a witness or expert. It was punished as well the person appearing as an offenser but that he actually had not committed a criminal act, or that against him was ready to be executed a penal punishment which had to be applied against another person instead. The punishment scale was in proportion to the consequence coming from the offenses in question. Also, it was punished even the person who incited, commited false testimony, expertises or interpretations. In their entirety, the penal norms were intended to protect the development of a fair legal process, including here even the preliminary investigation stage. The law cared to ensure the exercising of functions, in accordance with the legislation in force by all the actors of the system administration and providers of justice. Seen from this point of view, the code condemned also the legal counsel who misused his duty of representation, the trust given by the party claiming protection in the judicial process, using actions such as fraud, deals with the opposing party in the process, and that in the final analysis, harmed the party who had entrusted the case.

Article 259 of the Criminal Code, in function of the implementation of criminal justice penalized any person who supported the offender to escape the execution of the given sentence. This offense under the law of the time, in view of the objective side could be accomplished in different ways. Thus, the fault in question, could be accomplished by hiding the offender, covering, altering, or damaging the traces of the crime against the competent authority conducting the prosecution or execution of the given decision. But, for the purposes of legal qualification of the offense, in order to be in front of this offense, it was required by the legislator to had been committed an offense for which it was provided a punishment not less than imprisonment. Such a condition, hints that this act or offense was not applicable in the case of a penal infraction. Giving support and shelter to the author of an offense was punished with heavy imprisonment or imprisonment up to five years, provided that the punishment for the guilty would not pass in time, half of the given punishment for the offender he had supported.

The penal norms punished the support of the author even when against him had started or not the prosecution as well as when he was in the penitentiary institutions and he fleed, escaped or dodge from the execution of the given sentence. For the support of the offender, the penal law sanctioned more severe penalties, in proportion with the first sentence that the culprit had to suffer. Thus, if the escaping culprit was sentenced to life imprisonment, the author who supported the escaped person was sentenced to severe imprisonment from thirty months to four years. And when the escaped author was sentenced to death, for the guilty who supported him, was stipulated a severe penalty from three to four years[16]. When the subject of the offense was a particular one, a state official, it was given a sentence from one to five years, when he helped or facilitated to escape, a sentenced author to life imprisonment. When the punishment for the convicted person was capital punishment, for the particular subject who helped his escape was given a greater punishment, ranging from six to twelve years[17].

The Criminal Code regulated in detail the protection of institutions providing and implementing criminal justice from actions or inactions.

Likewise, the penal norms categorically prohibited the performation of self-justice. Under the Code, the self-justice was the right that had anyone in order to perform a claimed right, using violence and avoiding simultaneously the opportunity to address to the competent authority and demand the reinstatement of the violated or the infringed right. The culprit who commited the offence of self-justice was punished by fine, imprisonment or even deportation for a period of time. This sentence was always depending on the extent of use of violence or the threat made under the offense, the mean used under the offence or the harm caused in physical and mental health of the damaged person.

6. Offenses against the public order

Penal norms included urging and associating in commiting a criminal act, urging into civil war, the formation of the armed forces as well as public intimidation into the category of offenses against the public order. According to the penal law of the Albanian Kingdom it was punishable not only the urge made in public for committing a crime but also the boasting or the publicity made which could become an act provided as a crime by the law. At the same time, it was punishable the creation of obedience to not obey to the applicable laws, urging or inciting hate between different social classes and religious beliefs against one-another. In these conditions, the penal norms sanctioned a sentence of imprisonment from three months to one year and a severe fine from fifty to one thousand gold francs. Moreover, it was punishable with imprisonment from six to eighteen months, and a fine of one hundred to three thousand gold francs even the association to commit one of the above offenses. According to article 274 of the Criminal Code, with "association to commit guilt" should be understood the friendship, unity, organization of five or more persons to commit offenses against justice administration.

Penal norms took under their defense even the public order and tranquility in the Republic of Albania from criminal acts such as destruction, damage, theft, or bloodshed, as well as intentions to trigger civil war. The culprit was punished with imprisonment from five to twenty years, and if he had performed the criminal act, the Code provided capital punishment[18]. Also, it was punishable by the Code conducting criminal actions such as placing explosives, bombs, lethal cars, incinerating, which aimed the violation of public tranquility. The culprit was punished with imprisonment from four to ten years. When this criminal act was conducted by bringing a threat or real danger for a good part of the society, or in a place or time when there was a crowd, the penalty was from eight to twelve years inprisonment[19].

[16] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 136.
[17] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 136.
[18] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 145.
[19] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 146-147.

7. Offenses against public trust

Offenses against public trust included: counterfeiting coins and banknotes that have a public credit; counterfeiting tof stamps, public stamping; counterfeiting of documents, of ID cards, transfer-paper, certificates, acts of testimony and statements, frauds in commerce, industry, and in auctions.

In view of the objective side, these offenses were committed in various ways, through actions and inaactions. Thus, they could be carried out through production, modification, purchase, putting into civil circulation of domestic or foreign coins and banknotes, objects, jewelery and luxury things that the state fabricated, public credit cards. With the latter had to be understood in addition to those having a legislated rate like the coin, even those cards, or tickets issued by the executive power, as well as those derived from legal institutions based on an authorization[20]. The Criminal Code also condemned even the counterfeit of seals of state authorities, and emblems of whether local or central territorial units, postage stamps, state brands, transport tickets and tickets of other public services. When this act was committed by a particular subject, as would be a public official, whether it was fully or partially falsified, the guilty official was punished with severe imprisonment from five to twelve years[21].

8. Offenses against public entirety

In offenses against public "entirety" - the general public goods, the environmental crimes do take an important place. We say this because the lawmaker at that period of time had predicted as offenses and crimes these ones: the arson, floods with water as well as other offenses that had a public danger, offenses against the security of the means of transport or of traffic, offenses against public health and food. Offenses against the environment were included as special cases in the context of some general criminal offenses, which were provided as offenses as for example: the property damage, in which were included offenses and acts such as damage to fruit trees, or hunting in a place that the owner had banned the entry. Also, there were a group of offenses against public health and food, eg: destruction or poisoning of drinking water of "mass/commune usage" that jeopardized human health or the performance of this act in waters designated for animal feed. A special type of offenses against the environment was a deliberate arson, as one of the offenses that had a public danger[22]. In general, the Criminal Code of 1928, contained the major figures of offenses against the environment that were known at the time, although scattered in different titles of the two recent books of the Code which consisted even its particular part. These offenses, were classified as criminal offenses (contraventions) or simply offenses- criminal acts and depending on their group objective were provided as offenses against public entirety, wealth, but also against morality[23].

9. Offenses against family order and good habits

Humiliation by violence, physical demoralization of juveniles, human dignity violation, embarrassing humiliations, kidnapping, abetting in disgracing, adultery, bigamy, offenses against baby's origin, were some of the main offenses that were set out in the VIIIth title of the second book of the Criminal Code of 1928.

The Code took under protection with its norms even honor and dignity, regardless of the gender. The culprit was punished with severe imprisonment from three to ten years imprisonment, in such a case. This act was accomplished through blackmail and intimidation. Aggravating circumstances were: in case it was violated the honor and dignity of a person who had not yet attained the age of fifteen years old; in case the culprit was the first-born; in case he/she was the guardian or teacher of the humiliated person, and the latter had not attained the age of eighteen years old; in case the culprit benefited because of his position exercising his duty, or because of a mental or physical illness of the victim, etc. If it is attentively read the provision no. 364 of the Criminal Code, it is noted that this provision is non-exhaustive in terms of the objective side. We say this because in this article, the legislator in addition to the aggravating circumstances, does give the means\ effects used by the culprit. The legislator does not give a direct meaning of the effects of means used by the culprit. This leaves the implication of how such tools will be considered the assets that violate the dignity and the moral of every human being. Particularly interesting is the terminology used in compiling this code. It is a very simple and understandable terminology not only for the researchers of jusctice but for the general public as well.

The Criminal Code of the time, as many other contemporary codes condemned the actions against its nature or antinatural, being in unison not only with the legal-penal norms of the European countries, but also with the religious legal rights of families who prevalented back then in Albania.

The Criminal Code also punished the violation of fidelity by both spouses. Indeed, it went further, by condemning even their cooperator. The culprit was punished with imprisonment from three months to three years. In this way, the code was trying to ensure the continuity of regular family relationships. This is because as we highlighted above, to family, family relationships, and its members was devoted a great importance not only in terms of civil law but even in terms of criminal law as well.

Following the strengthening of the Albanian family's, the Code in its norms condemned polygamy. Thus, Article 394 of the Code stated that "[…] the married man who keeps a concubine in the house where he has his wife or in a public place, is punished with imprisonment from six months to three years". This sentence was applied to the concubine as well. Also, in the context of the development of family relationships, the penal

[20] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 151.
[21] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 155.
[22] TURKESHI, Enkelejda, *Criminal Legal Protection of the Environment*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor", scientific degree topic Tirana, 2014, p. 65.
[23] TURKESHI, Enkelejda, *Criminal Legal Protection of the Environment*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor", scientific degree topic Tirana, 2014, p. 66.

norms condemned cohabitation when one of the spouses was legally bound in marriage to another person. The culprit performing this offence was punished with imprisonment from one to eight months. Also, the code devoted an exclusive chapter to bigamy. Bigamy was considered an offense, for which the penal norm sanctioned a imprisonment from five to ten years for the guilty person.

10. Offenses against the person

The Criminal Code included in its range of defense even the life itself, the life of each person or individual, regardless of his social, economic, ethnic, racial or religious position. The death of the person was punished by law. For purpose of legal qualification of the offense of murder, the penal norm provided as aggravating circumstances the crime committed within the family circle, against a public official, against a pregnant woman, or by using other poisonous or special ways of choking (suffocation). The culprit, doing the offense in such aggravating circumstances was sentenced to life imprisonment[24].

The striking fact is that the Code qualified the premeditated murder, the violation of the right to live, as an aggravating circumstance for which the culprit was sentenced to life imprisonment. I think that the legislator has sanctioned such a sentence for an offender with the purpose and aim to help avoid the disappearance of the archaic phenomenon, ancient revenge that has characterized not only the Albanian people but even other European countries as well, when the the norms of the customary law prevailed. It should be emphasized that the action of the Albanian customary law for that period of time has been active, as it was seen as a sign and instrument of the dominance of the domestic law over that of the invador.

In these articles of the Criminal Code condemning murder, it was not given a definition of what was understood with murder. Simultaneously, the lawmaker when compiling the Criminal Code has not been careful in providing the specific types of criminal offenses against life or health. To determine the latter ones he was ensured in providing only the body lesions. The Criminal Code gave even a transverse meaning of the term "body lesion". According to the Criminal Code, body lesion meant causing physical and mental injuries. The culprit in this case, was sentenced with imprisonment from one month to one year[25]. In the Code, it draws attention the fact that the legislator devoted a special attention to the protection of a particular category as it was the pregnant wife.

11. Offenses against wealth

The Criminal Code of 1928 treated in separated chapters (heads) types of the criminal offenses. According to the Code in offenses against wealth were included: the crime of theft, prey, coercion, intimidation, fraud, abuse of trust, the concealment and receipt of items that came from the offense, robbery, and property damage. Although the criminal norms sanctioned the criminal figure of theft, they did not determine its types as with the actual code. The Criminal Code of 1928, in principle, protected any movable object despite the fact that the ownership could be public or private. Also, the Code took under protection even the unused properties of the agricultural land. These latter ones were not well defined in the Code.

The Criminal Code of 1928 in article 446 considered as a theft taking in order to benefit any movable object, by moving it from its place without approval – the permission of the owner. Moreover, to the concept of theft was involved even the removal of an electric wire that served to forward the electrical energy as well as any other wire or equivalent means (in terms of functions). Secrecy was a valuable element in terms of the objective side of the figure of this criminal act. For the realization of the crime of theft was essential, as one of the subjective side elements, the particular purpose to benefit. The Code punished the culprits with severe imprisonment ranging from 18 months to 6 years. Also, in addition to the imprisonment sentence given to the culprit, it was given even a heavy fine of not less than 100 gold francs.

In the theft offense, provided by article 446 of the Code, the legislator listed in detail a variety of causes which served as specific circumstances for the purposes of legal qualification of the criminal offense. These were[26]:

- Temporary or permanent interaction by abusing with the trust stemming from work relations.
- The benefit and facilitations stemming from different social factors, such as the violation of public order and safety, public alarm, disasters that could had been affected the injured person etc.
- Time and place of the excetued offense, at night, in the building, or another designated place of residence.
- The committment of another offense in order to cover or hide the stolen item (breaking, destruction, collapse, or the brokening of items that served to protect people's property, in order to take or transport the stolen item or the use of stolen or forged items during a theft).
- Destruction of state seals.
- Cooperation in crime.
- Benefitting from special state qualities.
- Public protection features of the stolen item.
- Conduct of the criminal offense in open public places.

Also, the Criminal Code protected even items that, for reasons of habit or because of their destination, remained exposed to the public trust. Such criminal actiones did directly violate property, whether public or private[27]. In some cases, it was important in view of the objective side, the place of committing the offense. As an important element of the objective side in crime of thievery, it

[24] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 198-199.
[25] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 203.
[26] LIKMETA, Engjëll, *The Legal-Criminal protection of property*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor" scientific degree topic, Tirana, 2014, p. 103.
[27] LIKMETA, Engjëll, *The Legal-Criminal protection of property*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor" scientific degree topic, Tirana, 2014, p. 109.

can be said that the Code accepted open or public places, places of animal breeding, as well as places where cut trees were served. Thus, the code stated that: "Thievery is done in secretly and with special skills in public places or places open to the public[28].

The criminal offense of coercion, as a rule, was directed against the property, but not rarely, it could happen to have also human health as a secondary object. The culprit was punished with imprisonment from three to ten years, as well as with severe fine of not less than 100 gold francs[29]. The use of violence in view of the objective side was a specific element in the predicted offense, which influenced in the increasing of the measure of punishment for the culprit from 1 to 5 years imprisonment as well as with a severe fine of not less than 50 gold francs[30].

Another offense was fraud. This offense was provided in article 458 of the Criminal Code. Its object was wealth protection from unfair benefit. The Code did not expressly specify what was understood with *unfair benefit*. To my judgment it referred to cash benefits, valuable items or anything that had a certain economic value. Simultaneously, the Code did not give us neither the meaning of *skills* nor of *the trickery means* specified by this article, in order to clarify our position about this offense[31].

The Code sanctioned the protection of public property, besides the private one. Furthermore, the legislator of that time sanctioned as an aggravating circumstance the breach of public property through fraud. In this context, therefore, against the person who damaged public propoerty or an institution of public welfare, the criminal law sanctioned a more severe punishment than for a private property that could be breached through fraud. Thus, according to the criminal norm resulted a severe punishment with imprisonment from 1 to 5 years when the act was done by a particular subject (lawyers, administrators, legal representatives) or in case of breach of public interest. In this case, there was an increase of the minimum and maximum limit of the sentence provided by the Code for the culprit. Respectively from 3 months to 1 year for the minimum limit, and from 3 to 5 years for the maximum limit[32].

The Criminal Code protected specifically from the crime of fraud even the property of a certain category of people, as were persons under the age of 20, detainees and legal persons with legal inabilities. Even in this case, the culprit was punished with imprisonment from 1 to 5 years and a severe fine of not less than 100 gold francs[33].

The Criminal Code punished the person who linked a credit agreement by abusing in terms of the great need. Moreover, the Code punished even the person who received, requested or transfered to the others the rights acquired in this way, knowing that those rights were illegally leaked[34]. The Code protected the wealth of the borrower as well as that of the lender. Of special interest was article 453 of the Criminal Code. Through this provision it was protected the wealth of different citizens from irresponsible acts for profit, such as through the emigration of citizens. In fact, it was created the impression, that the provision in question, took under protection the emigration. In reality, the provision attempted to defend mostly the wealth of the citizens who were "forced" to emigrate. In view of the objective side, the offense was consumed in two forms[35]:

- By lying the citizen with fake news,
- By showing flimsiest evidence.

The culprit was punished with imprisonment from three months to five years and a heavy fine of not less than 500 gold francs[36].

The Criminal Code protected the property from the person who posesed it in confidence or posesed it as escrow for whatever reason, and misused the trust given. So, it was punishable the unfair benefit of the property as a result of the misuse of the trust given. According to the Code the guilty was forced to pay the damage and pay not less than 100 gold francs, except the penalty of imprisonment from 2 months to 2 years.

The Criminal Code of 1928, although did not directly give a clear definition of robbery, it implied clearly the idea of what consisted the offense of robbery. According to the Code, object of this offense were only the immovable (estate) property that was infringed by the illegal actions aimed at the unfair profit in it or through it. The offense was performed in different ways and with active actions such as through movement, change or dissolution of boundaries[37].

The Criminal Code of 1928, protected the property from damages and destructions that could come as a result of the irresponsibility of the guilty person.

In Chapter VIII of the second book of the Criminal Code of 1928, were listed three provisions with common predictions for offenses against property. Article 479 of the Criminal Code provided the manner of calculating the punishment. The calcu-

[28] LIKMETA, Engjëll, *The Legal-Criminal protection of property*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor" scientific degree topic, Tirana, 2014, p. 110.
[29] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 226.
[30] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 226.
[31] LIKMETA, Engjëll, *The Legal-Criminal protection of property*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor" scientific degree topic, Tirana, 2014, p. 106.
[32] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 230.
[33] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 231.
[34] LIKMETA, Engjëll, *The Legal-Criminal protection of property*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor" scientific degree topic, Tirana, 2014, p. 107.
[35] LIKMETA, Engjëll, *The Legal-Criminal protection of property*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor" scientific degree topic, Tirana, 2014, p. 106.
[36] ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929, p. 232.
[37] LIKMETA, Engjëll, *The Legal-Criminal protection of property*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor" scientific degree topic, Tirana, 2014, p. 102-112.

lation was made accordingly to the damage brought. The first paragraph allowed the addition of the sentence to half of it, in case the value of the damage was huge. It predicted even the deduction up to a third, if the value of the item was too low. Here was left a wide margin of appreciation to the judge, since the provision did not determine what was meant by "a major damage" or "a minor damage", making possible the determination of their borders case by case into practice[38].

The second paragraph provided a mitigating circumstance. With the fulfillment of two cumulative conditions, the very small value of the stolen item and the great poverty as a motive to commit the theft, lead to exclusion from the punishment. Even in this case, the delimitation "very small", was evaluated by the court. The third paragraph gave an orientation about determining the value of the damage. This was realized depending on the value that the item has had before the damage was cuased, the value of the damage caused and the benefit of the guilty. Anyway, it was not determined in fixed limits what was called "a major damage", "a minor damage" and "a very small damage". According to the fourth paragraph, the following mitigating circumstances were not applied to the repeaters of the crime. They were note applied even for subjects who had committed one of the offenses provided in Chapter II, prey, coercion (extorsion) and blackmail[39].

Article 480 of the Criminal Code provided a case of mitigating circumstances. Specifically, it sanctioned the restitution of the taken item or its full compensation in case of the impossibility to return it. It was of importance the moment when the compensation was being made. In case that was before the judicial prosecution, the reduction of the sentence given was higher. If it was done during the investigations development and before the case was sent to trial, the sentence was reduced to a lesser extent.

The prediction made by article 481 of the Criminal Code was of great interest. Under this provision, it was not prosecuted the subject committing offenses predicted under this Title, in cases when the damage was caused to a certain category of persons. In this was included the husband (still legally undivorced), the defined circle of relatives, the brother or sister living with. The reason for such a prediction has been the inability to determine the ownership of the item was claimed to have been damaged by one of the family members, given that they lived together. While according to the last paragraph, if the damage was made to the legally separated spouse, sister, non-cohabiting brother, uncle, nephew /niece or brother in law /sister in law who lived together in a family, in these cases the lawsuit of the author was made only at the request of the injured party. In these cases the family ties served as a mitigating circumstance, since the punishment was reduced by a third.

In conclusion, it is to be estimated the detailed prediction made by this chapter, arranging the situations with a special care, especially in determining the sentence in accordance with the dangerousness of the offense and especially in accordance with the brought damage. On the other hand, through the provision of article 481 of the Criminal Code it is possible to understand the particular importance devoted to the family relationships, especially those living together and cohabitating in a family.

12. Conclusions

With the adoption of the Criminal Code of 1928 or Zog's Code, the Albanian state had thus as the main source of the criminal justice its own criminal law, replacing thus once and for all the Turkish Criminal Code of 1858.

Eventhough, the lawmaker when compiling the Criminal Code has not been careful in providing the specific definitions as for criminal offenses against life or health, murder or robbery. In those cases, like for determining the concrete punishment, was the court that had to decide case by case. In the Code, it draws attention the fact that the legislator devoted a special attention to the protection of a particular category as it was the pregnant wife.

Particularly interesting is the terminology used in compiling the Criminal Code. It is a very simple and understandable terminology not only for the researchers of jusctice but for the general public as well.

This code was a positive effort to bring the Western experience of the time in our country, in the legal field, which back then was still under the dictate of the Ottoman laws, even though years had been passed on since the secession from the Ottoman Empire.

Bibliography

ALBANIAN KINGDOM, THE MINISTRY OF JUSTICE, *The Albanian Criminal Code*, printing-house "Sun", Tirana, 1929.
ANASTASI, Auerela, *Political institutions and constitutional rights in Albania*, "Luarasi" Publishing house, Tirana, 1998.
DERVISHI, Kastriot, *The history of the Albanian state*, Publishing house "55", Tirana, 2006.
ELEZI, Ismet, & ELEZI, Ela, *The history of criminal law*, University Book Publishing House, Tirana, 2010.
LIKMETA, Engjëll, *The Legal-Criminal protection of property*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor" scientific degree topic, Tirana, 2014.
KAMBELLARI, Evisa., *Protecting the security of communications in the traditional context and reality of information technology*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor" scientific degree topic, Tirana, 2014.
PALNIKAJ, Dritan, *Constitutions*, "Grand Print" printing-house, Tirana, 2006.
TURKESHI, Enkelejda, *Criminal Legal Protection of the Environment*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor", scientific degree topic Tirana, 2014.

[38] LIKMETA, Engjëll, *The Legal-Criminal protection of property*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor" scientific degree topic, Tirana, 2014, p. 112.
[39] LIKMETA, Engjëll, *The Legal-Criminal protection of property*, University of Tirana, Faculty of Law, Department of Criminal Justice, "Doctor" scientific degree topic, Tirana, 2014, p. 112.

The Evolution of Russian Housing Law during the 20th Century

Marina A. Baratova *

Abstract

***T**his article deals with the process of establishing and the evolution of housing law as a branch of the Russian legal system. Different legal positions regarding the nature of housing law are reviewed and analyzed, the stages of development of housing law are proposed, and a conclusion is made as to the place of housing law within the Russian legal system. The formation of housing law in Russia substantially differs from the formation of housing law in the legal systems of other countries. Such distinctions and specificity in the evolution of housing law were predetermined by the historic features of development of the Russian state.*

The author of the article identifies three distinctive chronological periods in the formation of housing law in Russia: the first period (The Empyreal Period) ending in 1917, the second period (The Soviet Period) from 1917 to 1991, and the third period from 1991 to present time. Substantiated conclusions are made that housing law in contemporary Russia exists as an independent, complex branch of the Russian legal system, and constitutes a sub-branch of the Russian civil law.

Key words: *housing law; housing legislation; housing relationships; civil legislation; civil law; integrated branch of law; legal system; administrative law; Russia.*

At present in Russia, the term "housing law" means the body of rules governing the housing relationships.

Housing relationship means a legal relationship the object of which is always residential property. Since housing relationships arise in various ways, the parties and content of such legal relationships may also vary.

In other words, housing relationships arise and exist in order to satisfy the housing needs of the citizens.

It is the author's opinion that the evolution of housing law in Russia substantially differs from the evolution of the housing laws elsewhere, which was predetermined by the historical development of the Russian state. Both, socio-economical and political factors, determine its uniqueness. The following factors considerably influenced the development of housing law during the Soviet period: the ban on land ownership by individuals and entities, state ownership of the majority of the housing, the almost complete absence of a real estate market.

The author believes that housing law in Russia has come a long way from an institute of the administrative law to the sub-branch of the civil law.

When one considers the evolution of the housing laws in our country during the 20th century, it seems possible to chronologically distinguish three different systems used to satisfy the housing needs of the Russian citizens. The differences in these systems were conditioned by changes in ownership structure, public authority principles and functions of our state.

Therefore, we distinguish three different periods in the formation of the housing law branch in Russia.

1. The First Period in the Evolution of the Housing Law in Russia (to 1917)

The first of these systems of satisfaction by people of their housing needs existed in the Russian Empire.

Until October 1917, housing relationships in the Russian Empire had been governed by private law. Housing relationships at that time were mostly relationships for individual construction (both of separate residential buildings and of "tenement buildings"), lease or sale and purchase of residential premises. Individuals solved their housing problems on their own, without any participation of the government or local authorities. There was hardly any civil circulation of residential premises.

Such passive social role of the state with respect to the housing problem of the society was also standard for other countries in this historical period.

2. The Second Period in the Evolution of the Housing Law in Russia (from 1917 to 1991)

In the Soviet law development period, the process of establishing and evolution of housing legislation and housing law began. The issue of place of housing law in the Soviet legal system was extensively discussed in the academic legal literature of that

* Marina A. Baratova, Department of Civil and Entrepreneurial Law, Faculty of Law, National Research University Higher School of Economics, Moscow, Russia.

time. It seems possible for our purposes to divide this period of evolution of housing law in Russia into three stages.

The first stage of establishing and evolution of housing law was preceded by the period of establishing and development of socialist law in Soviet Russia. Soviet law was evolving simultaneously with the formation of Soviet state and was featured by the rejection of pre-revolution legal system and legislation of the Russian Empire. The scientific philosophy which was prevailing in our country in the historical period in question predicted quick withering away of law and legislation.

During the period of the formation of the Soviet state (as a state of a new historical type) it was suggested to apply so-called "revolutionary legal conscience" as the original source of law, which was the consequence of the attempt to build legal regulation of state and society on other principles of law and state, different from those which applied before. Legal regulation in the pre-revolution Russia was contrary to the principles of the state of the new type and, consequently, was not applied. The "legal vacuum" occurred in which it was suggested to consider the revolutionary legal conscience as the primary source of law. Theoretical basis for this suggestion was provided by psychological and sociological law origin theories, works by L. I. Petrazycki, P. I. Stuchka and others.

According to the definition given by P. I. Stuchka, revolutionary legal conscience is "… an inner belief of, at first, certain persons and then groups, the whole class and, finally, the whole humanity". Revolutionary legal conscience stands here as a "measure of to what extent each old law or custom shall be deemed cancelled or amended".

Thus, application of "old", i.e. pre-revolution legislation was allowed, but on a temporary basis and to a very limited extent.

Observation of E.A. Sukhanov that "… we became accustomed to… creating new Soviet or socialist law which is not known to anyone, announcing in advance that it is the best, and there are no authorities for us in this matter…", fully characterises the situation in the relevant historical period.

At this stage the primary direction of the governmental housing policy was the nationalisation of the housing fund of the country which was effected in the context of general nationalisation of immovable property.

One of the first decrees adopted in the Soviet Russia was the Decree of the Council of People's Commissars dated 14 December 1917 "On Prohibition of Transactions with Immovable Property". The Decree of the All-Russian Central Executive Committee on cancellation of private ownership of immovable property in cities was adopted on 20 August 1918.

As a result of the nationalisation, ownership title to immovable property, including residential premises of former ruling class of the Russian Empire, passed to the state. Thus, the state housing fund emerged in Soviet Russia. Residential premises from that fund were distributed administratively among the citizens of the country who needed housing.

It is important to note that in the relevant period most of the population of our country (poor peasants) lived in rural areas in their log cabins (*izba*). Nationalisation of immovable property almost did not affect ownership of residential houses of poor peasants in rural areas and residential houses of workers and petty bourgeois in cities.

The Constitution of RSFSR was adopted in 1918. The second chapter of this Constitution vested ownership of nationalised property in the state.

Thus, ownership of residential premises previously owned by former ruling class and legal entities was largely abolished.

Soviet state, as the owner of residential premises, needed specialised governmental agencies for the purposes of distribution of residential premises, management of nationalised housing fund and governmental control over housing fund management.

Thus, the need arose in legislation which could be the basis for management of newly established state fund of residential premises and distribution of residential premises among people.

The process of establishing housing legislation in our country was started.

In 1920 the Decree of the Council of People's Commissars "On Communal Departments of Executive Committees" was adopted, pursuant to which communal departments of executive committees were established in order to implement the housing and communal policy of the Soviet state at the local level. The communal department of the People's Commissariat for Internal Affairs was also established which was charged with implementation of the communal policy of central authorities and management of work of local communal departments.

For the purposes of appropriate distribution of housing fund, the Decree of the Council of People's Commissars dated 25 May 1920 "On Measures for Appropriate Distribution of Housing among Working People" was adopted which obliged citizens to "densify" those living in the premises and provided the period of two weeks to choose "companions for living".

That being said, most of utility services (water, electricity etc.) was supplied to people free of charge.

In 1922 the Civil Code of RSFSR was adopted, and legal institutions covering legal relationships with residential premises emerged. Such institutions include pledge of property, lease and sale of residential buildings, development, property lease (see articles 20, 52, 71, 152 and 180 of the 1922 Civil Code of RSFSR).

The end of the civil war and recovery of the country's economy assumed the replacement of legal regulation of war time and further development of the law. Simultaneously with the formation of the new legislation, the sources of developing socialist law are changing.

Instead of "revolutionary legal conscience", it is suggested to accept as the source of law "socialist legal conscience" which was taken as a basis of law-making activity and was considered as a method of filling gaps in laws.

In the relevant period the main direction and character of development of the housing policy of the Soviet state were determined - administrative distribution system for solving the housing problem as a result of established priority of public property. The institution of state provision of housing for population of the country came into being.

We may conclude that in the relevant period the housing relationships in Russia were governed by the rules of administrative law.

This period of time may be called the first stage of establishing and evolution of housing law in the Soviet (socialist) law development period in our country.

In the Regulation of the Central Executive Committee and the Council of People's Commissars of the USSR dated 17 October 1937 "On Preservation of the Housing Fund and Improvement of Housing in Cities" the term "housing legislation" was officially used for the first time.

By this regulation, housing legislation was "segregated" from the rest body of legislation. The object of a housing relationship – residential premises – was taken as a criterion for such segregation.

Thus, housing legislation included legal acts governing legal relationships in which residential premises were always the object. Originally, legal rules governing such legal relationships were scattered in various branches of legislation such as civil, administrative and family legislation.

V. N. Litovkin believes that, from that time, housing legislation got the official status. Therefore, it is justified to say that housing legislation was formed artificially and purposefully at the legislator's initiative and was comprised by the body of legal rules pertaining to various branches of law.

It is the author's opinion that the reason and purpose for creating, so far, just an inter-branch body of legal rules, was to establish the national state system for satisfaction of the society's housing needs. In other words, the state, as major owner of residential premises, undertook to provide people with housing on certain conditions. It was difficult for individuals to solve their housing problems on their own, without the state's aid.

Therefore, it seems appropriate to define the reason and purpose of the establishing of housing legislation in our country as strictly practical ones.

We may conclude that the state monopoly was established in the USSR to solve the housing problem.

Thus, as early as at the stage of willful formation of housing legislation, the legislator subordinated the said body of legal rules to public law regulatory measures.

This period of time may be called the second stage of establishing and evolution of housing law in the Soviet (socialist) law development period in our country. At this stage housing legislation was established and housing law was formed as a branch of legislation in Russia.

As mentioned above, housing legislation was comprised by legal rules from various branches of legislation.

Starting from 1964, civil law part of housing relationships was governed by the Civil Code of RSFSR, i.e. by the law. Administrative law part of housing relationships at that period of time was governed by governmental, departmental and regional regulations.

In 1977 the constitutional right of USSR citizens to housing was proclaimed, which pre-determined the different level of legal regulation of housing relationships. 1977 Constitution of the USSR reflected the main ideas of housing policy of the time: provision of housing by the state free of charge, distribution of the housing fund in accordance with the rules of administrative law (chapter 2, article 44).

The constitutional basis was established for further development of housing legislation in our country.

S. B. Vereschak believes that the adoption of the Fundamental Law laid the foundation for housing legislation as a separate branch of legislation and formal expression of housing law.

In this period housing legislation, which represented quite variegated body of legal acts, is systematised and put into order.

The Fundamental Principles of Housing Legislation of the Union of SSR and Union Republics were adopted in 1981 and the first Housing Code of RSFSR, in 1983.

In both of these legal acts the legislator clearly recognised that housing relationships are separate, but did not define them.

Due to this fact, there are different scientific points of view on this issue, and discussions continue to the present time.

In the course of the codification of housing legislation, chapter 28 of the 1964 Civil Code of RSFSR was adjusted – only one article of original 46 remained in it. All legal rules governing the housing lease institution were moved to 1983 Housing Code of RSFSR.

A. L. Makovsky believes that the housing distribution system which established itself in the country had nothing to do with commercial civil circulation.

V. N. Litovkin believes that the codification of housing legislation meant that housing legislation was recognised as an integrated branch of legislation. The same author argues that housing law does not correspond with housing legislation and, consequently, one should make a distinction between them.

R. Z. Livshitz believes that subject matter of a branch of legislation is always individually defined and the criterion for subject matter of a branch of legislation is the society's objective need in legal regulation of a certain group of social relationships.

Thus, after the adoption of the Fundamental Principles of Housing Legislation of the Union of SSR and Union Republics in 1981 and the Housing Code of RSFSR in 1983, the existence of housing legislation was beyond any doubt.

Moreover, the position was expressed that, as a result of the codification, the branch of housing law was established, as the formal attribute of existence of a separate branch of law was complied with (i.e. codified law, the Housing Code of RSFSR, was adopted).

The legislative act is a form of existence of the law. It is important to note that now (to say nothing about the period reviewed above) legislation is traditionally identified with law in our country.

G. Zhilin examines this issue in detail in his article.

O. A. Krasavchikov noted that the concept of a branch of law is often identified with any body of legal rules set aside, however insignificantly, in theory or in practice.

In 1940 s V. K. Raikher suggested to set aside housing law into a separate integrated branch of law which includes the rules of administrative, civil and cooperative law.

In 1982 several authors (S.N. Bratus, M.I. Kozyr and others) discussed this issue in "Soviet State and Law" journal.

P. V. Ramzaev believed that it was not justified to consolidate heterogeneous social relationships and to create an inte-

grated body from them, because many of these relationships have already been covered by the rules of other civil law institutions.

Yu. G. Basin was opposed to the existence of integrated branches of law.

Some authors argued that housing law is a sub-branch of civil law.

As regards the nature of housing law, i.e. its place in the legal system, discussions on this issue in scientific literature last for decades.

This period of time may be highlighted as the third period of establishing and evolution of housing law in the Soviet (socialist) law development period in our country.

Three academic legal positions were expressed in relation to the nature of housing law, i.e. its place in the legal system:

- housing law is a sub-branch of civil law;
- housing law is a separate integrated branch of law which includes the rules of administrative, civil and cooperative law;
- housing law is a sub-branch of administrative law.

3. The Third Period in the Evolution of the Housing Law in Russia (from 1991 to present time)

The third, post-Soviet system of satisfaction by people of their housing needs is being formed and developed now in Russia.

In accordance with paragraph "к" Article 72 of the 1993 Constitution of the Russian Federation, housing legislation is referred to the joint jurisdiction of Russia and its regions.

The decision to include this provision in the text of the 1993 Constitution of Russia was conditioned by historical and legal background.

In Soviet Union the two-level union-republic system of regulation of housing relationships was in effect. This system took into account climate, history and other features of a region and allowed to regulate housing relationships in the regions in a timely and appropriate manner.

Thus, it is quite logical and expedient to refer housing legislation to joint jurisdiction of Russia and its regions.

At the current stage of development of Russian legislation, the existence of housing legislation as a separate legal formation (branch of legislation) is beyond any doubt.

The Housing Code of the Russian Federation (RF HC) was adopted in 2005. According to clause 2 Article 5 of the RF HC, housing legislation is comprised by RF HC, federal laws of the Russian Federation adopted pursuant to RF HC and decrees of the President of the Russian Federation, regulations of the Government of the Russian Federation and legal acts of federal executive bodies adopted pursuant to them.

Ju.K. Tolstoy believes that housing legislation is an integrated legal formation which includes the rules from different branches of legislation. That being said, he is skeptical about whether it is necessary to distinguish between "housing law" and "housing legislation" and argues that there is no practical need in such distinction.

N. A. Vlasenko believes that housing law is the example of the situation when a branch of legislation exists but there is no branch of law in the legal structure.

However, all authors involved in the discussion agree that housing legislation includes legal rules and institutions of constitutional, civil, administrative and other branches of law, i.e. that it is an integrated formation.

S. M. Korneev believes that there are no sufficient grounds to recognise housing law as a separate branch of law, because housing relationships are not uniform by their nature. He classifies a part of such relationships as organisational (management) relationships and another part – as property relationships.

We may conclude that the existence of integrated legislation does not cause the existence of a separate branch of law. If the existence of housing law as a separate branch of law is impossible, then housing law should be a sub-branch of civil law.

This position is currently supported by a number of authors.

Based on the foregoing, we may make the following conclusions:

1. It is appropriate to define the reason and purpose of the establishing of housing legislation in our country as strictly practical ones.
2. Housing legislation exists as a separate integrated legal formation (branch of legislation), which is confirmed by paragraph "к" Article 72 of the Russian Constitution.
3. Housing law is not a separate branch of law but a sub-branch of civil law with somewhat "increased" share of mandatory provisions (as compared with other sub-branches of civil law), which is explained by the importance of the object of housing relationships (residential premises) for people of our country and for its society at large.
4. For the purposes of legal education, housing law is a specialised academic subject. When studying this subject, one should, apart from studying the sub-branch of civil law, deal with institutions of other branches of law.

Legal Regulation of Civil Contracts in Ancient City-States of the Black Sea Northern Coast

Oleksandr Gavrylenko *, *Oksana Skryl* **

Abstract

The paper pays attention to the fact that in every society an obligation can perform various functions. But their main area is property turnover, as obligations are among the principal legal measures that mediate trade turnover of any market society. The agreement between parties was considered the basis of contacts. Major contracts were concluded in writing, as a rule. Some of them, such as Chersonese contract for the sale and lease of public lands (60-70-ies. III B.C.) were fixed lapidary. It has been noted that the system of contracts in the antique states of the Northern Black Sea was quite simple. The most common contracts were those of sharing (exchange), sale and purchase, donation. Agreements of individual employment, by contract, hire, and loan were often concluded. In the ancient states of the Northern Black Sea coast, as well as in metropolitan, such debt measures as synhrafs and hirohrafs were widely practiced. In ancient states of the Northern Black Sea there were facts about the cancellation of debt, both private and public. This is the so-called sysahfiya ("shaking off the burden"), which was first made by the prominent Athenian lawgiver Solon. In Olbia, this measure was taken during the siege by Alexander Macedonian army – Zopyrion in 331 B.C. Sources indicate that there was a sufficiently developed system of rules of obligatory law that existed in the ancient states of Northern Black Sea. Contract law became the most detailed study, the foundations of which were common to most Hellenic city-states. Similarly to other Hellenic states, legal regulation of contracts in the ancient states of the Northern Black Sea was carried out primarily through discretionary rules, i.e. those applied only in the absence of any other guidance on the given issue in the agreement. Specific character of contracts was only caused specific historical circumstances evolved in a particular region in the period.

Key words: *city-state; civil contract; barter agreement; contract of sale; gift; loan agreement; lease.*

Introduction

Genesis issues of the law of obligation that is the set of civil norms regulating obligations should be the key point in the study of the history of law of ancient city-states of the Northern region of the Black Sea. In every society obligations can perform a variety of functions: sometimes they are legal forms of ownership relations, sometimes they are punitive measures for certain violation of personal and property rights. Yet the main area of obligations is property turnover, particularly in manufacturing, transportation, distribution and realization of goods and cultural values, knowledge, etc. As L. V. Emelyanov has stated "obligations belong to the major legal means which mediate trade turnover of market society" [1]. Even in ancient society everyone constantly had binding relations. But unfortunately, this area of historical and legal research of ancient city-states of the Northern region of the Black Sea has hardly been studied.

In ancient times law differentiated such obligations arising from agreements and those of the injury ("voluntary" and "involuntary" obligations). Obligations to the injury occurred in case of material loss (property damage or its destruction, causing damage, etc.). They resulted in compensation for damages. Responsibility occurred even when the damage was the result of actions of subordinate people – children, slaves and others.

But still much more common obligations both in ancient times and now were contractual obligations. Even then regulation of various contracts acquired certain theoretical drafting. In his speech against Dionisodora the famous Athenian orator Demosthenes noted: "Your laws establish that everything regarding what one person voluntarily enters into an agreement with another has legal force" [2]. Probably there was such a principle in ancient city-states of the Northern region of the Black Sea.

The basis of agreements was considered a compromise that does not require special formalities. But the most important agreements were usually concluded in writing. Depending on the nature of the contract the corresponding document was signed either by both parties (the contract of sale, loan, lease), or by one of the obliged parties under agreement (a loan agreement). It should be emphasized that religion played the special role in ancient contract law. An obligatory component of any

* JUDr., HistDr, PhDr. Oleksandr Gavrylenko, V.N. Karazin Kharkiv National University, Ukraine.
** PedDr. PhDr. Oksana Skryl, V.N. Karazin Kharkiv National University, Ukraine.

1 Yemelyanova Y.V. The system of obligations in Roman law: Author., DiS. for the degree of Candidate of Legal Sciences. 12. 00. 01 "Theory and history of state and law; history of political and legal studies" / Y. V. Yemelyanova. – Odesa, 2001. – p. 2.

2 The ancient method of production in literature / [ed. S. A. Zhebelev] // Proceedings GAIMK. – Vol. 78 – Leningrad, 1933. – p. 278.

important contract procedure was an invocation of both parties to the gods, who were appealed to be witnesses of the contract, and were the guarantees of the complience with the provisions of the contract.

The implementation of the agreement was usually guaranteed by deposit or the third party bail (in pre-classical times a loan agreement could be guaranteed by the debtor's loan). If the buyer refused to implement the contract, he lost his deposit, but the seller was obliged to return the double amount of the deposit. In case of bail, the third party was the guarantee of recovery of property Mortgaging of land was of particular importance. In case of mortgage, the land remained in debtor's possession and use, though he was deprived of the right to dispose of it. In case of debtor's non-performance of contract the land was given to the mortgagee. Pledged goods were in the possession of the mortgagee that could sell them if the debtor did not fulfill the obligations.

Such scientific publications as E. I. Solomonik, G. M. Nikolaenko, V. M. Zubar, N. O. Son, V. P. Yaylenko, V. D. Blavatsky, N. V. Skrzhynska and several other researchers who briefly worked out the problem gave some ideas of the existence of a sufficiently developed system of rules governing contractual relations in the city-states of the Northern region of the Black Sea. But a comprehensive analysis of legal regulation of civil contracts in the city-states of the Northern region of the Black Sea in ancient times has not been carried out yet. Taking into account the proximity of the legal systems of Hellenistic ecumene, narrative materials and ancient orators judicial speeches that contain evidence of relevant legal practices, legal procedure features and judicial decisions implementation in civil obligations cases substantially help to cover adequately the main features of the law of obligations in Olbia, Khersones, Thira, Bosporus.

Unfortunately, there is no legal evidence that would show directly the legal procedure of making contracts in the states of the Northern region of the Black Sea. However, taking into account close relations between the legal systems of the ancient countries, the text of Samos Corn Law dated to the 2^{d} century B.C.[3] under which the cases of a loan or a guarantee of public money collected for the purchase of bread was under the competence of the National Assembly "thousands" (Samos Community, in Greek. *φυλή*) which "checked institutions and guarantors, (represented mortgagor)" may be an illustration. Already tested institutions and guarantors were recorded in public books by the governors – pritanes[4].

The system of agreements in the states of Northern Black Sea coast, as far as the available historical sources can determine, was quite simple.

Trade barter agreements

One of the oldest types legal deals was barter transaction (or exchange) that is a contract under which one party transfers to the other the ownership of his thing and the other one transfers his thing in return. In the ancient period, trade relations researchers highlight such kind of transactions as trade exchange, which was caused by economic non-self-sufficiency of ancient states or entities[5]. Although barter is not mentioned in discovered ancient regulations, we can still assume its existence as barter historically preceded the emergence of sale. The well-known specialist in ancient law I. B. Novitsky said: "Property turnover (transition from one farmstead to another) took place before money appeared and was the direct exchange of a thing into another thing (the so-called barter). This was consistent with the general economic conditions of society that was moving from natural economy to such of barter"[6].

Mentioning of barter contract one can find in the "Iliad" by Homer (Hom. Ill. VII, 472-475). In the archaic period barter was extended in the northern Black Sea coast. Thus, archaeologists have long been attracted by the fact that they found very few coins during excavations in the Lower Dniester. For example, there were no coins in the settlement near the village Mykolaivka at all. Only one Istrian coin was found in the settlement near the village Nadlymanske, and a copper coin of Thira of IV. B.C. was found near the village Pivdenne. The excavations of coin is still limited by this short list. At the same time, as opposed to a small number numismatic material, antique ceramic products, and especially amphorae, which transported wine and olive oil, are presented quite in a large number of samples in all settlements. Such a significant disparity between the findings of the massive ancient coins and ceramic material in rural settlements of the Lower Dniester allowed scientists and archaeologists to conclude that barbaric population trade with Niconium and Thira by the end of the fourth century. B.C. had the character of barter[7].

In spite of the fact that barter historically preceded contract of sale, it found its place in the legislation as an independent contract much later than the contract of sale. Trade barter had less legal influence, rather than the circulation of money. The result of this circumstance was, for example, that in the classical system of contracts in Roman law (II century AD), the contract of barter (permutatio) did not have an appropriate slot. Even in the Middle Ages in a number of countries contract of barter was recognized as a contractus innominati – nameless contract[8]. Later, when barter was in the sphere of civil law regulation and became one of those named contracts (contractus nominati),

[3] Gavrylenko O. A. Samos "Corn Laws" as lapidary Gothic landmark of legislation on food safety (2d century B.C.) // Sources of law in Ukraine, and other countries of the international community: history and modernity : materials of the XXIX International historical legal conference September, 19-22, 2013, Feodosiya / ed. board: I. B. Usenko (Chairman), A. U. Ivanova (ed. Secretary), O. A. Gavrylenko et al. – Kyiv; Simferopol: Universum, 2013. – p. 288-297.

[4] The ancient method of production in literature / [ed. S. A. Zhebelev] // Proceedings GAIMK. – Vol. 78 – Leningrad, 1933. – № 430, p. 269-271.

[5] Saggs H.W.F. Civilization before Greece and Rome / H.W.F. Saggs. – New Haven; London : Yale University Press, 1989. – p. 167.

[6] Novitsky I. B. Roman law / I. B. Novitsky. – M.: Mirror, 2002. – p. 176.

[7] Zubar V. M. The ancient world of the Northern Black Sea: Essays on historical and socio-economic development: [Tutorial] / V. M. Zubar, Y. A. Liniova, N. O. Son. - K.: Publishing House of O. Teliga, 1999. – p. 93-94.

[8] Pashkus Y. V. Money: Past and Present / Y. V. Pashkus. – L: Znaniye, 1990. – p. 8-13; Civil law: [Tutorial]: in 2 parts. Part II / [ed. A. P. Sergeev, Y. K. Tolstoy]. – M: Prospect, 1997. – p. 113.

an extremely small number of standards were dedicated to its regulation by law. For a long time barter was mainly the subject of sales contracts.

Contracts of sale

Even in ancient times sale was of importance among civil contracts. It was spreading in connection with the extensive development of trade in the Northern Black Sea states and with neighboring countries. Purchase Agreement is an agreement under which one party (the seller) undertakes to transfer to another party (the buyer) the ownership of a thing, goods, and the latter, in his turn, agrees to pay a sum of money for a sold thing.

Describing the history of the origin of the contract of sale Roman lawyer Paul noted: "The origin of sale is found in barter. There were times when there was no money when something was not called goods, and something was called price, and everyone, depending on the needs of the moment and the nature of things, exchanged an unnecessary thing into the necessary one: it often happens that the thing which is unnecessary for one person may be of importance for another one. But since it was not always easy to find that you had and what is necessary for me, and I had in my turn what you need, a subject was chosen that received permanent public assessment; transmitting it in an equal amount removed direct exchange difficulties. This object (criterion of values) was given a public form, and it spread and got importance not only in essence, but by quantity, moreover, the thing that was given by both parties was not called the product (merx) any more, and one of the subjects was called the price (pretium)" [9].

An extremely interesting record, confirming the sale of land is a piece of a marble plate with the printed act of selling (and / or lease) of land defining the area and the list of their parties of the contract, which was found by K. K. Kosciusko-Valyuzhynych in Chersonesos in the square of the St. Volodymyr Cathedral, which was being built then in 1890. In 1983 while excavating in the northern part of Chersonesos S. G. Ryzhov discovered two fragments of the same plate. The document of the 60-70's III. BC and other similar proofs may be the basis to study the characteristics of civil law transactions in ancient times. Although the beginning of the inscription was not preserved, and the rest of the text survived though being damaged, researchers still managed to largely reconstruct the contract [10].

On the basis of the inscriptions, the same citizens gained ground, which consisted of several sections located in different places. Therefore, the same name was given several times and the areas of individual sections were inscripted, and then their general area was summarized.

The researchers of Chersonesus Act on land sales made a number of conclusions that are important for understanding the civil and land relations of that time. Having restored, as far as possible, the text of the document, E. I. Solomonik and G. M. Nikolaenko found that wide sale or lease of land, expressed in the act, was conducted by the state. That is why at the end of the text epimelets (επιμελήται) that signed this legal document are mentioned [11]. As V. P. Yaylenko, V. M. Andreev, O. I. Popov stated the presence of a magistrate while concluding the contract of sale of land in most ancient states was badly required [12].

Scientist epigraphists state that, since the Greeks did not have any precise legal definitions (this was done only in ancient Rome "in connection with the creation of certain legal regulations and laws") the interpretation of certain terms always causes considerable difficulty [13]. In particular, the term πρασις used in the above-mentioned act can have a dual meaning, pointing to the sale or lease of land. However, if we draw our attention to close in time analogies, it turns out that lease unlike the sale was generally given at this time as μίσθωσις and its derivatives. Thus, Lysias's speech (VII. 4, 9-10), concerning the purchase and lease of land in the IVth BC, gave the verb μισθόω, and in VII.4 it is stated that Aptykles bought (πριάμενος) land, and farm it out (ἐξεμίσθωσεν). In the great Delian inscription of 300-290 Bc. specially dedicated to the lease conditions and terms of temple lands, lease is defined as μίσθωσάμενος, and in lines 10, 25-27 the verb άποδώσουσι is used in the sense of "to give the area" or "to repay the debt" [14]. Finally, in the collection of Greek legal inscriptions, where one can find a significant number of documents about the terms of purchase of real estate (house, land) the verb πρίαμαι is commonly used [15].

The given analogies in combination with other data made E. I. Solomonik and G. M. Nikolaenko believe that the act is likely to refer to the sale of land, but the hypothesis regarding the lease can't be completely rejected. In order to solve this issue the information on the price of land could help, but there were no such inscriptions, as well as the information about the mandatory tax on lease of land [16].

Sale of a large number of lands can not be considered normal and common. It was to be connected with the general situation of Kherson State at the beginning of the III century BC, its poli-

[9] Novitsky I. B. Roman private law: [Tutorial] / I. B. Novitsky. – M. "Krasnoe Znamia"; "Gudok", 1948. – p. 69.
[10] V. D. Blavatsky Agriculture in the antique states of the Northern Black Sea / V. D. Blavatsky. – Moscow: Publishing House of the USSR Academy of Sciences, 1953. – p. 29-33.
[11] The same. – p. 51.
[12] Yaylenko V. P. Greek colonization VIII-III centuries. B.C. According to epigraphic sources / V. P. Yaylenko. – Moscow: Nauka, 1982. - P. 92; Andreev V. N. Attic public landownership V-III centuries. B.C. / V. N. Andreev // Bulletin of ancient history. – 1967. – № 2. – p. 61, 65.
[13] Solomonik Y. I. On plots of Chersones early in the III century. B.C. / Y. I. Solomonik, G. M. Nikolaenko // Bulletin of ancient history. – 1990. – № 2. – p. 92.
[14] Lopuhova O. B. Some issues of land lease temple on Delos / O. B. Lopuhova // Bulletin of ancient history. – 1985. – № 1. – p. 150-151.
[15] Dareste R. Recueil des inscriptions juridiques greques. Vol. 1 / R. Dareste, B. Haussoullier, Th. Reinach. – paris, 1891. – p. 66,72.
[16] Solomonik Y. I. On plots of Chersones early in the III century. B.C. / Y. I. Solomonik, G. M. Nikolaenko // Bulletin of ancient history. – 1990. – № 2. – p. 93.

tics and economy. Such a mass sale of land can be seen in Attica in the IV century BC, when the state experienced a profound general crisis. Late in IV century – early in III century B.C. Chersonese also experienced a difficult period of its history. Based on the oath of Chersonese citizens[17], set of ostracons and the fragment of law about the return of political exiles[18], the researchers found out that in this period a fierce political struggle which culminated in the temporary seizure of power by antidemocratic elements (oligarchs or a tyrant) and the expulsion of their opponents (the supporters of democracy) occurred there. Later the restoration of democratic order took place and it was fixed by the oath of Chersonese citizens, and the return of exiles.

Contracts of sale were very common in the ancient world, particularly in the northern states of the Black Sea, because active internal and external trade took place for most of their existence[19]. Central trade administration was responsible for direct trade regulation. At different times large churches, merchants, sailors and others could be other trading parties. "Articles of prime necessity are bounteously provided by the neigboring countries of Pontika that are admittedly the most useful of all, namely cattle and a lot of excellent slaves, as well as luxury goods such as a lot of honey, wax and tinned fish" (Polyb. IV, 38, 4). Thus, in late VI-V century B.C., during the collapse Olbian chora when agricultural area of Olbia was limited only by the outskirts of the city, and life in rural settlements of the Lower Bug region ceased to exist. Historians (particularly N. O. Son, V. M. Zubar, E. A. Linova) on the basis of archeological data noted the simultaneous revival of the local economy. This led them to the conclusion that at this time the proportion of intermediary trade and crafts, whose products were given to barbaric population of the region increased[20]. It was the profit from trading intermediary transactions received by the civil community as a whole and its individual members engaged in the industry, which was the basis of economic development of Olbia until the revival of choruses in Lower Pobuzhya in turn of V-IV B.C. Striking evidence of the spread of sale in Olbia in VI-I centuries B.C. is the findings of local minting coins and coins from Istria, Amastriyi, Sinop, Amasia, Amis, Koman[21].

The existence of a small group of wealthy citizens in Olbia, a prominent representative of which was Protogen who gave money to buy food[22] is also in favor of the conclusion of the increase in the proportion of intermediary trade. Thus, taking into account weakening of Olbian traditional ties with the nomadic Scythian world since the IIIth B.C. and military and political situation changing in the North-Western Black Sea., we can say that a leading role was taken by maritime trade since then.

The gradual development of domestic trade is seen in Chersonese. Since early IV. B.C. in legal life the Chersonese citizens, sales contracts replaced the agreements on the exchange of agricultural products into craft products, as evidenced by the first coinage by City Mint. At the same time lively and intermediary trade was carried out by merchants of Tyre[23]. Thus, over time the sales contracts replace barter.

According to the researchers, the prominent center of intermediary trade in the ancient world was also the Bosporus[24]. It is known from the sources about the large-scale delivery to mainland Greece, particularly to Athens and to Asia Minor of the Bosporus grain (wheat, barley, millet). This is evidenced in particular by the Athenian decree 288/287 B.C. in honor of the king of Bosporus Spartoka, Evmen's son[25]. In his remarks against Leptin Demosthenes also mentioned the brisk trade relations between the Bosporus and Athens[26]. First of all, it was the sale of bread: "... Levkon, being the owner (κύριον) of it (Pontus – auth.), provided athelia to those who drove him to Athens" (Dem. Adv. Lept. 31).

Bronze statues to several kings of the Spartokids dynasty that were built in gratitude to them may also be the evidence of Bosporus large-scale foreign trade[27]. A marble slab with the trade agreement text concluded in 347/346 B.C. by Athens and Bosporus and with the relief image of the Bosporus king Levkon's I sons (389/8 – 349/8 B.C.) – Spartok and Perisad who were called "good men" because they were "willing to care about sending grain to the people of Athens, as well father did and eager to serve in all things, which are necessary to the people of Athens"[28] was mounted in Piraeus harbor in Athens. The translation of the document into Russian had been made by the

[17] Zhebelev S. A. Chersones oath / S. A. Zhebelev // Northern Black Sea. – Moscow-Leningrad : Publishing House of the USSR Academ, 1953. – p. 217-218.

[18] Solomonik Y. I. Detail of the inscription from the Chersonese on political exiles / Y. I. Solomonik // Bulletin of ancient history. – 1984. – № 3. – p. 75.

[19] Gavrylenko O. A. Ancient Northern Black Sea state, at the forefront of national law (late VII century. B.C. – the first half of the VI century A.D.). Monograph / O. A. Gavrylenko. – Kharkiv: Parus, 2006. – p. 138.

[20] Zubar V. M. The ancient world of the Northern Black Sea: Essays on historical and socio-economic development: [Tutorial] / V. M. Zubar, Y. A. Liniova, N. O. Son. - K.: Publishing House of O. Teliga, 1999. – p. 98.

[21] Shenert-Geys Y. Trade and economic relations with Greece, Northern Black Sea Coast and their reflection in the material of coin finds (VI-I centuries B.C.) / Y. Geis-Shenert // Bulletin of Ancient History. – 1971. – № 2. – p. 26.

[22] Latyschev V. Inscriptiones antiquae orae septentrionalis Ponti Euxini grecae et latinae. Vol. 1. Ed. 2 / V. Latyschev. – petropoli, 1916. – № 32.

[23] Zubar V. M. The ancient world of the Northern Black Sea: Essays on historical and socio-economic development: [Tutorial] / V. M. Zubar, Y. A. Liniova, N. O. Son. - K.: Publishing House of O. Teliga, 1999. – p. 181.

[24] Brashinsky I. B. Athens Decree 323/2 B.C. (On the history of the Athens-Bosporus relations) / I. B. Brashinsky // Brief of the reports and field studies of the Institute of History of Material Culture. – № 74. – M.: Publishing house of the Academy of Sciences of the USSR, 1959. – p. 3-8.

[25] Grakov B. N. Materials on the history of Scythia in the Greek inscriptions of the Balkan Peninsula and Minor Asia / B. N. Grakov // Bulletin of ancient history. – 1939. – № 3. – p. 281.

[26] Tokhtasiev S. R. Bosporus and Sindica in the era of Leucon I (Review of new epigraphic publications) / S. R. Tokhtasiev // Bulletin of ancient history. – 2004. – № 3 – p. 171.

[27] Zinko V. N. Archaeological walks on ancient Kerch / VN Zinko. – Kerch: [B. I.], 1998. – C. 8-9.

[28] The ancient method of production in literature / [ed. S. A. Zhebelev] // Proceedings GAIMK. – Vol. 78 – Leningrad, 1933. – № 585. – p. 360-361.

remarkable expert of antiquity S. O. Zhebeliov. "As Spartok and Perisad give the Athenians the same privileges that were granted by Satire and Levkon[29], then let Spartok and Perisad have the same privileges which people of Athens gave to Satire and Levkon[30]... about the debt payment to Levkon's sons[31] (to report in the National Assembly ekklesia)... To satisfy Spartok and Perisad's request to provide them with a forensic team", – stated the contract. Bosporus rulers were reassured that "they met no the refusal of the Athenian people in anything"[32].

Part of trade transactions for the purchase of Bosporus grain was carried out by Athens on credit. This is evidenced by Demosthenes (Dem. Adv. Lept. XX, 40) in his speech against Leptin[33], noting that the Athenians always have Levkon's I money. Of course, this could only be the money that belonged to him for bread, sold to the Athenians. It also follows from the above mentioned Athenian decree 347/346, which states that Levkon's sons were reimbursed their money in order they didn't "criticize the Athenian people"[34]. An interesting fact is that Levkon's debtor did not appear to be private Athenian merchants, but "Athenian people", i.e. the Athenian state. The money had to be paid from the state treasury. Athenian proedros were attributed to conduct business in the first place, right after the religious issues, because it was extremely important for Athens to maintain the trust and loans of Levkon's children, despite the fact that they were unable to cover all the costs of the purchase of the Bosporus bread by their exports[35].

As remarked by M. Skrzhynska, the representatives of underprivileged population were mostly involved activity in the field of trade[36]. Plato and Aristotle believed that the intermediary trade was fitting only to foreigners. Citizens prefer to invest only in trade and thus receive benefits from it. Thus, for example, the famous Athenian orator Demosthenes and his father did like that (Dem. XXVII, 11; Plut. Dem. III, 6). Perhaps in the same way, at least in part, the wealthy Protogen of Olvia acquired his wealth[37].

Thus, in the period under review, the ancient Northern Black Sea states widely used sales contracts. As a contractual (consensual) agreement, contract of sale was one of the most popular deals in the life of the people. The form of them was oral or written, after what the thing was given to the buyer. According to Stobaei witnessing, sales contracts entered into force upon the receipt of the deposit seller. But this rule is limited in case when the agreement was concluded by unusual procedure (in anger, during the argument) or in a state of mental disorder[38].

Deed of gift

In ancient Northern Black Sea states citizens and non-citizens often made deeds of gift. Deed of gift was a Grant Agreement to the alienation of property, particularly in giving the right of ownership to a person, who is gifted. To make any gift a legal act, the consent of a gifted person was required, consent to accept the gift. Without this the agreement was invalid. Such a deed of gift which was concluded under psychological or physical pressure, etc. or in the disease state was considered void too. Plutarch (Plut. Sol. XXI), naming the reforms undertaken by Solon, mentioned the law under which the gift was considered valid if the man who made it, "... did not act in a state of illness, was not enchanted potion, was not imprisoned in chains or was made do it or not under the influence of a woman"[39]. As regards the legal consequences of a gift, from the very essence of this agreement it came out that the person who took the gift could not put forward claims on the quality of the gifted object because such an agreement is free of charge.

Available sources provide an opportunity to give enough examples of deeds of gift, originated in ancient states of the Northern Black Sea. Thus, in one of his works the academician A. I. Tyumenyev, exploring connections of Chersones and Delos, referring to the lapidary monuments of foreign origin, said that Chersonesites gave capital as a gift to one of the Delian temples, the interest of which was directed to the celebration of religious holidays – Chersonesiones. That is why this capital was named «χερσονήσιον» in Delian documents[40]. In the code of Olbian inscriptions there is the honorary decree of Olbian citizens dating from about the middle of the third century. B. C. to honor persons who gave the city significant financial aid in times of economic crisis[41].

We also know about the rich gifts that were given to the Temple of Achilles on the island of Levkos (Λευκός, now named "Zmiyinyi"). Ancient writers reported that the island is preserved many valuable gifts, jewels, rings, coins, expensive vessels, bronze and terracotta statuettes, wooden and marble statues of Achilles and his friends. Only some of the listed items were found during the excavations. Repeated attacks on the sanctuary, its plunder are also the evidence of temple wealth[42].

---

[29] Satyr I (393/2 - 389/8 B.C.) – Leucon's I Father. Privileges provided to Athens by the Government of the Bosporus, consisted in duty-free transportation of grain cargoes from the Bosporus.

[30] These privileges were to provide Satire I and Levkona of Athenian citizenship and human rights and duty-free export of goods from Athens.

[31] For previously purchased bread to the Athenians.

[32] The ancient method of production in literature / [ed. S. A. Zhebelev] // Proceedings GAIMK. – Vol. 78 – Leningrad, 1933. – № 585. – p. 360-361.

[33] Readings on the history of ancient Greece / [ed. D. Рю Kallistov]. – M.: Mysl, 1964. – C. 643-644.

[34] The ancient method of production in literature / [ed. S. A. Zhebelev] // Proceedings GAIMK. – Vol. 78 – Leningrad, 1933. – № 585. – p. 360-361.

[35] Brashinsky I. B. Trade duties and duty-free in the Bosporus (IV century B.C.) / I. B. Brashinsky // Bulletin of ancient history. – 1958. – № 1. – p. 137.

[36] Skrzhinska M. V. Everyday life and holidays in Olbia, VI-I centuries B.C / M. V. Skrzhinskaya. – SPb. : Aletheia, 2000. – p. 114.

[37] Latyshev V. V. Research on the history and polity of the city of Olbia / V. V. Latyshev. – SPb. : Type. V. S. Balasheva, 1887. – C. 109.

[38] The ancient method of production in literature / [ed. S. A. Zhebelev] // Proceedings GAIMK. – Vol. 78 – Leningrad, 1933. – № 447. – C. 278.

[39] Readings on the history of ancient Greece / [ed. D. P. Kallistov]. - M.: Mysl, 1964. – p. 155.

[40] Tyumenev A. I. Chersonesus sketches. I. On the question of the time and circumstances of the emergence of Chersonesos / A. I. Tyumenev // Bulletin of ancient history. – 1938. – № 2(3). – p. 270-272.

[41] Olbian Inscribtions (1917-1965). – L. : Nauka, 1968. – № 29. – p. 36-37.

[42] Rusyaeva A. S. Pontic Olbia: City of happiness and sadness / A. S. Rusyaeva, M. V. Rusyaeva. – K.: Publishing House "Stylos", 2004. – p. 34-35.

From the 2d century. B.C. till present days one can see a survived honored decree to honor a foreigner who has repeatedly provided free benefits in kind, money, by distributing bread to Chersonesites in general and to individuals in particular[43]. Since this aid was of gratuitous character, it is quite possible to consider it a gift.

Loan Agreements

A loan agreement was widely used in everyday life of people. The loan is an agreement under which one party provides to another party a number of things as property that can be replaced (i.e. those that can be determined in money, in size or in weight), provided the same things are returned in a certain period. The subject of the loan agreement could be money or various goods (grain, wine, etc.)[44].

The literature describes the cases where the State was a lender. As a general rule, the state loan in the Hellenic city-states could be available for the freighter for transportation. It was returned only in case of the safe arrival of the vessel (in the case of an accident or loss of property and other emergencies the freighter was freed from paying the loan)[45]. Sometimes the borrower could be the entire community of the city-state. An example of this may be the plate found in 1951 during the excavations of Olbian temenos and dated from the middle of the third century. B.C. which had the honorary decree in honor of three sons of the Chersonesus citizen Apollonius, who once had also provided many services to Olbian community. The monetary loan provided by Apollonius and his sons at difficult times for the country, i.e. "three thousand gold coins that his father lent... and appointed the time of pay back..." is the last mentioned in the decree[46].

Yet individuals were often debtors. In a speech of an unknown speaker "against Formion", made in 327/6 B.C. and placed in the collection of speeches of Demosthenes, it is indicated that for trading in the Bosporus the merchant Formion received loans from three people: 2000 drachmas from the Athenian Chrysippus, 4500 drachmas from Phoenician Theodore, 1000 drachmas from the shipowner Lampida (Dem. Adv. Phorm. XXXIV, 6). The record about the Chrysippus loan was made and kept in Kit's trapeza τραπεζα (probably a descendant of the same name servant of the famous Athenian trapesitos Pasion who ran business of the Bosporyan Sopeyid). The contract stated that Chrysippus gave Formion the debt of 2000drachmas and after its return from Bosporus had to receive 2,600 drachmas[47].

Thus, the loan agreement could be interest contracted and interest-free. Generally, the loan from moneylenders was taken under considerable interest. For example, in banking practice of Athens money was given at the rate of 8-36% per annum. V. P. Yaylenko stated that "in Olbia of the III-II century. B.C. usury interest was very large, so it won't be an exaggeration that it was ruined not only the barbarians, but also by lenders such as Protogen"[48]. In addition, not only acts of exchange but also credit ones were obviously carried by moneylender-trapesyts (from τραπεζα – a table where coins are exchanged)[49]. In particular, Aristotle pointed out the wide-spreadness of credit operations among the Greeks (Aristot. Pol. And 4, 1258 b 24-25).

In most cases the loan agreements were concluded orally, sometimes resulting in legal disputes, such as, for example, described in Isocrates' "banking speech"[50]. But over time, more and more loan agreements become literal (according to Roman law concept) character. The legal nature of literal contracts was that the obligation arose not from mere agreement of the parties, but from the written form, which it had to acquire. The ancient Greeks worked out the procedure for concluding agreements in detail. In the speech against Kalinik, attributed to Demosthenes (Dem. Adv. Kal. LII 4) it is stated that normally when an individual invested his money, indicating whom they must pay, all moneylenders first recorded the name of the depositor and the amount of the deposit, then the name of a person to whom this contribution should be given. Moreover if a moneylender knows the person, who must issue a contribution, he only recorded his name. If he did not know the person, in addition, he wrote also down another person's name, who would indicate and recommend the man, to give the money back[51]. Undoubtedly, in ancient states of Northern Black Sea coast, as in metropolitan countries loan agreements the so-called syngraphs and chirographs were widely used.

Syngraph (συγγραφή) was a bilateral written document that recorded the fact of transfer of creditor's sum of money or a certain number of things to the debtor. It could be signed or under creditor's and the debtor's seals (a sufficiently large number of seals were found during the excavations of the ancient city-states of Northern Black Sea)[52] and also notarized by seals or signatures of witnesses. After that this document was given to trapesyt (Dem. XLIX, 22), for which he received a certain payment[53]. Thus, syngraph drafting process was quite complicated. With its drafting usually the content of the contract was declared, which was not always desirable for the parties. Therefore, in the legal life another form of debt instruments

[43] Solomonik E. I. New epigraphic monuments of Chersonesos / E. I. Solomonik. – K.: Naukova Dumka, 1964. – p. 27.
[44] Gavrylenko O. A. History of state and law in Ukraine: the ancient period / O. A. Gavrylenko. – Kharkiv: HNUVS, 2011. – p. 31.
[45] Millett P. Maritime loans and the structure of credit in fourth-century Athens / P. Millett // Trade in the Ancient Economy – London, 1983. – p. 36.
[46] Olbian Inscribtions (1917-1965). – L. : Nauka, 1968. – № 28. – p. 35.
[47] Skrzhinskaya M. V. Scythia by Greek eyes / M. V. Skrzhinskaya. – SPb. : Aletheia, 2001. – p. 180.
[48] Yaylenko V. P. Materials for the "Corps lapidary inscriptions of Olbia" / V. P. Yaylenko // Research on epigraphy and language of ancient Anatolia, Cyprus and the Ancient Northern Black Sea. – Moscow: Institute of Universal History of the USSR, 1987. – C. 11.
[49] Skrzhinskaya M. V. Scythia by Greek eyes / M. V. Skrzhinskaya. – SPb. : Aletheia, 2001. – p. 165.
[50] Isocrates. Banking Speech (Trapedzytyk) / Socrates; [tr. N. N. Zalesskiy] // Bulletin of ancient history. – 1968. – № 4. – p. 209-216.
[51] The ancient method of production in literature / [ed. S. A. Zhebelev] // Proceedings GAIMK. – Vol. 78 – Leningrad, 1933. – № 521. – p. 322.
[52] Maximova M. I. Ancient Seals of the Northern Black Sea / M. I. Maksimov // Bulletin of ancient history. – 1937. – № 1. – p. 253-256.
[53] Skrzhinskaya M. V. Everyday life and holidays in Olbia, VI-I centuries B.C / M. V. Skrzhinska. – SPb. : Aletheia, 2000. – p. 86.

such as a chirograph which was a unilateral document made by the debtor on its own behalf and signed by him became more widespread[54].

At maturity date both syngraph and chirograph became a writ. However, in order to acquire executive force, the document had to be registered with the appropriate government agencies (άρχειον, χρεωφυλάκιον, βιβλιοφυλάκιον etc.) and citizens often did not do it, evading the payment of the due tax[55]. In addition, the preparation of documents, if necessary facilitated creditor's proof of transfer of property or money to loan and at the same time provided an opportunity to prove his right to require the debtor to return the appointed in synagraph or chirograph sum of money or things that could be replaced[56]. In this case, the documents had to be notarized and registered.

An example of a loan agreement with certain observations one can consider a financial operation undertaken by Bosporian citizen Sopeyidom and described in "Trapesyt speech" by Isocrates[57]. When Sopeyid, who at that time was in Athens, was in need for money from his homeland, he used a widespread in those times way: "In order not to imperil the money during the voyage" (a shipwreck happened quite often), he asked Stratokl, that sailed to the Bosporus, to give him the required amount of his own funds and then to get borrowed money from his father at the Bosporus[58].

The loan could be lent to a creditor against a pledge. According to one of Olbian inscriptions, to find a way out of monetary hardship caused by financial crisis in the second half of the third century B.C., the government gave sacred vessels as a pledge to a moneylender[59]. In this case (in civil law, unlike criminal procedure) pledge means a way to enforce the obligations. According to ancient rules of customary law, the lender (mortgagee) has the right in case of default by the debtor (mortgagor) collateralized obligations to obtain satisfaction from the value of the mortgaged property ex parte. Due to the mortgaged property a mortgagee acquired the right to satisfy the demands in full, which was determined at the time of actual pleasure, probably including interest, damages, compensation, and penalty. The subject of the loan agreement could be property alienated by a mortgagor and which could be levied.

Interesting information on the practice of contracting mortgage loans, as well as the practice of terms performance specified in the contract, is given in the speech of the unknown speaker in the fourth century B.C. "Against Lakrit"[60], included in the speeches of Demosthenes. Lakrit, who came from a small Asian town Faselidy, lived in Athens in the middle of the fourth century. He was a disciple of the famous logograph Isocrates and simultaneously was engaged in commercial activities. Lakrit had a brother named Artamon, who with his compatriot Apollodorus, once decided to earn money by trading with the cities of Northern Black Sea. Since he had no initial capital, he became a debtor. In the course of the trading operation he violated the terms of his contract with the lender and he went to court. This case was described by M. V. Skrzhynska[61] in sufficient detail. She states that, the fact that before the court, which took place between 351 and 340 B.C. Artamon died, and Lakrit inherited all its property, the plaintiff filed a case against Lakrit who refused to be responsible for the debts of his brother.

Practice when wealthy Greeks, despite significant risk (piracy, loss of ships from storms, etc.), sought to multiply their wealth investing money in maritime trade was widespread enough. In case of shipwreck or pirates capture the lender usually lost all the money invested. But in case of successful completion of the case, he received a profit of 20 to 30%. In turn, merchants who have money in debt had the temptation not to give it back, resorting to various machinations. That is apparently happened in this case. Two merchants from Faselid decided to get profit from selling wine to the Northern Black Sea Coast city-states. However, they did not have the required amount for freight of the ship, or to purchase goods. Thanks to their friends they found two potential lenders in Athens and concluded a loan agreement.

The text of the agreement was saved almost completely until now. "Androkl from Sfett and Navsikrat from Karistos lent Artamon and Apollodorus of Faselidy 3000 silver drachmas for trade trip from Athens to Mende or Scione, and thence to the Bosporus and if they wish along the left coast to the Borisphen and back to Athens, at the interest of 22.5%[62]; and if they sailed from Pontus to Gidron after climbing Arcturus, at the interest of 30%[63] against a pledge 3000 wine amphorae of Mende, which will be loaded in Mende on Scione twenty-oar ship, whose owner is Hiblesius. They give this guarantee, without being under it to anyone, and will not borrow under it. And the goods that were loaded instead of wine, they would completely deliver from Pontus back to Athens on the same ship; when the goods are safely transported to Athens, debtors would give the creditors under the contract the due sum within 20 days of arrival in Athens. It should be everything completely, except that excluded from the general consent of seafarers, and

[54] Orach Y. M. Fundamentals of Roman private law / Y. M. Orach, B. I. Tyschyk. – K.: Atika, 2000. – p. 198.
[55] Lurie S. Y. For the organization of notaries in the Greek metropolis (the inscription IG VII 3172) / S. Y. Lurie // Bulletin of ancient history. – 1938. – № 2(3). – p. 68.
[56] Orach Y. M. Fundamentals of Roman private law / Y. M. Orach, B. I. Tyschyk. – K.: Atika, 2000. – p. 198.
[57] Isocrates. Banking Speech (Trapedzytyk) / Socrates; [tr. N. N. Zalesskiy] // Bulletin of ancient history. – 1968. – № 4. – p. 209-216.
[58] Skrzhinskaya M. V. Scythia by Greek eyes / M. V. Skrzhinskiy. – SPb. : Aletheia, 2001. – p. 166.
[59] Latyschev V. Inscriptiones antiquae orae septentrionalis Ponti Euxini grecae et latinae. Vol. 1. Ed. 2 / V. Latyschev. – petropoli, 1916. – № 32; Levi E. I. Olbia. The City of Hellenistic Times / E. I. Levi. – L: Nauka, 1985. – p. 3.
[60] The ancient method of production in literature / [ed. S. A. Zhebelev] // Proceedings GAIMK. – Vol. 78 – Leningrad, 1933. – p. 257-267.
[61] Skrzhinskaya M. V. Scythia by Greek eyes / M. V. Skrzhinskiy. – SPb. : Aletheia, 2001. – p. 177-178.
[62] That is while returning the loan debt one should add 22.5% of it.
[63] In September, when the sea began storming, the risk of shipwreck increased, and so, accordingly, the interest on the debt increased. Furthermore, ships were often plundered by pirates. That is why the loans were given to maritime trade at the highest percentage (for comparison, loans secured by land were under 8-10%).

if something had to be paid to the enemy, and the rest should be paid completely. They provide freight to creditors as untouchable to pay the due sum under the contract… And if something went wrong with the ship which transported the goods, the guarantee should be saved (by the debtor), and the rest of property that was lucky to be rescued, should be jointly owned by the participants of the loan" [64]. According to the speech, in the presence of witnesses this agreement was given to the Athenian Arhemonid to save. In turn, in the presence of five witnesses Apollodorus and Artamon got 3000 silver drachmas listed in the agreement and, as per agreement, they went to Mende by Hiblesius's ship.

According to the statement of the plaintiff, from the very beginning the terms of the contract were violated. As it became known in Mendy instead of 3000 amphorae of wine only 450 were loaded on board. Subsequently wine was not purchased instead of the goods in Pont. Later, at the meeting of creditors, Artamon and Apollodorus claimed that all the goods had been lost on the way from Panticapaeum to Theodosia.

According to eyewitnesses, in Pantikapaeum only 80 pitchers of Cosco cheap wine and salted fish were loaded on board, but not for delivery to Athens, where such goods could hardly be profitably sold. It was food for farm workers, bought by some Bosporus citizen in Pantikapaeum which he was carrying to Theodosia. On the way there the ship crashed indeed, but as one of the participants testified before the court, there were one or two bales of goat skins besides the goods belonging to local landowners on board. So, in fact, it was not the cargo, which was waited for in Athens. When asked what happened to the money received from the sale of wine from Menda, the defendant stated that it was given on the Bosporus in debt to the merchant who is at Chios. Probably Artamon and Apollodorus had a chance to earn, giving the money they had interest and were not bother by buying and selling goods from Bosporus. So one more violation of agreement was found, which did not suppose such use of money gained from the sale of wine. According to M. V. Skrzhynska, no matter to what extent the claimant was right in this particular case, it depicts a typical picture for that time [65].

Another example of loan agreement against a pledge is contained in Ahillodor's letter found by archaeologists from Berezan. It refers to the dispute between the author of the letter and some Anaxagoras, who was given Ahillodor's property as a loan against a pledge, consisting of houses and slaves. The latter believed that he then had the right to at least a portion of the property (one slave) [66].

As V. L. Zuts pointed out [67], we know the facts of cancellation of debt, both private and public in ancient states of the Northern Black Sea region. This is the so-called seisachtheia ("shaking off the burden"), which was first made by the prominent Athenian lawyer Solon. In Olbia it was used during the siege by the army commander Zopyrion of Alexander Macedonian in 331 B.C. It is know from the decree in honor of Protogen that it was used later, when this wealthy citizen of Olbia while being an oykonom (a manager of public sector) and state treasurer, "forgave debts to some people, and gave delay to others for as long as they wanted and did not have interest". Next the decree states: "When everything in the city was in decline as a result of wars and bad harvests, and there was no money, so that people (i.e. the National Assembly – auth.) therefore asked him (Protogen – auth.) to give the monthly deferral and take care of creditors and debtors, he was the first, though his and his father's debts reached 6000 of gold coins, offered people to count on him in that, and when people asked him to forgive their debtors debts, he forgave everything to everyone…" [68].

Luggage Agreements (transfer things in storage)

Epigraphic sources certify the facts concluding agreements on luggage. Under the terms of the contract the depositary (a person who was given the things to store) was obliged to keep the given items within a certain period, then return them to the depositor. It was a free agreement; otherwise one should talk not about luggage but about the leasehold. If, while being stored, the things gave profit, the depositary should return it back. The fact of being free somehow weakened the contract demands that were raised to the Depositary. In fact, he was responsible for keeping things only when he had special guilt or gross negligence.

In the autumn of 1996 during the excavation on the eastern slope of Mount Mitridat (Panticapaeum) a lead plate with the text of the letter dated around the second half of the fourth century B.C. was found and it stated: "Hermey writes to someone, hello! Fifty… were under concern… It is… provided… I sent them… take care of it. See you!" Clarifying the interpretation of the text made by S. Y. Saprykin and A. V. Kulikov, who first published this finding [69], the content of the message can be explained as follows: a certain Hermey writes about something of concern in the amount of fifty. It was Hermey's property, but obviously, was given by him to store to an authorized representative. However, due to some circumstances and, obviously, to get out of a difficult situation, the depositor shall notify the depositary that someone else sent him a mandate to take care of the things. That luggage agreement between Hermey and the person received the letter was broken. The property owner allowed the depositary to take a certain number of things, probably from the person who was given the things to. Thus, the letter makes it possible to state with sufficient certainty the presence of luggage contracts in the daily life of the ancient population of the Northern Black Sea states.

---

[64] Skrzhinskaya M. V. Scythia by Greek eyes / M. V. Skrzhinskiy. – SPb. : Aletheia, 2001. – p. 177-178.
[65] Ibid. – p. 178.
[66] Vinogradov U. G. The oldest letter from Berezan / U. G. Vinogradov // Bulletin of ancient history. – 1971. – № 4. – p. 91.
[67] Zuts V. L. On ancient ownership in Olbia / V. L. Zuts // Archaeology. – 1971. – № 3. – p. 24.
[68] Latyschev V. Inscriptiones antiquae orae septentrionalis Ponti Euxini grecae et latinae. Vol. 1. Ed. 2 / V. Latyschev. – petropoli, 1916. – № 32. – p. 56.
[69] Saprykin S. Y. New epigraphic finds in Panticapaeum / S. Y. Saprykin, A. V. Kulikov // Ancient states of Eastern Europe. 1996-1997. Northern Black Sea region in antiquity: Issues of source. – M.: Publishing house "Eastern Literature" RAS, 1999. – p. 203.

Employment agreement

Undoubtedly, in the Northern Black Sea countries there were employment agreements which were agreements by which one person (an employee) gives to another person (an employer) his labor for a fee. These agreements did not provide the right of the employer to the employee. In the Northern Black Sea states this kind of agreements was likely more common than in classical Greece as slave labor was used in a sufficiently small amount, mainly in the household. The subject of the employment agreement was physical work (Hom. Od. XVIII, 357), for instance, such as those performed at the direction and under the supervision of the employer (for example, work in ergastery (ἐργαστήριον), processing land, etc.). The employer was obliged, over a period specified in the contract, to provide his labor, and the employer was obliged to pay the agreed salary. If the employee had not fulfilled work even beyond his circumstances, the employer could be exempted from payment [70]. The interests of both parties were defended by lawsuits.

The lease

One of the common documents in the ancient Northern Black Sea city-states was the lease under which the contract was based on the possession and use of property within a certain period for a fee [71]. As lease (tenancy) the landlord undertakes to provide the lessee (tenant) property for temporary possession and use or use for a fee for independent entrepreneurial activity or for other purposes. The object of the agreement could be both movable things (including cattle and slaves), and real estate.

Perhaps, the tenancy agreement is given in the document of 60-70. III B.C., engraved on the already mentioned marble slab found in Chersonese. In this case, the object of the agreement was land. The contract clearly defined its area and provided a list of names of subjects of the transaction. Even if this legal monument is not about lease, such agreements were undoubtedly concluded. These objects could be land, residential and commercial premises and others. Such texts of agreements, engraved on stone slabs were found in Peyessa (apr. 400 B.C.) [72], in Athens (346, 321 B.C.) [73], in Ephesus (290-280 B.C.) [74] and others.

With scribbled on a lead plate the letter by Artykona from Berezan (or from Olbia), first published in 1904 by V. V. Latyshev [75], one is aware of the contracts for hiring of premises. Taking into account the fact that this document has not attracted the attention of legal scholars it is given here in full: "Artykon welcomes his relatives. If you are taken out of Million's house, then move into Atak's room, if he permits, but if not, then you are welcome to Ahatarh's room. Let him charge some wool of Kerdon" [76]. Thus, the letter refers to a certain family (apparently non-residents) that did not have their own homes and had to rent it from others, from the property owners (residents).

In the case of a contract about renting residential and non-residential premises in the Greek city-states the employer had to pay the landlord stehanomiya (στεγανόμιον), so called renting fees for residential building or room, or enoykiya (ενόικιον), renting fees for the shop, warehouse, etc.[77] Artykon's letter shows that in certain cases stehanomiya could be paid not only in cash but also in kind, in this particular case it was wool [78]. Stehanomiya was also the fee paid to the host of the hotel for staying in it [79]. Agreements on lease were not uncommon in the states of Northern Black Sea because the person, who did not have local citizenship, had limited rights or the right to acquire ownership of the building, and so had to hire real estate. The fact that such agreements were widespread in ancient times one can find in the documents from the Greek metropolises, in particular in the judicial speech against Olympiodorus, the authorship of which is attributed to Demosthenes [80].

Tenancy agreement could contain additional terms, e.g. those concerning room repairing. In case of the breach of contract penalties were usually assumed [81]. It's also known from different sources that in cases where the tenant did not make timely payments for housing, the landlord had the right to evict him. Before that, in order to show the last warning, the owner of the house could take the doors and the roof off the building or close the well [82].

Similarly, in case of non-payment of rent the landlord of the leased land has the right to do the same. When he saw that unscrupulous tenant cultivated the field he had the right to carry out "raids" (καταδρομάς) and "seal" (ένεχυράζει) the tools for processing grounds (e.g. a harrow), stopping work in rush season. In cases when the landlord couldn't carry out such actions, he probably could seek assistance from officials that in most Hellenic states were called praktor (πράκτωρ). It was especially necessary when the landlord thought it necessary to carry out the penalty (πράττειν) not from the unfair tenant's property (έχ

[70] Gavrylenko O. A. Ancient Northern Black Sea state, at the forefront of national rights (late VII century. B.C. – the first half of the VI century A.D.). Monograph / O. A. Gavrylenko. – Kharkiv: Parus, 2006. – p. 150.
[71] Big legal dictionary / [ed. Sukharev A. Y. Krutskikh V. E.]. – Moscow: Infra-M, 2000. – p. 35.
[72] The ancient method of production in literature / [ed. S. A. Zhebelev] // Proceedings GAIMK. – Vol. 78 – Leningrad, 1933. – № 327. – p. 207-208.
[73] Ibid. – № 329, 330. – p. 208, 209.
[74] Ibid. – № 332. – p. 210.
[75] Latyshev V. V. Epigraphic news from Southern Russia (1901-1903 findings.) / V. V. Latyshev // Proceedings of the Imperial Archaeological Commission. – 1904. – Vol. 10. – p. 10-13.
[76] Vinogradov Y. G. The oldest letter from Berezan / Y. G. Vinogradov // Bulletin of ancient history. – 1971. – № 4. – p. 78.
[77] The ancient method of production in literature / [ed. S. A. Zhebelev] // Proceedings GAIMK. – Vol. 78 – Leningrad, 1933. – №. 346, 347. – p. 220.
[78] Vinogradov Y. G. The oldest letter from Berezan / Y. G. Vinogradov // Bulletin of ancient history. – 1971. – № 4. – p. 78-79.
[79] The ancient method of production in literature / [ed. S. A. Zhebelev] // Proceedings GAIMK. – Vol. 78 – Leningrad, 1933. – № 348. – p. 220.
[80] Ibid. – № 349. – p. 220-221.
[81] Ibid. – № 344. – p. 219-220.
[82] Ibid. – № 350. – p. 221.

των ὑπαρχόντων), but (without trial) put the defendant to debt prison (ἐξ αὐτου του δανεισαμένου) [83]. This prison (pit) was found during the excavations of Chersonese in 2002 [84]. But such actions apparently weren't often taken, because it cost significant money to the landlord to take the prisoner in prison and it often deprived the debtor the opportunities to find the means to pay the debt [85].

Freight

Taking into account the maritime trade in the states of the northern part of the Black Sea, freight contract became significantly widespread. It is mentioned in badly fragmented and therefore beyond coherent translation epigraphic documents from Thira of Roman period [86]. In addition, the Olbian decree in honor of Protogen shows that the state "paid freight to individuals who carried stones, because the state-owned vehicles were damaged and had nothing to do with the equipment" [87]. Aristotle ascertained the prevalence of freight operations [88] in ancient states (Aristot. Pol. I, 4, 1258 b 21-22).

Freight was understood as the fee to the owners of the vehicle (mostly marine) for providing him transportation of passengers or goods, and, also under the terms of the contract it was the fee for loading, unloading and storing [89]. The amount of freight was usually paid to the owner of the vessel after the transportation.

Contracts of agency

There is some information and facts about the contracts of agency, which refers to unpaid agreement due to which one person – a principal gets a commission to another person – an agent to perform some work. This agreement was usually considered to be a personal service. Most commissions were often individual actions: to purchase or sale of a slave, to receive the goods at the place of delivery by sea, etc. In some cases, an agent was considered to dispose of all principal's property, trade management, decedent's estate. In the states of Northern Black Sea coast, as well as in their Greek metropolis, sometimes an agent was not only a citizen or a foreigner, but also freedmen (usually former brought-up people) and even slaves. Thus, the unknown speaker speech "Against Formion" 327/6 B.C. and placed in a collection of speeches of Demosthenes (Dem. Adv. Phorm. XXXIV, 8; 28) says that the Athenian citizen Chrysippus, who actively exercised meat trade with Bosporus state, held here his trusted slave (οἰκέτη) [90] for commercial transactions during the year, even in winter, when shipping stopped. The latter did his owner's business and, in particular, oversee his debtors [91]. However, he worked with Chrysippus's companion (κοινωνος), who obviously had to supervise the activities of the slave [92].

Joint Agreements

A joint agreement was also popular in the states of the Northern Black Sea [93]. Although primarily researchers associate the fact of its formation with Roman law, it is still worth noting that this kind of contracts was concluded earlier [94]. W. Shreter wrote: "joint ventures to achieve certain economic goals were found in ancient times. Actually the idea of a joint agreement where one lacks the strength to solve a problem himself is so simple and natural that wherever we meet a man in public life, we see a joint agreement. There is no civil law not knowing to the joint agreement" [95]. Under this contract several persons (e.g., merchants or ship-owner) for a particular purpose brought into the general fias fund certain property. Incomes and losses were distributed between the parties as it was due to the contract, whether made in proportion to the contribution [96].

The benefits and the need for companionship and associations are also mentioned by A. L. Fedorov, who wrote that "individual power of a man over time is not sufficient to overcome various difficulties in the implementation of the target; for example, one can have the capital, but no ability to open and run business and the other, by contrast, can have

---

[83] Lurie S. Y. For the organization of notaries in the Greek metropolis (the inscription IG VII 3172) / S. Y. Lurie // Bulletin of ancient history. – 1938. – № 2(3). – p. 70.

[84] Gavrylenko O. A. Ancient Northern Black Sea state, at the forefront of national rights (late VII century. B.C. – the first half of the VI century A.D.). Monograph / O. A. Gavrylenko. – Kharkiv: Parus, 2006. – p. 212.

[85] Lurie S. Y. The above mentioned work. – p. 70.

[86] Zubar V. M. The ancient world of the Northern Black Sea: Essays on historical and socio-economic development: [Tutorial] / V. M. Zubar, Y. A. Liniova, N. O. Son. - K.: Publishing House of O. Teliga, 1999. – p. 181; Karyshkovskiy P. O. Materials for the collection of ancient inscriptions of Sarmatia and Tauris / P. O. Karyshkovskiy // Bulletin of ancient history. – 1959. – № 4. – p. 115.

[87] Latyschev V. Inscriptiones antiquae orae septentrionalis Ponti Euxini grecae et latinae. Vol. 1. Ed. 2 / V. Latyschev. – petropoli, 1916. – № 32; The ancient method of production in literature / [ed. S. A. Zhebelev] // Proceedings GAIMK. – Vol. 78 – Leningrad, 1933. – № 460. – p. 284.

[88] The ancient method of production in literature / [ed. S. A. Zhebelev] // Proceedings GAIMK. – Vol. 78 – Leningrad, 1933. – № 379. – p. 237.

[89] Nahrebelnyy V. P. Freight / V. P. Nahrebelnyy // Legal Encyclopedia. V.6. T-I. – Kyiv: Ukrainian Encyclopedia, 2004. – p. 310.

[90] Brashinsky I. B. Trade duties and duty-free in the Bosporus (IV century B.C.) / I. B. Brashinsky // Bulletin of ancient history. – 1958. – № 1. – p. 136.

[91] Skrzhinskaya M. V. Scythia by Greek eyes / M. V. Skrzhinskiy. – SPb. : Aletheia, 2001. – p. 177-178.

[92] Brashinsky I. B. Trade duties and duty-free in the Bosporus (IV century B.C.) / I. B. Brashinsky // Bulletin of ancient history. – 1958. – № 1. – p. 136.

[93] Diachkov S. V. On the social composition and the nature of the Bosporus finance in I-III centuries B.C / S. V. Diachkov // Bulletin of the Kharkov State. Univ. – 1992 – Vol. 25 (№ 362) / Series: History. – p. 96-103.

[94] Dmitrieva Y. Emergence and development of the institute of partnership (the role of Roman private law in the process) / Y. Dmitrieva // Law of Ukraine. – 2007. – № 6. – p. 126-130.

[95] Schroeter B. Soviet Business Law / W. Schroeter. - M.; L., 1928. – p. 149.

[96] Gavrylenko O. A. History of state and law in Ukraine: ancient times / O. A. Gavrylenko. – Kharkiv: HNUVS, 2011. – p. 34.

a skill, but has no required capital; meanwhile the association of such people is able to give both the capital, and the necessary skills"[97].

Ship-owners' fias were most popular in II-III century. The union of Olbian ship-owners belonged to them. In Horhippia the existence of certified fias of marine professions, included not only the ship-owners and merchants, but state port officials, united by common professional activity or kinship, bonds or mutual objectives with the cult of the same patron god was also proved[100]. As observed by S. V. D'yachkov, leading positions in most major fias were taken by the representatives of the state and city plutocracy, allowing them to monitor the activities of fias[101]. The fact of "royal residence governor"[102] presence in the composition of fias of shipowners of Horhippia in the times of Sauromates II, who also served as a priest, made it possible to M. P. Pisarevskii to conclude that the officials of central administration (of Panticapaeum) had interest to use this private unions in their personal interests. He even considers it possible to think that this fact proves the inclusion of voluntary associations of the state system and their actual merge[103].

Conclusions

Thus, sources indicate that there was a sufficiently developed system of rules of obligatory law that existed in the ancient states of Northern Black Sea. Contract law became the most detailed study, the foundations of which were common to most Hellenic city-states. Contracts were common means of regulating relations between specific entities i.e. the parties to the contract. The implementation of the contracts function of civil law would be impossible at that time without fixed common law principle of freedom of contract under which the parties were not only able to enter into a variety of contracts, but were free to implement their terms, if these terms did not contradict mandatory rules of law, i.e. the rules obligatory to use regardless of the will of the parties. However, there were very few rules of such a kind in ancient law. Similarly to other Hellenic states, legal regulation of contracts in the ancient states of the Northern Black Sea was carried out primarily through discretionary rules, i.e. those applied only in the absence of any other guidance on the given issue in the agreement. Specific character of contracts was only caused specific historical circumstances evolved in a particular region in the period.

[97] Fedorov A. F. Commercial Law / A. F. Fedorov. – Odessa: Slavic typography E. Hrisogelos, 1911. – p. 411-412.
[98] Zhebelev S. A. Bosporus Studies / S. A. Zhebelev // Northern Black Sea. – M.; L.: Publishing House of the USSR Academy, 1953. – p. 204-216.
[99] Diachkov S. V. The social and class structure of the Bosporus kingdom of the I-III centuries. B.C. / S. V. Diachkov // Problems of research of ancient cities: [abstract]. – Moscow: Institute of Archaeology of the Academy of Sciences of the USSR, 1989. – p. 44.
[100] Corps of Bosporus inscriptions. – M.; L. : Nauka, 1965. – № 1281-1292. – p. 770-783.
[101] Pisarevsky N. P. Navy of ancient states of the Northern Black Sea Coast: Author., DiS. for the degree of Doctor. Of Hist. Sciences: spec. 07.00.03 "General history (the history of the ancient world)" / N. P. Pisarevsky. – Voronezh, 2001. – p. 27.

Gedanken zum „Recht auf die Heimat“

Einführung

Die Vertreibung der deutschen Bevölkerung aus dem Gebiet des Deutschen Reiches jenseits von Oder und Neiße und der deutschen Volkszugehörigen aus den meisten ihrer traditionellen Siedlungsgebiete in Ost- und Südosteuropa vor 70 Jahren gehört nach wie vor zu den schmerzhaftesten Kapiteln der deutschen Geschichte.[1]

Doch was ist Heimat? Der Tiroler Alt-Landeshauptmann Wendelin Weingartner unterbreitete in der 2010 anlässlich des 90. Geburtstages von Hans R. Klecatsky herausgebrachten Festschrift einige Gedanken zum Thema „Heimat“. So definierte er den Begriff, den es im romanischen Sprachgebrauch nicht gibt, wie folgt:

> „Heimat, so wie wir den Begriff heute verstehen, ist ein Gefühl, ist eine Sehnsucht der Menschen, in einem vertrauten und damit sicheren Umfeld zu leben. Zu wissen, dass man mit vielen anderen eine gemeinsame Welt teilt und gemeinsam auch Verantwortung für sie trägt. Heimat, das sind vertraute Räume mit ihrer Landschaft, ihren Bauten, ihren Klängen, ihrer Sprache, ihrer Geschichte und ihren Menschen.“[2]

Um noch einmal das Rad der Geschichte um 70 Jahre zurückzudrehen, muss man erkennen, dass das Recht auf die Heimat verständlicherweise vor allem in der deutschen Literatur eine ausführliche und detaillierte Behandlung erfahren hat. Auf ihrer ersten Tagung im April 1947 beispielsweise fassten die deutschen Völkerrechtslehrer eine Entschließung, in der unter anderem festgestellt wurde, dass

> „[…] das Recht der persönlichen Freiheit, das zu den allgemeinen Menschenrechten gehört, auch das Recht umfaßt, in der Heimat zu leben und nicht gewaltsam aus ihr vertrieben zu werden“[3]

und dass

> „Massenausweisungen der einheimischen Bevölkerung aus besetztem feindlichem Gebiet völkerrechtswidrig sind.“[4]

Ein Jahr nach der Gründung der Bundesrepublik Deutschland gab es eine Tagung der neugegründeten *Deutschen Gesellschaft für Völkerrecht*, die ebenfalls in der Hansestadt Hamburg stattfand. Dabei kam zur Geltung, dass

> „[…] der Wille der heimatberechtigten Bevölkerung ein entscheidender Gesichtspunkt für die Zuweisung eines Gebietes ist. Die Trennung der angestammten Bevölkerung von ihrem Heimatboden ohne ihren Willen widerspricht bisher allgemeinen anerkannten Grundsätzen des Völkerrechts. Daher sollte bei der Kodifikation der Grundrechte des Menschen das Recht auf den Verbleib in seiner Heimat aufgezählt werden.“[5]

Im gleichen Jahr wurde die Charta der deutschen Heimatvertriebenen beschlossen. Sie nennt „Pflichten und Rechte“ der Flüchtlinge und Vertriebenen, die nach dem Zweiten Weltkrieg bis 1949 die früheren deutschen Ostgebiete und viele andere Gebiete verlassen mussten. Darunter wird der Verzicht auf Rache und Vergeltung für die Vertreibung, aber auch das Schaffen eines geeinten Europas und die Beteiligung am Wiederaufbau Deutschlands und Europas verstanden. Zudem wurde ein „Recht auf Heimat“ postuliert, das ein von „Gott geschenktes Grundrecht der Menschheit“[6] sei, und es wurde seine Verwirklichung gefordert.

Darf man im Rechtssinne diesen Erklärungen mit Pathos begegnen und das beschworene Recht auf die Heimat einfordern, wenn es ähnliche Vorgänge wie vor sieben Jahrzehnten gibt? Das ist ein strittiger Punkt, den es zu hinterfragen gilt. Das *Institut de Droit International* behandelte im Frühjahr 1952 auf seiner Tagung im italienischen Siena aufgrund eines Rapports des italienischen Völkerrechtlers und einstigen Präsidenten des *Europäischen Gerichtshofes für Menschenrechte*, Giorgio Balladore Pallieri, das Thema „Les transferts internationaux de populations“[7], wobei es primär um Verträge über den Bevölkerungsaustausch zwischen den direkt beteiligten Staaten ging, aber auch die Rechtsmäßigkeit der Vertreibung der deutschen Bevölkerung aus dem Osten zur Debatte stand. Die resultierenden Stellungnahmen waren sehr unterschiedlich, hatten aber die Verurteilung der Barbarei aller Vertreibungen, die der Krieg mit sich brachte, gemeinsam.

Schaut man sich die deutsche Literatur an, so finden wir eine vorsichtige Untersuchung von Rudolf Laun[8]. Der profilierte Verfechter des Heimatrechts nähert sich der Frage eines Rechts auf Heimat vom Völkerrecht her und betont, dass er in dieser Thematik „nach möglichster Objektivität streben“ wolle. Als Basis sei die Heimat anzusehen, die dem

---

1 Siehe dazu: Christian Tomuschat, Das Recht auf die Heimat – Neue rechtliche Aspekte. In: Jürgen Jekewitz/Karl Heinz Klein/Jörg Detlef Kühne [u. a.], Des Menschen Recht zwischen Freiheit und Verantwortung. Festschrift für Karl Josef Partsch zum 75. Geburtstag, Berlin 1989, 183-212, hier 183.

2 Wendelin Weingartner, Gedanken zum Begriff Heimat. In: Franz Matscher/Peter Pernthaler/Andreas Raffeiner (Hrsg.), Ein Leben für Recht und Gerechtigkeit. Festschrift für Hans R. Klecatsky zum 90. Geburtstag, 801-810, hier 802.

3 Siehe dazu *Berichte der Deutschen Gesellschaft für Völkerrecht* 1 (1957), 72.

4 Siehe dazu *Berichte der Deutschen Gesellschaft für Völkerrecht* 1 (1957), 72.

5 Siehe dazu ebd.. 76.

6 Siehe dazu passend Dieter Blumenwitz (Hrsg.), Flucht und Vertreibung, Köln 1987, 563.

7 Giorgio Balladore Pallieri, Les transferts internationaux de populations. In: *Annuaire de l'Institute de Droit International* 44 II (1952), 138-199, hier 138 f.

8 Rudolf Laun, Das Recht auf die Heimat. In: Kurt Rabl (Hrsg.), Das Recht auf die Heimat. Zweite Fachtagung, München 1959, Bd. 2, 95-118, hier 95 f.

Menschen einen „der heiligsten Werte, die der Mensch auf dieser Erde hat“, vermittelt.[9]

Laun betrachtet geschichtliche Tatsachen des 19. Jahrhunderts und erkennt darin ein selbstverständliches Recht auf die Heimat, soweit diese nicht freiwillig gegen eine andere vertauscht wurde, und ein Miteinander von Deutschen und Slawen in den Ostgebieten des Deutschen Reiches sowie in der Habsburgermonarchie. Seit dem Erwachen des Nationalgefühls sei es zwischen den Nationalitäten weitgehend nur zu einem friedlichen Kampf mit geistigen Waffen und wirtschaftlichen Mitteln gekommen. Daraus entwickelte sich die Idee, dass nationale Minderheiten über die allen Menschen zustehenden Freiheitsrechte hinaus eines besonderen Schutzes bedürften.

Unmittelbar nach Rudolf Laun versuchte Hartwig Bülck[10] das Heimatrecht in der positiven Völkerrechtsordnung nachzuweisen und stützte sich entgegen den damals vorherrschenden Tendenzen darauf, die Rechtswidrigkeit von Massenvertreibungen mithilfe der Allgemeinen Menschenrechte vom 10. Dezember 1948 zu begründen.[11] Seine Ausführungen fußten auf dem in der Charta der Vereinten Nationen anerkannten Prinzip nationaler Selbstbestimmung und er betonte, dass jede Maßnahme, die die Volksgrenzen zugunsten der Staatsgrenzen verschiebe, völkerrechtswidrig[12] sei. Das sind nur drei von verschiedenen Lehrmeinungen. In dieser Arbeit will der Verfasser grundlegend herausfinden, ob es in concreto ein tatsächliches „Recht auf Heimat“ gibt, das in irgendeiner Konvention, einer Verfassung oder einem Abkommen anerkannt ist, und ob es sich um ein justiziables Recht oder expressis verbis nur eine politische Forderung handelt.

„Ubi bene, ibi patria“ – Versuch einer Übersetzung

Vielen ist noch der lateinische Spruch „*ubi bene, ibi patria*“ ein Begriff. Wortwörtlich heißt er „wo es gut ist, dort ist das Vaterland“; wer im deutschsprachigen Raum den positiv besetzten Begriff „Heimat“ verwendet, sagt aber besser: „wo man sich wohl fühlt, dort ist die Heimat.“[13]

Juristisch relevante Bedeutung des „Rechts auf die Heimat“

Wie angedeutet, gibt es im geltenden Völkerrecht keinen Rechtssatz, in dem der Begriff „Recht auf Heimat“ verwendet wird.[14] Folglich ist der im Raum stehende Rechtsanspruch auch kein Teil des allgemeinen Völkergewohnheitsrechts.[15] Man kann das Fehlen einer völkerrechtlichen, grundlegenden Begriffsbestimmung auch als Indiz dafür deuten, dass das subjektive Heimatrecht in der Geschichte des Rechts expressis verbis kein juristisches Problem dargestellt hat.[16]

Wenn man sich Weingartners Ausführungen in Erinnerung ruft, so sieht man, dass die Heimat auch ein gefühlsbetonter Begriff ist, der durchaus verschiedene Definitionen haben kann und vielschichtig ist. Die unterschiedlichen Prägungen und Facetten eignen sich nicht, ein Gegenstand juristischer Garantien zu sein,[17] wohl wissend, dass emotionale Kernelemente keineswegs sinnstiftend oder gar brauchbar[18] sind.

Rechtlich bedeutsam wird der Begriff „Heimat“ im Zusammenhang mit dem Besitz von Haus und Hof.[19] Somit ist das Wort geografisch einzuengen und in concreto determiniert. Die Menschenrechtserklärung der *Vereinten Nationen* von 1948, die die Freizügigkeit und das Recht der Rückkehr in die jeweils eigene Heimat forderte, koppelte als Paradigmenwechsel das „Recht auf die Heimat“ an die Existenz der Person und nicht mehr an die Rechtslage eines bestimmten Ortes oder das Vorhandensein von Besitz.

Das „Recht auf die Heimat“ im Völkerrecht

Man muss wissen, dass dieser Rechtsschutz eine unterschiedliche Ausgestaltung hat. Auch ist es von Bedeutung, ob es sich um Friedensrecht oder Kriegsrecht handelt. Auf diese Weise ist eine Differenzierung mehr als nur erforderlich. Das bereits angeschnittene Selbstbestimmungsrecht der Völker darf dabei nicht außer Acht gelassen werden.

Das Völkerrecht regelt die Rechtsbeziehungen zwischen Staaten. So gesehen ist das Verhalten eines Staates gegenüber seinen eigenen Staatsangehörigen nicht Gegenstand des Völkerrechts. Das Selbstbestimmungsrecht der Völker und nicht jenes der Staaten ist zu einem Gewohnheitsrecht geworden und findet sich in den internationalen Pakten über politische und bürgerliche Rechte wieder.

Zusammenfassung und persönliches Fazit

Der vielschichtige Begriff der „Heimat“ findet in vielen Bereichen, angefangen von der Soziologie bis zur Geschichte, Anerkennung. Er kann aber nicht in all seinen Facetten Gegenstand juristischer Regelungen sein. Er ist auch nicht wortwörtlich in den Rechtsbestimmungen des Völkerrechts enthalten. Trotzdem finden wir den Forschungsgegenstand „Recht auf die Heimat“ in den unterschiedlichsten Abkommen und Konventionen.

Als Musterbeispiele können die beiden internationalen

[9] Rudolf Laun, Das Recht auf die Heimat, Hannover 1951, 5.

[10] Hartwig Bülck, Das Recht auf Heimat, in: *Jahrbuch für internationales Recht* 3 (1950/51), 58-84.

[11] Ebd., 77.

[12] Bülck, Das Recht auf Heimat, 84.

[13] Otto Kimminich, Das Recht auf die Heimat, Bonn 1989, 34.

[14] Tomuschat, Das Recht auf die Heimat, 187 f.; Dietrich Murswiek, Die völkerrechtliche Geltung eines Rechts auf die Heimat. In: Gilbert H. Gornig/Dietrich Murswiek (Hrsg.), Das Recht auf die Heimat (= Staats- und völkerrechtliche Abhandlungen der Studiengruppe für Politik und Völkerrecht, Bd. 23), Berlin 2006, 17-35.

[15] Ignaz Seidl-Hohenveldern, Völkerrecht, Köln [u.a.] [9]1997, Rdnr. 945.

[16] Dieter Blumenwitz/Hans von Mangoldt (Hrsg.), Neubestätigung und Weiterentwicklung von Menschenrechten und Volksgruppenrechten in Mitteleuropa (= Staats- und völkerrechtliche Abhandlungen der Studiengruppe für Politik und Völkerrecht, Bd. 10), Köln 1991, 42.

[17] Murswiek, Die völkerrechtliche Geltung, 17 f.

[18] Kimminich, Das Recht auf die Heimat, 43.

[19] Susanne Baer, Zum „Recht auf die Heimat“ – Art. 11 GG und Umsiedelungen zugunsten des Braunkohletagebaus, in: *Neue Zeitschrift für Verwaltungsrecht* 1 (1997), 27-33, hier 27-28.

Pakte über bürgerliche und politische Rechte, da Art. 1, die Haager Landkriegsordnung, hier Art. 43 und 46, ferner das IV. Genfer Abkommen vom 12. 8. 1949 zum Schutze von Zivilpersonen in Kriegszeiten, insbesondere dessen Art. 49, und das Vierte Zusatzprotokoll zur Europäischen Menschenrechtskonvention von 1963, Art. 3 und 4, genannt werden.

Das darin erfasste „Recht auf die Heimat" wird sowohl im Kriegs- als auch im Friedensfall geschützt. Dem Schutz vor Vertreibungen und Zwangsumsiedelung steht das Rückkehrrecht gegenüber. Eigentum und Besitz sind vor Enteignungen rechtlich gesichert. Losgelöst von Schadenersatzfragen tritt eine globale strafrechtliche Verfolgung ein, während die juristische Durchsetzbarkeit durch eine Weiterentwicklung und den steten Wandel des Individualschutzes auf internationalem Parkett zunehmend gegeben ist.

Außerdem ist das „Recht auf die Heimat" entgegen allen rechtlichen Annäherungsversuchen ein Ankerplatz emotionaler Gedankenspiele, dem Wunsch nach Orientierung überschaubarer Einheiten, die Sicherheit bieten. Die Globalisierung beispielsweise kann nur ein Teilbereich der sozialen Entwicklung sein, zumal es diverse Strömungen gibt, die in unserer Gesellschaft Einzug halten und wirksam werden. Gegenströmungen können im modernen Sinn auch wieder Heimat bieten. Auch ist letztere ein fester Punkt, um zu verweilen und die Zukunft zu planen. Es ist ein entschleunigter Ort, der das rechte Maß noch kennt und der auch den Kontrapunkt zur Meta-Welt der neuen Medien setzt. Kurzum ist es für das eigene Leben wichtig, das „Recht auf die Heimat" zu schätzen und auch die Heimat als solche zu kennen, denn es beinhaltet den Ausgangspunkt und den Rückhalt des Lebens, auch im Hinblick auf rasche Veränderungen und neue Herausforderungen.[20]

[20] So zusammenfassend Weingartner, Gedanken zum Begriff Heimat, 809 f.

Literaturverzeichnis

Baer, Susanne, Zum „Recht auf die Heimat" – Art. 11 GG und Umsiedelungen zugunsten des Braunkohletagebaus. In: *Neue Zeitschrift für Verwaltungsrecht* 1 (1997), 27-33.

Balladore Pallieri, Giorgio, Les transferts internationaux de populations". In: *Annuaire de l'Institute de Droit International* 44 II (1952), 138-199.

Berichte der Deutschen Gesellschaft für Völkerrecht 1 (1957).

Blumenwitz, Dieter (Hrsg.), Flucht und Vertreibung, Köln 1987.

Blumenwitz, Dieter/Mangoldt, Hans von (Hrsg.), Neubestätigung und Weiterentwicklung von Menschenrechten und Volksgruppenrechten in Mitteleuropa (= Staats- und völkerrechtliche Abhandlungen der Studiengruppe für Politik und Völkerrecht, Bd. 10), Köln 1991

Bülck, Hartwig, Das Recht auf Heimat. In: *Jahrbuch für internationales Recht* 3 (1950/51), 58-84.

Kimminich, Otto, Das Recht auf die Heimat, Bonn 1989.

Laun, Rudolf, Das Recht auf die Heimat, Hannover 1951.

Laun, Rudolf, Das Recht auf die Heimat. In: Kurt Rabl (Hrsg.), Das Recht auf die Heimat. Zweite Fachtagung, München 1959, Bd. 2, 95-118.

Murswiek, Dietrich, Die völkerrechtliche Geltung eines Rechts auf die Heimat. In: Gilbert H. Gornig/Dietrich Murswiek (Hrsg.), Das Recht auf die Heimat (= Staats- und völkerrechtliche Abhandlungen der Studiengruppe für Politik und Völkerrecht, Bd. 23), Berlin 2006, 17-35.

Seidl-Hohenveldern, Ignaz, Völkerrecht, Köln [u.a.] ^{9}1997.

Tomuschat, Christian, Das Recht auf die Heimat – Neue rechtliche Aspekte. In: Jürgen Jekewitz/Karl Heinz Klein/Jörg Detlef Kühne [u.a.], Des Menschen Recht zwischen Freiheit und Verantwortung. Festschrift für Karl Josef Partsch zum 75. Geburtstag, Berlin 1989, 183-212.

Weingartner, Wendelin, Gedanken zum Begriff Heimat. In: Franz Matscher/Peter Pernthaler/Andreas Raffeiner (Hrsg.), Ein Leben für Recht und Gerechtigkeit. Festschrift für Hans R. Klecatsky zum 90. Geburtstag, 801-810.

Andreas Raffeiner*

* Mag. phil. Andreas Raffeiner, Philosophisch-Historische Fakultät, Leopold-Franzens-Universität Innsbruck, Österreich.

Allerlei Rechtsgeschichten - von Hammurabi bis zum Code civil. Ein Blick auf die Schriftenreihe des Rechtshistorischen Museums Karlsruhe

Die hier anzuzeigende Reihe stellt ein Novum in der rechtsgeschichtlichen Literatur dar, weil sie dem Leser badische, deutsche und europäische Rechtsgeschichte in fasslicher Form bietet und diese zugleich in die allgemeinen historischen Zusammenhänge einbindet. In einer höchst gelungenen Komposition aus Text, Bildmaterial und Dokumentation wird der Leser neben den rechtshistorischen Komponenten (Bilder, Urkunden usw.) an die allgemeine Geschichte herangeführt. Die 1982 gegründete Reihe umfasst bis heute 30 Hefte. Sie ist ein Produkt des Rechtshistorischen Museums Karlsruhe e.V. (das einzige dieser Art in Deutschland), das eine bedeutsame Sammlung rechtshistorischer Dokumente von der Antike bis zur Gegenwart enthält. Der Trägerverein unter seinem rührigen Vorsitzenden Bundesrichter a.D. Dr. Detlev Fischer veranstaltet in loser Reihenfolge Vorträge von Wissenschaftlern und Praktikern, die dann jeweils in die Reihe Aufnahme finden.

Aus der großen Zahl der behandelten Themen (eine Liste findet sich am Ende der Rezension) seien hier einige beispielhaft herausgegriffen. Die Reihe beginnt mit dem ersten umfassenden Gesetzbuch der Welt des babylonischen Königs Hammurabi 1700 v. Chr., das, verkörpert in Keilschrift in einer Säule aus schwarzem Basalt (einer Kopie aus dem Louvre) im Mittelpunkt des Rechtshistorischen Museums Karlsruhe steht (Heft 1). Als Beispiel für Personen von **allgemeiner** rechtsgeschichtlicher Bedeutung sei die Studie von Fritz Sturm zu **Theodor Mommsen** (1817-1903. 2006, Heft 11) genannt, der zu den bedeutendsten Gelehrten des 19. Jahrhunderts gehört. Von Hause aus Jurist (er studierte 1838-1843 in Kiel Rechtswissenschaft) war Mommsen (1817-1903) zugleich auch Philologe. Für sein bekanntestes Werk, die „Römische Geschichte", erhielt er den Nobelpreis in Literatur und wurde nach Stil und Darstellung für ganze Historikergenerationen zum Vorbild. Mommsen war zugleich, was wenig bekannt ist, ein politischer Mensch. 1848 engagierte er sich, damals außerordentlicher Professor in Leipzig, für die Revolution, wurde jedoch bereits 1851 wieder entlassen, weil er zusammen mit anderen Professoren gegen die Auflösung des sächsischen Landtags 1849 durch den König protestiert hatte. Mommsen schrieb 1849 auch einen Kommentar zu den „Grundrechten des deutschen Volkes" in der im März 1849 beschlossenen Reichsverfassung („Pauskirchenverfassung". Abdruck in Majer / Hunziker; Juris Fontes 2009 Bd.1, S.286ff.), in dem er seine Landsleute mit leidenschaftlichen Worten aufrief, für die Grundrechte zu kämpfen, sonst seien sie nur „eitel Worte und Papier". Nach dem Scheitern der Revolution sah er den Obrigkeitsstaat wiederhergestellt („das… Wundervolle [wurde] in einer einfachen Düpierung und eitel Gemeinheit [aufgelöst]…". Die Schweiz bot ihm vorübergehend Zuflucht (1852 – 1854), bis er dann 1854 als Professor für Römisches Recht an die Universität in Berlin berufen wurde.

Mommsen wandte sich später den Nationalliberalen zu und wurde sogar nach einer Zwischenstation als Abgeordneter im preußischen Abgeordnetenhaus Reichstagsmitglied für die von den Nationalliberalen abgespaltene „Sezession". Zunehmend empfand er jedoch Resignation wegen der aktuellen Bismarck'schen Politik. Mommsen war Liberaler, allerdings kein Demokrat; vehement wandte er sich gegen die Arbeiterbewegung und ihre Forderung nach politischer Mitsprache im Staat. Die vorliegende Schrift schildert anschaulich Mommsens Leben und Werk. Besonders verdienstvoll ist die Darstellung von Mommsens Auseinandersetzung mit dem deutsch-nationalen Historiker Heinrich Treitschke, der, Professor an der Berliner Fakultät, ein bekannter Antisemit war („die Juden sind unser Unglück"). Mommsen hat sich deutlich von ihm distanziert und zur Rückbesinnung auf liberale Grundwerte aufgerufen. Mommsen und seinen beherrschenden Einfluss über seine Nachfahren (er hatte 16 Kinder) und seine Schüler (W. Kunkel, M. Kaser, u.a.) begründete den Aufschwung der Altertumswissenschaft in der zweiten Hälfte des 19. Jahrhunderts in Deutschland. Die römische Antike wurde zum absoluten „Muss" des deutschen Bildungsbürgertums, bis weit ins 20. Jahrhundert hinein. Ebenso wurde in der Rechtswissenschaft das römische Recht als Pflichtfach bis in die 1970er Jahre gelehrt und als Prüfungsfach abgefragt. Noch heute erinnern sich die Alt-Studierenden von Freiburg mit Schaudern oder Bewunderung an die berühmten Digestenrexegesen eines Hans Julius Wolff oder anderer Gelehrter. Der in Freiburg und auch von anderen süddeutschen Universitäten verliehene Doktorgrad war der eines Doktor juris utriusque (Doktor beider Rechte), der zeigt, wie wichtig damals das römische Recht war, (dieser Titel ist heute ein „geheimes" Erkennungsmerkmal der alten Freiburger Doktorgrade, Anm. d. Rez.) Das römische Recht hat der Welt die „pax romana" und ein Imperium gegeben, das noch viele Jahrhunderte nach seinem Untergang Vorbild und Sehnsucht vieler Völker war. Dieses Erbe wieder lebendig gemacht zu haben, ist Theodor Mommsen zu verdanken; Fritz Sturms Verdienst ist es, ihn wieder in unser Gedächtnis zurückgerufen zu haben.

Von deutschlandweiter Bedeutung in der Politik ist die Figur des **Reichskanzler Constantin Fehrenbach** (1852-1926, Freiburger Rechtsanwalt und Zentrumspolitiker) der von Christian Würz beschrieben wird (2013, Heft 27).

Fehrenbach, aus dem Südschwarzwald stammend, Sohn eines Volksschullehrers mit acht Kindern, war eine wichtige Figur in den Revolutionswirren 1918/1919. Gerade hier am Ende des Kaiserreichs standen Badener in der ersten Reihe: Prinz Max von Baden als letzter Reichskanzler des Kaiserreichs, und Friedrich Ebert aus Heidelberg als erster Reichspräsident der jungen Republik. Fehrenbach hat in der Wissenschaft bisher nur wenig Beachtung gefunden. Er wollte ursprünglich Pfarrer werden, absolvierte dann aber die juristische Laufbahn und machte schon früh durch seine besondere Rednergabe auf sich aufmerksam. Bald übernahm er politische Ämter im kommunalen und kirchlichen Bereich, engagierte sich im Kulturkampf und wurde Mitglied der Zweiten Badischen Kammer. 1903 zog er in den Reichstag ein, wo er bald zum Führer des Zentrums aufstieg. Er war in seiner Fraktion ein eindrucksvoller Vertreter des Grundsatzes *Recht vor Macht*, was damals im Kaiserreich mit seiner Mehrheit der oft arrogant auftre-

tenden preußischen Abgeordneten keine Selbstverständlichkeit war. Fehrenbach geißelte vor allem die arrogante Besatzungspolitik Preußens in dem 1871 an das Reich gefallenen Elsass-Lothringen. Gesetze gelten für alle, auch für das Militär, so hatte er anlässlich eines Vorfalls in Zabern verkündet, wo ein Leutnant respektlos gegen die Elsässer aufgetreten war. In der Parlamentarisierung der Deutschen Republik war er an führender Stelle beteiligt, eine enge Kooperation verband ihn mit Friedrich Ebert. Wie dieser lehnte auch Fehrenbach die Reparationsbestimmungen des Versailler Vertrags ursprünglich ab, musste aber später zustimmen, da die Alliierten mit der Besetzung des Landes drohten, falls die Reichsregierung den Vertrag nicht akzeptierte.

Die Amtszeit Fehrenbachs, der als erster Reichskanzler der noch jungen Republik seit Mai 1919 amtierte, war geprägt von der Reparationsfrage, der Abrüstung der Reichswehr, der Wehrverbände, der Ruhrkrise und der Arbeitslosigkeit und Rentenreform. Dies alles überstieg seine Kräfte, sodass er schon nach 10 Monaten zurücktrat. Als er 1926 nach langer Krankheit starb, schrieb Joseph Wirth, sein Nachfolger im Kanzleramt an Fehrenbachs Bruder: „Es ist auch meine Pflicht, des Kanzlers Fehrenbach zu gedenken. […] Man hat ihn […] als ‚wehleidig' verschrien. Das ist unberechtigt. Fehrenbach hatte neben dem starken und echten Pathos einen künstlerischen und warmen, einen höchst patriotischen Zug. Schwere politische Entscheidungen […] haben den großen Mann mit seinem empfindsamen Herz schwer getroffen, sehr schwer […]."

Der **badischen** Rechts- und Justizgeschichte sind mehrere hervorragende Biographien bekannter Juristen gewidmet. Zu nennen ist zunächst die Biographie von **Anton Christ** (1800-1880), der von Alexander Hollerbach gewürdigt wird und der das Leben des Karlsruher Juristen als moderaten Reformer und loyalen Beamten der großherzoglichen Verwaltung beschreibt (Anton Christ Vormärz, Revolution und Nachmärz im Spiegel des Wirken eines badischen Juristen, 2013, Heft 26). Für die Rechtsgeschichte Badens bedeutsam war auch **Arnold Horn** (1844-1938), Karlsruher Rechtsanwalt und Privatgelehrter, dem Carl Zippelius seine Untersuchung gewidmet hat (2012, Heft 24). Vielseitige schriftstellerische Arbeiten über Rechtspflege machten Horn weit über Baden hinaus bekannt. Vor allem zur Strafrechtstheorie, zur Lehre von der Zurechnungsfähigkeit, zu Kausalitätsfragen und zur Willensfreiheit veröffentlichte er zahlreiche Schriften. Seine Nachfahren gehören zu den alteingesessenen badischen Eliten; seine Tochter Dora begründete die berühmte Architektenfamilie Zippelius.

Schließlich ist die Studie Detlev Fischers über **Eduard Dietz** (1866-1940), zu nennen (2008, Heft 16), der für die Geschicke Badens vor und nach 1918 von ausschlaggebender Bedeutung war. Seine Biographie zeigt ungewöhnliche Höhepunkte und außerordentliche Leistungen. Geboren als unehelicher Sohn eines adeligen Legationssekretärs der russischen Gesandtschaft in Karlsruhe, wuchs er in einer Pflegefamilie aus der Arbeiterschicht auf. In Heidelberg und Berlin studierte er Rechtswissenschaft. Nach seinem Studium der Rechtswissenschaft in Heidelberg und Berlin trat er 1892 in den Justizdienst in Baden ein, wechselte jedoch bald zur Rechtsanwaltschaft und war elf Jahre lang (ab 1922) Präsident der badischen Rechtsanwaltskammer. Auch in die Weltpresse fand Dietz Eingang, als er den Mordfall Karl Hau vertrat, der 1906 in Baden-Baden seine Schwiegermutter erschossen haben sollte. Hau (der nie gestanden hatte) wurde in einem Indizienprozess zum Tode verurteilt, später begnadigt und 1925 freigelassen. Der Fall Hau war die Vorlage für den berühmten Justizroman aus der Weimarer Zeit: „Der Fall Maurizius" (1928) von Jakob Wassermann.

Die eigentlichen Verdienste von Dietz liegen jedoch auf dem Gebiet der Verfassungsreform. 1919 verabschiedete der Badische Landtag ohne größere Abstriche einen von ihm erarbeiteten Verfassungsentwurf, der, in Anlehnung an das Erfurter Programm der SPD von 1891, im wesentlichen dessen Punkte aufnahm: Verhältniswahlsystem, gleiches Wahlrecht für Männer und Frauen, unmittelbare Volksgesetzgebung, Trennung von Staat und Kirche, die Abschaffung der Todesstrafe und einen ausführlichen Grundrechtskatalog. Zu Recht wurde er daher der „Vater der badischen Verfassung" genannt. Nach seiner Entlassung aus dem Vorstand der Anwaltskammer 1933 ging Dietz weiterhin seiner Anwaltstätigkeit nach und starb im Dezember 1940. Dietz' Witwe erhielt nach seinem Tod aus England folgende Zuschrift: „Das Bild dieses seltenen Mannes – selten in seiner gleichgroßen Höhe des Charakters und der geistigen Begabung, der hohen menschlichen Güte und des unwiderstehlichen Charmes – möge Dir bald wieder, von den Schatten seiner Krankheit befreit, vor der Seele stehen."

Die rechtshistorische Tradition Badens fasst Detlev Fischer in **Rechtshistorische Rundgänge durch Karlsruhe** (2011, Heft 10) zusammen. Die Studie versucht anhand bedeutender Justizgebäude die Rechtsgeschichte lebendig werden zu lassen. In verschiedenen „Rundgängen" (die aus stadtgeschichtlichen Exkursionen des Autors für Rechtsreferendare entstanden sind) lässt der Autor nicht nur die „bloße" Rechtsgeschichte, sondern auch das kulturelle Leben der ehemaligen Residenzstadt vor dem Betrachter entstehen. Beispiele sind das von dem Schinkel-Schüler Weinbrenner konstruierte Rathaus und die Evangelische Stadtkirche. Fischer weist auf die Wohnhäuser bekannter Juristen, wie das des Juristen, Staatsmannes und Schwagers Goethes, Johann Georg Schlosser (1739-1799) sowie das des von den Nazis ermordeten Präsidenten des Landgerichts Mannheim, Heinrich Wetzlar hin und beschreibt bekannte Anwälte, die im Westteil der Stadt wohnten, wie Dr. Fritz Oppenheimer, Dr. Fritz Hertz, Albrecht Fuchs (der Sohn des bekannten Freirechtlers) und Reinhold Frank etc., ebenso wie der republikanische Historiker Franz Schnabel – so bildete sich hier ein einzigartiges juristisch-politisches „Biotop". Viele von ihnen, die in der Weimarer Zeit Rang und Namen hatten, wie etwa Friedrich Weill, Reinhold Frank, Eduard Dietz und Ludwig Marum, erlitten im Dritten Reich ein schlimmes Schicksal (Marum war bis 1933 badischer Staatsrat und Regierungschef und wurde 1934 ins Gefängnis von Kislan bei Bruchsal ermordet; die Mörder wurden nach 1945 zu lebenslanger Haft verurteilt, Anm. d.Rez.)

Überregionale und **bundespolitische** Eckpunkte der Justizgeschichte sind verkörpert in dem Bundesverfassungsgericht, das nach langen Diskussionen aus dem Prinz-Max-Palais (Wohnhaus des Prinzen Max von Baden; 1951) mitten in den Karlsruher Schlosspark versetzt wurde. In der Nähe befindet sich auch das Geburtshaus des Anwalts, Schriftstellers und Lyrikers Alfred Mombert, das des Völkerrechtlers Albrecht Mendelssohn Bartholdy [1], das Wohnhaus des Dichters Joseph Victor von Scheffel

(Autor berühmter Studentengedichte, z.B. *„Als die Römer frech geworden…“*, und historischer Werke wie *Ekkehard* oder *Der Trompeter von Säckingen*) sowie der Buback-Gedenkstein (1977), das an das Attentat der RAF auf den damaligen Generalbundesanwalt erinnert. In der Stephanienstraße ist ein Wohnhaus von gediegener Bürgerlichkeit und harmonischer Architektur zu bewundern, in dem bis 2003 das von dem Bankier Heinz Schröder 1985 gegründete Rechtshistorische Museum untergebracht war, bevor es im Bibliotheksgebäude des Bundesgerichtshofs eine neue Unterkunft fand. Das ehemalige Erbgroßherzogliche Palais am Karlstor beherbergt heute den Bundesgerichtshof, während die Bundesanwaltschaft (nach einem RAF-Attentat von 1977) in einem von dem Architekten Unger konzipierten Kompaktbau an der Brauerstraße untergebracht ist (der allerdings eher an ein Grabmal denn an ein von Leben erfülltes Dienstgebäude erinnert (Anm d. Rez.).

Hinsichtlich systematischer Themen verdient vor allem die Abhandlung von Fritz Sturm „**Das Preußische Allgemeine Landrecht**“ Geist und Ausstrahlung einer großen Kodifikation (Heft 30, 2014, 110 S.) besondere Erwähnung. Das *Allgemeine Landrecht für die Preußischen Staaten* (ALR) von 1794, wie es ursprünglich genannt wurde, gehörte neben dem französischen *Code civil* (1804) und dem *Josephinischen Allgemeinen Bürgerlichen Gesetzbuch* (1811) zu den bedeutendsten Kodifikationen des 18. und 19. Jahrhunderts. Es regelte in über 17000 Paragraphen das Verhältnis des Bürgers zum Staat sowie die Rechtsverhältnisse ziviler Art zwischen den Bürgern.

Das ALR ist der klassische Ausdruck des fürsorglichen Obrigkeitsstaats, der die Untertanen „an die Hand nehmen“ und ihnen sagen wollte, wie sie ihr Leben zu gestalten hatten. Es war deshalb sehr ausführlich formuliert. Der preußische König Friedrich II., kritisierte den Entwurf als zu lang: „ Das Gesetz sei ‚sehr dicke‘, Gesetze müssten kurz und nicht weitläufig sein.“ (Um aber für das Volk, das oft kaum lesen und schreiben konnte, verständlich zu sein, musste der Text zwangsläufig ausführlich sein: „Rechtssicherheit durch Rechtsklarheit“. Anm. d. Rez.)

Das 1794 in Kraft getretene ALR diente mehreren Zwecken: Einmal der Abwehr der Folgen der Französischen Revolution, ferner aber auch der Abwehr der reaktionären Kräfte in Adel und Kirche, die gegen jede Rechtsreform waren. Der Autor rechnet deutlich mit F. C. von Savigny ab, einem der „bösen Geister“ der Rechtsgeschichte, der das Inkrafttreten eines moderneren (deutschen) Gesetzbuches als das ALR verhinderte solange er konnte, weil er die damals privilegierte Stellung der Gelehrten, d.h. der Universitätsprofessoren, als authentische Rechtsinterpreten aufrechterhalten wollte. Das ALR als Verkörperung des aufgeklärten Absolutismus enthielt gegenüber dem noch vielfach aus dem Mittelalter stammenden gemeinem Recht zahlreiche Liberalisierungen, so z.B. in den Bereichen Erziehung, Sprache, Frauen, Fürsorge, Strafen, Polizeirecht, Glaubens- und Gewissenfreiheit etc. Vor allem im Familienrecht zeigte es Besonderheiten, die das Vernunftrecht des aufgeklärten Absolutismus wiederspiegelten. Es statuierte Rechtsgleichheit, außer wenn die Gesetze dies ausdrücklich anders bestimmten (2. Teil, 1.Titel § 24 I). So konnte z.B. die Ehefrau mit ihren Mann durch besonderen Ehevertrag vereinbaren, dass sie in die von ihr in die Ehe gebrachte Morgengabe frei verfügen konnte (die bis dahin Teil des Ehevermögens mit Verwaltungs- und Nutznießungsrecht des Ehemanns wurde).

Das ALR, das zu der rasanten Entwicklung von Technik und Wissenschaft in der zweiten Hälfte des 19. Jahrhunderts mehr und mehr in Gegensatz geriet, galt bis zum Inkrafttreten des BGB im Jahr 1900. Noch heute wirkt es vielfach nach, z.B. in den § 74, 75 der Einleitung als Rechtsgrundlage (Gewohnheitsrecht) für den sog. Aufopferungsanspruch bei rechtswidrigen Eingriffen des Staates in Gesundheit und Leben der Bürger und für den sog. enteignungsgleichen Eingriff (Entschädigung bei rechtswidrigem Eingriff des Staates in Vermögensrechte des Bürgers). Das ALR hatte auch große Ausstrahlung auf andere Länder, deren Gesetzgebung es beeinflusste, wie Polen, die Schweiz, Holland, Argentinien, Brasilien oder Österreich. Die Rechtsgeschichte stand dem ALR bis Anfang des 20 Jahrhunderts skeptisch gegenüber; fast 150 Jahre übte sie sich in Vergessen, was nicht zuletzt auf die Faszination des napoleonischen *Code civil* von 1804 zurückzuführen war.

In engem zeitlichen Zusammenhang mit dem preußischen ALR steht das **Badische Landrecht**, dessen 200-jähriges Gedenkjahr man 2011 feierte und das wiederum von Fritz Sturm analysiert worden ist (200 Jahre Badisches Landrecht, 2011, Heft 23). 1804 wurde in Baden und in den französisch geprägten Rheinbundstaaten der napoleonische Code civil (CC) sowie der Code de commerce übernommen. 1809 wurde das Gesetzeswerk umbenannt und trat ab dem 1. Januar 1810 als „Badisches Landrecht“ in Kraft. Die Einführung des Code civil als Badisches Landrecht erwies sich als ein Segen, da Baden damals in zwei Landesteile zerfallen war und eine heillose Rechtszersplitterung herrschte. Baden erhielt für seine Bündnistreue gegenüber Napoleon erhebliche Gebietszuwächse; hinzu kamen die ehedem habsburgischen Gebiete Ortenau, das Breisgau und die Städte Radolfzell und Stockach. Der Geltungsbereich des Code civil war daher beträchtlich. Damit behauptete sich Baden gegen die deutschen Staaten, die vom ALR geprägt waren. Das Badische Landrecht hatte zahlreiche Ergänzungen durch den Staatsrat Max Brauer (1754-1813) erhalten, der das französische Recht an die badischen Besonderheiten anpasste. Frankreich hatte viele Anhänger im Reich; dem Großherzog verübelte man die Beibehaltung des CC nach Napoleons Niederlage nicht. Der CC beruhte, anders als das preußische ALR, auf dem römischem Recht und war wegen seiner klaren Strukturen hoch angesehen. Allerdings wurden die feudalen Strukturen (an die Landesherren und die Kirche musste der Zehnte abgeführt werden) beibehalten, jedoch im Badischen Landrecht zwischen 1820 und 1848 abgemildert, womit dieses den übrigen Landrechten um Jahrzehnte voraus war. Es gab aber auch Konzessionen an die Kirchen (das Personalstandswesen sowie Geburt, Heirat, Tod blieben in kirchlicher Verwaltung). Allerdings herrschte im CC ein höchst rückständiges, auf dem Spätmittelalter beruhendes Eherecht, bei dem die lebenslange Geschäftsunfähigkeit (incapacité) der Frau bestehen blieb, auch wenn sie verheiratet war.

[1] Mendelssohn-Bartholdy gründete 1922 das Institut für auswärtige Politik an der Universität Hamburg, ebenso das Amerika-Institut. 1933 war er gezwungen, nach England zu emigrieren.

Der günstige Preis der einzelnen Hefte (zwischen 5 € und 15 €) bietet auch Laien, die dickleibigen rechtshistorischen Werken nicht zugeneigt sind, einen hervorragenden Einblick in die Welt von Recht, Politik und der sie bestimmenden Persönlichkeiten. Die Reihe versteht es, die Geschichte der Justizbehörden, die Biographien der Akteure und die Schauplätze ihres Wirkens in ausgezeichneter Weise zu verbinden. Das ist in der Rechtsgeschichte selten. Hinzu kommt in allen Heften eine aufwendige Ausgestaltung mit reichhaltigem Bildmaterial, Faksimile-Abbildungen wichtiger historischer Dokumente sowie ein reicht bestückter Anmerkungsapparat. Die Reihe ist vor allem in einer Zeit, in der die Rechtsgeschichte in der juristischen Ausbildung nur noch ein karges Dasein als Wahlfach fristet, weiterhin die Herausgabe und die Pflege der Rechtsgeschichte zu wünschen!

Schriftenreihe des Rechtshistorischen Museums Karlsruhe,
Verlag der Gesellschaft für Kulturhistorische Dokumentation e.V. Karlsruhe 1982 ff.

Heft 1 Herbert Rittmann: Hammurabi und sein Gesetzbuch, 1982. Heft 2 Jürgen Spinnarke: Recht in Deutschland, 1985. Heft 3 Hildebert Kirchner: Eduard von Simson, 1985. Heft 4 Reiner Haehling von Lanzenauer: Recht und Gericht in Baden-Baden, 1987. Heft 5 Dietrich Pannier: Ansprachen zum Präsidenten-Wechsel beim Bundesgerichtshof, 1988. Heft 6 Reiner Haehling von Lanzenauer: Dichterjurist Scheffel, 1988. Heft 7 Gerd Pfeiffer: Karlsruhe auf dem Weg zur Residenz des Rechts, 1990. Heft 8 Walter Nlathiak: Zwischen Kopfsteuer und Einkommensteuer: Die preußische Klassensteuer, 1999. Heft 9 Detlev Fischer: Karlsruher Juristenportraits aus der Vorzeit der Residenz des Rechts, 2004. Heft 10 Detlev Fischer: Rechtshistorische Rundgänge durch Karlsruhe - Residenz des Rechts, 2005. Heft 11 Fritz Sturm: Theodor Mommsen - Gedanken zu Leben und Werk des großen deutschen Rechtshistorikers, 2006. Heft 12 Detlev Fischer: 150 Jahre Badische Amtsgerichte, 2007. Heft 13 Alexander Hollerbach: Julius Federer- Rechtshistoriker und Verfassungsrichter, 2007. Heft 14 Reiner Haehling von Lanzenauer: Der Mord an Matthias Erzberger, 2008. Heft 15 Dietrich Pannier: Ansprachen zum Präsidentenwechsel beim Bundesgerichtshof 2008. Heft 16 Detlev Fischer: Eduard Dietz (1866-1940), Vater der badischen Landesverfassung von 1919, 2008. Heft 17 Norbert Gross: Josef Kohler, Lebenspfade eines badischen Universaljuristen, 2009. Heft 18 Wilhelm Güde: Der Rechtshistoriker Guido Kisch (1889-1985), 2010. Heft 19 Wolfgang Kneip: Die Staatsanwaltschaft Mannheim im 19. Jahrhundert, 2010. Heft 20 Markus Gehrlein: Franz Schäfer - Ein Juristenleben vom Kaiserreich bis zum Bonner Grundgesetz, 2010. Heft 21 Hildebert Kirchner: Gesammelte Schriften zur Rechts- und juristischen Zeitgeschichte, 2010. Heft 22 Ulrich Falk: Fallstudien zur zivilrechtlichen Judikatur des Reichsgerichts um 1900, 2011. Heft 23 Fritz Sturm: 200 Jahre Badisches Landrecht, 2011. Heft 24 Karl Zippelius: Arnold Horn (1844 -1938), Karlsruher Rechtsanwalt und Privatgelehrter, 2012. Heft 25 Angela Borgstedt: Badische Anwaltschaft und sozioprofessionelles Milieu in Monarchie, Republik und totalitärer Diktatur 1864-1945, 2012. Heft 26 Alexander Hollerbach: Anton Christ (1800-1880), Vormärz, Revolution und Nachmärz im Spiegel des Wirkens eines badischen Juristen, 2013. Heft 27 Christian Würtz: Reichskanzler Constantin Fehrenbach (1852-1926) Freiburger Rechtsanwalt und Zentrumspolitiker, 2013. Heft 28 Norbert Groß: Ernst von Simson - Im Dienste Deutschlands: Von Versailles nach Rapallo (1918-1922), 2013. Heft 29 Detlev Fischer: In Memoriam Hildebert Kirchner, 2013. Heft 30 Fritz Sturm: Das Preußische Allgemeine Landrecht. Geist und Ausstrahlung einer großen Kodifikation, 2014. Heft 31 Ansprachen zur Amtseinführung der Präsidentin des Bundesgerichtshofs am 2. Oktober 2014, 2015. Heft 32 Dr. Eberhard Foth: Bemerkungen zur RAF und zu den RAF-Verfahren in Stuttgart-Stammheim, 2015.

Diemut Majer*

* Prof. Dr. Diemut Majer. Die Verfasserin ist emeritierte Universitätsprofessorin. Sie ist Rechtsanwältin in Karlsruhe und Lehrbeauftragte für Europarecht und Umweltrecht an der dortigen Universität.

Das ABGB im Spiegel der rechtshistorischen Literatur

Christian Neschwara (Hg.), Die ältesten Quellen zur Kodifikationsgeschichte des österreichischen ABGB (Österreichische Akademie der Wissenschaften/Philosophisch-historische Klasse – Kommission für Rechtsgeschichte Österreichs FONTE RERUM AUSTRIACUM/Dritte Abteilung: Fontes Iuris, Bd. 22). Josef Azzoni, Vorentwurf zum Codex Theresianus – Josef Ferdinand Holger, Anmerckungen über das österreichische Recht (1753). Wien [u.a: Böhlau Verlag, 2012, 338 S., ISBN 978-3205-78864-5

Das ABGB (Allgemeine Bürgerliche Gesetzbuch) ist die 1812 in Kraft getretene und auch heute noch geltende, bedeutendste Kodifikation des Zivilrechts in Österreich. Mit über 200 Jahren ist es auch das älteste gültige Gesetzbuch des deutschen Rechtskreises. Anlässlich des runden Geburtstages wurden viele Bücher zu diesem weit gestreuten und komplexen Thema veröffentlicht. Der am Wiener Institut für Rechts- und Verfassungsgeschichte lehrende Christian Neschwara hat mit dem zu rezensierenden Buch ein Werk vorgelegt, das mustergültig, detailliert und vor allem sehr akribisch recherchiert wurde. Nach der Einleitung, die den Werdegang des ersten Entwurfs des Codex Theresianus kohärent und schlüssig skizziert, folgen biografische Skizzen von Azzoni und Holger sowie ein ausführliches Schlagwortregister. Auf diese Weise erschließt der Autor interessante und kaum berücksichtigte Quellen und zeigt dies anhand einer guten Einführung in die Geschichte des Codex Theresianus.

Das über 300 Seiten zählende, sehr empfehlenswerte Werk beinhaltet drei wegweisende Punkte: Zunächst betont der Verfasser die Wichtigkeit der Rechtsvereinheitlichung des Codex Theresianus, dann folgen stichhaltige Aussagen über den Konservatismus der Brünner Kommission, und abschließend lässt sich mit Verwunderung feststellen, wie differenziert und mehrdeutig der Stellenwert des Römischen Rechts in den Verfassungsentwürfen bewertet wurde.

Neschwara gelingt es, dem Leser ein zentrales Kapitel in der österreichischen und europäischen Rechtsgeschichte akzentuiert und pointiert nahe zu bringen. Wer sich für die Rechtsgeschichte Österreichs interessiert, kann an diesem Werk nicht vorbeikommen. Auch Liebhaber der politischen Ideen werden in Neschwaras Werk fündig. Diese gilt es jedoch auch über 200 Jahre nach der Geburt des ABGB zu vertiefen und in einen größeren Kontext zu stellen.

Daniele Mattiangeli, Die Anwendung des ABGB in Italien im 19. Jahrhundert und seine historischen Aspekte (= Salzburger Studien zum europäischen Privatrecht, Bd. 30). Frankfurt a. M.: Lang Verlag, 2012, 207 S., ISBN 978-3631-62359-6

Ohne Zweifel hat das ABGB in den letzten beiden Jahrhunderten auch ein paar Strahlen auf andere Rechtsordnungen in Europa geworfen. Dies ist ein besonderes Phänomen, das es zu untersuchen gilt. Daniele Mattiangeli hat sich dieser Herausforderung gestellt und die Umsetzung der österreichischen Kodifikation im Norden Italiens analysiert. Dabei vergleicht er die heute geltenden Rechtsbestimmungen mit den vorhergehenden romanistischen Ursprüngen des Rechts in den zu untersuchenden Regionen. Auch die Strahlkraft ausländischer Gesetzessammlungen, die im gleichen Zeitraum entstanden, kommt zum Ausdruck.

Mattiangeli gelingt es mit seiner detaillierten Arbeit, ein wenig Klarheit zu schaffen. Diese ist erforderlich, wenn man den historischen und rechtswissenschaftlichen Sinn der Umsetzung des vom ABGB ausgehenden Rechtstransfers auf Norditalien im 19. Jahrhundert unter die Lupe nimmt. Just in dieser Zeit erlebte ja Italien seine staatliche Neubildung durch den Zusammenschluss von Territorien unterschiedlicher Herrschafts- und Rechtsstrukturen.

Das 2011/12 gefeierte 200. Wiegenfest des ABGB kann daher wohl als Ausgangslage für die Untersuchungen des Verfassers gesehen werden. Der bekannte Rechtsphilosoph Johann Michael Rainer hat ein Projekt des österreichischen Fonds zur Förderung der wissenschaftlichen Forschung geleitet und den in Rom geborenen Autor Daniele Mattiangeli zu einem höchst interessanten Dissertationsthema ermutigt, das nun gedruckt vorliegt. Auch wenn das Buch klein und übersichtlich ist, ist es gerade in einer Zeit, in der sich alles um die 100. Wiederkehr des „Intervento" seitens des Königsreiches Italien gegen Österreich in den Wirren des Ersten Weltkrieges mit der gewollten Zersplitterung des Dreibundes und dem Scheitern der Mittelmächte dreht, nicht aus den österreichisch-italienischen Forschungsergebnissen wegzudenken.

Mattiangeli kommt in seinen messerscharfen Analysen zum Schluss, dass es ein „sistema tavolare" gibt. Dieses ist in den früheren österreichischen Territorien als Erbe des ABGB anzusehen. So gibt es beispielsweise in Südtirol das Grundbuchwesen. Ob dieses in einem zentralistisch ausgerichteten und sich vielleicht vom Föderalismus weg bewegenden Italien noch der Fall sein wird, werden wir sehen.

Heinz Barta/Christine Lehne/Monika Niedermayr/Martin Schennach (Hg.), Kontinuität und Wandel. 200 Jahre ABGB (1811 – 2011), (= Innsbrucker Beiträge zur Rechtstatsachenforschung, Bd. 4). Innsbruck: innsbruck university press, 2012, ISBN 978-3-902811-63-9

Auch die Universität Innsbruck veranstaltete anlässlich der 200-Jahr-Feier des ABGB eine Tagung. Anlässlich dieses Innsbrucker Symposiums zur Rechtstatsachenforschung am 9./10. Juli 2011 haben Heinz Barta und drei weitere Herausgeber die dort gehaltenen interessanten Referate veröffentlicht.

Nach der Einleitung des allseits geschätzten Heinz Barta, der über Jahrzehnte hinweg mit Geduld und Präzision den Juristennachwuchs das Einmaleins der Einführung in die Rechtswissenschaften lehrte, finden die Gedanken von insgesamt zwölf Autorinnen und Autoren Eingang in den Tagungsband. Dabei wählte Margret Friedrich, die derzeitige Leiterin des Innsbrucker Instituts für Geschichtswissenschaften und Europäische Ethnologie, zur Tagungseinführung den klassischen und dennoch konzisen Titel „200 Jahre ABGB".

Monika Niedermayr, Rainer Oberhummer und Clemens Peer widmen sich in ihrem Aufsatz dem Projekt der „Ratsprotokolle". Dabei betonen sie die früheste Judikatur zum ABGB 1811, erwähnen in ihrer Ausführung den Tyrolisch-Vorarlbergischen Senat der obersten Justizstelle und untersuchen die 30 Jahre zwischen 1814 und 1844. Martin Schennach steht dem Institut für Römisches Recht und Rechtsgeschichte an der Alma Mater Oenipontana vor. Sein bis dato vorliegendes Schriftenverzeichnis ist überwältigend. In seinem Aufsatz, dem längsten des Sammelbandes, befasst er sich mit der Generalisierung und Differenzierung des Rechts und durch das Recht. Dazu vergleicht er das ALR, den Code Civil und das ABGB.

Interessant ist auch die Abhandlung von Christine Lehne. Die Mitherausgeberin der Publikation befasst sich mit dem Einfluss der Kodifikationen auf das römische Recht und findet eine Antwort auf die Frage, ob es sich dabei um eine neue Ära oder den Beginn der großen Krise des Rechts handelt.

Peter Mayr legt in seinem Text großen Wert auf die praktische Juristenausbildung im Zeitalter des ABGB, während Gregor Lässer seiner Abhandlung den kurzen und einprägsamen Titel „Naturrecht – heute?" gibt. Jakob Schiechtl wählte in seiner Untersuchung die Rolle der Rechtsgeschichte in der Kodifikationsgeschichte des ABGB zum Thema.

Bernhard Eccher schreibt über das ABGB und Italien und erwähnt, dass das Gesetzbuch auch in heute italienischen und ehemals österreichischen Territorien Anwendung fand, wenn wir an Südtirol, das Trentino und an Friaul-Julisch-Venetien denken. Andreas Schwartze geht in seiner Untersuchung der Frage nach, ob es möglicherweise Parallelen, Kontinuitäten oder Brüche zwischen dem ABGB und dem deutschen Zivilrecht gab.

Bernhard A. Koch charakterisiert in seinem Aufsatz Sklaven und Kabarettisten und legt den Fokus seines Interesses auf den § 16 im Wandel der Zeit. Von Interesse ist auch der Text von Michael Hebeis, der eindrucksvoll den Kampf von Karl Anton von Martini als Präsident der Gesetzgebungskommission von 1790 bis 1796 schildert und dessen Spuren im ABGB nachgeht. Caroline Voithofer erforscht das Sprachbewusstsein in der über 200 Jahre alten Kodifikation.

Elinor Forster, nach Margret Friedrich die zweite Historikerin im Autorenpool, befasst sich mit der Spiegelung widersprüchlicher Vorstellungen über die Geschäftsfähigkeit von Frauen im österreichischen Privatrecht um 1900. Kurt Ebert, Schennachs Vorgänger in Amt und Würden, bringt seine Forschungen über die Reformen des Dienstvertragsrechts im ABGB durch die Dritte Teilnovelle von 1916 zu Papier, während sich Michael Ganner mit dem § 21 als Grundlage eines dynamischen Sachwalterrechts befasst.

Alles in allem ist dieser Tagesband sehr gelungen. Die Vielfältigkeit der Themenfelder, die allesamt das ABGB ins Zentrum des Forschungsfeldes rücken, lässt hoffen, dass auch in annähernd 50 Jahren, wenn wir den 250. Geburtstag der ältesten Kodifikation des deutschen Rechtskreises feiern, das ABGB immer noch ein wichtiger Bestandteil der österreichischen und europäischen Juristenwelt sein wird. Das Symposium hat aufgezeigt, dass es eine schier unendliche Anzahl von Themen gibt, die es zu behandeln gibt, und man kann gespannt sein, welche davon diesbezüglich in den nächsten fünf Jahrzehnten in den verschiedensten rechtswissenschaftlichen Bereichen, in der Forschung und in verschriftlichter Dokumentation auf uns zukommen.

Attila Fenyves/Ferdinand Kerschner/Andreas Vonklich (Hrsg.), 200 Jahre ABGB. Evolution einer Kodifikation. Rückblick – Ausblick – Methode. Tagungsband. Wien: Verlag Österreich, 2012, ISBN 978-3-7046-5773-2

Auch das Herausgebertrio Attila Fenyves (Universität Wien), Ferdinand Kerschner (Universität Linz) und Andreas Vonklich (Universität Innsbruck) feierte den 200. Geburtstag des ABGB mit einem Tagungsband. Dieser enthält ein Dutzend interessanter und überarbeiteter Vorträge, die im Oktober 2011 bei einem vom Linzer Institut für Zivilrecht, der Gerichtsbarkeit Oberösterreich, der Oberösterreichischen Rechtsanwalts- und Notariatskammer und der Oberösterreichischen Juristischen Gesellschaft veranstalteten Festakt gehalten wurden. Dabei kommen die Herausgeber in ihrem Prolog zu der Feststellung, dass die Geschichte des ABGB so etwas wie eine wunderbare „Rechtssymphonie" ist. Die Frage, ob sie eine evolutionäre Entwicklung hat, muss hingegen offen bleiben.

Das gelungen-tiefgründige, schmale Bändchen weist eine Reihe interessanter Abhandlungen auf. Christine Wendehorst geht dabei in ihren Ausführungen der Frage nach, ob der Kodifikationstreit entschieden ist. Josef Weixelbraun widmet sich ebenfalls der Kodifikationsidee und hat für seinen Aufsatz den pointierten Titel „Unser ABGB – Bewährte Klugheit mit Zukunft" gewählt.

Peter Apathy ist der einzige Vertreter des zweiten Unterkapitels. Er betitelt seinen Aufsatz „200 Jahre ABGB – ein Rückblick", skizziert die Entstehungsgeschichte des ABGB und spannt den zwei Jahrhunderte langen Bogen von den Anfängen bis zur Gegenwart.

Interessant sind auch die Ausblicke von Johannes Stabentheiner und Manfred Umtauft. Stabentheiner befasst sich mit dem Jubiläumsprojekt zur Modernisierung des österreichischen ABGB und dem Europäischen Vertragsrecht, Umtauft analysiert detailliert das ABGB und die Vermögensnachfolge von Todes wegen, wobei das Pflichtteilsrecht den. Als Dreh- und Angelpunkt seiner Untersuchung bildet.

Gleich sieben Autoren haben sich mit der Methode des „Geburtstagskindes ABGB" auseinandergesetzt. Herausgeber Attila Fenyves stellt das Gesetzes- und Richterrecht einander gegenüber und fragt den Leser, eine Antwort suchend und findend, ob es das Best Practice Modell gibt. Matthias Neumayr vergleicht ebenso das Gesetzes- mit dem Richterrecht und hat einen leicht provokanten Untertitel „Des Richters Last und Lust" gewählt, eine Alliteration, die durchaus zu denken gibt und über die es man gerne sich zu reflektieren lohnt.

Ferdinand Kerschner würdigt in seinem Beitrag die lex-lata-Grenze und möchte wissen, ob es sich dabei im Hinblick auf die Gesetzesbindung und das ABGB um ein zentrales Element des gewaltenteilenden Rechtsstaates handelt. Hansjörg Sailer hat sich mit einer ähnlichen Thematik befasst. Der Haupttitel entspricht jenem von Kerschner, der Untertitel jedoch ist abweichend, denn er behandelt den OGH und die Grenzen der Analogie.

Andreas Vonklich, der dritte Herausgeber im Bunde, und Georg E. Kodek fragen den Leser nach der Rolle der Rechtswissenschaft und wollen herausfinden, ob es sich um einen Katalysator der Rechtsentwicklung oder um einen antiken Tragödienchor handelt. Dabei geht es bei Vonklich um die Stakeholderrolle der Dogmatik, während Kodek mit spitzer Feder einige Gedankensplitter aus Anlass des 200-jährigen Jubiläums des ABGB zu Papier bringt.

Den Abschluss macht erneut Hansjörg Sailer. Er analysiert 200 Jahre § 12 und versucht die Ungewissheit, ob es eine Rechtssicherheit ohne stabile Entscheidungspraxis gibt, einer zufriedenstellenden Antwort zuzuführen.

Als ein kleines Manko des Sammelbandes kann das fehlende Sachregister angesehen werden, doch schmälert dies nicht den Eindruck, dass das ABGB mit dem vorliegenden Werk ein sehr gelungenes Geburtstagsgeschenk erhalten hat.

Franz von Zeiller, Das ABGB in den „Vaterländischen Blättern" (1811), herausgegeben von Gerald Kohl und Susanne Gmoser. Wien: Verlag Österreich, 2012, ISBN 978-3-7046-6418-1

Wie die beiden Herausgeber in ihrem Vorwort eindrucksvoll dokumentieren, waren die Jahre 2011/12 für die „Juristenwelt" nicht nur in Österreich, sondern auch in anderen Staaten auf dem Boden der einstigen Habsburgermonarchie vom Bizentenarium des ABGB beherrscht.

Im vorliegenden Buch wird der Aufsatz aus der Feder Franz von Zeillers „Das allgemeine bürgerliche Gesetzbuch für die gesammten deutschen Erbländer der österreichischen Monarchie", der das erste Mal 1811 in der offiziösen Zeitschrift „Vaterländische Blätter für den Kaiserstaat" erschienen ist, abgedruckt. Dieser beinhaltet eine große Anzahl von Paragraphen aus der Kodifikation, sodass er für das Herausgeberduo einen Beitrag zur Textgeschichte leisten kann.

Gmoser, Projektmitarbeiterin am Institut für Rechts- und Verfassungsgeschichte der Universität Wien, und der ebenda lehrende und forschende Kohl stellen zu diesem Zweck Vergleiche zweier unterschiedlicher Buchausgaben des ABGB mit der in der Justizsammlung veröffentlichten Fassung an. Auf diese Weise werden viele neue Fragen aufgeworfen, auf die wohl erst die künftige Forschung Antworten geben kann.

Darüber hinaus beinhaltet das kleine, aber feine Bändchen noch einen interessanten Aspekt: Betrachtet man die Paragraphen des ABGB im Hinblick auf von Zeillers Formulierungen, so wurden diese in drei Kategorien (wörtlich, frei, fehlend) systematisch durchsucht und ausgewertet. Auf diese Weise wurden sage und schreibe 181 Paragraphen, das heißt im Umkehrschluss etwas mehr als 12 Prozent des Textes, angeführt. Diese tabellenartige Übersicht trägt dazu bei, dass die Rechtsgeschichte dank Gmoser und Kohl mit mathematischen Facetten angereichert und so indirekt mit fast jeder Wissenschaft verknüpft werden kann.

Andreas Raffeiner*

* Mag. phil. Andreas Raffeiner, Philosophisch-Historische Fakultät, Leopold-Franzens-Universität Innsbruck, Österreich.

Guy Burak [1]

The Second Formation of Islamic Law. The Hanafi School in the Early Modern Ottoman Empire.

Cambridge: Cambridge University Press, 2015, 294 pp.

The Hanafi school of law (*maḏhab*) is one of the four major schools of Sunni Islamic legal reasoning and repositories of positive law. It was built upon the teachings of Abu Hanifa (699-767 AD), a merchant who studied and taught in Kufa, Iraq, and who is reported to have left behind one major (and four minor) work, *Al-Fiqh al-Akbar* (*The Great Fiqh*). Two of Abu Hanifa's disciples, Abu Yusuf (738-798 AD) and al-Shaybani (749-805 AD), compiled and organized their master's teachings, which were favored and followed by the Abbasid dynasty. Hanafi doctrines have always been considered among the most flexible and liberal in Islamic law, including in the areas of criminal law, treatment of non-Muslims, individual freedoms, marriage and guardianship, and ownership and use of property. While the Hanafi *maḏhab*, along with other Sunni schools, utilizes *qiyas* (analogical reasoning) as a method of legal reasoning, Abu Hanifa himself relied extensively also on *ra'y* (personal opinion). He also favored the use of *istihsan* (which is believed by scholars to be based on principles of *equity*), commonly known as juristic preference, which, in some circumstances, can operate to ameliorate harsh consequences that might otherwise flow from strict legal reasoning.

Officially adopted by the Ottoman Turks in the 16th century and codified in the *Mecelle-i Ahkam-ı Adliyye*, the *Ottoman Civil Code.* Hanafi jurisprudence remains the most influential school in the world today and is used in Jordan, Lebanon, Pakistan, Syria, Turkey, and the United Arab Emirates. Hanafi *fiqh* predominates in Bangladesh, Egypt, India, Iraq, Pakistan, Syria, and, for significant minority populations, in Iran and Malaysia. The Constitution of Afghanistan privileges Hanafi jurisprudence as a residual source of law in the absence of explicit legislation or other constitutional provisions.

To understand the significance of the Hanafi School, it is useful to gain an overview of the history and the major developments of the school in general. The specialized literature support sufficient information of this field. In historical and legal approach first in the 20th century professor Mohammad Hameedullah provides a short, general overview approaching Sunni schools called *The Schools of Islamic Jurisprudence: A Comparative Study* (1991). Professor Mohammad Hashim Kamali in *Shari'ah Law: An introduction* (2008) writes clearly and well organized about the school and its mission int he Islamic law. George Makdisi in *The rise of colleges: Institutions of Learning in Islam and the West* (1981) overviews of the relationship between Muslim scholars and schools. Wael B.

[1] Guy Burak is the Middle Eastern and Islamic Studies Librarian at New York University's Bobst Library. Previously, Burak was a postdoctoral fellow at the Max Planck Institute for the History of Science, Berlin, and in the Islamic Legal Studies Program at Harvard Law School. His articles have appeared in the International Journal of Middle East Studies, Comparative Studies in Society and History, the Mediterranean Historical Review, and the Journal of Islamic Studies.

Hallaq in *A History of Islamic Legal Theories. An Introduction to Sunni Usul al-fiqh* (1999) acquaints the readers with the major Islamic legal principles. Peri J. Bearman academician issued the *The New Encyclopaedia of Islam* (2005). Knut S. Vikor's study *Between God and the Sultan. A History of Islamic Law* provides basic information on theory, applications, history, and specific topics in Islamic law. Though Joseph Schacht's *The Origins of Muhammadan Jurisprudence* (1979) and Noel Coulson's *A History of Islamic Law* (1994) studies are foundational sources in the study of Islamic law perhaps of less use in the modern era in my opinion.

The Second Formation of Islamic Law started as a dissertation at New York University almost a decade ago. It is the first book to deal exclusively with the forming and rise of the Hanafi School of Law, the most significant school in both the Islamic and the Turkish History of Law from the 16th century. The most important results of this research is that the author examines how the Ottoman dynasty formed a new and particular branch within the Hanafi school, shaping an official law school, bringing new doctrines to the Islamic law, elaborating the structure and finally creating the "Ottoman Islamic" law system that was finally modernized in the 19th century.

The book is an enlargement of the dissertation. The author using multilingual - Arabic, Ottoman Turkish, Persian - sources of law and examines the grand jurists of the Ottomans from the emergence of the concept of an official school of law to the nineteenth century as the major rupture. The author has an unique opinion on nineteenth-century codification developments of Islamic law that are rooted in much earlier centuries.

In 1535 when Ottoman troops led by Sultan Süleymán (1494-1566 AD) marched into Baghdad, the most important learning center of the Arab-speaking world seizured the tomb of the Greatest Imam, Abü Hanifa (699-767 AD) the eponymous founder of the Hanafi School (*maḏhab*) and ordered the purification and reconstruction of the crave. This symbolic event was mentioned in details by the sixteenth- and seventeenth-century chronicles as the beginning of the adoption of Hanafi system, emergence the official school of law of the Ottoman Islamic Law. According Bura this event was equal with the announcement of the Ottoman Islam law as official.

The institutional aspects of the adoption of Hanafi system have been studied in detail by several scholars. The innovation of the dissertation goes far beyond examining the institutional developments. The study is not organizing tematically and by strict doctrinal aspects the legal institutes. The study is a basic research in which the author uses conjunctive sources. The author gives a systematic analysis of the legal principles of the canonization. In his opinion the legal features and principles of the canonization process by the Ottomans, the legal canons from the earlier centuries that converted and transferred to the Islamic tradition are the pivotal to the emergence of the Ottoman Islamic legal tradition and that have received considerably less attention yet. Burak examines both the institutional and doctrinal dimensions of the development of Hanafi school adopted by Ottomans meaning the particular features of the canonization practices, the mechanism and legal canons from the earlier centuries that Ottomans employed to shape the Ottoman Islam. The study seeks the regional differences from the imperial administrative and judicial system which are deeply rooted in tradition. The book is epoch making as the author proves that the Ottoman Islamic Law, that was previously examined mainly by dogmatic aspects is not homogeneous, many times differentiated than we thought. Burak takes the „Ottoman Islam" out of the territorial limits of the Ottoman Empire and examines it in a wider, eastern islamic regional perpective. He differentiates not only by territorial, but cultural aspects and gives a detailed analysis of the jurisconsults classical texts and explanations in specified cases, always interpreting the *praxis* in social and cultural aspects.

Through the conjunctive use of the sources the author convincingly defends the major starting point of his research. According to him the acting jurisconsults in the various provinces of the Ottoman Empire were contacted, they gave and received legal responses to each others question, they traveled a lot in the Empire so the legal texts were in continous circulation within the Empire. As the author investigates from the second half of the 15th century to the second half of the 18th century he can througly examines the different effects and its integration to the Hanafi school, and the legal system.

The author examines the Ottoman official *maḏhab* both provincial and imperial levels. At provincial level he examines the different branches and tradititons, the significant doctrinal differences between the jurists within the Hanafi school of law. At the imperial level he seeks to draw attention to how the conquest and incorporation of the Arab lands into the empire produced a change in the hierarchy of traditions, which brand within the Hanafi school that members of the ottoman dynasty were expected to follow.

In order to understand the rise of the official Hanafi school the author introduce us in the notion and features of the *maḏhab* before the ottoman times. The pre-Mongol *maḏhab* (Turkish *mezheb*) was a fairly loose social organization whose main function was interpreting the divine revelation and to determine the authority of the interpreter. The word *maḏhab* is derived from the Arabic root *dh-h-b* and means following the path. Later the term was often used to denote a tenet, or doctrine in a certain issue. During the late ninth and tenth centuries the *maḏhab* emerged as a legal discourse or canon which the communitiy of jurists were expected to follow.

In the late eleventh century all four Sunni schools of law developed a hierarchy of authorities, which – according to Burak – is is strong connection with the growing textual body of chronological typologies of the jurists from different schools. Therefore the schools started chronologize the writings of the different jurists. Finally the schools emerged as a *corpus* of doctrines and arguments that their followers had to study and memorize. These works were often accompanied by an extensive biographical literature (*tabaqát* literature) mainly for the followers for documenting the genealogies of the legal works of the different schools. The typologies as we can see in Chapter 2 and 3, vary in structure and scope. Some are comprehensive while others deal with general priciples. Some of them begin with the highest rank of *mujtahid*s followed by his immediate companions writings. Other typologies start from

the least qualified follower to the utmost *muqallid*. Between the utmost *mujtahid* and the utmost *muqallid* there were jurists who were allowed the create minor texts (*ijtihād*, industrious) as long as they conform to the hermeneutic principles set by the eponym of the school and their immediate followers. This form of judicial activity was performed by the jurists who studied with the founder and his immediate successors. In the later centuries these jurists concerned with weeding out the weaker and less important, less authoritative opinions and arguments endeavouring to leave and collect preponderant opinions. According to Burak, over the centuries the Sunni schools of law developed discursive conventions and other institutional practices to guide their followers through the different opinions of the schools and to point out what opinions and doctrines were considered authoritative.

Burak pointed out, that though the state sponsored some of the jurists, the law of schools were not „state-sponsored" enterprises. This not means that the state did not make his influence on the school, or did not sponsore a jurist. It means that time (10-11th century) there were no an institutionally identifiable group of jurists who were charged by the dynasty to create a comprehensive and official law system.

The author pointed out, that the main changes in the history of the Hanafi school of law can be linked to the rise of the Ottoman Empire. The reason the *maḏhab* in the ottoman times diverges markedly from the pre-mongol times is the ottoman sultan, who assumed the right himself to intervene doctrinally in regulating and structuring the school. This caused in the half past of the 15th century that the ottoman ruling and judicial elite sought to single out a particular branch within the school.

The author collects in four points the developments that contributed to the evolution of the state *maḏhab*: the emergence of the imperial learned hierarchy, the emergence of the practice of appointing muftis by the dynasty, the dynasty's regulation of the structure and doctrine of the school and the rise of dynastic law in the post-Mongol eastern Islamic lands.

In connection with the rise of the dynastic learned hierarchy the author states that since the conquest of Istambul in 1453, the dynasty gradually developed an imperial learned hierarchy, with standardized career (though the sultan also accredited the trainings outside the Empire), hierarchical network of teaching institutions, whose graduates manned many of the senior judicial and bureaucratic positions throughout the empire. This system was regulated by a series of imperial edicts, regulations legal codes. The most famous of which was a legal code ascribed to Mehmet II. The codes regulated not only the structure of this hierarchical system, but sometimes the *curriculum*. The dynastical rules also regulated the doctrines of the Hanafi school of law and limited the range of permissible hermeneutic principles that jurists could follow when deriving new rules.

In the Capter 2 Burak examines *tabaqát* and compilation works through the ottoman learned hierarchy's evolution. He stresses the „bureaucratic consciousness" among members of the hierarchy. The textual corpuses examined in this chapter reveal that the emergence of the imperial learned hierarchy had important doctrinal dimensions. According to the author the doctrinal and institutional developments go hand in hand; the hierarchy with its standardized career and training paths, and the secured and privileged position of the branch's followers within the ottoman imperial framework producted a series of imperial edicts and legal codes which had an exclusive status and presented itself as defender of Islamic Sunni.

The second develepoment of the Ottoman dynasty was introducing the practice of appointing the jurisconsults (*mufti*s, Turkish *müftü*) by the sultan and the rise of the chief imperial *mufti* (*Şeyh-ül İslam*) who was charged by presiding over the learned hierarchy as a whole. The appointed *mufti*es and the *Şeyh-ül İslam* were jurisconsults and served as professors in the imperial educational system (*madrasa*) and the *Şeyh-ül İslam* became institutionally the chief judicial and scholarly authority who in this position regulated the imperial jurisprudential canon, the doctrines that members of the hierarchy were to apply. The *Şeyh-ül İslam* could also enforce specific legal arguments and doctrines out of a wider range of opinions within the Hanafi school and in some cases he could opted for a minority opinion within the school and asked the sultan to issue an *edictum* that would enforce it within the hierarchy.

The *tabaqát corpus* that Burak examines in Chapter 2 and 3 illustrates how the conquest and integration of Arab lands into the ottoman imperial framework contributed to a clearer written articulation of different perceptions of the school of law and the relationship between ottoman dynasty and the *maḏhab*. Furthermore - states Burak - it is likely that many of the ideas and materials that shaped the different works had been circulating in earlier decades and centuries. He stresses that the articulation of the various branches within the school of law were outcome of an ongoing dialogue between their respective proponents. About the explanation of this dialogic nature of the encounter Burak states that first of all the followers of each of the traditions within the school wanted the adherents of the others to read their works. Secondly the members of the imperial learned hierarchy who authored the *tabaqat* works strove to link their literary-jurisprudential production to medieval Islamic jurisprudential-historiographical traditions, with the intention of establishing and propagating their authority. Burak supposed that the integration of the Arab provinces into the Empire and the increasing interactions between the different scholarly circles and traditions throughout the ottoman domains motivated the different jurists to document their intellectual genealogies in general and contributed to a clearer formulation of an ottoman Hanafi school in particular. The *tabaqat* works were instrumental in defining a repertory of legal arguments and texts and resulted the emergence of jurisprudential „textual communities" within the Hanafi school and across the Empire. In these chapters the author emphasises his *novum* as the Hanafi school of law in the ottoman period should not be treated as homogenous school either socially or intellectually.

This study for proving the above mention statement also pays attention to the overlapping topographies of administrative practices and legal-scholarly traditions across the Ottoman Empire. With this point of view the author shows us the complexity of the empire's legal landscape and examining the debates and exchanges between the different jurists highlights the importance of the conquest and incorporation of the Arab lands that have not received much attention in modern legal historiography. In

this framework Burak demonstrates how the ottoman dynasty and its learned hierarchy shaped the empire's multicentric legal landscape.

In Chapter 4 and 5 the author pays considerable attention to encounters between the different jurists within the Hanafi school after the conquest of the Arab lands. These debates were not only centered on legal controversies concerning special issues. They were about the role of the sultan in regulating and shaping the structure of the Hanafi school of law and its doctrines. Burak examining the primary sources divides the jurists into two parts: jurists affiliated with the dynasty and jurists who are not. While jurists who were affiliated with the ottoman dynasty were accepted, other jurists mainly from the empire's Arab provinces and argued for much greater autonomy for the jurists were not. The position of a jurist in relation to the dynasty effected his position within the Hanafi school. The critiques were ultimately about the validity of the legal order of the Ottoman dynasty. The sultan, after the adoption of the arab lands into the empire did not ban the activity of the prominent and outstanding but not officially appointed jurists (though banned the activity of the non appointed *qadi*s). Though the debates between the jurists were not merely scholarly debates they affected to a considerably degree the legal landscape of the empire. The Hanafi jurists had to maintain an ongoing dialogues with their colleagues in order to preserve their position within the Empire. They were keenly aware that the ruling elite could address the Hanafi school also both from the central and the Arab lands of the Empire. They always had to assure the Empire with new options to resolve their legal issues. Burak's analysis on the relationship between the dynasty and the jurists based not on the sincerity of either parties. His goal is that he focuses on both parties sophisticated responses, solutions in order to develop legal solutions in the encounter of the post-Mongol dynastic law and the Islamic law. The author examines these critiques to introduce how radically novel was in the Islamic History of Law an emergence of an official state school.

T*he Second Formation of Islamic Law* concentrates on the various polities, the recurring discursive and administrative patterns across the Islamic lands through the Empire which attributed to the introduction of the „ottoman dynastic law". One of the most important result of this research is defining this term and recognizing of the notion and features of the „ottoman dynastic law", which according Burak consists of administrative *praxis*, *edictum*s and legal codexes of the empire. The term is reasonable because both the imperial administrative praxis and the legal codexes derives its legitimacy from the dynasty and its ancestors, as Burak proves from Chinggis Khán and his legal heritage. The new law system was a harmonization of several different dynastic laws from the empire's provinces from the post-Mongol times when each ruling dynasty had a corpus of legal and administrative practices that formed the later ottoman *kánún* (or the *yasa* of Chinggis Khán). This law were often perceived as incompatible with Islamic Law. The reason for this tension is that each of these legal corpuses had different historical and points of reference. While the Islamic legal discourse derived laws by interpreting the divine revelation, the dynastic law often drew its legitimacy from the authority of the dynasty's ancestors. This tension shaped the immediate background of the to the rise of the official state *maḏhab*. The jurists reduced the tension between the legal bodies and helped the dynasties to regulate on the basis of dynastic laws the structure of the school and its doctrines. Burak with tracing the history of the official *maḏhab* followed the reconciliation or harmonization of dynastic law and *sharia*.

Most studies focus on the incompability of the two legal bodies, concentrate mostly on the specific legal arguments or rules. They tend to consider a specific sultanic edict, or rule according to Islamic law or contradictory to the tenets of Islamic law. The goal of Burak is that he assumes a very specific form of harmonization of the two discourses. He looks at the relationship between dynastic and Islamic law from the perspect of *maḏhab* as a development in the ottoman political thought. According to the author in the late 16th century the empire promoted a more legalistic view of the sultanate and stressed the importance of the dynastic legal tradition (*kanún*) as the definitive law of the government. This more legalistic worldview of the sultans resulted another textual corpus by those jurists who were affiliated with the Ottoman dynasty.

According to Burak the different textual traditions and communities within the Hanafi school shows that the formation of different canons shows broader developments and processes. The analysis of the bibliographies sheds light on the dynamics that accompanied the incorporation of the arab lands and the scholarly and jurisprudential traditiona prevalent in these lands into the empire. Over the course of the late sixteenth and seventeenth centuries some Arab Hanafi jurists sought to integrate themselves in different ways into the imperial framework. These Hanafis synthesized substantial elements of the local Hanafi tradition with that of the core lands of the empire. The members of the imperial learned hierarchy were aware of towering jurisprudential figures who were active in the Arab provinces, consulted their opinions and included their works in the imperial canon. After all the graduates of the ottoman *madrasa* system traveled quite frequently across the arab lands and the senior members of the imperial learned hierarchy showed interest in the work of their counterparts in the Arab provinces. The analysis of the bibliographies sheds light on the circulation of texts and demonstrates the connections between the imperial center across the Arab provinces and between the different learning centers across the Arab lands. The imperial learned hierarchy's members should consult on regulating the readings of these texts, the study of the imperial canon emphasizes the importance of jurisprudential texts in defining the various jurisprudential traditions within the Hanafi school. Burak stresses that the circulation of texts and their canonization were not an issue at the margins of the study of legal content but rather the legislation process itself.

In Chapter 5 the author examines the interactions between the jurists, their followers and other authorities. In this framework he differentiates between the jurists within the Hanafi school: those who had official appointment by the sultan and those who did not have. Burak points out that also the non appointed jurists had a certain positions in the imperial judicial system and they could maintain their authority. Burak suggests mutuality between the two group of jurists. FIrst of all he examines the decision of different

solicitors mainly who were not members of scholarly circles and states that the jurists often cite from the works of the outstanding and appointed jurists. This examination indicates the prestige and reputation of high rank appointed mufties not among scholars and jurists but also among nonscholars. The author draws a picture in which official legal institutions were used to counter provincial jurists who did not had official appointment and *vice versa*. It suggests according to Burak, that the *mufti*es and *qadi*es workes hand in glove. Unlike their core region counterparts most Syrian and Palestinian *mufti*es served the court system only as a secondary counsellor. Their primary mission was giving legal advice to the local community of which they were a part. So the opinion of the prominent non appointed *mufti*es were also influental (mainly across Greater Syria). Therefore dividing the muftis according to appointed/non appointed dichotomy misses the complexity and the homogenious notion of the imperial legal life in general.

The officially appointed muftis monopolized the institutional authority to issue enforceable legal opinions within the imperial legal system. The Ottoman state did not prevent prominent (mainly provincial) jurists and muftis who was not officially appointed from issuing their own legal opinions. So it can easily occured that some of these non appointed jurists and *mufti*s voiced their opinions on certain legal decisions ruled by chief *mufti*es and judges. It appears according Burak, that most part the ottoman authorities were not reluctant to envolve in decisionmaking process and use the activitiy of eminent *mufti*s who were not officially appointed and sometimes they adopted their rulings or writings. The mutual cooperation was continously hold by the jurists regardless the appointment. The non appointed jurists sought to obtain the opinion of the hierarchies' chief jurisprudential authority. They invited the imperial learned hierarchy to intervene in their communities' affairs. Questions were both addressed to imperial and local authorities (though assessing the degree to which were used the non appointed *mufti*es'opinion now is almost impossible according to Burak).

The author also tries to reveal the roots of the doctrinal and institutional aspects of the Ottoman official school of law. The author's starting point of view is: among the legal systems of the early modern Muslim world the ottoman system is the best studied. The author wanted to expand the scope of the inquiry and suggests that the history of the ottoman legal system and learned hierarchy should be situated in the broader context of the eastern Islamic lands of that period. Burak makes his examination in the central lands of the Ottoman Empire and the Eastern Islamic lands mainly Greater Syria in the post-mongol period. This work is a tentative and provisional as the Islamic law in other parts of the eastern lands were in embryonic stage. According to Burak there were similarities between the two parts and this could justify his theory in connection with the interaction between the two parts and the two law systems. According to Burak the imperial legal system and the eastern Islamic lands in the post-mongol period were a somewhat coherent unit that can illuminate severeal issues such as political thought, legal disciplines and other issues.

For the examination of the interaction the author examines several primary sources of different nature and from different parts of the eastern Islamic lands within the Hanafi law of school. The author tries to make a comparative approach and tries to make bridge between the two part stressing the important similarities. He examines two practices that recur in different contexts across the eastern Islamic lands throughout the post-mongol period and are central to understand the ottoman adoption and development of Hanafi school of law: the appointment of mufties by the ruling dynasty and the imperial canonization of jurisprudential texts as the outcome of the rise of the dynastic law in the post-mongol eastern Islamic lands.

As the most important task, the rise of the officionally appointed muftiship was typical throughout the region. In the first decades of the 15th century the timurid ruler Sháhrukh (1377-1447 AD) appointed a *Shaykh al-Islam*. This office which was held by the members of two families was intended to oversee all the juridicial activity throughout the timurid lands. The appointment of the first timurid *Shaykh al Islam* parallels similar developments in the ottoman lands. Roughly around this time the Ottoman sultan Murad II. (1404-1451 AD) appointed Mollá Semseddin Fenári (1350-1431 AD) as *Shaykh al-Islam*. A century later around 1514 the itinerant jurist and chronicler Fazl Alláh b. Rüzbahán (1519) wrote a treatise in which he advised the new Özbek khán on how to conduct the affairs of his state. In the chapter on the administration of the religious and judicial offices the jurist advises the khán to appoint a chief jurisprudential authority, a *Shaykh al Islam*. According to this writing the chief jurisprudential authority was to preside over the khán's learned hierarchy and to operate on his behalf to guarantee that the hierarchy functions properly. The *Shaykh al-Islam* had authority to inspect and examine the competence and knowledge of their appointed jurists. This administrative practice was implemented probably in other major urban centers across the khanate.

Related to the rise of the officially appointed mufti of course started to grow the importance of his legal opinion (*fatáwá*). The rulings of the officially appointed *mufti*es were instrumental in regulating which opinions and doctrines within the Hanafi school of law members of the ottoman learned hierarchy were to apply. This seems to to be the reason for the appointment of *mufti*s in other parts of the eastern Islamic lands as well. The appointment of the *mufti*s by the state, the rise in the importance of these *mufti*s' rulings and the different textual geographies within the Hanafi school across the eastern Islamic lands suggest that the ottoman adoption and development of a specific branch within the Hanafi school was not a unique case. In the post-Mongol period, rulers and dynasties across the eastern Islamic lands sought to regulate in an unprecedented manner the structure of the school of law and the doctrines that the school's affiliated jurists were expected to follow.

*T*he author often uses the term post-mongol. Under this term the author means that after the mongol invasions of the 12 th century which culminated in the conquest of Baghdad in 1258 introduced new notions of sovereighnity and law to the eastern Islamic lands which means that the sultans emperors and dynasties on these lands later held with their real and imagined Mondol past and Chinggisid heritage. Many of these dynasties perceived Chinggis Khán and the law that was associated with him as a historical and legal point of reference so we can talk about „connected legal histories". Burak proposes that the adoption and development of an

official madhhab is one of the results of the dialogues the different dynasties held with their Chinghisid heritage and particularly with the post-Mongol notion of dynastic law.

*T*he Chingissid universalist notion of sovereighnity rested on the view that the divine dispensation to rule the world was given to Chinggis Khán and his descendants. Chinggis Khán was perceived as divine legislator. According to Burak two concepts capture this notion of sovereighnity: Chinggisid *yasa* and the Turkis *töre* (*töra*) The Chinggisid yasa was not a fixed written legal code but rather an evolving body of individual decrees, regulations and practices that had been instituted by Chinggis Khán in his unwritten constitution. These notion of sovereighnity did not lose in the following centuries after the demise of the Mongol empire. The rulers of the successor states upheld key Mongol-Chinggisid ideals of law and sovereighnity only modified these ideals to varying degrees. For example members of the ruling and scholarly elites in the ottoman and the timurid lands (the two most important and best studied states among those that emerged in the centuries following the demise of the Mongol empire in the 14th century. Although the dynasts of both polities were not descendants of Chinggis Khán scholars and rulers in these lands maintaines an ongoing dialogue with Chinggisid ideals of sovereighnity and law.

Burak states that in the primary sources the term uses for law *kánún* used by ottoman authors referred to the mongol *yasa*. According to the 15th century authors (Táccü'ddin Ibráhim b. Hizir Ahmedi (1330?-1413 AD) it is just Ottoman *kánún* that distinguished the Ottoman dynasts from its Mongol counterparts. Similarly by the 15th 16th centuries members of the Ottoman dynasty explicitly referred to their own *töra*.

In a correspondence between Mehmet I and Timur's son Sáhrukh concerning ottoman succession practices Shahrukh presents himself as the defender of Chinggisid traditions while emphasising the contradiction between these traditions and the ottoman *töre* (implying a hierarchy between the Mongol *töre* and the ottoman and other *töre*). Mehmet I in his reply suggests that by the 15th century local dynastic traditions had gained priority at the expense of the more universalist Chinggisid approach. Regardless of the different approaches toward the Chinggisid tradition the correspondance shows that dynasties negotiated and debated their notions of sovereighnity in relation to their Mongol past with their contemporaries.

In the 16th century with the emergence of the four major polities - the Ottomans, the Safavids, the Özbeks and the Mughals - dynastic laws became the predominant norm. Each of the dynasties followed political, legal and adminsitrative norms they could trace to a real or imagined ancestral origin (whether the early Ottoman sultans, Chinggis Khán or Timur). These legal principles became the cornerstone in each dynasty's perception of itself *vis-á-vis* other dynasties. In the multiethnic and diverse landscapes of these empires, these political-legal traditions enabled the dynasts to instill a sense of imperial coherence and order.

The rise of distinctive dynastic legal traditions provoked debates between members of the ruling elites and judicial circles across the eastern Islamic lands concerning the relationship between these dynastic traditions and Islamic law. According to Burak 15th 16th century chronicles, legal treatises and other sources attested the tensions and difficulties of the amalgamation of various legal, political and religous traditions entailed with the changes. As the authors of these chronicles and treatises observed there were serious contradictions between the political legal heritage on Chinggis Khán and certain pre-Mongol perceptions of Islamic law.

The perceived tensions between these discourses also necessittated the delineation of the boundaries ofeach of the legal corpuses. Since the Mongol invasions different jurists would condemn the new rulers for not following the saria. Likewise sources from the ottoman lands preserve this distinction between *kánún* and *shari'a*: the chief imperial mufti had to insist on the implementation of both dynastic law (*kánún*) and *shari'a*. In the decades after the ottoman conquest of the Arab lands in 1516-17, jurists from the empire's Arab provinces accused their collegues from the cora lands of the empire of following the *yasa* (*kánún*) implying that it was not compatible with the *shari'a*.

The rise of the official *maḏhab* across the eastern Islamic lands in the post-Mongol period has not received sufficient attention in the grand narratives of Islamic legal history. The reason of this disregard is that most of the scholars of the most grand narratives of Islamic theory tend to place on the so called formative period of Islamic law and the legal reforms ofthe nineteetnth century. These nineteenth century states and scholars increasingly codified Islamic law as part of a wider set of modernizing reforms. As a result the fluidity and diversity that characterized the premodern *shari'a* from the earliest centuries are diminished. In addition to the codification of law the state's appointment of jurists and especially of *mufti*es is perceived as part of this modernization of Islamic law by the state which modeled its legal ideals and institutions after „western" notions of law. These narratives take the intervention of the state in regulating the content of the law as one of the most important organizing principles. As Burak suggests the rise of the official *maḏhab* along with the development of legal hierarchies and the different dynastic states' appointment of *mufti*s reflects a growing interest on the part of the post-Mongol dynasties to intervene in regulating the structure of the school (or more precisely the branch within the school) they adopted and developed. And moreover in some cases – as in the Ottoman Empire sultans and dynasties were quite succesful in obtaining this goal.

Of course Burak does not state, that there were no major developments in the 19th century but the intensive intervention of the state in regulating the school of law and by extension the Islamic law antedates the 19th century. The 19th century narratives assured the continuity between the pre-and the post-nineteenth century periods and Islamic and non-Islamic governmental practices. To illustrate this continuity Burak quotes a decree which was issued in Egypt in 1865.

„It has been brought to our attention that some John Does issues fatwas related to shari'a cases dealt with in the shari'a courts, in the awqaf ministry and particularly in the Supreme Council of Adjudication. It also transpires that the parties who obtain such fatwas believe them to be valid and see them as an authoritative source that would enable them to achieve their goal – ignorant and unaware of the fact that these fatwas

have neither value nor significance whatsoever…This phenomenon causes grave problems and greate dispute between the parties, and these John Does assume the honorable position of muftis for their own personal profit."

This case hitherto was interpreted as the modern Egyptian state's attempt to monopolize and systemize the law system. According to Burak, this case was the post-Mongol legal reality in the eastern Islamic lands (of which Egypt was part, following its incorporation into the Ottoman Empire in the 16th century). The jurists who were affiliated with the Egyptian state wanted to regulate the content of a particular *shari'a* or more accurately of a particular school of law which was to be applied within the confines of the state's official legal system. In other words the Egyptian state was employing administrative logic and practices that had been in place by that time for centuries. With this analyzis Burak wants to stress a set of dichotomies that serve to organize many of the grand narratives of the 19th century (state or dynastic law/jurist law, modern-premodern and Western-non Western law) which intersect and overlap in the same adminsitrative or legal practice and was succesfully harmonized by the Ottomans in the 19th century codification.

Szűcs Lászlóné Siska Katalin*

* Dr. Szűcs Lászlóné Dr. Siska Katalin, associate professor, Department of Legal History, Faculty of Law, University of Debrecen, Hungary.

Wilfried Hartman - Kenneth Pennington

The History of Byzantine and Eastern Canon Law to 1500

Washington, D.C.: Catholic University of America Press, 2012, 356 pp.

This prodigiously and well-researched study, edited by Wilfried Hartmann and Kenneth Pennington, is an attempt to understand the evolving corpus of ecclesiastical law and the history of Medieval Canon Law. There is little research exists on the general development of ecclesiastical law prior to the Council of Nicaea (325). The formation of church law was an arduous process that first took place in the early communities; and these communities ruminated on the existing institutional norms, behavior, and discipline. This book covers the rich history of Canon Law in Eastern Christianity. Constantinople was to have a position of primacy in the East that was comparable to Rome in the West. *The History of Byzantine and Eastern Law to 1500* consists of five chapters. The opening chapter of this book deals with two methods studying the development of ecclesiastical law in the early period. First, the involvement of the early canonists and papal decretals and legal topics that are discussed in these sources can be mentioned. The early documents were mainly in letters and tractates. "The date and provenance of the church order cannot be identified precisely, although its allusions to, and quotations from, the Gospel of Matthew and Luke, and the common source it shared with the Epistle of Barnabas, suggests it was reacted early in the second century." (p. 5) The author highlights that an "abstract set of ecclesiastical laws was never imposed upon the incipient communities; rather, liturgical practices that were already recognized as traditional were gradually given the force of normative law." (p. 5). Bishops and deacons were chosen by a selected group of leaders and then approved by the whole Church.

It is interesting to point out that right behavior, a clear conscience, and freedom from heresy were thought to be possible only for those who submitted fully to the authority of the bishop and to those in his service. The church resembled the celestial sphere: the bishop was an embodiment of God, the presbyters, the apostolic council, and the deacons were representation of Jesus; and obedience to the bishop was equal to obedience to Christ and God. The congregation and the clergy formed a choir to sing in harmonious love in hymns to Christ and God. The new law of Christ was not an abolishment of the old law, but reinterpretation. Such rituals as sacrifice, fasting, circumcision, dieting, Temple, and Sabbath, as well as purity laws became spiritual pronouncements and an allegory that are essential to partake in the kingdom. Behavioral norms and moral conduct were not an abstract set of legal principles, but developed in the community and human relations. The church councils were not the expression of a particular community's internal regulations, but rather the result of the collective reflection of those who were a part of the church hierarchy. The established age of ordination into priesthood was at thirty years old, since Jesus did not begin his ministry until age thirty. The New Testament was seen as an important source of the Christian Law, "with its reference to Graeco-Roman household codes, its allusions to an emerging church hierarchy, and its scattered references to the remnants of a Jewish law, the very idea that a binding set of legal norms existed was already implicit in the tradition." (p. 21)

Heinz Ohme explores the evolving law of the church. The canonical material of Byzantine canon law can be organized into four groups: (1) Canons of the Apostles; (2) Canons of ecumenical synods; (3) Canons of local synods; (4) Canons of the Fathers. The Canons of the Apostles is a collection of 85 canons. The unity of the *Apostolic Constitutions* and the *Canons of the Apostles* is confirmed by the fact – as close inspection shows – that the Canons of the Apostles is also a compilation of older material, particularly from the synods of Antioch (328), Laodicea, and Nicaea (325), from which at least 28 canons have been taken. The council fathers of the Quinisext Council (692) underscored the "great importance of the Canons of the Apostles in the East placing them before

Nicaea in the list of authorities, 'canonizing' their apostolic origin." (p. 33) The only surviving sources for the decrees and negotiations of the First Ecumenical Council of Nicaea (325) are the 20 canons of this council, along with its creed, a synodal letter to the Church of Alexandria, and the list of episcopal subscribers.

The council was especially of a great importance by the late fourth century because it became "the foundation of the future development of ecclesiastical doctrine, as well as exemplary expression of imperial power in an ecclesiastical synod." (p. 34) The canons are important for the history of the institutions of penance; and those canons in ecclesiastical law passed by the Western bishops have problems with numeration, form, and original language. The numbering of canons is different in the Latin and Greek versions. The canons of Serdica (Modern Sophia, Bulgaria), for example, deal almost exclusively with questions of the office of the bishop. While the language of proceedings under the presidency of Ossius was Latin, there still must have been existed a translation from Latin into Greek, which, as Heinz Ohme points out, could be the reason of dependency of the Greek and on the Latin text (p. 71).

The canons of the fathers make up a significant portion of Greek canonical collections. Almost all the canons of the fathers consist of the letters or writings addressed to specific people; they also often include poems and epilogues. Athanasius of Alexandria named the canonical books of the Old and New Testaments a source of salvation. The Old Testament canon corresponded to the Hebrew canon with 22 books; for the New Testament, all 27 books, including *Revelation*, were enumerated. Athanasius also listed books which were certainly not canonical, but which can be read aloud for catechetical purposes: *Wisdom of Solomon*, *Wisdom of Jesus Sirach*, *Esther*, *Judith*, *Tobit*, the 'so-called *Didache'*, and The Shepherded of Hermans. Basil the Great was a prominent figure in Eastern Christianity, a father of the church, and a teacher in questions of dogma. He often gave instructions on the spiritual life and its organization. The author highlights that no other Greek father of the church has had so many of his letters included in Eastern canonical collection. Starting from the fifth century, the 'canons of Basil' have an important role in the Canons of the Fathers in Greek canonical collections. In the evolving law of the church bishops interpreted the applicable law, also explained obscure moments, and developed important principals, mostly as advisors. The Maurists published 365 of Basil's letters. Interestingly, eight letters and parts from *De Spiritu Sancto*, divided into 92 canons, belong to the later 'normal corpus' of the Greek canonical collections.

The iconoclastic controversy is an important issue that has no consensus among researchers regarding its causes (p. 143). January 17, 730 must be considered an official starting point of the iconoclastic controversy. It must be mentioned that the iconoclastic disputes shook the foundations of Church and the whole empire. Church and state, according to the understanding of the Constantine the Great, were not two separate institutions but rather two forms of the one and "indivisible concept of Christendom, forms which, in the political and theological thought of Byzantines, could not be thought separately." (p. 151) There was the existence of two legal systems but of only one authority. The emperor and patriarch were equal powerful bearers of the two highest authorities within the state.

Elena Shabliy *

* Elena Shabliy, Ph.D., Department of Comparative Literature, Harvard University, USA.

Julian Lubini

Die Verwaltungsgerichtbarkeit in den Ländern der SBZ/DDR 1945 – 1952 (Beiträge zur Rechtsgeschichte des 20. Jahrhunderts, Bd. 82).

Tübingen: Mohr Sieber Verlag, 2015, 319 S., ISBN 978-3-16-153526-0

1945 – Nicht nur für Mitteleuropa klingt dieses Jahr wie ein Fanal für eine Zäsur, einen Neubeginn, eine Stunde null. Ganz Europa lag in Schutt und Asche, als die vier alliierten Siegermächte das Deutsche Reich zur Kapitulation zwangen und in der Folge in Besatzungszonen aufteilten. Der Westen und der Osten entwickelten sich trotz verbaler Bekundungen von Wiedervereinigung binnen vier Jahren aufgrund anderer politischer Zielsetzungen und Ideologien zu unterschiedlichen Staaten, die erst vier Jahrzehnte später wiedervereinigt wurden.

Die Deutsche Demokratische Republik, in der weder die Demokratie noch die Republik großgeschrieben wurden, avancierte zum post-kommunistischen Vasallenstaat des großen Mutterstaates Sowjetunion. Auch wenn man sich nach außen als friedliebend bezeichnete, begann man sich nach eigener Diktion und Auslegung vor den „Aggressionen des Westens" zu schützen und nachfolgend unterschiedlich ausgelegte Wege zur Realisierung der behaupteten und in der Folge Schiffbruch erlittenen Ideale zu finden. Wenn man das kommunistische Weltbild der damaligen Zeit hervorheben möchte, muss man auch die marxistische Lehre in den Vordergrund stellen. Doch man kann auch sagen, dass es den Befehlshabern darum ging, diese zu ersetzen, den ideologischen Aufbau über das die ökonomischen Sachverhalte bildende Recht in eine humanere, aber dennoch am Menschen vorbeiführende sozialistischere Politik umzuwandeln.

Der Autor Julian Lubini behandelte einen Auszug davon und legte seine gut fundierte und auf einem, breiten, archivalischen Fundament basierende Dissertation „Die Verwaltungsgerichtsbarkeit in den Ländern der SBZ/DDR 1945-1952“ an der Frankfurter Universität im Sommersemester 2013 vor. Als Betreuer fungierte niemand Geringerer als Michael Stolleis. Das zu besprechende Werk ist neben der Einleitung und allgemeinen Ausführungen über den Forschungs- und Untersuchungsgegentand und Quellenlage in sechs große Kapitel eingeteilt. In allen erkennt man die akribische Arbeitsweise Lubinis. So wird der Entwicklungsstand der Verwaltungsgerichtsbarkeit bei Kriegsende, Haltungen und Entscheidungen zur Zukunft der Verwaltungsgerichtsbarkeit und die Reorganisation und Entwicklung der gleichen Institution in den Ländern der sowjetischen Besatzungszone ab 1947 angeschnitten. Des Weiteren spannt der Autor den Bogen von anderen öffentlich-rechtlichen Gerichtsbarkeiten über den Stand nach der Neuordnung der administrativen Strukturen im Sommer 1952 bis hin zu Hintergründen und Motiven der Nichteinrichtung, Einrichtung und Abschaffung der Verwaltungsgerichtsbarkeit in der DDR in ihren frühen Jahren ihres Bestehens.

Der Autor vertritt den Standpunkt, dass nach dem deutschen Einigungsprozess im 19. Jahrhundert und der anfangs in Einzelstaaten des Deutschen Bundes erfolgten Installation von Verwaltungsgerichten entgegengesetzt als im von den USA okkupierten Thüringen mit seiner etwas anderen politischen Nachkriegslandschaft, nach dem Kriegsende 1945 in Sachsen an eine schnelle Wiederaufnahme der Verwaltungsrechtsprechung keineswegs so leicht zu denken war. Das war auch in Brandenburg, Mecklenburg(-Vorpommern) und Sachsen(-Anhalt) der Fall. Diese drei neu gebildeten Länder wiesen gar keine historisch gewachsene Tradition der Verwaltungsgerichtsbarkeit auf. Wenn man den Sonderfall Thüringen dessen ungeachtet außen vor lässt, stellt Lubini die mehr als berechtigte Frage in den Raum, aus welchem Grund bei für alle Länder identischen und verbindlichen rechtlichen Vorgaben in zwei Ländern eine halbwegs passable Verwaltungsgerichtsbarkeit gar nicht vorhanden war. Mit seiner Antwort nach dem Warum gelingt es dem Verfasser, eine klaffende Lücke in der Forschung der Verwaltungsgerichtsbarkeit zu schließen.

Um die vielschichtige Materie zu begreifen, muss man wissen, dass zur Erforschung der verzweigten Forschungsthematik auch Normgefüge, Rechtsstab und juristische Anwendung Einzug finden müssen. Dem Autor gelingt es vorbildhaft, kritisch das Handeln aller Beteiligten zu ergründen und an den persönlich zu charakterisierenden Wertbestimmungen dingfest zu machen. Dass das an den jeweiligen Herausforderungen der Zeit anzugleichen ist, ist klar und bedarf, eine rest- und lückenlose Aufklärung der historischen Begebenheiten in Betracht ziehend, keiner weiteren Auseinandersetzung. Jedenfalls ist es auf keinen Fall immer einfach, eine Erklärung aufgrund einer mangelnden, abgeschlossenen Aktensammlung zu bekommen. Dadurch kann man auch anhand der nie aktenkundig gewordenen Absprachen nichts dazu erfinden oder beschönigen. Das Interesse, und das ist für den Leser mehr als bedeutsam, ist die Entstehung der Verwaltungsgerichtsbarkeit ab 1945. Lubini versteht es, im Rahmen eines komplizierten und für den Laien oftmals opaken Beziehungskonstrukts Licht in das Dickicht zu bringen. Dadurch werden die Knoten gelöst und Sachsen, das bedeutendste Land im Osten mit relativ guter und umfangreicher Quellenlage, in den Dreh- und Angelpunkt des Geschehens gerückt.

Neben der Vorstellung der historischen Voraussetzungen der Verwaltungsgerichtsbarkeit in den Ländern des Ostens wird der Leser mit dem komplizierten Anhaltspunkt, ausgehend von den Ansichten und Präjudizen von KPD/SED und dogmatischen Prämissen der Partei und den Verfassungsentwürfen konfrontiert. Es geht dabei vorrangig um das In-Kraft-Treten des Kontrollratgesetzes Nr. 36 in der Sowjetischen Besatzungszone. In der Folge dokumentiert Lubini ausführlich zwei Jahre vor der Gründung der Deutschen Demokratischen Republik die Anfänge und Auswirkungen in Sachsen, Sachsen-Anhalt, Thüringen, Brandenburg, Berlin und Mecklenburg. Dabei wird die Eingabe an die Volksvertretung, aber auch die Beschwerde an das übergeordnete Organ und das Verfahren des Einspruchs gut dargestellt. Ähnlich verhält es sich mit der Chance der Inzidentkontrolle. Darunter versteht man die juristische Prüfung eines vorgreiflichen Rechtsverhältnisses durch die ordentlichen Gerichte. Ferner wird der Ausschluss des richterlichen Normprüfungsrechts in den Verfassungen ausgiebig und in verständlicher Form erörtert.

In einem weiteren Kapitel geht es um die Auflösung der Länder und in der Folge um das Ende der Verwaltungsgerichtsbarkeit. Lubini geht auf das vorher angeschnittene Kontrollratsgesetz ein und baut Art. 138 des Grundgesetzes der Deutschen Demokratischen Republik ein. Dementsprechend diente dem Schutz der Bürger gegen rechtswidrige Maßnahmen der Verwaltung die Kontrolle durch die Volksvertretungen und die Verwaltungsgerichtsbarkeit. Sowohl Aufbau und Zuständigkeit der Verwaltungsgerichte wurden durch das Gesetz geregelt. Für die Mitglieder der Verwaltungsgerichte galten die Grundsätze über die Wahl und Abberufung der Richter der ordentlichen Gerichtsbarkeit entsprechend.

Zudem überprüft Lubini in äußerst profunder und sorgfältiger Kleinarbeit die nicht immer einfachen Beziehungen zwischen der Verwaltungsrechtswissenschaft und der Verwaltungsgerichtsbarkeit. Um erneut auf die Szenerien und Gründe der Nichtinstallation, Einrichtung und danach vollständigen Auflösung der Verwaltungsgerichtsbarkeit zu kommen, versteht es Lubini geschickt, die Sichtweise der früheren Machthaber zu deuten. Mehr noch: Er verknüpft für sie die Frage nach der Instruktion aus der Historie gekoppelt mit Rechtstatsachen und den daraus abgezweigten Überlegungen. Gekonnt akribisch und in der Materie festgebissen, versteht es der Autor, die deutsche Blockpolitik mit der Deutschlandpolitik der Sowjetunion zu vergleichen. Als Ergebnis, das mehr als nur geglückt und einleuchtend wirkt, erkennt man, dass man im Osten die Verwaltungsgerichtsbarkeit verdrängte, um das eigene politische System ohne Störfaktoren „von außen“ in die Wege zu leiten und folgerichtig durchzudrücken. Die politische Machart der Erstarrung hat dazu auch wesentlich dazu beigetragen. Die Moskauer Macht- und Schaltzentrale maß nach der Gründung der Deutschen Demokratischen Republik ihrem Bestand einen hohen Stellenwert auf einem wirkungslos gesuchten Weg zu einem geeinten Deutschland unter einem sozialistischen Führungsapparat bei. Der Ruin des SED-Regimes und anknüpfend die

Bankrotterklärung Ost-Deutschlands vier Jahrzehnte später, kann deshalb treffend mit der nicht befriedigenden Kontrollfunktion der Staatsgewalt zu Lasten des Individualrechtsschutzes in Zusammenhang gebracht werden. Alles in allem ist das zu rezensierende Buch ein rechtshistorischer Fundus, der, wenn man sich die Geschichte der Deutschen Demokratischen Republik vor Augen hält, Vieles, was heutigen Generationen nicht bekannt ist, ans Tageslicht bringt. Somit kann man auch juristische Informationen, die einst verschollen oder in der Wissenschaft beiseitegeschoben waren, der Allgemeinheit näherbringen. Detail- und kenntnisreich, aber auch zu empfehlen ist das Werk Lubinis allemal, was im Hinblick auf die informative und stringent durchdachte Auswertung des Quellenmaterials kein Wunder ist.

Andreas Raffeiner *

* Mag. phil. Andreas Raffeiner, Philosophisch-Historische Fakultät, Leopold-Franzens-Universität Innsbruck, Österreich.

Gerhard Strejcek

Erlerntes Recht. Zur Ausbildung von Juristinnen und Juristen an der Wiener Universität 1365 – 2015.

Wien: New Academic Press, 194 S., ISBN 978-3-7003-1881-1

Dass die wissenschaftliche Ausbildung von Juristinnen und Juristen eine lange Überlieferung hat, ist im Grunde genommen nichts Neues. Diese Feststellung geht bereits bis ins Mittelalter zurück. In Bologna und anderen italienischen Städten entstanden die ersten Juristenschulen. Im Mittelalter waren es die Jesuiten, die die nach der Stiftung Rudolfs finanziell verarmte Fakultät an ihre Kandare nahmen. Im vorletzten Jahrhundert ging es um die Heranbildung loyaler und kaisertreuer Rechtswissenschaftler. Als postrevolutionär können die Reformen des konservativen Unterrichtsministers Thun-Hohenstein angesehen werden, und selbst die Angleichungen seines Nachfolgers Madeyski überdauerten annähernd 100 Jahre.

Das 195 Seiten starke, übersichtliche Werk gibt Einblick in die Entstehung und Wurzeln der verschiedenen Modelle der Ausbildung und umreißt auch die Nachwehen des Bologna-Prozesses. Dabei geht man mit den aktuellen Gegebenheiten auf keinen Fall zimperlich, sondern eher kritisch ins Gericht. Langer Rede, kurzer Sinn kann man sagen, dass sich das Werk mit den Höhe- und Tiefpunkten der wissenschaftlichen Lehre am Wiener Juridicum vom Beginn bis in die Gegenwart auseinandersetzt.

Dreh- und Angelpunkt des zu besprechenden Werkes bilden etliche Abhandlungen über die Wiener Schule des Rechtspositivismus, die im 19. und 20. Jahrhundert gefruchtet hat. Auf diese Weise werden die staatsrechtlichen Wurzeln, aber auch ihre Forschungsweise in Lehre und Wissenschaft und die räumliche Dimension beschrieben. Im staatsrechtlichen Rahmen der Monarchie kommen bekannte Gesichter vor; als Beispiele können hierbei der spätere Staatskanzler und Bundespräsident Karl Renner oder der über die Wiener Grenzen der Juristerei bekannte Hans Kelsen namentlich angeführt werden.

Ein anderer Teil befasst sich mit den zentralen Grundzügen der Allgemeinen Rechtslehre und der Methodik der eben genannten Wiener Schule. Hierbei kommen die rechtsphilosophischen Prinzipien im Werk von Kelsen, Adolf Merkl und Alfred Verdroß zum Tragen. Von Interesse ist ebenfalls die Darstellung der Naturrechtschulen und anderer Vorboten des Staats- und Zivilrechts. So kann man diagnostizieren, dass die Soziologie, die Nationalökonomie, die Rechts- und die Politikwissenschaften miteinander durchaus verwandt sind und Parallelen in ihren Curricula aufzeigen und dass es gewissermaßen lobenswert wäre, wenn man diese interdisziplinär und keineswegs in der Bachelor-Gleichmacherei herauskristallisieren würde.

Ein weiteres, höchst interessantes und nicht bedeutungsloses Kapitel, hat die Rolle der Frauen in der Rechtswissenschaft am Standort Wien zum Inhalt. Im Finale des Werkes kommen Überlegungen zum derzeitigen Studienplan zum Ausdruck, die in einem Schlussplädoyer für einige Umgestaltungen in der rechtswissenschaftlichen Ausbildung münden.

Kurz und knapp kann man das Buch als Grundstein zum Verständnis der vielfältigen Rechtsstadt Wien ansehen. So sieht es auch Strejcek federführend für das Autorenteam in seiner Einleitung. Dem ist im Wesentlichen nichts hinzufügen.

Andreas Raffeiner *

* Mag. phil. Andreas Raffeiner, Philosophisch-Historische Fakultät, Leopold-Franzens-Universität Innsbruck, Österreich.

Guidelines for authors

The **Journal on European History of Law** publishes posts from the field of history of law, History of legal thought and Roman law. The length of a post cannot exceed 50.000 characters. It must be written in English or in German languages.

All the works are reviewed. The executive editor decides on whether to publish the materials and in which order. After the review, the decision will be sent to the author by email.

The authors are responsible for the lingual and formal level of submitted papers. These levels are checked by the editorial office and some small necessary changes can be done by the editor. Corrections are possible only upon prior request.

Corrections done by the author must be returned within 4 days and no significant changes are permitted.

Supplements must be sent to the email address of editor's office: info@historyoflaw.eu

The supplements must be in the formats DOCX, DOC or RTF (MS Word). In the Word editor, use the font Times New Roman, font size 12, spacing 1,5.

If your text contains pictures or tables (only black and white), mention their meaning in the text. If the pictures are sent by electronic mail, they must be in JPG, TIFF or EPS format. All the tables, pictures and graphs must be placed somewhere in the text and also sent separately.

Since The European Society for History of Law is a non-profitable organization, there would be no payment for manuscripts published in the Journal on European History of Law.

Each work must contain:

1. **Title**. It contains (in this order, always in a new row):

Short and understandable title;

The full name and last-name of the author/s including academic titles and working-place;

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.